NO. COA12-476

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 233345-46

MICHAEL DAVID MCDARIS

Appeal by defendant from judgments entered 26 October 2011 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Angenette Stephenson, for the State.

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

BRYANT, Judge.

Where a variance between defendant's indictments and the trial court's instructions to the jury did not deprive defendant of the opportunity to adequately defend himself, we find no error.

Facts and Procedural History

The victim, a twenty-year-old woman, went to the Mint Hill Police Department on 29 June 2009 and reported that her uncle,

defendant Michael David McDaris, had engaged in sexual intercourse with her on four separate occasions when she was a young teenager. The victim testified that the first incident occurred in defendant's garage; the next two incidents also occurred at defendant's house – one in defendant's garage and one inside the house itself; and the fourth and final incident occurred in the victim's house. Defendant was born on 22 June 1948 and was approximately fifty-five years old at the time of the incidents. Initially, the victim reported that these incidents occurred when she was fourteen and fifteen years old.

The State procured four indictments for statutory rape against defendant, one for each incident reported by the victim. Two of the indictments stated the victim as fourteen years old at the time of the first two incidents, and two of the indictments stated the victim as fifteen years old at the time of the last two incidents. The victim testified that defendant started molesting her when she was thirteen, and then progressed to intercourse when she was a sophomore in high school. The victim turned fifteen on 8 October 2004, a few months into her sophomore year. The victim testified that, as she thought more about the events that had occurred approximately five years before she reported them to the police, she realized all four

instances of intercourse had occurred when she was fifteen. Based upon this changed information, the State, before trial, dismissed the two indictments alleging statutory rape when the victim was fourteen years of age.

Defendant was interviewed at the police station on 8 July 2009. Defendant admitted to having sex with the victim "a couple dozen times," which he described as consensual. Defendant stated that it had occurred "four to five years ago," which would have made the victim somewhere between fourteen and sixteen years old. At trial, defendant's strategy was not to deny having had sexual relations with the victim. Instead, defendant challenged the victim concerning her actual age at the times she claimed the events had occurred.

When the case numbers 09 CRS 233345 and 233346 were called for trial the court inquired: "So that would be two counts of statutory rape of a 13-, 14- and 15-year-old and one count of a sex offense;" the prosecutor clarified they were "just submitting two counts of statutory rape" and there was no objection by defendant. The trial court also addressed defendant directly regarding the charges:

> THE COURT: Mr. McDaris, . . . [y]ou understand at this time your trial will proceed on two counts of sexual rape of a 13-, 14- or 15-year-old?

> THE DEFENDANT: I do understand that, Your honor."

Finally, the trial court gave preliminary instructions to the jury pool prior to selection of the petit jury noting, "Defendant is charged with two counts of statutory rape of a 13, 14 or 15 year old . . . ." Defendant made no objection or comment regarding the trial court's instructions.

At the charge conference, the trial court indicated it was going to instruct the jury that it could convict defendant of statutory rape if the jury determined, *inter alia*, that the victim was fourteen or fifteen years of age at the time the incidents occurred. Both defendant and the State objected and requested that the trial court instruct the jury it had to find the victim was fifteen at the time of the incidents so the the instruction would comport with the indictments.

There was also a lengthy discussion concerning whether the trial court would instruct the jury on all four of the incidents to which the victim testified, or only on two. The trial court decided to instruct the jury specifically on the first incident that occurred in defendant's garage and on the last incident that occurred in the victim's house. At this point, the State changed its position and requested that the instruction include

that the victim's age was fourteen years old or fifteen years old. Presumably, this was because there was some evidence from which the jury could determine that the first incident occurred when the victim was fourteen years old. The trial court proceeded with its initial decision to instruct the jury that it could convict defendant if the jury found the victim was either fourteen or fifteen years old at the time of the incidents.

The jury returned guilty verdicts on two counts of statutory rape, and defendant was sentenced to consecutive active sentences of 192 months to 240 months in prison. Defendant appeals.

The sole issue on appeal is whether the trial court erred by instructing the jury in a manner inconsistent with the indictments upon which the charges against defendant were based. Defendant argues that the trial court committed reversible error by instructing the jury that it could convict defendant of statutory rape if it found that intercourse between defendant and the victim occurred when the victim was fourteen or fifteen years old, because the indictments restricted the age of the victim to fifteen years old.

