IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-586

Filed 7 May 2024

Martin County, No. 20 CRS 50450

STATE OF NORTH CAROLINA

v.

BILLY NELSON WYNNE

Appeal by defendant from judgment entered 11 August 2022 by Judge Eula E. Reid in Martin County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

W. Gregory Duke for defendant-appellant.

THOMPSON, Judge.

Defendant Billy Nelson Wynne appeals from the judgment entered upon a jury's verdicts finding him guilty of two counts of statutory sex offense with a child by an adult. After careful review, we conclude that defendant received a fair trial, free from prejudicial error.

I. Factual Background and Procedural History

Defendant Billy Nelson Wynne (defendant) and his wife were the foster parents of the minor victim, C.S.[1] C.S.'s biological mother was related to defendant's wife by marriage, and when C.S. was approximately four years old, she was removed from her biological mother's home by DSS. Defendant's wife and defendant offered to help care for C.S. and her brother as their foster parents, and the minor children remained in the custody of defendant and his wife for the next several years. According to her testimony at trial, C.S.'s biological mother received a phone call from C.S. in June of 2020, wherein C.S. told her mother that defendant "had been coming into her room at night and fondling her and messing with her clothes . . . ."

At trial, C.S. testified that around the time she was six years old, defendant would "start taking [her] clothing off and touching [her] inappropriately." C.S. further testified that defendant would touch her with his mouth and tongue in her genital area, and that this would happen "[e]very day to every other day . . . [u]ntil [C.S.] was . . . around the age of ten or eleven."

C.S. also testified that she never told an adult about the abuse because she was "afraid that [defendant would] get mad, and then he'd hurt me." However, when she was in fifth grade, C.S. told the guidance counselor at her school what had happened because C.S. "felt really upset about it, and it started affecting [her] school work, and [her] teachers were worried about what was going on." Shortly thereafter, C.S.

[1] Initials are used to protect the identity of the minor child.

informed her biological mother of her allegations against defendant, and C.S.'s biological mother called the Martin County Sheriff's Department. On 20 June 2020, C.S. was evaluated at TEDI BEAR, a "child advocacy center . . . set up for kids . . . where there were concerns of sexual abuse [and the children] would have the opportunity to have medical needs met . . . and . . . allow the investigating professionals an opportunity to collaborate."

On 31 March 2021, defendant was indicted upon a grand jury's true bill of indictment for two counts of statutory sex offense with a child by an adult. The matter came on for trial at the 8 August 2022 Criminal Session of Martin County Superior Court. On 11 August 2022, the jury returned guilty verdicts on both counts of statutory sex offense with a child by an adult, and pursuant to the jury's guilty verdicts, the court sentenced defendant to consecutive active sentences of 300 months to 420 months in the North Carolina Division of Adult Corrections. From this judgment, defendant filed timely written notice of appeal on 24 August 2022.

II. Discussion

On appeal, defendant raises the following issues:

> I. Did the trial court err in permitting [C.S.]'s [biological] mother to remain in the courtroom while [C.S.] was testifying and not sequestering her?
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> II. Did the trial court err by allowing the State to amend the two indictments for statutory sex offense with a child by an adult?
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> III. Did the trial court err in allowing testimony to be

> elicited by the State regarding allegations that defendant inappropriately touched his own children?
>
> IV. Did the trial court err in denying defendant's motion to dismiss the offenses of statutory sex offense with a child by an adult based on the insufficiency of the evidence?

We will address each of these issues in the analysis to follow.

A. Sequestration of the minor child's mother at trial

On appeal, defendant argues that "the trial court erred in permitting [C.S.]'s [biological] mother to remain in the courtroom while [C.S.] was testifying and not sequestering her." We do not agree.

"A motion to sequester witnesses is addressed to the sound discretion of the trial court and will not be reviewed absent a showing of an abuse of discretion." *State v. Weaver*, 117 N.C. App. 434, 436, 451 S.E.2d 15, 17 (1994). "[T]he court's denial of the motion *will not* be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Garcell*, 363 N.C. 10, 41, 678 S.E.2d 618, 638 (2009) (emphasis added). Generally, sequestering a witness is designed to prevent a later witness from tailoring their testimony to that of a prior witness in order to assist the finder of fact in detecting unreliable testimony. *See State v. Jackson*, 309 N.C. 26, 32, 305 S.E.2d 703, 709 (1983) ("The separation of witnesses . . . is not founded on the idea of keeping the witnesses from intercourse with each other. . . . The expectation is not to prevent the fabrication of false stories, but by separate cross[-]examination to detect them.").

