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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1349

Filed: 1 December 2015

Polk County, Nos. 13 CRS 247-52

STATE OF NORTH CAROLINA

v.

ANTHONY KYLE BIGGS, Defendant.

Appeal by defendant from judgments entered 19 September 2014 by Judge Robert T. Sumner in Polk County Superior Court. Heard in the Court of Appeals 18 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.

Richard Croutharmel for defendant-appellant.

GEER, Judge.

Defendant Anthony Kyle Biggs appeals from judgments entered on convictions of three counts of indecent liberties with a child and three counts of statutory sexual offense with a child. On appeal, defendant primarily argues that the trial court committed plain error when it allowed a polygraph examiner to testify that defendant lied when he denied that any sexual contact had ever occurred between himself and the victim. Even though the polygraph test was never mentioned to the jury, the trial

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court arguably erred in admitting the polygraph examiner's opinion because it was based upon the results of a polygraph test, which is inherently unreliable. However, defendant has failed to show the error was prejudicial. In addition to the victim's testimony, the State admitted into evidence without objection a video of defendant confessing to four instances of sexual contact between himself and the victim. Because defendant's own admissions show that he lied when he initially denied the victim's allegations, defendant has failed to show that the polygraph examiner's opinion had a probable impact on the verdicts. We find defendant's remaining arguments unpersuasive and hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. Defendant had one daughter, "Connie," who was born in November 1994.¹ Connie's mother left when Connie was eight years old, and defendant's girlfriend, Christina, who Connie called her "stepmom," moved in with defendant and Connie.

When Connie was 13 years old, she was home alone with defendant nearly every day after school because he did not have a full-time job, and Christina regularly worked from noon to eight p.m. Defendant began responding to Connie's requests to go to a friend's house or to go out with someone by taking her into his bedroom and

¹For ease of reading and to protect the identity of the minor victim, we use the pseudonym "Connie" throughout this opinion.

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making her earn those privileges by engaging in sexual acts with him. Defendant would disrobe and either undress Connie himself or make her remove all of her clothes. Defendant would then make Connie perform oral sex, and he would put his fingers in her vagina, touch her breasts, kiss her, and put his mouth on her vagina.

The sexual activity with defendant continued when Connie turned 14 years old. Connie testified that it became a “normal thing” that “was almost expected” for her to earn privileges. When Connie turned 15, the sex acts occurred “[a]lmost every day. It was something that was expected. If I wanted to go anywhere, if we were ever there alone -- I mean, obviously, there were days that [Christina] was off and she would be home [and] things wouldn’t happen. But mostly, any time she wasn’t there, it would occur.”

When the sexual activity first started, defendant told Connie that if she ever told anyone about it, he would kill her. Defendant repeatedly told Connie that their sexual activity was a secret and not to tell anyone. Consequently, Connie did not tell anyone because she knew that her father would find out and she was afraid of what he would do to her.

After Connie turned 16 years old, defendant got a new girlfriend, Cindy, and Connie and defendant moved in with Cindy and Cindy’s parents. The sexual activity between defendant and Connie stopped after they moved in with Cindy.

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On the evening of 3 October 2011, Connie and defendant had an argument over Connie's boyfriend. Defendant had been drinking and was angry that Connie had come home late. Defendant wanted Connie to stop seeing her boyfriend. Connie had already made arrangements to spend the night with Christina, so Connie called Christina to pick her up. When Christina arrived, defendant and Connie were still arguing, and defendant shoved Connie as she was getting into Christina's truck, causing her to hit her head on the center console. The police came to the scene in response to a call from either Cindy or her parents and stayed while Connie retrieved all of her clothes from the house. Christina then took Connie to the hospital to evaluate her head injury.

Connie's grandparents sought a domestic violence protective order ("DVPO") as a result of the incident. In the complaint, Connie alleged that defendant had physically abused her and that she felt that her life was threatened. However, the complaint did not contain any allegations that defendant had ever engaged in sexual activity with her. The DVPO was denied.

After the incident, Connie moved in with her grandparents. Connie never mentioned any sexual activity between defendant and herself to the police on the evening of the fight, to the health care personnel at the hospital when her head injury was examined, to Christina, to her grandparents, to the Department of Social

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Services (“DSS”) social worker who investigated the incident, or to the judge when she appeared before him at the DVPO hearing.

In February 2012, Connie was expelled from Polk County High School after she was caught selling Adderall at school. Connie enrolled in Crossnore Academy, which Connie described as a kind of group home for children who had been taken away from their families, had drug problems, or were wards of the state. Connie became close with one of her house mothers at Crossnore, and, on 28 May 2012, told the house mother that defendant had engaged in sexual activity with her. Connie’s house mother told DSS about Connie’s allegations and an investigation began.