The indictments in this matter included the following relevant language:

> STATUTORY RAPE OF PERSON FIFTEEN YEARS OLD G.S. 14-27.7A
>
> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on about and between the 8th day of October, 2003 and the 7th day of October, 2004, in Mecklenburg County, [defendant] did unlawfully, willfully, and feloniously engage in vaginal intercourse with [the victim], a person of the age of fifteen (15) years. At the time of the offense, [defendant] was at least six (6) years older than the victim and was not lawfully married to the victim.

The trial court instructed the jury that if it found Defendant "engaged in vaginal intercourse with [the victim] when she was 14 or 15 years old, that . . . defendant was at least six years older than [the victim] and was not lawfully married to [her], it would be your duty to return a verdict of guilty on this charge." This instruction varied from the indictment in that it allowed the jurors to convict defendant if they found evidence that defendant engaged in vaginal intercourse with the victim when she was fourteen years old.

Defendant was indicted under N.C. Gen. Stat. § 14-27.7A, which states in relevant part:

> (a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another

> person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a) (2011). In cases involving alleged child sex abuse, our Court has previously discussed temporal variances between indictments and the facts presented:

> Under N.C.G.S. § 15A-924(a)(4) (1988), an indictment must allege the date or the period of time during which the offense was committed. However, it is well established "'that variance between allegation and proof as to time is not material where no statute of limitations is involved.'" As recently stated by this Court, "the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal."
>
> In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. *Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance*, the policy of leniency governs.

State v. Burton, 114 N.C. App. 610, 612-13, 442 S.E.2d 384, 385-86 (1994) (citations omitted) (last emphasis added).

> This Court has stated on a number of occasions that the State may prove that the crime charged was in fact committed on some date other than that alleged in the indictment. However, this rule cannot be used to "ensnare" a defendant and deprive him of the opportunity to *adequately defend* himself.

State v. Ramey, 318 N.C. 457, 472, 349 S.E.2d 566, 575 (1986) (citations omitted) (emphasis added).

There is no statute of limitations issue involved in this case. N.C.G.S. § 14-27.7A(a) requires that the victim be thirteen, fourteen, or fifteen years old at the time the sexual act takes place. Violation of N.C.G.S. § 14-27.7A(a) is a class B1 felony whether the victim is thirteen, fourteen, or fifteen. Had the State included language in the indictments covering the full thirteen to fifteen year age range allowed under N.C.G.S. § 14-27.7A(a), the trial court's instruction would pose no difficulty. Nevertheless, there is no substantive difference in a conviction pursuant to N.C.G.S. § 14-27.7A(a) depending on whether the victim is thirteen, fourteen, or fifteen. In the present case, however, because the State specifically limited the age of the victim to fifteen in the indictments, we must determine whether this limitation, and the trial court's

subsequent instruction permitting conviction if the jury determined the victim was either fourteen or fifteen, deprived defendant of an opportunity to adequately defend himself. *Ramey*, 318 N.C. at 472, 349 S.E.2d at 575.

Defendant was initially indicted on two counts of statutory rape with the victim identified as having been fourteen years old at the time of the intercourse and indicted for two additional counts listing the victim as having been fifteen years old. Once the victim, after further thought, amended her account of events and informed the State that she had been fifteen for all four incidents, the State dismissed the two indictments indicating an age of fourteen and only proceeded on the indictments listing the age as fifteen, even though the victim stated that there had been four discrete incidents of statutory rape.[1] A trial, the victim testified that the first incident occurred in defendant's garage, that the second and third incidents also occurred at defendant's house, and that the fourth and final incident occurred at the victim's house.

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[1] We note with dismay the decision of the prosecutor to include a specific age in separate indictments where the statute makes it a crime to engage in sexual acts with a victim between the ages of thirteen and fifteen. Most indictments allege the age *range* of the victim as opposed to a specific age, to avoid situations such as presented in the instant case.

Defendant attempted to present a defense that the incidents actually occurred when the victim was sixteen, which would have been a complete defense to the charge of statutory rape. The jury clearly rejected defendant's defense that the victim was sixteen at the time of the incidents.

While defendant's defense was that the victim was sixteen and that the acts were consensual, defendant's trial strategy was based on attempts to impeach the victim's credibility by showing that the earlier incidents occurred when the victim was fourteen, not when she was fifteen years old. Defendant cross-examined the victim extensively concerning her initial statements to the police that she was fourteen when the first incidents occurred.

