NO. COA14-133

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

STATE OF NORTH CAROLINA

v. Henderson County
Nos. 11 CRS 55726-31

CHARLES STEVENS BLOW, JR.

Appeal by defendant from judgments entered 31 July 2013 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Associate Attorney General Christina E. Simpson, for the State.

Paul F. Herzog for defendant-appellant.

HUNTER, Robert C., Judge.

Charles Stevens Blow, Jr. ("defendant") appeals from six judgments entered 31 July 2013 after a jury convicted him on three counts each of first degree rape and first degree sex offense on a child. On appeal, defendant contends that the trial court erred by: (1) denying his motion to dismiss with respect to one count of first degree rape and (2) denying his motion to continue when defense counsel learned of a potential defense witness on the eve of trial.

After careful review, we vacate one judgment for first degree rape, but we find no error in the denial of defendant's motion to continue.

Background

Defendant is the biological father of M.B.[1] and her sister, C.B. M.B. was born in 2001 and was eleven years old when this case went to trial. Defendant and Angela Blow ("Angela"), the mother of M.B. and C.B., married in 2005. In August 2010, Angela and defendant separated and Angela moved to Michigan with M.B. and C.B. While in Michigan, Angela suffered a breakdown and left M.B. and C.B. with her brother. As a result, psychological and medical evaluations were performed on M.B., C.B., Angela, and defendant in April 2011 in the process of determining placement of custody for the children. During these evaluations, M.B. denied the occurrence of any previous abuse when her family lived in North Carolina. Pursuant to an agreement between Angela and defendant, M.B. and C.B. moved to North Carolina to live with defendant and his new girlfriend in June 2011.

While visiting her mother in Michigan on 23 December 2011, M.B. was being teased by other children in the family when she

[1] A pseudonym will be used to protect the privacy and identity of the minor and her minor sibling.

became upset and retreated to the bathroom. When Angela went in to check on her, M.B. revealed to Angela that "[s]ometimes dad takes his boy parts and he touches my girl parts." M.B. then said, "[defendant] told me that if I did not let him do it to me, that now that [C.B.] was getting older he was going to do it to her." M.B. told Angela, and later testified at trial, that this abuse had been occurring since she was about six years old. The next morning, Angela took M.B. to the local hospital for an examination.

At the hospital, M.B. was questioned by Trooper Ruth Osborne ("Trooper Osborne") of the Michigan State Police. M.B. told Trooper Osborne that defendant would put "his boy parts" "on [M.B.'s] girl parts." When asked for clarification, M.B. later stated to Trooper Osborne that defendant would put his "boy parts" inside her. M.B. stated during the interview that defendant would touch her on her private parts with his hand, his "boy part," and his electric toothbrush. A sexual assault examination was performed on M.B. during this hospital visit, however the prosecution was not able to present this evidence because the swabs were accidentally thrown away before being examined by the North Carolina State Bureau of Investigation.

The Michigan State Police contacted Detective Dottie Parker ("Detective Parker") of the Henderson County Sheriff's Office, and a North Carolina investigation began. Defendant consented to an interview with Detective Parker on 28 December 2011. During this interview, defendant admitted that he had rubbed his penis on M.B.'s vagina, performed oral sex on M.B., and put a vibrating toothbrush on her vagina. However, defendant repeatedly denied ever "penetrating" M.B. with either his finger, toothbrush, or penis.

Defendant was arrested following the interview. He was indicted on 26 March 2012 on three counts of first degree rape, alleged to have occurred between June 2011 and December 2011, and three counts of first degree sex offense, alleged to have occurred between June 2007 and June 2010.

The defense made a pretrial motion to continue on the eve of trial, claiming that defense counsel had learned of the psychological evaluations completed on defendant, Angela, and M.B. the day before trial was scheduled to begin. During the motion hearing, the defense asserted that the relevance in these evaluations lay in (1) the impeachment of M.B. through purported prior inconsistent statements, and (2) the psychological profiles of M.B. and defendant. The motion was denied.