However, N.C. Gen. Stat. § 15A-1225 allows for the parent of a minor child to remain in the courtroom while a minor child testifies:

> Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian *may be present while the child is testifying even though his parent or guardian is to be called subsequently*.

N.C. Gen. Stat. § 15A-1225 (2023) (emphasis added)

At trial, the State asserted that, "the statutes are pretty clear that with a child witness we may have a parent or guardian with a child witness even if they are a State's witness." Defense counsel objected to C.S.'s "biological mother being in the courtroom while [C.S.] testifies because we think that . . . these allegations stem . . . primarily from [C.S.'s biological mother] and that there's been coaching in this case and influence exercised over [C.S.] and so we would object to [C.S.'s biological mother remaining present during C.S.'s testimony]." The court initially ruled that C.S.'s biological mother would be sequestered during C.S.'s testimony. However, following in-chambers review of the motion to sequester C.S.'s mother, the court reversed its initial ruling, noting that

> after communication with both attorneys in chambers and listening to the State's position with regards to the statute, I will allow the [biological] mother to be in the courtroom with [C.S.]. She would have to sit sort of midway in the back, and if there were any indications that the [c]ourt saw of her attempting to coach the child, then I would have [the biological mother] removed from the courtroom.

Despite defendant's expressed concerns about coaching in this case, as noted above, N.C. Gen. Stat. § 15A-1225 expressly provides that, "when a minor child is called as a witness the parent or guardian *may be present while the child is testifying even though his parent or guardian is to be called subsequently*[,]" N.C. Gen. Stat. § 15A-1225 (emphasis added), and the trial court's decision whether to "sequester witnesses is addressed to the sound discretion of the trial court and will not be reviewed absent a showing of an abuse of discretion." *Weaver*, 117 N.C. App. at 436, 451 S.E.2d at 17.

Here, as noted above, the trial court initially ruled to sequester C.S.'s biological mother during C.S.'s testimony; however, after "conversation that [the parties] had in chambers with regards to allowing the [biological] mother to be present during the testimony of the child[,]" the court reversed course and "allow[ed] the [biological] mother to be in the courtroom with [C.S.]." The decision whether to sequester witnesses is left to the sound discretion of the trial court, and in this case, the trial court's ruling on the motion was neither arbitrary nor the result of an unreasoned decision, but the result of careful consideration after in-chambers discussion between the parties. For this reason, we conclude that the trial court did not err in allowing C.S.'s biological mother to remain in the courtroom during C.S.'s testimony, per N.C. Gen. Stat. § 15A-1225.

B. Sufficiency of indictment

Next, defendant contends that, "the trial court erred by allowing the State to amend the two indictments for statutory sex offense with a child by an adult." We do not agree, as time was not an essential element of the offense charged.

"On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). "Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution." *State v. Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011) (citation omitted). "The purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused . . . ." *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation and brackets omitted). "An indictment charging a statutory offense must allege all of the essential elements of the offense." *Cobos*, 211 N.C. App. at 540, 711 S.E.2d at 468 (citation omitted). "A conviction based on a flawed indictment must be arrested." *Id.*

Generally, N.C. Gen. Stat. § 15A-923(e) provides that, "[a] bill of indictment *may not be amended*." N.C. Gen. Stat. § 15A-923(e) (emphasis added). However, our Supreme Court has previously noted that, "[t]his statute fails to include a definition of the word 'amendment.' " *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). In *Price*, our Supreme Court held that a "change of the date of the offense, as permitted by the trial court, did not amount to an amendment prohibited by N.C. Gen. Stat. § 15A-923(e), because the change did not 'substantially alter' the *charge*

set forth in the indictment." *Id.* at 598–99, 313 S.E.2d at 558–59 (emphasis in original). Furthermore, our Court has held that, "[a] change in an indictment does not constitute an amendment where the variance was inadvert[e]nt and defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535–36, 515 S.E.2d 732, 735 (1999). Finally, a defendant is guilty of "statutory sex offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a).