We reject defendant's argument that his defense would have been altered in such a way that he would be deprived of the opportunity to present an adequate defense. Assuming *arguendo,* that the indictment had alleged the victim was fourteen or fifteen, defendant would not have tried to show that the victim was fourteen years old even though it is likely his cross examination of the victim regarding her credibility would not have changed very much. However, this would merely amount to a slightly different trial strategy, not a deprivation of an

opportunity to adequately defend himself against the charges. Furthermore, where the statute prohibits sexual acts upon a victim whose age is thirteen, fourteen, or fifteen, and the defense at trial is that the acts occurred when the victim was sixteen as opposed to fifteen, an indictment alleging the victim was fifteen, and the trial court's instructions to the jury based on evidence at trial that the victim was either fourteen or fifteen, is not so prejudicial to defendant as to require a new trial.

Based on the foregoing, we hold that the variance between the remaining indictments and the trial court's instruction did not deprive defendant of the opportunity to adequately defend himself against the charges in this case. *See Ramey*, 318 N.C. at 472, 349 S.E.2d at 575.

No prejudicial error.

Judge THIGPEN concurs.

Judge MCGEE dissents in a separate opinion.

Report per Rule 30(e).

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STATE OF NORTH CAROLINA

v. Mecklenburg County
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MICHAEL DAVID McDARIS

McGEE, Judge dissenting in part.

Because I believe Defendant was prevented from preparing an adequate defense due to the difference between the indictments and the jury charge for one of his convictions, I respectfully dissent in part.

Though I agree that there was no error with respect to the conviction based upon the incident in the victim's house, I would reach a different result with regard to the conviction based upon the first alleged incident of statutory rape, and vacate that conviction. This first incident was clearly related to one of the two indictments the State dismissed based upon the victim's changed statements regarding her age at the time of the first alleged incidents.

Defendant relied on the language of the surviving two indictments, which limited the victim's age to fifteen, when defending against the charges at trial. Defendant attempted to

show that the later incidents occurred when the victim was sixteen, and not when she was fifteen. For the earlier incidents, however, Defendant attempted to show that they occurred when the victim was *fourteen*, not when she was fifteen. Defendant cross-examined the victim extensively concerning her initial statements to the police that she was fourteen when the first incidents occurred. When arguing that the trial court should instruct the jury that it could only find Defendant guilty if it found that the victim was fifteen at the time of the incidents, Defendant's counsel argued:

> There were two other indictments that the State hasn't proceeded on, ultimately, that specifically address 14. So as far as what he's – what he's on notice for defending himself on, this – I just argue that 15 is clearly what was to be proceeded on.

The State also argued to omit the option of finding Defendant guilty if the jury found the victim was fourteen at the time of the incidents:

> Your Honor, as far as the indictment goes, he's only been indicted for when she turned -- the day she turned 15 to the date before she turned 16. So I'd suggest one of two things. Either allow me to amend the indictments to cover that two-month period in '03 and '04 where she's 14, which would be consistent with all of the evidence, or simply just saying statutory rape of a 15-year-old. I don't want to get into a situation where the Court of Appeals

> reverses my conviction because it doesn't match the indictment dates.

The prejudice we need to consider on appeal is the prejudice to Defendant's defense, not to the potential outcome at trial. *State v. Burton*, 114 N.C. App. 610, 612-14, 442 S.E.2d 384, 385-86 (1994). The majority contends certain statements by the trial court put Defendant on notice that Defendant could be convicted if the jury determined the victim was fourteen at the time of the incidents. I disagree. In these statements the trial court was correctly tracking the language of the charging statute – N.C.G.S. § 14-27.7A(a). The trial court was indicating, generally, the crime for which Defendant was on trial. The trial court was not tracking the language of the actual indictments in this matter.

It is apparent that neither Defendant, the State, nor the trial court itself understood this to be the case. The State believed, erroneously, that it was required to indicate an exact age in its indictments. The State dismissed two indictments precisely because they included a specific age, fourteen, that the State did not believe was supported by the evidence.

Defendant's reliance on the specificity of the indictments – that the victim was fifteen, not fourteen – is evident throughout the proceedings and the multitude of transcript pages

where Defendant is challenging the victim concerning her initial statements to the police that she was fourteen when some of these acts occurred. Defendant's reliance is most clear in the objections he repeatedly made to the instruction given. These objections were echoed by the State on multiple occasions, and only dropped by the State when the State was informed that the trial court would limit the jury's consideration to the last and *the first* incident testified to by the victim.

The trial court did *not* instruct the jury as it did based upon the language of the charging statute, N.C.G.S. § 14-27.7A(a). If the trial court believed it could instruct based upon the language of the statute alone, it could have simply instructed the jury that the jury needed to find that the victim was thirteen, fourteen, or fifteen. This option was rejected by the trial court, the State, and Defendant.

