NO. COA12-1389
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.	Cleveland County Nos. 11 CRS 1911-1915 11 CRS 1917-1918 11 CRS 2111
BOBBY GENE JOLLY, Defendant.	

Appeal by defendant from judgments entered 23 May 2012 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 9 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Bobby Gene Jolly appeals from his convictions of numerous counts of different types of sexual offenses committed against his daughter. In his main argument on appeal, defendant contends that the indictments for two counts of incest were improper because they were based on and cited to a statute that did not exist at the time of the acts giving rise to the

charges. The indictments, however, alleged facts sufficient to charge the offense of incest as it existed at the time of the offense, and the statutory reference in the indictments amounted to mere surplusage. Because, in addition, the jury was instructed in accordance with the applicable version of the statute, we hold that no error occurred as a result of the indictments.

Nevertheless, as defendant points out, the judgments that include the incest counts erroneously identify them as Class B1 felonies. While the current version of the statute classifies incest as a B1 felony, under the applicable version of the statute, incest was either a Class G or a Class F felony. We, therefore, remand for correction of the clerical error.

Facts

The State's evidence tended to show the following facts. Defendant and his wife had two children, Sally and her brother.[1] Sally was born 15 March 1983, while her brother was born 17 November 1988. When Sally was in the second grade (during 1990 to 1991), defendant began playing the "tickle game," which involved defendant's kissing Sally all over her body and

[1]The pseudonym "Sally" is used throughout this opinion to protect the identity of the child victim and for ease of reading.

sticking his finger inside her vagina. The tickle game occurred about once a week.

As Sally grew older, defendant played with her pubic hair, and he masturbated and ejaculated in her presence. Other times, he had Sally touch his penis until he ejaculated, or he would fondle her and stick his fingers in her vagina. Defendant also performed oral sex on Sally.

When Sally was in the fourth grade, defendant began to attempt to put his penis in her vagina. From the fifth grade on, defendant was regularly having vaginal intercourse with Sally. Defendant began taking her to hotel rooms to perform sexual acts when Sally was in middle school.

Sally attempted to lock her father out of her room, but he broke the lock on the door. She also tried to avoid her father by sleeping with her younger brother, but her father would get her out of bed. Sally wrote a letter to her mother telling her what was happening. Her father then threatened to kill her if she ever said anything again. Nevertheless, when Sally was in high school, she spoke to her mother about what was happening, and the conduct stopped.

Sally also told a social worker at Wake Forest University Medical Center and a psychiatrist she was seeing. In December 2010, Sally admitted to her boyfriend that she had been sexually

abused and told him what her father had done to her. Sally then went to her parents and tried to talk to them about what had happened, but they would not talk to her. Later that month, defendant called Sally repeatedly and said he would talk to her and her boyfriend another time.

In April 2011, Sally went to talk to her grandfather and her Aunt Bridgette about the sexual misconduct. After talking to them, Sally made a report to the police because she was worried that her father might be sexually abusing her younger cousin.

Sally subsequently recorded a conversation with her father in which she confronted him using a recording device given to her by the police. Defendant did not deny Sally's accusations, but instead repeatedly apologized for his conduct. On 10 May 2011, defendant was interviewed by the police. Defendant told the police that he had been adversely affected by his time serving in Vietnam and, in addition, was trying to protect Sally by turning her against boys.

Defendant was indicted for two counts of first degree sexual offense, two counts of first degree rape, one count of incest with a child under 13, one count of statutory sex offense against a child 13, 14, or 15 years old, one count of incest with a child 13, 14, or 15 years old, felony child abuse, and

two counts of indecent liberties with a minor. At trial, in addition to Sally's testimony, the recordings of her conversation with defendant, and the police's interview with defendant, several witnesses provided corroborating testimony of Sally's prior statements. Also, Sally's Aunt Bridgette testified about an earlier incident when defendant took her to a hotel room and attempted to get her to go inside.