On 19 February 2013, defendant agreed to voluntarily submit to a polygraph examination regarding Connie’s sexual abuse allegations. The examination was conducted by Agent Bruce Frame of the United States Secret Service. Prior to the test, defendant was read, initialed, and signed a *Miranda* rights form and a polygraph consent form. The entire examination took approximately three and a half hours to complete and consisted of an initial information session (the “pretest”), the polygraph test (the “in-test”), and then a follow-up interview (the “post-test”).

During the polygraph test, defendant denied Connie’s allegations and said that no sexual contact had ever occurred. At the beginning of the post-test interview, Agent Frame told defendant that he had failed the polygraph test and began to interrogate him further. Eventually, defendant admitted to three instances in which

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Connie touched his bare penis. During one instance, defendant said that he was asleep in his chair and he woke up to Connie giving him a lap dance on his bare erect penis. The second time, defendant said he was asleep on the couch and he woke up to Connie giving him a hand job. The third time, Connie came into the bathroom where defendant was showering, threw open the shower curtain and grabbed his genitals. Defendant also said that Connie would masturbate in her room with the door open so that he could see her. Defendant told Agent Frame that this occurred when Connie was 13, 14, and 15 years old. Defendant also told Agent Frame that during this time period, he was heavily medicated and there were times when there were lapses in his memory. Defendant denied that Connie ever gave him oral sex, stating that “If she ever did oral sex on me, I don’t know it” and “I can’t tell you something that I can’t not [sic] remember or I did not see.”

At the end of the post-test interview, defendant said he was ready to speak to Lieutenant Betty Joe Bayne of the Polk County Sheriff’s Department. Agent Frame left, and Lieutenant Bayne entered the room and talked to defendant for approximately 10 minutes. Defendant admitted for the first time to Lieutenant Bayne that he remembered one instance when Connie performed oral sex on him, but he claimed that it only happened once.

Defendant was arrested on 20 February 2013, the day after the polygraph test. Defendant was indicted on three counts of statutory sexual offense with a person who

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is 13, 14, or 15 years old in violation of N.C. Gen. Stat. § 14-27.7A (2011). The three indictments were identical, except that one alleged that the victim was 13 years old, one alleged that the victim was 14 years old, and one alleged that the victim was 15 years old. Defendant was also indicted on three counts of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 (2011). Each of the indecent liberties indictments were identical and alleged that Connie was under 16 years of age at the time and identified the date of the offense as being from November 2007 to November 2010.

Defendant moved to suppress any statements he made during the polygraph examination on 19 February 2013 on the grounds that they were not made voluntarily. After a suppression hearing on 16 September 2014, the trial court denied defendant's motion to suppress. The trial court concluded that defendant was not in custody, that his statements were not coerced, and that they were made voluntarily and willingly. A written order denying defendant's motion to suppress was entered on 22 September 2014.

At trial, the State submitted into evidence without defendant's objection the video recording of defendant's post-test interviews with Agent Frame and Lieutenant Bayne. All references to the polygraph test were redacted from the video. Defendant did not present any evidence at trial. The jury returned verdicts of guilty on all six counts. The trial court consolidated each indecent liberty offense with one statutory

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sex offense, resulting in three separate judgments. The trial court sentenced defendant to two presumptive-range terms of 288 to 355 months imprisonment, and one presumptive-range term of 276 to 341 months imprisonment, to be served consecutively. Defendant gave oral notice of appeal to this Court.

I

On appeal, defendant argues that a portion of Agent Frame's testimony amounted to an impermissible expression of his opinion that defendant had lied during the polygraph exam, and was, therefore, inadmissible. Because defendant did not object to this testimony at trial, we review it for plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Our Supreme Court has held that polygraph evidence is not admissible in any trial because it is inherently unreliable, and a jury may be unduly persuaded by it. *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). This Court later clarified that "polygraph evidence" includes "all evidence concerning whether or not,

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in the operator's opinion, the defendant was being deceptive" *State v. Singletary*, 75 N.C. App. 504, 506-07, 331 S.E.2d 166, 168 (1985). However, even though "admission of polygraph test results may serve as the basis for reversal on appeal, not every reference to a polygraph test will necessarily result in prejudicial error." *State v. Sanders*, 201 N.C. App. 631, 638, 687 S.E.2d 531, 536 (2010).