At trial, M.B. testified that during the time period when she and C.B. lived with defendant and his girlfriend from June to December 2011, defendant would oftentimes come into the small bedroom M.B. shared with C.B. and would touch M.B. on her "private parts" and chest. M.B. stated that this happened "a lot," not just once or twice. M.B. testified that defendant performed oral sex on her "a lot," sometimes taking her into his bedroom to perform these acts. M.B. also stated that defendant placed his fingers and electric toothbrush inside her vagina "a couple times." M.B. further testified that defendant put his penis in her vagina "a couple times." M.B. did not remember exactly how many times defendant put his penis inside her, but she testified that it happened "more than one time." M.B. testified that she did not tell anyone about this abuse initially because she was afraid "[defendant] would hurt me."

Defendant presented no evidence, but moved to dismiss all charges at the close of the State's evidence and renewed the motion before the case was submitted to the jury. Defendant argued in part that one of the charges for first degree rape should be dismissed because the only evidence presented by the State to support those charges was M.B.'s testimony that defendant inserted his penis into her vagina "a couple" times.

Both motions were denied. The jury convicted defendant of all charges. Defendant was sentenced to 221 to 275 months imprisonment for each of the three charges of first degree rape and one count of first degree sex offense, all of which are to be served concurrently. He was also sentenced to 221 to 275 months imprisonment for the remaining two counts of first degree sex offense, which are to be served consecutively. Thus, in total, defendant was sentenced to 663 to 825 months of active imprisonment.

Discussion

I. Motion to Dismiss

Defendant first argues that the trial court erred when it denied defendant's motion to dismiss with respect to one count of first degree rape. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). To defeat a motion to dismiss, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted). "Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-665, 652 S.E.2d 212, 213 (2007) (quotation marks omitted). "Generally, a jury may find a defendant guilty of an offense based solely on the testimony of one witness." *State v. Combs*, __ N.C. App. __, __, 739 S.E.2d 584, 586, *disc. review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

In considering a motion to dismiss, the trial court must look at the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference drawn from that evidence. *Denny*, 361 N.C. at 665, 652 S.E.2d at 213. However, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

"A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.2(a)(1) (2013). Our Supreme Court has held that "intercourse" means "the slightest penetration of the

sexual organ of the female by the sexual organ of the male." *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970).

Here, M.B. explicitly testified at trial that defendant put his penis into her vagina. She told Trooper Osborne that she "didn't know what he was doing," but defendant said that it was "just sex." M.B. testified that the first time defendant put his penis into her vagina, it caused her pain because she "never did it before." When asked how many times defendant put his penis into her vagina, M.B. said "a couple," and that it happened "more than once," but could not remember exactly how many times it occurred.

Defendant and the State are in agreement that M.B.'s testimony supported two charges of first degree rape. Indeed, M.B. testified that defendant inserted his penis into her vagina "more than once," and under any definition of the term, "a couple" indicates more than one. However, defendant contends that since M.B. testified that defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. We agree.

The dissent relies on Detective Parker's testimony regarding her post-interview report to reach the conclusion that

the State presented substantial evidence of three counts of rape. In the report, Detective Parker indicated that defendant admitted to having intercourse with M.B. three times. We do not believe that Detective Parker's conclusion regarding defendant's statements amounts to substantial evidence supporting three charges of first degree rape. Defendant openly conceded that he committed sexual acts with M.B., such as rubbing his penis, hands, and a vibrating toothbrush on her vagina and performing oral sex on her. Thus, when asked by Detective Parker if he had "sex" with M.B. about three times when she lived with him in North Carolina, he answered in the affirmative. However, defendant did not admit to penetrating M.B.'s vagina with his penis. Detective Parker's testimony revealed that defendant seemed confused about what her definition of "sex" was:

> Q: Do you recall Mr. Blow ever telling you in his – from his mouth that "I've had sex with [M.B.] three times"?
>
> A: I would ask him how many times and he said "about once every three months."
>
> . . .
>
> Q: Okay. And from your calculation from that to him in the video you indicate you believe that was about three times?
>
> A: Yes.
>
> Q: And you got him – when you said that he

agreed with you.