Defendant testified on his own behalf that he served in Vietnam when he was 18 and saw heavy combat for 18 months. As a result, he suffered post-traumatic stress disorder. He denied having had any sexual contact with Sally and denied taking Bridgette to a hotel and trying to have her get out of the car. He acknowledged that he wanted to turn his girls against boys so that they would be independent, but testified that he did not do so by engaging them in sexual acts. With respect to the recorded conversation with Sally, he claimed that he had been taking medication at the time of the conversation. In addition, defendant's brother, a woman with whom defendant had other children, and those children all testified that they had not seen any evidence that Sally had been sexually molested.

In rebuttal, the State called Sally's mother who testified that she had been involved with defendant since she was 14½ years old. Sally's mother corroborated Sally's testimony that

Sally had given her a letter about the sexual abuse when Sally was in the fifth or sixth grade. Sally's mother spoke with defendant, who denied Sally's accusations, but Sally's mother still had defendant leave the home. Nevertheless, he returned in a matter of weeks. Defendant also denied Sally's accusations in 2010 or 2011 when Sally's mother questioned him again.

Defendant was convicted of two counts of indecent liberties with a child, two counts of first degree statutory sexual offense, two counts of first degree statutory rape, two counts of incest, one count of statutory sexual offense with a 13, 14, or 15 year old, and one count of felony child abuse. For the charges of first degree sexual offense with a child, the trial court sentenced defendant to a term of life imprisonment for each charge. The court consolidated one count of first degree rape of a child and one count of incest and imposed a sentence of life imprisonment. For the second count of first degree rape of a child, the trial court sentenced defendant to a fourth term of life imprisonment. The trial court sentenced defendant to six years imprisonment for the two counts of indecent liberties with a child. Finally, the court consolidated one count of statutory sexual offense, one count of incest, and the felony child abuse count and imposed a sentence of 240 to 297 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends that the trial court violated the ex post facto clauses of the North Carolina and United States Constitutions when it allowed the charges of incest to be submitted to the jury even though the indictments charged defendant with a crime that did not exist at the time of the alleged conduct. In one indictment, the State alleged that between June 1994 and August 1994, defendant, in violation of N.C. Gen. Stat. § 14-178(b)(1)(a), had "carnal intercourse with [Sally], who is the Defendant's child" and that Sally was less than 13 years of age, while defendant was at least 12 years of age and at least 4 years older than Sally. The second incest indictment included substantially identical allegations except that it alleged that the conduct violated N.C. Gen. Stat. § 14-178, that it occurred between 15 March 1996 and 15 June 1999, and that Sally was 13, 14, or 15 years old. The indictments further stated that the offenses were B1 felonies.

During the time frames alleged in the indictments, incest was defined by N.C. Gen. Stat. § 14-178 (1993) as: "carnal intercourse between (i) grandparent and grandchild, (ii) parent and child or stepchild or legally adopted child, or (iii) brother and sister of the half or whole blood." The classification of the offense changed from a Class G felony to a

Class F felony effective 1 October 1994. *See* 1993 N.C. Sess. Law ch. 539, § 1192 (effective January 1, 1995); 1994 N.C. Sess. Law (Extra Session) ch. 24, § 14(c) (effective March 26, 1994).

In 2002, the legislature amended the incest statute to provide for different levels of punishment depending on the age of the victim. While the definition of incest remained essentially the same for purposes of this case, N.C. Gen. Stat. § 14-178(a) (2011), a violation was a B1 felony if (1) the victim was less than 13 years of age and the defendant was at least 12 years old and four years older than the victim, or (2) the victim was 13, 14, or 15 years old, and the defendant was at least six years older. N.C. Gen. Stat. § 14-178(b). Other age combinations not relevant here resulted in the offense being classified as either a Class C or a Class F felony. *Id.* *See* N.C. Sess. Law ch. 119, § 1 (effective December 1, 2002).