The majority states: "While Defendant's defense was that the victim was sixteen and that the acts were consensual, Defendant's trial strategy was based on attempts to impeach the victim's credibility *by showing that the earlier incidents occurred when the victim was fourteen*, not when she was fifteen years old." (Emphasis added). If the majority is correct – if Defendant was on notice that he could be convicted if the jury

found the victim was fourteen at the time the first two incidents occurred – then Defendant's counsel admitted guilt to both charges of statutory rape at trial. There were only four incidents testified to at trial. Defendant could only be convicted for two of the four incidents. Neither Defendant nor the State knew before the charge conference that the trial court was going to limit the jury's consideration to the first and last alleged incidents. Pursuant to the reasoning of the majority, Defendant, by attempting to show that the victim was fourteen at the time of the first two incidents, was admitting guilt to two charges of statutory rape in order to impeach the victim's credibility on the two remaining, superfluous charges. This cannot have been Defendant's strategy.

Our Supreme Court addressed the prejudice to a defendant's defense when specific language in an indictment is ignored in *State v. Silas*, 360 N.C. 377, 627 S.E. 2d 604 (2006). In *Silas*, the defendant was indicted in relevant part as follows: "James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building . . . with the intent to commit a felony therein, to wit: murder." *Id.* at 379, 627 S.E.2d at 605-06. However, the trial court instructed the jury that it could find the defendant broke into the house with either the intent to

kill, *or* the intent to commit assault with a deadly weapon inflicting serious injury. *Id*. at 379, 627 S.E.2d at 605-06. Our Supreme Court held this was error, rejecting the State's argument, because an instruction allowing conviction based upon a finding of an intent less than murder deviated from the original indictment. Our Supreme Court held the defendant was deprived of a full opportunity to prepare his defense:

> [T]he indictment served as notice to defendant apprising him of the State's theory of the offense. [Defendant] relied upon the allegations in the original indictment to his detriment in preparing his case upon the assumption the prosecution would proceed upon a theory defendant intended to commit murder. . . . . Because the indictment alleged defendant intended to commit murder after breaking and entering into Mrs. Silas's residence, defendant prepared his case and the theory of his defense, including his decision to testify on his own behalf, to discredit the allegation that he intended to kill Mrs. Silas. By doing so, defendant could hope to be acquitted of the charges alleged in the felonious breaking or entering indictment[.]

Id. at 382-83, 627 S.E.2d at 608. Our Supreme Court observed that it is the State that drafts the indictment, and the State should be held to the language it chose. *Id*. at 383, 627 S.E.2d at 608 (citations omitted).

In *Silas*, breaking or entering with the intent to commit the felony of assault with a deadly weapon inflicting serious

injury was no more a defense to the charge of felony breaking or entering than the victim being 14 instead of 15 was a defense to statutory rape in the present case. The issue, contrary to the majority analysis, is not whether a defendant presented evidence that was a defense to the statutory crime charged. The issue is whether the defendant relied on the indictments to fashion his defense as to the facts alleged in the indictments. In *Silas*, the defendant argued at trial that he did not intend to kill the victim – he only intended to hurt her. *Id.* at 382-83, 627 S.E.2d at 608. Because assault with a deadly weapon is a felony, the defendant in *Silas* was effectively confessing to having committed the crime of felonious breaking or entering. However, because the indictment restricted the intent element of felony breaking or entering to intent to kill, our Supreme Court vacated the defendant's conviction for felony breaking or entering because the jury decided the State had only proven intent to harm, not intent to kill.

In the present case, Defendant's strategy, as evidenced in the transcript, was not restricted to arguing that the victim was sixteen and consented, but to arguing that the victim ***was not fifteen***. Defendant attempted to show that the victim was sixteen for the last incident, and that the victim was fourteen

for the first incident. These were the only two incidents sent to the jury. In the present case, the fact that being fourteen is not a defense to the crime should not be any more fatal to Defendant's appeal than the fact that shooting the victim with only an intent to harm was to the defendant in *Silas*. The victim having been fourteen is certainly not a defense to N.C.G.S. § 14-27.7A(a). It is, however, a defense to a specific indictment that the victim was fifteen when the acts occurred.

While I agree there was no error relating to 09 CRS 233346, the incident in the victim's house, I would vacate the conviction in 09 CRS 233345, the first incident in Defendant's garage. I wish to emphasize that I do not believe deviation from the age stated in an indictment, when instructing the jury, is *per se* fatal. However, when, as here, Defendant has reasonably relied upon the language of the indictments obtained by the State to craft his defense, it is error for the trial court to instruct the jury in a manner which undermines that defense.