A: Yes.

Q: He said okay. And there was a point later in the video, a little over an hour into your interview with him . . . that Mr. Blow indicated to you that – he says "you keep saying that I put my penis in her," but he tells you that that didn't happen, and you explain to him, "well, that's what sex is"?

A: Uh-huh.

Q: . . . It may be difficult, but I'm – because I'm referring to a specific point where near the end, before you go out the second time, for about a 12- to 14- minute period you and he are discussing what sex is.

A: Uh-huh.

Q: Do you recall that point?

A: I do recall.

Q: Okay. And – and at that point he is telling you again that he did not put his penis inside of her, that [it] was on her?

A: Uh-huh.

Q: And that – and in fact, actually, I think you made a point of it yesterday in your direct that he kept saying "on" not "in"?

A: Yes.

Q: He said that a lot?

A: He did.

Thus, defendant's admission to three instances of "sex" with M.B. does not equate to an admission of vaginal intercourse. He openly admitted to performing oral sex on M.B., among other sexual acts, but vehemently denied penetrating her vagina with his penis.

Furthermore, Detective Parker herself conceded on cross examination that defendant later clarified his statements and denied penetrating M.B. with his penis. Specifically, Detective Parker testified as follows:

> Q: You indicate in your report that Mr. Blow admitted to actually having intercourse with [M.B.]; is that right?
>
> A: Yes.
>
> Q: Do you recall that Mr. Blow actually told you that if there had been changes to [M.B.] that any penetration would have been accidental?
>
> A: I recall him saying that, yes.
>
> Q: Okay. And you recall him telling you throughout the interview that he had never put anything, I think his words were, "I never stuck anything in [M.B.]"?
>
> A: Yes.
>
> Q: He told you he never put his finger in [M.B.]?
>
> A: Yes.
>
> Q: He told you that he had never put the

> toothbrush in [M.B.]; is that right?
>
> A: Yes.
>
> Q: He told you that he never put his penis in [M.B.]?
>
> A: Yes.
>
> Q: And he told you that, would it be fair to say, about ten times?
>
> A: Sure.

Given the context of Detective Parker's testimony, we do not believe that her assertion in her report that defendant admitted to having sex with M.B. three times was a reasonable account of defendant's statements. This may explain the State's passing mention of this argument in its brief on appeal.[2] Even giving the State every reasonable inference, defendant's admission to multiple acts of sexual abuse, but adamant denial of penetrating M.B.'s vagina with his penis, does not amount to evidence that a "reasonable mind might accept as adequate to support" the conclusion that defendant inserted his penis into

[2] Specifically, the entirety of the State's argument on this issue is the following: "The State also submitted evidence of Defendant's extrajudicial admission to an interviewing office [sic] to having had sex with the child about once every three months over the nine month period she resided in his house since her move in April 2010. Or, as he acceded, according to his previous estimation, 'about three times.'"

M.B.'s vagina on three separate occasions. *Denny*, 361 N.C. at 664-665, 652 S.E.2d at 213.