At the charge conference in the case, the State pointed out to the trial court that the enhanced punishments for incest based on age did not exist until 2002, after the events for which defendant was charged. The court, therefore, gave the following instruction for each count of incest, in accordance with the statute in effect at the time of the alleged offenses:

> The defendant has been charged with incest. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

> First, that the defendant had vaginal intercourse with another person.
>
> Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ.
>
> Second, that the person with whom he had vaginal intercourse was the defendant's daughter.
>
> And Third, that the defendant knew that person was his child.
>
> Ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had vaginal intercourse with a person who was his daughter, and that the defendant knew that this person was his daughter, it would be your duty to return a verdict of guilty on this charge.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty on that charge.

Defendant does not dispute that the trial court properly instructed the jury in accordance with the statute applicable to the alleged time frame of the offenses. In addition, defendant does not dispute that the indictments alleged all the facts necessary under the law in effect at the time of the offenses. Instead, defendant appears to argue that the bare fact that the indictment cited the current version of the statute and identified the offenses as Class B1 felonies consistent with the current version of the statute means that the State charged

defendant with an offense created after the time he engaged in the alleged conduct.

Defendant overlooks the fact that the crime of incest existed at the time he committed the charged acts. He was not charged with a new crime, and the indictments included all the elements necessary under the relevant definition of incest. It is immaterial that the indictments cited the wrong version of the statute: "This Court previously has held that although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect." *State v. Mueller*, 184 N.C. App. 553, 574, 647 S.E.2d 440, 455 (2007). Defendant was, therefore, properly convicted of two counts of incest.

However, the judgment for 11 CRS 1918 erroneously indicated that the incest offense was a Class B felony, while the judgment for 11 CRS 2111 erroneously indicated that the incest offense was a Class B1 felony. We agree with the State that this was a clerical error that did not prejudice defendant.

The incest conviction in 11 CRS 1918 was consolidated with the first degree rape of a child conviction in 11 CRS 1915, which, under the applicable sentencing scheme, required

imposition of a life sentence. The classification of the incest offense was, therefore, immaterial to the sentence imposed in that judgment.

The second incest conviction was consolidated with the conviction of statutory sexual offense of a 13, 14, or 15 year old under N.C. Gen. Stat. § 14-27.7A(a), a Class B1 felony, and the conviction of felony child abuse by sexual act, a Class E felony. Thus, because of the statutory rape conviction, defendant was required to be sentenced based on a Class B1 felony no matter what. It is also apparent from the record that the trial court was aware of the change in the incest law and, therefore, that the misclassification on the judgment of the incest conviction did not affect the court's decision regarding where in the presumptive range for a Class B1 felony the court should sentence defendant.

"'Clerical error' has been defined . . . as: 'An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)). Here, the error in classification of the incest offenses on the judgments was a mere clerical error. "When, on appeal, a clerical error is

discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Therefore, while we hold that no error occurred with respect to the indictments, we must remand for correction of the judgments to reflect the proper felony classification of the incest offenses.

II

Defendant next contends that the trial court erred in admitting the testimony of Sally's Aunt Bridgette regarding defendant's taking her to a hotel. After voir dire and after instructing the jury that it should only consider the testimony for the purpose of determining whether there existed in the mind of defendant "a plan, scheme, system or design" as to the crimes with which he was charged, the trial court allowed the State to elicit the following testimony from Sally's aunt:

> Q. Did [Sally] tell you where that happened or –
>
> A. In Gastonia. She said it could have been Gastonia or it was a hotel somewhere around there.
>
> Q. And when she told you that, what was your reaction?

A. I told her that he had took me to a hotel room in Gastonia.

Defendant then objected under Rules 402, 403, and 404 of the Rules of Evidence, under the Sixth Amendment of the United States Constitution, and under Article I, Sections 15, 19, and 23 of the North Carolina Constitution. The trial court overruled that objection, and the testimony continued:

Q. And tell me some more about that. When did that happen?

A. I was about twelve or thirteen -- around in there. My sister had sent him to pick me up from a friend's house in Ramblewood and he picked me up but he kept going and took me to a hotel in Gastonia.

