

NO. COA14-317

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v.

Wake County
No. 11 CRS 226769, 11 CRS
226773-75

ROBERT EARL SPENCE, JR.

Appeal by defendant from judgments entered 18 June 2013 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 September 2014.

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

W. Michael Spivey, for defendant.

ELMORE, Judge.

Robert Earl Spence, Jr. (defendant) appeals from judgments entered upon his convictions for four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative. Defendant was sentenced to three consecutive terms of active imprisonment each for a minimum of 230 months and a maximum of 285 months.

I. Facts

The State indicted defendant on three counts of rape, sex offense, and incest in each of six cases (eighteen counts in total) stemming from alleged sexual misconduct between defendant and his daughter ("Donna¹"). At trial, the State presented evidence that defendant continually sexually abused Donna when she was five years old until she was twelve. Donna recalled the locations where the abuse occurred but was unable to remember dates or time-frames. The State attempted to establish the time-frames by establishing the years in which defendant lived at the various locations of the alleged abuse. The approximate time-frames established that defendant separated from his wife in 2002, moved out of the family home and briefly lived with his cousin, Dartanian Hinton, followed by his oldest brother, Ellis Rodney McCoy. Defendant lived with McCoy from approximately 2003 until early 2005. Subsequently, defendant lived with his younger brother, David Edison Spence, for the duration of 2005. During the final months of 2005 or early in 2006, defendant resided with ATN Hinton for about five or six months. Thereafter, defendant married and moved into the home of his new wife, Joann Freeman. In July 2006, defendant divorced Ms.

¹ Donna is a pseudonym used to protect the identity of the minor.

Freeman, re-married, and moved into another house with his third wife, Angel Spence.

During her trial testimony, Donna became nervous, visibly upset, and began to directly ask defendant questions about his conduct towards her. In response, the trial court recessed court and, over defendant's objection, ordered that the courtroom remain closed for the duration of Donna's direct and cross-examination testimony.

At the close of all the evidence, defendant made a motion to dismiss three of the first-degree sex offense charges that were alleged to have occurred in 2001, 2004, and 2005 for insufficiency of the evidence. The trial court denied defendant's motion, and the charges were submitted to the jury.

While reading the jury instructions, the trial court, without any objection by defendant, followed the pattern jury instructions by referring to Donna as "the victim." During deliberations, the jury asked the trial court whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. The trial court, without any objection by defendant, answered, "the use of the word 'any object' refers to parts of the human body as well as inanimate or foreign objects. So that is the definition of the term

'object.' And then under that definition the penis being a part of the human body, that would be within the definition of an object."

The jury returned with unanimous verdicts of guilty of four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative.

II. Analysis

a.) Preservation of Constitutional Issue

Defendant first contends that the trial court erred by violating his sixth amendment constitutional right to a public trial when it closed the courtroom during Donna's testimony. The State contends that defendant failed to preserve this issue on appeal. We disagree.

N.C. Appellate Procedure Rule 10(a)(1) mandates that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). Accordingly, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Ellis*, 205 N.C. App. 650, 654, 696

S.E.2d 536, 539 (2010) (citation and quotation marks omitted). This general rule applies to constitutional questions, as constitutional issues not raised before the trial court "will not be considered for the first time on appeal." *Id.*

Pursuant to the sixth amendment of the United States constitution, a criminal defendant is entitled to a "public trial." U.S. Const. amend. VI.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46, 81 L. Ed. 2d 31, 38 (1984) (citations and quotation marks omitted).

In order to preserve a constitutional issue for appellate review, a defendant must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right. *State v. Rollins (Rollins I)*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 76 (2012).