The State therefore relies on the definition of "a couple" to argue that it presented substantial evidence of three counts of first degree rape. As the State notes, Merriam-Webster Dictionary provides several definitions for the term "couple," one of which being "an indefinite small number" that may be used interchangeably with the term "few." Additionally, defendant points us towards other sources indicating that "a couple" can also be defined as "two individuals of the same sort considered together"; "two similar things"; "two of the same species or kind, near in place or considered together"; and "a pair."[3]

However, we need not determine whether "a couple" means "two" or "more than two" of something to rule on this matter. Instead, we agree with defendant's contention that the ambiguous nature of the term "a couple" causes M.B.'s testimony to raise no more than a suspicion or conjecture that more than two instances of rape occurred. If we agree with the State that

[3] Although not a controlling source of authority on this distinction, we find the following anecdote indicative of the common usage of the term "a couple." When a father asked his four-year-old daughter if he could take "a couple" of french fries from her plate, the daughter said yes. But when the father took four french fries, the little girl took back two of them and stated emphatically, "A couple means two!"

testimony of "a couple" instances of conduct amounts to substantial evidence supporting "an indefinite small number" of charges, we open the door to speculation as to how many charges can fit within those bounds. Using this logic, the State could potentially charge a defendant with four or five crimes just as it could with three, based only on an allegation that the criminal conduct happened "a couple" of times. We believe that this is the type of "speculation" and "conjecture," *State v. Brown*, 162 N.C. App. 333, 338, 590 S.E.2d 433, 437 (2004), that cannot defeat a motion to dismiss. *See State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424 (2011) ("A motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.").

Accordingly, although "the unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury," *State v. Carter*, 198 N.C. App. 297, 306, 679 S.E.2d 457, 462 (2009), M.B.'s ambiguous characterization of the number of times defendant inserted his penis into her vagina as "a couple" was

insufficient to charge defendant with three counts of first degree rape.

II. Motion to Continue

Defendant next contends that the trial court erred in denying defendant's motion to continue, as defense counsel learned of a potential defense witness on the eve of trial. We disagree.

Ordinarily, the ruling on a motion to continue is "addressed to the discretion of the trial court," and it is not subject to review absent "a gross abuse of that discretion." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). However, "when a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable on appeal." *Id.* Even if a constitutional issue is raised, denial of a motion to continue is grounds for a new trial only if the defendant can show that the ruling was both erroneous and prejudicial. *State v. Garner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988).

"It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d

742, 747 (1977). "However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case." *Id.* Here, defendant argues that he was denied this right because his defense counsel learned of the psychological reports conducted on defendant and M.D. on the eve of trial and did not have adequate time to subpoena the psychologist to testify. At the hearing on the motion to continue, defense counsel conceded that defendant had knowledge of these proceedings due to his participation in the psychological evaluations and that defense counsel had two months to confer with defendant in order to prepare their case before trial. Based on these circumstances, *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747, we conclude that the two-month period during which defense counsel could have learned of the psychological reports had there been diligent communication with his client amounted to a "reasonable time to investigate, prepare and present his defense." *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747. Thus, we find no error in the trial court's denial of defendant's motion to continue.

Additionally, even if the denial of the motion to continue was erroneous, defendant has failed to demonstrate prejudice. *See Garner*, 322 N.C. at 594, 369 S.E.2d at 596. During the

cross-examination of M.B., defense counsel was allowed to introduce relevant parts of the psychologist's written report. Specifically, defense counsel had M.B. read to the jury a portion of her psychological evaluation which stated, "[M.B.] denies being physically or sexually abused. She denies being afraid of either parent or any other relatives." After reading this part of the report, M.B. testified that she had very little recollection of the psychological examination and did not have any recollection of denying sexual abuse by defendant. Thus, because defendant was still able to use the psychological reports at trial to impeach M.B.'s testimony, the denial of the motion to continue did not prevent defendant from "present[ing] his defense," *Carter*, 184 N.C. App. at 712, 646 S.E.2d at 851, and he has failed to demonstrate the prejudice required to be granted a new trial.

Accordingly, we find no error in the trial court's denial of defendant's motion to continue.

Conclusion

For the foregoing reasons, we vacate the underlying judgment entered for the third count of first degree rape, number 11 CRS 55728. We find no error in the trial court's denial of defendant's motion to continue. Because the sentences

entered on the three judgments for first degree rape are to be served concurrently, this decision does not alter defendant's sentence, and we need not remand the matter to the trial court.