In the present case, at the close of the State's evidence, the State "mov[ed] to amend the offense dates on the indictment to include up to [8 June] 2020," and contended it was appropriate here because "[t]ime was not an essential element of the offense charged," and although "this is a case where a substantial element is that the child was under the age of 13 . . . even up to [8 June] 2020 [C.S.] was only ten years old . . . so she was substantially under the age of 13 regardless of the change in the offense date . . . ." The court granted the State's motion over defendant's objection.

As noted above, our Supreme Court has previously held that a "change of the date of the offense, as permitted by the trial court, d[oes] not amount to an amendment prohibited by N.C. Gen. Stat. § 15A-923(e), because the change d[oes] not 'substantially alter' the *charge* set forth in the indictment." *Price*, 310 N.C. at 598–99, 313 S.E.2d at 558–59 (emphasis in original). Here, defendant was charged with statutory sex offense with a child by an adult pursuant to N.C. Gen. Stat. § 14-

27.28(a), and "chang[ing] of the date of the offense," from 31 December 2018 to 8 June 2020, did not "substantially alter the *charge* set forth in the indictment" because at all times, including the modified date of offense, C.S. was under the age of thirteen. *Id.* (emphasis in original) (internal quotation marks omitted).

Moreover, "defendant was neither misled nor surprised as to the nature of the charges[,]" *Campbell*, 133 N.C. App. at 536, 515 S.E.2d at 735, by the modified indictment. Here, the indictment charged defendant with two counts of statutory sex offense with a child by an adult, in that defendant "unlawfully, willfully[,] and feloniously did engage in a sexual act with [C.S.], a child who was under the age of 13," and modifying the dates of the indictment from 31 December 2018 to 8 June 2020 did not surprise or mislead defendant as to the nature of the charges against him. At all times, defendant knew "with reasonable certainty the nature of the crime of which he [wa]s accused[,]" *Brinson*, 337 N.C. at 768, 448 S.E.2d at 824, and that he would have to defend himself against allegations that he "unlawfully, willfully[,] and feloniously did engage in a sexual act with [C.S.], a child who was under the age of 13 . . . ." For the foregoing reasons, we conclude that the trial court did not err in allowing the State's motion to amend the indictment.

C. Admissibility of testimony

i. Motion *in limine*

Defendant also alleges that, "the trial court erred in allowing testimony to be elicited by the State regarding allegations that defendant inappropriately touched his

[own] children" because the State asked questions of defendant's witness "[i]n violation of the trial court's [o]rder" on the State's motion *in limine*. We disagree.

It is well established that, "[a] motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial, and is recognized in both civil and criminal trials." *Smith v. Polsky*, 251 N.C. App. 589, 593–94, 796 S.E.2d 354, 358 (2017) (citation omitted). "The trial court has wide discretion in making this advance ruling . . . ." *Id.* at 594, 796 S.E.2d at 358 (citation omitted). "Moreover, the court's ruling *is not a final ruling on the admissibility of the evidence in question*, but only interlocutory or preliminary in nature." *Id.* (emphasis added) (citation omitted). "Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial." *Id.* (citation omitted).

In the present case, the motion *in limine* provided

> 1. [t]hat statements made by [defendant's daughters] regarding the defendant[']s prior sexual touching or attempted sexual acts and later asserted as being false, whether written, oral, or recorded, shall not be admissible by the defendant during cross-examination of the State's witnesses or during the defendant's case in chief, and,
>
> 2. That counsel for the defendant shall be precluded from questioning the State's witnesses during cross[-]examination as to the substance, nature or circumstances surrounding these statements not offered by the State in its case in chief.

Here, the State's motion *in limine* to exclude testimony sought to preempt questions of the witnesses by *defendant*, not the State. Nothing in the court's order

on the motion *in limine* prevented *the State* from asking questions regarding allegations that defendant had sexually touched or attempted sexual acts with his own children. Moreover, a motion *in limine* "*is not a final ruling on the admissibility of the evidence in question*, but only interlocutory or preliminary in nature[;] [t]herefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial." *Id.* (emphasis added). For these reasons, we conclude that the State's line of questioning regarding the prior allegations against defendant was not in violation of the trial court's order on the motion *in limine*.

ii. Relevancy of questions regarding prior allegations

Defendant further contends that this line of questioning was "not relevant" and that the testimony "was extremely prejudicial and that a different result would have been reached at trial had the jury not heard the evidence." We do not agree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance . . . [and] [i]n order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation and internal quotation marks omitted). "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986). "This Court reviews questions of relevancy *de novo*, but accords deference to the trial court's ruling." *State v. Shareef*, 221 N.C. App. 285, 299, 727 S.E.2d 387, 397 (2012) (emphasis added).