Here, the trial court ordered that bystanders in the courtroom, who included people on defendant's witness list, remain outside the courtroom for the remainder of the alleged victim's testimony. Defendant's attorney objected in response to the closure of the courtroom:

DEFENDANT'S ATTORNEY: Your Honor, just if your Honor could note defendant's objection. People that are here that are on my witness list who have been seated in the audience haven't contributed to this disruption and haven't been making faces or gestures which would in any way cause the upset that the witness has been displaying and I object to them being removed, but I understand the Court has enormous discretion in the matter. I just don't like it. . . . I'm concerned that the jury may feel that somehow my part of the audience had something to do with the witness's behavior and I don't think that's the case and I wouldn't want to let that be inferred or implied in the Court's ruling, so if the Court could fashion some statement to that effect I'd be grateful.

Before defendant cross-examined Donna, the trial court ordered that the courtroom remain closed, and defendant objected to the closure once again.

TRIAL COURT: All right. I've considered whether there's any particular reason to allow bystanders to be in the courtroom during the cross-examination and I'm inclined to continue the order closing the courtroom during the remainder of this witness's testimony, including cross-examination, so that would

be for the same reasons and findings of fact that I made previously. That would be my intention. . . . [D]o you want to be heard?

DEFENDANT'S ATTORNEY: Just an objection, but if I could go out for a minute and tell my people they don't need to stick around.

TRIAL COURT: Again, clarify that once she is off the stand they would be welcome back.

It is apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicates defendant's constitutional right to a public trial. Thus, we hold that defendant preserved this issue on appeal. See *State v. Comeaux*, __ N.C. App. __, __, 741 S.E.2d 346, 349 (2012) *review denied*, __ N.C. __, 739 S.E.2d 853 (2013) (ruling that the “[d]efendant’s objection to ‘clear[ing] the courtroom’” preserved the defendant’s argument on appeal that his constitutional right to a public trial was violated); see also *Rollins I*, __ N.C. App. at __, 729 S.E.2d at 76 (holding that the defendant preserved appellate review of an alleged violation of his constitutional right to a public trial “based on his contention [at trial] that ‘[c]ourt should be open’”).

b.) Constitutional Right to a Public Trial

We now address the merits of defendant's argument that the trial court violated defendant's constitutional right to a public trial. For the reasons set forth below, we hold that the trial court did not violate defendant's constitutional right.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). This court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007).

"[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a

fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38. In accordance with this principle, N.C. Gen. Stat. § 15-166 (2013) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

However, when deciding whether closure of the courtroom during a trial is appropriate, a trial court must: (1) determine whether the party seeking the closure has advanced "an overriding interest that is likely to be prejudiced" if the courtroom is not closed; (2) ensure that the closure is "no broader than necessary to protect that interest"; (3) "consider reasonable alternatives to closing the proceeding"; and (4) "make findings adequate to support the closure." *Waller*, 467 U.S. at 48, 81 L. Ed. 2d at 39. The findings regarding the closure must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45, 81 L. Ed. 2d at 38 (citation and quotation marks

omitted). In making its findings, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Rollins (Rollins II)*, __ N.C. App. __, __, 752 S.E.2d 230, 235 (2013) (citation omitted).

Here, the trial court originally issued oral findings of fact in support of its decision to close the courtroom:

THE COURT: Outside the presence of the jury, in my discretion I determined that it would be in the best interest of justice to exclude all bystanders from this courtroom while Ms. Spence continues with her testimony. I have no complaint about the way that the bystanders are conducting themselves. It's simply that there are approximately, I would say, thirty adults, many of whom are friends or family members, who appeared at this trial that are obviously -- have an interest in these proceedings in the gallery. I've also observed that Ms. Spence is nervous and upset as she testifies and as essentially may be expected. In any event, in my discretion and in my judgment simply allowing this courtroom to be as free from distractions as possible would be in the best interest of justice, so what I've done is simply required that all bystanders remain outside for the remainder of this witness's direct testimony. I'll revisit this after we take our lunch recess and I'll revisit it at the close of the direct testimony of this witness, but that would be my order at this time.

When the trial court re-visited its ruling after the close of the alleged victim's direct testimony, it stated:

TRIAL COURT: All right. I've -- I will say that since the audience members were asked to leave the courtroom I do think that the testimony has been easier to -- for the jurors to understand anyway. There's been less crying and less nervousness, so I'm going to continue in my discretion to continue that order throughout the remainder of the direct examination.