Defendant contends that the facts of this case are analogous to the facts in *State v. Willis*, 109 N.C. App. 184, 426 S.E.2d 471 (1993). In *Willis*, the defendant submitted to a polygraph test and answered " '[n]o' " when asked three questions concerning whether he had shot his wife. *Id.* at 187, 426 S.E.2d at 473. After the test, the polygraph examiner told the defendant that he believed the defendant was not truthful in answering the three questions. *Id.* The defendant then altered his story and admitted that he had his hand on the gun when it accidentally fired. *Id.* at 187-88, 426 S.E.2d at 473. At trial, the polygraph examiner described his interview with the defendant to the jury, including the defendant's response to the three questions, and testified that in his opinion, the defendant lied in answering the questions. *Id.* at 192, 193, 426 S.E.2d at 476. Although the polygraph test was never mentioned to the jury, this Court held that the examiner's opinion that the defendant lied was inadmissible polygraph evidence.

This Court explained that

the examiner's sole basis for his testimony was his interpretation of the polygraph test results, evidence which

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the Supreme Court has held to be inherently unreliable. The examiner's opinion regarding the truth or falsity of defendant's answers cannot be separated from the test results themselves. . . .

. . . .

. . . It matters not whether the parties have made reference to the polygraph test itself at trial. The fact remains that the State was presenting inherently unreliable polygraph evidence through the witness examiner's opinion testimony.

Id. at 192-93, 426 S.E.2d at 476.

Here, as in *Willis*, Agent Frame described his interview with defendant to the jury without mentioning that defendant had submitted to a polygraph test. Agent Frame testified that defendant initially denied any allegations of sexual contact between himself and Connie, but that after further questioning, admitted to three separate instances where Connie touched his penis. When asked why he continued questioning defendant after defendant claimed that nothing had happened, Agent Frame explained:

Well, in my experience of doing interviews and interrogations, the difference between an interview and an interrogation is the interview is nonconfrontational. You are not accusing the person of anything, you are just trying to get their side of the story, what happened, what's going on in regard to the particular situation that's in question.

Once I conduct an interview with someone, at some point if I feel that there's enough information that I've gotten, not only from this individual but also from the allegations of a victim or whatever the additional

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information that's been gathered by the law enforcement, local law enforcement agency or the investigating agents or whoever it is, if I feel like this person isn't being truthful to me, then I go into an interrogation.

And an interrogation is where I directly confront this individual and say, look, I don't believe what you are telling me. I don't believe that you had nothing to do with it. I believe you did have something to do with whatever this deed is. Now let's talk about why this happened. Because that's the whole goal of the interrogation is to find out why. I think this person did it, I'm not going to come off of that.

That's why if you were to see me in an interview, you'll see that I continue to go over the same thing, over and over again, because . . . my job is to increase this person's desire to tell the truth and decrease their desire to avoid the confession.

Through this testimony, Agent Frame expressed to the jury his opinion that defendant was not being truthful during his interview when he denied the allegations of sexual contact with Connie. As in *Willis*, although the polygraph test was never mentioned, the basis for Agent Frame's opinion was his interpretation of the polygraph test results. Accordingly, we hold that this amounted to inadmissible polygraph evidence, and the trial court erred in admitting this testimony.

The question remains whether this error prejudiced defendant. Defendant asserts that pursuant to *Willis*, this was reversible error. In *Willis*, this Court granted a new trial because "[a]llowing the unreliable opinion testimony of the polygraph examiner may have caused the jury to disbelieve defendant's testimony, and we cannot say that absent the examiner's testimony a different result would not

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have been reached.” 109 N.C. App. at 193, 426 S.E.2d at 476. The standard of review articulated in *Willis*, however, is not the standard applicable in this case. Here, we are reviewing under the plain error standard of review, which requires defendant to show that “the error had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation marks omitted).

After reviewing the entire record, we hold that defendant has failed to meet this burden. On appeal, defendant challenges only Agent Frame’s testimony expressing an opinion that defendant was lying when he initially denied that any sexual contact had occurred. Significantly, defendant does not challenge the admission of the video-taped post-test interrogation with Agent Frame in which defendant admits to three instances of sexual contact with Connie, or the subsequent interview with Lieutenant Bayne in which defendant admits that Connie performed oral sex on him on one occasion. Although defendant moved to suppress this evidence on the ground that his statements were involuntary, the trial court denied the motion, and defendant does not challenge that ruling on appeal. Furthermore, all references to the polygraph test were redacted from the video and defendant makes no specific argument on appeal that the video constitutes inadmissible polygraph evidence.