"Under certain circumstances . . . otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994). "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be . . . irrelevant had it been offered initially." *Id.* at 752–53, 446 S.E.2d at 3 (citation and internal quotation marks omitted). "Evidentiary errors are harmless unless a defendant proves that absent the error[,] a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

At trial, during cross-examination of defendant's witness, the following colloquy transpired:

> [THE STATE]: And so when [defense counsel] asked you about your opinion as to whether or not this may have happened you said - - your exact quote was nothing is possible, not like that.
>
> [WITNESS]: No. [Defendant] would never do anything like that.
>
> [THE STATE]: So he would never touch a child.
>
> [WITNESS]: Not like that, no.
>
> [THE STATE]: Were you aware of allegations that he touched both of his children?
>
> [WITNESS]: Yes, sir, I was - -

[DEFENSE COUNSEL]: Objection.

At this point, defense counsel moved to strike the testimony, and after an in-chambers conference between the parties, the trial court overruled defendant's motion to strike the testimony. The State then asked the witness about the allegations again, "[t]o reiterate that question, were you aware that your other grandchildren had made allegations that [defendant] had touched them?" To which the witness replied, "[y]es, sir." Defendant did not address the allegations on re-direct, and the allegations that defendant had touched his own children were not addressed again at trial.

As noted above, once defendant's witness testified that "[defendant] would never do anything like that[,]" the allegations that defendant had previously touched his own children became relevant, because defendant's witness "introduce[d] evidence of a particular fact," and the State was "entitled to introduce evidence in . . . rebuttal thereof . . . ." *Baymon*, 336 N.C. at 752–53, 446 S.E.2d at 3 (citation omitted). Defendant contends that, "[t]here is little doubt that the testimony that [d]efendant touched his own two biological daughters was extremely prejudicial and that a different result would have been reached at trial had the jury not heard the evidence." However, defendant has failed to demonstrate how absent this testimony, made relevant by the testimony of his own character witness—which defendant had the opportunity to address on re-direct and failed to do—a different result would have been reached at trial. As will be discussed below, the State presented evidence of all

elements of the offense charged, and a unanimous jury returned a guilty verdict against defendant. For the aforementioned reasons, we find no error in the trial court's evidentiary ruling on the admissibility of the testimony, as our Court "accords deference to the trial court's ruling" on questions of relevancy. *Shareef*, 221 N.C. App. at 299, 727 S.E.2d at 397.

D. Sufficiency of the evidence

Finally, defendant alleges that, "the trial court erred in denying defendant's motion to dismiss the offenses of statutory sex offense with a child by an adult based on the insufficiency of the evidence." We do not 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). "Whether the State has presented substantial evidence is a question of law, which we review *de novo*." *State v. China*, 370 N.C. 627, 632, 811 S.E.2d 145, 149 (2018) (emphasis added) (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 632, 811 S.E.2d at 148 (citation omitted). In making the determination of whether the State has presented substantial evidence, "the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Id.* at 632, 811 S.E.2d at 148–49.

Here, the trial court instructed the jury:

> For you to find the defendant guilty of these offenses the

> State must prove three things beyond a reasonable doubt: First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means, A, cunnilingus which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another or, B, any penetration, however slight, by an object into the genital opening of a person's body; second, that at the time of the act the alleged victim was under the age of 13 years, and, third, that at the time of the act the defendant was at least 18 years of age.

After our careful review of the evidence, taken "in the light most favorable to the State, drawing all reasonable inferences in the State's favor[,]" *id.*, leads us to the conclusion that the State proffered substantial evidence of each essential element of the offense and that defendant was the perpetrator. For this reason, the trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence.

III. Conclusion

After careful review, we conclude that the trial court did not err in allowing C.S.'s mother to remain in the courtroom during C.S.'s testimony, that the trial court did not err in allowing the State to modify the indictment because time was not an essential element of the offense charged, that the trial court did not err in allowing the testimony regarding prior allegations against defendant where defendant's witness opened the door to the allegations, and that there was sufficient evidence of each element of the offense charged. For the aforementioned reasons, we conclude that defendant received a fair trial, free from error.

NO ERROR.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).