The trial court's original findings of fact relating to its decision to close the courtroom are supported by competent evidence. During the alleged victim's testimony, she exhibited nervousness and cried, such that her testimony was difficult to understand. She eventually became so upset that she asked defendant directly, "[w]hy did you do this to me? Why? Why?" The trial court determined that the numerous adult bystanders in the courtroom, in part, contributed to the alleged victim's emotional state, and in order to re-establish courtroom order, the trial court recessed the trial for a few minutes.

Under the first *Waller* factor, the trial court articulated that the overriding interest that was likely to be prejudiced absent a courtroom closure was courtroom order, the alleged victim's emotional well-being, and the jury's ability to hear the alleged victim's testimony. The trial court also considered

the second *Waller* factor, ensuring that the closure was not too broad, as it only ordered closure during the alleged victim's testimony once courtroom order was threatened and re-visited its ruling after the lunch recess and before cross-examination.

However, the trial court's original order did not indicate that it considered reasonable alternatives to the closure. As such, the absence of findings on the third *Waller* factor prevented us from conducting a proper review of the propriety of the closure.

Therefore, we remanded this matter for the trial court to enter a supplemental order containing supported findings of fact and conclusions of law related to the third *Waller* factor. In its supplemental order, the trial court addressed the third *Waller* factor:

10. The Court considered reasonable alternatives to the closure of the courtroom.

11. In considering reasonable alternatives, having previously observed that taking a recess to allow the alleged victim to compose herself did not have any beneficial effect on her emotional state or the ability of the Court and jurors to hear and understand her testimony, the Court concluded that the taking of additional recesses would not likely lead to a different outcome.

12. The Court considered, as an alternative

to closing the courtroom, arranging for the remote testimony of the victim via closed circuit television. However, the Court excluded that possibility because the alleged victim did not appear to be emotionally distressed by the physical proximity of the Defendant and a remote testimony arrangement would impair the Defendant's rights to confront the alleged victim and would impair the ability of the jury to fully assess her credibility. Therefore, the Court found that closure of the courtroom to all nonessential personnel was the most reasonable alternative.

These supplemental findings are supported by competent evidence in light of the trial court's own observations of the victim and other individuals inside the courtroom.

In sum, the trial court's orders together considered Donna's young age, nature of the charges, familial relationship with defendant, other non-essential personnel present in the courtroom, necessity of Donna's non-hearsay testimony, limited time and scope of the courtroom closure, and consideration of reasonable alternatives to closing the courtroom. Thus, the findings were adequate to support a courtroom closure pursuant to the fourth *Waller* factor. Accordingly, the trial court did not violate defendant's constitutional right to a public trial.

c.) Jury Instructions

Defendant also argues that the trial court committed plain error by instructing the jury in a manner that permitted the

jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act of penile vaginal penetration. Specifically, defendant argues that "the error occurred because the trial court erroneously instructed the jury that a penis could be considered an 'object' for purposes of establishing a sexual act by either genital or anal penetration." As a result, defendant contends that the jury became confused about whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1443(c) (2013), "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." Accordingly, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Hope*, ___ N.C. App. ___, ___, 737 S.E.2d 108, 111 (2012), *review denied*, 366 N.C. 438, 736 S.E.2d 493 (2013) (citation and internal quotation marks omitted).

Our Supreme Court has addressed the concept of "inviting error" within the context of jury instructions. *State v. Sierra*, 335 N.C. 753, 759-60, 440 S.E.2d 791, 795 (1994). In *Sierra*, the defendant, on appeal, argued that the trial court

should have instructed the jury on second-degree murder. *Id.* At trial, however, the defendant specifically declined the trial court's offer to provide such an instruction on two separate occasions. *Id.* Our Supreme Court held that "defendant is not entitled to any relief and will not be heard to complain on appeal" despite any possible error by the trial court because he acquiesced to the trial court's jury instructions. *Id.*

Similarly, in *State v. Weddington*, the defendant argued to our Supreme Court that the trial court erred by failing to properly clarify a jury question regarding the time at which the intent to kill must be formed for the charge of first-degree murder. 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). At trial, however, defendant agreed with the trial court's decision to merely reinstruct the jury on each element of the offense. *Id.* Our Supreme Court held that "[t]he instructions given were in conformity with the defendant's assent and are not error. The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant." *Id.* (citation omitted).