Thus, the jurors were able to view for themselves both Connie’s testimony in which she outlined her allegations against defendant and the interviews of defendant

during which he ultimately admitted to four instances of sexual contact with Connie. During those interviews, defendant's own statements and admissions contradict his original denial of any sexual contact with Connie. Defendant also admitted in that interview that he was heavily medicated during the relevant time frame and that he had lapses in memory. With respect to oral sex, defendant's position during the course of the interview evolved from a complete denial, to an assertion that if it did happen, he could not remember it, to, finally, an admission that he did remember one instance when Connie had performed oral sex on him.

Given Connie's testimony and the admission of defendant's videotaped confession -- which defendant does not challenge on appeal -- we cannot say that Agent Frame's testimony had a probable impact on the jury's verdicts. *See State v. Horton*, 225 N.C. App. 655, 738 S.E.2d 453, 2013 WL 599953, at *10, 2013 N.C. App. LEXIS 155, at *28 (2013) (unpublished) (holding that because "the jury had an ample basis upon which to evaluate the relative credibility of the witnesses whose testimony was critical to the outcome in this case[,]” defendant was not prejudiced by reference to polygraph evidence).

II

Defendant next argues that Agent Frame's testimony impermissibly vouched for Connie's credibility. Admissible lay witness opinion testimony is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness

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and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.R. Evid. 701. While a witness may not express an opinion on the veracity of another witness, lay opinion testimony is not automatically inadmissible simply because it favorably reflects on the credibility of another witness. *See In re Butts*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003) (holding that “otherwise admissible expert testimony is not rendered inadmissible merely because it enhances a witness’s credibility”).

Here, defendant argues that Agent Frame vouched for Connie’s credibility when he stated that:

Once I conduct an interview with someone, at some point if I feel that there’s enough information that I’ve gotten, not only from this individual *but also from the allegations of a victim* or whatever the additional information that’s been gathered by the law enforcement, local law enforcement agency or the investigating agents or whoever it is, if I feel like this person isn’t being truthful to me, then I go into an interrogation.

(Emphasis added.) This testimony was given in the context of explaining the interview techniques he employed in the course of the investigative process that led to defendant’s confession. We do not agree with defendant that Agent Frame’s reference to Connie’s allegations amounted to an opinion regarding Connie’s truthfulness or credibility. Indeed, in explaining the interview process, Agent Frame explained that before he met with defendant, he had been briefed on Connie’s

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allegations, but he had not met with her personally to discuss them. Thus, the jury was aware that Agent Frame had no basis upon which to judge Connie's truthfulness.

This Court has held that a law enforcement officer may offer testimony that will assist the jury in understanding his investigative process. *See State v. Wallace*, 179 N.C. App. 710, 715, 635 S.E.2d 455, 460 (2006). In *Wallace*, the detective who interviewed the child sexual abuse victim testified regarding the procedure he uses for questioning child witnesses and that in his experience, if a child's story never changes, the child has usually been coached. *Id.* This Court held that the detective's testimony constituted permissible lay witness testimony and did not amount to an opinion on the credibility of the child witness. *Id.* Here, as in *Wallace*, Agent Frame's testimony assisted the jury in understanding his investigative process and did not amount to an opinion on Connie's credibility.

III

Defendant next argues that the trial court erred in denying his motion to dismiss two of the indecent liberties charges because there was insufficient evidence that defendant had touched Connie's breasts on more than one occasion. "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.

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If so, the motion is properly denied.’” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

“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). “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).

In this case, defendant was convicted of three counts of indecent liberties with a child. “A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]” N.C. Gen. Stat. § 14-202.1(a)(1) (2013). Although several different types of sexual activity could form the basis of this offense, the trial court instructed the jury that an indecent liberty is “an immoral, improper or indecent touching by the defendant upon the child by touching her breast.” Thus, in reviewing defendant’s motion to dismiss, we must determine whether the State presented sufficient

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evidence that defendant touched Connie's breast on three occasions between November 2007 and November 2010.

At trial, Connie testified that when she was 13 years old,

[defendant] would make me perform oral sex. That was the main thing. We never had full penetration. There was never full penetration. So it was just like oral sex. He would touch me. He would make me take my clothes off. He would be naked. Just things like that.

The State later asked Connie:

Q. Besides oral sex, was there any other type of sexual touching that your dad would have you participate in?

A. He would put his fingers inside of my vagina.

Q. And did he ever touch . . . your breasts or anything of that nature?

A. Yes, sir.

Connie then testified that when she turned 14, “[t]he same acts, the oral sex, *the touching, the same exact things that would happen from the 13th year*” continued. (Emphasis added.) She further testified that when she was 15, “the sex acts” occurred almost every day.

