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NO. COA11-1438  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Gaston County  
Nos. 09 CRS 61054-59,  
11 CRS 4481-83

KEITH DEVON PETTIS

Appeal by Defendant from judgment entered 18 July 2011 by  
Judge Nathaniel J. Poovey in Gaston County Superior Court.  
Heard in the Court of Appeals 9 May 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney  
General Celia Gratsy Lata, for the State.*

*Paul F. Herzog, for Defendant.*

BEASLEY, Judge.

Keith Devon Pettis (Defendant) appeals his convictions for three counts of sexual offense by one whom has assumed a parental role, two counts of first degree sexual offense, and four counts of indecent liberties with a child. For the following reasons, we affirm in part and vacate in part.

J.J. was born on 16 July 1994.<sup>1</sup> Defendant and his wife were foster parents to J.J. for approximately three years. While she lived with Defendant, Defendant performed sexual acts on J.J. and forced her to perform sexual acts on him multiple times over the span of three years. The abuse ended in 2009 when J.J. told her social worker, Ms. Stacey Christensen, about the inappropriate sexual contact. She was subsequently removed from Defendant's home. After a thorough investigation of J.J.'s allegations, Defendant was arrested.

On 5 October 2009, Defendant was indicted on three counts of first degree statutory sexual offense, attempted first degree statutory offense, three counts of sexual offense by one whom has assumed a parental role, attempted sexual offense by one whom has assumed a parental role, and four counts of indecent liberties with a minor. At the conclusion of the State's evidence, the trial court dismissed one count of attempted first degree statutory sex offense, one count of sexual offense by one who assumed a parental role, and one count of first degree statutory sex offense. Defendant was convicted of three counts of sexual offense by one whom has assumed a parental role, two

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<sup>1</sup> The victim, a juvenile at the time of trial, will be referenced throughout as J.J. to protect her identity.

counts of first degree sexual offense, and four counts of indecent liberties with a child. Defendant appeals.

Defendant argues that the trial court erred by not granting his motion to dismiss the charges of attempted sexual offense by a person assuming a parental role and taking indecent liberties with a child at the close of all the evidence because the evidence was insufficient to support the charges.

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "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). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

First, Defendant argues that his conviction for 09 CRS 61059, attempted sexual offense by a person assuming a parental role, was not supported by the evidence. Before we can review the sufficiency of the evidence, we must address the variance between the indictment and the jury charge.

Defendant was indicted in 09 CRS 61059, *attempted* sexual offense by a person assuming a parental role, but Defendant was convicted of 09 CRS 61059, sexual offense by a person assuming a parental role. Although the indictment was labeled "ATT SEX OFFENSE-PARENTAL ROLE," the trial court treated the indictment as if it charged the completed crime. A review of the record reveals the trial court's reasoning.

THE COURT: That's what I meant to say. In 09 CRS 61059 the indictment shows attempted sexual offense by one who had assumed a parental role. Is that correct?

[DEFENSE COUNSEL]: Correct.

THE COURT: Is there any change in the class of felony it is because it is an attempt?

[PROSECUTOR]: It actually - it says attempt at the top. The language in the actual indictment shows having assumed. It doesn't even use the language attempt but it does change it.

THE COURT: Well, which are you proceeding on? The attempt or the underlying charge?

[PROSECUTOR]: The underlying charge, the

actual language.

THE COURT: Okay. So I shouldn't tell them then it's attempted. I should tell them that it is a sexual offense by one who has assumed a parental role instead of the attempted sexual offense by one who assumed a parental role; is that right?

[PROSECUTOR]: That's correct and I am sorry, Your Honor. I didn't do these indictments. That's actually the first time I even saw the a-t-t at the top.

THE COURT: Well, that's one reason I am going through all these. I know it is taking some time but it will be helpful for me later on to separate these out, for y'all's motions later on to have them separated out, and just so we take a look at them and make sure we are all together on it. The alleged date of offense of that one is 3-1-09 through 3-31-09 on the indictment but that has been amended to 12-1-08 through 3-31-09. Is that right?

[PROSECUTOR]: That's correct.

The prosecutor informed the trial court that the language in the indictment did not use the word "attempt", but our reading of the indictment shows that this was a misstatement by the prosecutor. The indictment for 09 CRS 061059 reads as follows, "[t]he jurors for the State upon their oath present that . . . defendant named above unlawfully, willfully and feloniously did having assumed the position of a parent in the home which . . . a minor child under 18 years of age, was

residing, *attempt* to engage in a sexual act with that child." (emphasis added). Because of the prosecutor's misstatement and the trial court's misapprehension of the indictment, the trial court erroneously treated the indictment as if it was an indictment for sexual offense by a person assuming a parental role.

At the close of evidence, defense counsel argued for dismissal of 09 CRS 061059, attempted sexual offense by a person assuming a parental role, but the trial court was still under the mistaken belief that the language of the indictment charged the completed offense.

[DEFENSE COUNSEL]: And, Your Honor, my motion to dismiss those, there was no - there was no evidence elicited that this occurred between December 1 of '08 and 3-31 of '09. The attempted - well 59, was that - I have got the indictment showing that it is an attempted sex offense.

THE COURT: Well, I think the title of it is maybe a-t-t. The language itself charged the crime. That is sexual offense by one who assumed a parental role.