Comparable to *Sierra* and *Weddington*, the jury in the case at bar asked whether "the penis is considered an object" for the purposes of "penetration" for the charge of first-degree sex

offense. In deciding how to answer the jury, the trial court stated, in relevant part:

TRIAL COURT: What I'm inclined to say is that the legal definition of an object is any object, inanimate or animate, so part of the body may be an animate object or some other item would be an inanimate object. The definitions of sexual acts have been provided to the jury. They include some specific sexual acts such as anal intercourse, which is penetration by the penis into the anus, and then rape, which is penetration of the vagina by the penis, so those are where there's a more specific definition, that's the definition that should be used.

The trial court then asked defendant's attorney about his thoughts on the issue, and defendant's attorney responded, "I agree. . . . [O]r the Court can reinstruct them on that count, just see what happens." The trial court then responded:

TRIAL COURT: I'm just going to read the definition[,] and under that definition of penis [sic] is a part of body and so as a matter of law, since the Supreme Court has said that any object embraces parts of the human body as well as inanimate or foreign objects, and the answer to the question is yes, the penis is considered an object.

In response to the trial court's proposed answer to the jury question, defendant's attorney stated, "[t]hat's fine." After the trial court answered the jury's question in the exact manner proposed above, he asked the parties, "I didn't go on to

distinguish between vaginal intercourse and sexual intercourse offense, but do either of you feel that further clarification is needed for the jury?" Defendant's attorney responded, "[n]o."

Thus, defendant's attorney actively participated in crafting the trial court's response to the jury question, overtly agreed with the trial court's interpretation that a penis could be considered an "object," and denied the trial court's proposed clarification between vaginal intercourse and a sexual act for purposes of a sexual offense. Accordingly, we rule that defendant invited any error stemming from the trial court's instructions and dismiss this issue on appeal. See *Hope*, ___ N.C. App. at ___, 737 S.E.2d at 113 (dismissing issue on appeal because the defendant invited error by "objecting to the correct instruction, requesting the incorrect instruction, and by choosing to forgo a self-defense instruction"); see also *State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996) (ruling that the defendant invited error and declining to review issue on appeal "because, as the transcript reveal[ed], defendant consented to the manner in which the trial court gave the instructions to the jury").

d.) Motion to Dismiss

Next, defendant argues that the trial court erred by denying his motion to dismiss certain first-degree sex offense

charges (11 CRS 226769, 11 CRS 226773 and 11 CRS 226774) for insufficiency of the evidence. 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). "'Upon defendant's motion for dismissal, the question for the Court is whether there is 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. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In relevant part, an individual is guilty of a first-degree sex offense if the person "engages in a sexual act . . . [w]ith 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. § 14-27.4(a)(1) (2013). A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." Importantly, a "sexual act" is also "the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1 (2013). An "object" for the purposes of this statute "embrace[s] parts of the human body as well as inanimate or foreign objects." *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981).

First-degree rape requires an individual to "engage[] in vaginal intercourse . . . [w]ith 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 (2013). Vaginal intercourse is defined as "penetration, however slight, of the female sex organ by the male sex organ." *State v. Combs*, ___ N.C. App. ___, ___, 739

S.E.2d 584, 586 (2013) *review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

Because the crime of first-degree sex offense excludes vaginal intercourse, and vaginal intercourse is a specific element of first-degree rape that requires penile penetration, a "sexual act" of penetration by "any object into the genital" opening under N.C. Gen. Stat. § 14-27.4 constitutes first-degree rape if the "object" is a penis. *See State v. Leeper*, 59 N.C. App. 199, 202, 296 S.E.2d 7, 9 (1982) (holding that "[w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms[,] the particular statute will control "unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto").