Defendant does not dispute that Connie's testimony is sufficient to show that defendant touched Connie's breast when she was 13, but argues that Connie's testimony is “too generalized and vague” to show that defendant touched her breast on three separate occasions. We disagree.

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This Court has held that the State is not required to present evidence of specific and unique details of each charge to the jury, and may submit multiple counts of the same offense to the jury based upon the victim's testimony that repeated incidents occurred over a period of time. In *State v. Bullock*, 178 N.C. App. 460, 464, 631 S.E.2d 868, 872 (2006), the defendant was convicted of 11 counts of rape. The victim gave specific testimony regarding the first act of sexual intercourse and then testified that defendant had sex with her " 'more than two times a week' " during an 11-month period of time. *Id.* at 463, 631 S.E.2d at 871. This Court held that the victim's generic testimony was sufficient to support the defendant's convictions of 10 additional counts of rape. *Id.* at 473, 631 S.E.2d at 877.

Here, Connie's testimony that defendant had touched her breast when she was 13 and that "the touching, *the same exact things* that would happen" when she was 13 continued once she turned 14, and that "it was just a normal thing" shows that the sexual contact, including defendant's touching Connie's breasts, occurred multiple times. A jury could also reasonably infer that when Connie later testified that "the sex acts" continued on a daily basis once she turned 15, that "sex acts" encompassed all of the sexual contact and touching that Connie had previously described, including defendant touching her breasts. We hold that this evidence is sufficient to support defendant's convictions of three counts of indecent liberties and that the trial court did not err in denying the motion to dismiss. *See State v. Khouri*, 214 N.C. App. 389,

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391-92, 397, 716 S.E.2d 1, 4, 17 (2011) (holding that State submitted substantial evidence to support multiple counts of indecent liberties where State presented evidence that defendant initiated acts of touching and oral sex with victim and acts occurred regularly following initial occurrence, and, although victim testified that defendant later added vaginal intercourse to other sexual acts, the jury could reasonably infer that touching and oral sex continued on occasion even after instances of vaginal intercourse began and that defendant took indecent liberties with victim during their many sexual encounters.)

IV

Finally, defendant contends that it was error for the trial court to omit specific dates in its jury instructions and verdict sheets for the three indecent liberties charges because it was unclear if the jurors unanimously agreed to guilt on each charge based on three separate incidents. Defendant argues that the jury was confused by the indecent liberties instruction because during deliberations they sent out a note asking if there should be dates or ages associated with the three indecent liberties charges. We disagree.

We first note that with respect to the three counts of sex offense, the jury was required to find that one count occurred when Connie was 13, one count occurred when she was 14, and one count occurred when she was 15. This is consistent with the sex offense indictments that specified different ages for Connie for each count. In

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contrast, the indictments for the indecent liberties offenses were identical and simply specified that Connie was under the age of 16 and the acts occurred between November 2007 and November 2010. Therefore, the jury was only required to find defendant took indecent liberties with Connie on three separate occasions during that time frame and there was no specific age requirement for each instance. The jury's question during deliberation simply reflects that they noticed that the jury instructions and verdict sheets for the three counts of sex offense specified different ages for Connie on each count, whereas the jury instructions and verdict sheets for the indecent liberties offenses did not. The trial court's response properly clarified that there was no age requirement in the indecent liberties charges.

With respect to whether the verdicts were unanimous on all three counts, our Supreme Court has held that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006).

Here, although Connie specifically testified to only one instance when defendant touched her breasts, she testified that defendant continued the same exact sexual behavior when she turned 14, and that when she was 15, it occurred on a daily basis. As we have previously discussed, the State is not required to present evidence

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of specific and unique details of each charge to the jury, and may submit multiple counts of the same offense to the jury based upon the victim's testimony that repeated incidents occurred over a period of time. *Bullock*, 178 N.C. App. at 472, 631 S.E.2d at 876. Connie's testimony is sufficient to show that sexual contact, which included defendant's touching Connie's breasts, occurred on a regular basis when she was 13, 14, and 15 years old. Therefore, as in *Lawrence*, the jury considered a higher number of incidents than the number of counts actually charged. We hold, pursuant to *Lawrence*, that defendant was unanimously convicted of three counts of indecent liberties with a minor, notwithstanding the trial court's failure to indicate specific dates of the offenses in the jury instructions or verdict sheets.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).