Q. What happened when you got to the hotel in Gastonia?

A. He was asking me to come in and I was like, no. I just locked myself in the truck. He went on in and I stayed out there a few hours. It seemed like hours to me.

Q. He went in the hotel?

A. He went in. It was upstairs.

Q. Was anybody else with you?

A. No.

Q. Did anybody else come there?

A. No.

Q. Did he tell you that you were going to a hotel?

A. No.

> Q. And when you got to the hotel, what did he tell you or say?
>
> A. He asked me to get out of the truck.
>
> Q. And did you get out of the truck?
>
> A. No.
>
> Q. What did you do?
>
> A. I stayed in there. Whenever he finally shut the door, I just locked the doors and I told him, no, I ain't getting out.
>
> Q. Where were the keys?
>
> A. I think he had the keys.

Even assuming, without deciding, that this testimony was inadmissible, defendant has failed to show prejudice. Sally testified on direct examination that "in April of 2011, I went to my grandfather and talked to -- that's when I talked to him and Bridgette. Bridgette then told me that he tried something with her and then it was brought to our attention that he had tried something with [defendant's niece]." Given that testimony, which defendant has not challenged, together with Sally's consistent reporting of what occurred, the numerous witnesses corroborating Sally's testimony, and defendant's own recorded admissions, we do not believe that there is a reasonable possibility that the jury would have reached a

different verdict in the absence of the challenged testimony. *See State v. Henderson*, 182 N.C. App. 406, 416, 642 S.E.2d 509, 515 (2007) (holding that admission of nurse's testimony was harmless error when it substantially reiterated another witness' expert testimony that was not challenged on appeal).

III

Defendant finally contends that the trial court improperly denied his motion for a mistrial in that the State made reference to historical matter within its closing argument when the State had successfully obtained a ruling from the trial court precluding defendant from making a historical reference in his counsel's closing argument. We disagree.

At trial, defendant sought to use a PowerPoint slide that pictured Elizabeth Hubbard and Abigail Williams, two women whose accusations of witchcraft began the Salem witch trials. The trial court barred that part of defendant's closing argument as being outside the scope of the evidence in the case. During the State's closing argument, however, the prosecutor referenced Elizabeth Smart, a well-publicized victim of childhood sexual abuse: "If Elizabeth Smart can move on with her life and have a normal relationship, then anybody can."

Defendant promptly objected that the argument was outside the scope of the evidence, and the trial court sustained the

objection, instructing the jury: "Ladies and gentlemen, if you'll confine your discussions to evidence relating to this case. Members of the jury, do not to [sic] consider any matters outside of the record and only take the facts of the case as you see them into account."

After the jury had left the courtroom following closing arguments, defendant moved for a mistrial on the basis that the remark was incurably prejudicial to defendant in that it had elicited sympathy from the jury for Sally. The trial court denied the motion.

As our Supreme Court has held, "'to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion.'" *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998) (quoting *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995)). It is appropriate for a trial court to declare a mistrial "'only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.'" *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996) (quoting *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982)).

Here, following defendant's objection, the trial court immediately issued a curative instruction. Our Supreme Court has held that "[w]here, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982) (holding that impropriety of prosecutor's statement that sentencing defendant to death amounted in effect to sentence of life imprisonment because no one was ever executed in this State was cured by defendant's objection and trial court's curative instruction). Because the trial court sustained defendant's objection and issued a curative instruction, it cured the defect in the State's closing argument, applying the same rule that it imposed on defendant's closing argument. Defendant has, therefore, failed to show that the trial court abused its discretion in denying defendant's motion for a mistrial.

No error in part; remanded in part.

Judges McGEE and DAVIS concur.

Report per Rule 30(e).