Here, each of the first-degree sex offense indictments subject to defendant's motion to dismiss alleged that defendant "unlawfully, willfully and feloniously did engage in a sex offense with D.SP., by force and against that victim's will." 11 CRS 226769 alleged that the offense occurred between 1 January and 31 December of 2001, 11 CRS 226773 alleged that the offense occurred between 1 January 2004 and 31 December 2004,

and 11 CRS 226774 alleged that the offense occurred between 1 January 2005 and 31 December 2005.

With regard to 11 CRS 226769, the only evidence that a sex offense had occurred was when Donna read an entry from her journal that chronicled her prior abuse and other witnesses testified about statements Donna made to them prior to trial. This evidence indicated that the sexual abuse by defendant began in 2001 in Donna's parents' home when she was five or six years old. In one particular instance, defendant penetrated Donna's anal opening and engaged in anal intercourse with her in a trailer. While the State purported to use this evidence to corroborate Donna's testimony, it could not use the testimony for substantive purposes. See *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000) ("It is well established that . . . prior statements admitted for corroborative purposes may not be used as substantive evidence."). The trial court appropriately instructed the jury:

Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict with or be consistent with testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made and that it conflicts with or is

consistent with the testimony of the witness at this trial you may consider this and all facts and circumstances bearing on the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

Although the State provided evidence of vaginal intercourse during this time period, such conduct was sufficient to support defendant's first-degree rape conviction, not a first-degree sex offense. Thus, the State failed to provide substantial evidence of a first-degree sex offense in 2001, and the trial court erred by denying defendant's motion to dismiss this charge in 11 CRS 226769.

Similarly, Donna's in-court testimony shows that in 2004 and 2005, defendant engaged in vaginal intercourse with her on numerous occasions. Such conduct was sufficient evidence of first-degree rape, and defendant was convicted of such charges. Although Donna's journal entry and other witness testimony about statements made by Donna before trial indicated that defendant committed a "sexual act" through anal intercourse with Donna at McCoy's house between 2004 and 2005, there is no substantive evidence that during this time period, defendant committed a "sexual act" by way of cunnilingus, fellatio, analingus, anal intercourse, or penetration by any object (other than a penis) into Donna's genital or anal opening. *Leeper, supra.*

Accordingly, the State failed to provide substantial substantive evidence of a "sexual act" for the first-degree sex offense charges in 11 CRS 226773 and 11 CRS 226774.

We also note that in its brief, the State points to substantial evidence at trial to support first-degree sex offenses occurring in 2006, but fails to cite any substantive evidence in the record of such conduct in 2001, 2004, or 2005. Nevertheless, the State argues that we should apply the rule of leniency to the case at bar.

Generally, "[t]he 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." *State v. Pettigrew*, 204 N.C. App. 248, 253, 693 S.E.2d 698, 702 (2010) (internal citation and quotation marks omitted). With regard to child sexual abuse cases, the courts of this State "are lenient . . . where there are differences between the dates alleged in the indictment and those proven at trial." *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002) (citation omitted). The rationale for this relaxed standard is "in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which

the offense charged was committed goes to the weight rather than the admissibility of the evidence." *Id.* (citation and internal quotation marks omitted). This policy of leniency applies unless defendant "demonstrates that he was deprived of his defense because of lack of specificity[.]" *Id.* (citation and internal quotation marks omitted).

We do not believe the rule of leniency is applicable to the case at bar. The State mischaracterizes the issue as one of time variance, when it is, in fact, a question of sufficiency of the evidence. Had the State, at trial, shown that the specific sexual offense *conduct* that was alleged to have occurred in 2001, 2004, and 2005 happened on a different date, the rule of leniency would apply. However, the first-degree sexual offense indictments contain identical language and lack specificity as to particular conduct. The only substantive evidence of sexual-offense conduct elicited at trial occurred in 2006, and defendant was convicted of that offense. Thus, the State's theory on appeal would require us to impute the conduct in 2006 to 2001, 2004, and 2005, which would result in punishing defendant more than once for the same conduct in violation of the double jeopardy clause of the U.S. constitution. See *State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 708 (1986)

("[W]hen a person is . . . convicted and sentenced for an offense, the prosecution is prohibited from . . . sentencing him a second time for that offense[.]").

e.) Referring to Donna as "the victim"

Finally, defendant argues that the trial court erred by referring to Donna as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to her as "the victim" in its final jury instructions. We disagree.