JUDGMENT IN NUMBER 11 CRS 55729 VACATED.

NO ERROR AS TO REMAINING JUDGMENTS.

Judge MCCULLOUGH concurs.

Judge ERVIN concurs in part and dissents in part by separate opinion.

NO. COA14-133

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

STATE OF NORTH CAROLINA

v. Henderson County
Nos. 11 CRS 55726-31

CHARLES STEVENS BLOW, JR.

ERVIN, Judge, concurring in part and dissenting in part.

Although I concur in the Court's determination that the trial court did not err by denying Defendant's continuance motion, I am unable to join the portion of the Court's opinion that concludes that the trial court erred by denying Defendant's motion to dismiss one of the three first degree rape charges that had been lodged against him. After carefully reviewing the record in light of the applicable law, I am compelled to conclude, contrary to the result reached by my colleagues, that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict Defendant of three counts of first degree rape. As a result, although I concur in the remainder of the Court's opinion, I respectfully dissent from my colleagues' decision to vacate one of Defendant's first degree rape convictions for insufficiency of the evidence.

In the course of concluding that the State failed to present sufficient evidence to support the jury's decision to convict Defendant of three counts of rape, the Court focuses on the testimony of the alleged victim, M.B., who stated that Defendant put his penis into her vagina "a couple times." In the course of clarifying this portion of her testimony, M.B. further stated that, although Defendant penetrated her vagina with his penis on more than one occasion, she could not remember exactly how many times Defendant engaged in this unlawful conduct. Although I agree with my colleagues that this portion of M.B.'s testimony, viewed in isolation, does not suffice to support a determination that Defendant raped M.B. on three different occasions, the record also contains the testimony of Detective Dottie Parker of the Henderson County Sheriff's Office, who testified that, in the course of discussing M.B.'s allegations with her, Defendant admitted having "had sex" with M.B. about once every three months over a seven month period and that he had engaged in this conduct "about three times." Given that, "when considering a motion to dismiss, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of 'every reasonable inference to be drawn therefrom,'" *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212,

213 (2007) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)), I believe that Defendant's admission that he had "had sex" with M.B. "about three times," when taken in the light most favorable to the State, sufficiently supports the trial court's decision to allow the jury to consider the issue of Defendant's guilt of three counts of first degree rape and dissent from my colleagues' decision to the contrary.

In rejecting the analysis set out in this concurring and dissenting opinion, the Court relies upon two essential arguments. First, my colleagues appear to argue that Defendant's statement that he had "had sex" with M.B. did not constitute an admission that Defendant had vaginally penetrated her with his penis on those occasions. However, when read in context, I believe that Defendant's statements, as recounted by Detective Parker, are reasonably susceptible to the interpretation, which is consistent with ordinary parlance, that Defendant used the term "having sex" as a shorthand reference to engaging in vaginal intercourse. Secondly, my colleagues argue that various statements that Defendant made during the remainder of his conversation with Detective Parker establish that he did not acknowledge having vaginal intercourse with M.B. more than twice. Although Defendant made a number of different statements

during his conversation with Detective Parker, I believe that the extent, if any, to which his subsequent comments contradicted, rather than explained, his admission to having "had sex" with M.B. on three different occasions was a question for the jury rather than a matter to be resolved by the trial court in addressing Defendant's dismissal motion. *State v. Wagoner*, 249 N.C. 637, 639, 107 S.E.2d 83, 85 (1959) (stating that "[t]he contradictory statements made by the defendant to the investigating officer do not cancel out the testimony given in the trial"). As a result, given that I am unable to agree with my colleagues that the record fails to contain sufficient evidence to support all three of Defendant's rape convictions and would uphold the denial of Defendant's dismissal motion relating to Defendant's third rape conviction, I concur in the Court's decision in part and dissent from that decision in part.