Our reading of the indictment shows that Defendant was indicted on the lesser charge of attempted sexual offense by a person assuming a parental role, and not the completed offense. "It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense

charged in the warrant or bill of indictment.” *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). Moreover, “the trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense.” *State v. Scott*, 150 N.C. App. 442, 453-54, 564 S.E.2d 285, 294 (2002). “While it is permissible to convict a defendant of a lesser degree of the crime charged in the indictment . . . an indictment will not support a conviction for an offense more serious than that charged.” *Id.* at 454, 564 S.E.2d at 294 (citation, brackets and internal quotations omitted). Therefore, we vacate Defendant’s conviction of 09 CRS 061059 sexual offense by one who assumed a parental role. We will not address Defendant’s remaining arguments concerning this conviction.

Next, Defendant argues his conviction for 11 CRS 4482, taking indecent liberties with a child, was not supported by the evidence where the Defendant did not commit an “overt act”. We disagree.

Pursuant to N.C. Gen. Stat. § 14-202.1 (2011), a person is guilty of taking indecent liberties with a child, if he either:

- (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child. . . .

Contrary to Defendant's suggestion, the State was not required to prove that Defendant committed an "overt act". In this case, the State presented evidence that Defendant approached J.J.; Defendant was "asking if he could see [her];" and Defendant was "trying to perform a sexual act on [her]". Based on the foregoing, the trial court properly denied Defendant's motion to dismiss the charge of indecent liberties with a child.

Next, Defendant argues that the trial court's instructions for the charges of first degree statutory sexual offense and sex offense by a person acting in a parental role rendered the guilty verdicts ambiguous and thereby deprived him of a unanimous verdict. We disagree.

"The North Carolina Constitution and North Carolina Statutes require a unanimous jury verdict in a criminal jury trial." *State v. Lawrence*, 360 N.C. 368, 373-74, 627 S.E.2d 609, 612 (2006) (citing N.C. Const. art. 1, § 24; N.C.G.S. § 15A-1237(b) (2011)). "It is true that our Court generally does not review constitutional arguments for the first time on appeal. . . . However, our Supreme Court has previously



recognized an exception to this rule where a defendant alleges a violation of Article I, Section 24." *State v. Wilson*, 192 N.C. App. 359, 364, 665 S.E.2d 751, 753 (2008) (citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)) (holding that "[w]here . . . the error violates [the] defendant's right to a trial by a jury of twelve, [the] defendant's failure to object is not fatal to his right to raise the question on appeal")).

Defendant argues that "the trial judge instructed . . . both statutory sex offense and sexual offense by a person assuming a parental role . . . instructed the jury that [Defendant] could be found guilty if the jurors found either that he committed cunnilingus on [J.J.] or if he digitally penetrated her." Defendant argues that the trial court's instruction violated his right to a unanimous verdict because it was impossible to determine whether all of the jurors found him guilty of the same offense.

Our Courts have rejected Defendant's contention that the mere use of a disjunctive instruction violates a defendant's right to a unanimous verdict.

In *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), this Court considered whether disjunctive jury instructions (instructions containing mutually exclusive alternative elements joined by the conjunction "or") for charges of indecent

liberties with a minor resulted in an ambiguous or uncertain verdict such that a defendant's right to a unanimous verdict might have been violated. As explained in a subsequent opinion discussing the *Hartness* line of cases, this Court held that "if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991).

*Lawrence*, 360 N.C. at 374, 627 S.E.2d at 612. In this case, Defendant was convicted, *inter alia*, of statutory sex offense pursuant to N.C. Gen. Stat. § 14-27.7A(a) and sex offense by one acting in a parental role pursuant to N.C. Gen. Stat. § 14-27.7(a). Both crimes require the commission of either vaginal intercourse or a sexual act with a victim. A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means 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(4) (2011). It is well established that "[t]he statutory definition of 'sexual act' does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *State v. Petty*, 132 N.C. App. 453, 462, 512 S.E.2d 428,

434 (1999). Because the jury instruction did not create disparate offenses as Defendant suggests, Defendant's argument is without merit.

Finally, Defendant argues the trial court erred by allowing two of the State's witnesses to testify that J.J. was a truthful person. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). However, "[p]lain error review is appropriate when a defendant fails to preserve the issue for appeal by properly objecting to the admission of evidence at trial." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *Id.* (citation omitted). Defendant contends that the trial court erred by allowing the testimony of Stacey Christensen, J.J.'s foster care social worker, and Kimya Williams, J.J.'s community support manager. Defendant objected to Ms. Christensen's testimony, but failed to object to Ms. Williams' testimony; therefore, we review the admission of Ms.

Christensen's testimony for abuse of discretion and Ms. Williams' testimony for plain error.

Defendant argues that both witnesses offered inadmissible expert opinion as to the credibility of J.J. See *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."). Defendant's argument is unpersuasive. Here, neither of these witnesses testified as experts, a point that Defendant concedes. Defendant asserts that even though the witnesses were not tendered to the court as certified experts, both witnesses were professionals who were part of J.J.'s treatment team, and "were in effect offered to the jury as *quasi-experts*." Defendant cites no authority for his contention. Therefore, case law concerning expert opinion testimony is inapplicable. We find no abuse of discretion or plain error in the admission of the witnesses' testimony. See N.C. Gen. Stat. § 8C-1, Rule 608(a) (2011) ("The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion[.]").

Defendant final's argument is an ineffective assistance of counsel claim that is based on defense counsel's failure to object to Ms. Williams' testimony. Because we have found no error in the admission of Ms. Williams' testimony and an objection was not required, Defendant's ineffective assistance of counsel claim is without merit.

Vacated in part; Affirmed in part.

Judge CALABRIA and STEELMAN concur.

Report per Rule 30(e).