Defendant concedes on appeal that he never objected to the trial court referring to Donna as "the victim." Thus, we review this issue for plain error, not *de novo* as a statutory violation. See *State v. Phillips*, ___ N.C. App. ___, ___, 742 S.E.2d 338, 341 (2013), *review denied*, ___ N.C. ___, 753 S.E.2d 671 (2014) and *review dismissed*, ___ N.C. ___, 753 S.E.2d 671 (2014) ("[W]here our courts have repeatedly stated that the use of the word 'victim' in jury instructions is not an expression of opinion, we will not allow defendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the issue was preserved."). "In deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt."

State v. Richardson, 112 N.C. App. 58, 66, 434 S.E.2d 657, 663 (1993) (citation omitted).

Pursuant to N.C. Gen. Stat. § 15A-1232, “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.” N.C. Gen. Stat. § 15A-1232 (2013).

Defendant relies on *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *review allowed, writ allowed*, ___ N.C. ___, 753 S.E.2d 666 (2014) and *review denied*, ___ N.C. ___, 753 S.E.2d 667 (2014), in support of his argument that the trial court erred in referring to Donna as “the victim,” as it was an expression of an improper opinion to the jury. We are unpersuaded.

In *Walston*, the trial court, over defendant’s repeated objections, used the word “the victim” instead of “the alleged victim” in its jury instructions, which followed the pattern jury instructions. *Id.* at ___, 747 S.E. 2d at 727. This Court reviewed the appeal *de novo* because the defendant alleged a statutory violation of N.C. Gen. Stat. § 15A-1232. *Id.* This Court held that the trial court committed prejudicial error

because “[t]he issue of whether sexual offenses occurred and whether [the complainants] were ‘victims’ were issues of fact for the jury to decide[,]” defendant was convicted of offenses which contained the word “victim” in the jury instructions, and the pattern jury instructions did not absolve the trial court from giving correct instructions to the jury. *Id.* at ____, 747 S.E.2d at 727-28.

We acknowledge that the case at bar shares some factual similarities to *Walston*. Most importantly, however, this case is distinguishable from *Walston* because we are reviewing this issue on appeal for plain error, not under a *de novo* standard of review. On this basis, defendant’s argument fails because “it is clear from case law that the use of the term ‘victim’ in reference to prosecuting witnesses does not constitute *plain error* when used in instructions[.]” *State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) (emphasis added); *State v. Carrigan*, 161 N.C. App. 256, 263, 589 S.E.2d 134, 139 (2003); *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 166 (1998); *Richardson*, 112 N.C. App. at 67, 434 S.E.2d at 663. Moreover, upon review of the evidence, we cannot conclude that the use of the words “the victim” had a probable impact on the jury’s finding of guilt. Donna testified to constant sexual

abuse by defendant for approximately eight years, and her testimony was corroborated by her journal and other witnesses who testified as to her prior statements to them. Additionally, the trial court instructed the jury:

The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

Thus, we hold that the trial court did not commit plain error by referring to Donna as "the victim" during jury instructions.

III. Conclusion

In sum, we hold that the trial court did not err by 1.) closing the courtroom during Donna's testimony, 2.) answering a jury question about whether a penis could be considered an "object," or 3.) referring to Donna as "the victim" during jury instructions. However, the trial court erred by denying defendant's motion to dismiss the first-degree sex offense charges in 11 CRS 226769, 11 CRS 226773 and 11 CRS 226774. Thus, we vacate those sex-offense convictions and remand for a new sentencing hearing.

No error, in part, vacated and remanded, in part.

Judges CALABRIA and STEPHENS concur.