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NO. COA03-1713

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.	Wake County
MARTIN JOHN CUNNINGHAM, JR.,	Nos. 02 CRS 47332
Defendant.	02 CRS 47333

Appeal by defendant from judgment entered 9 April 2003 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 21 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Haral E. Carlin for defendant-appellant.

THORNBURG, Judge.

Defendant was indicted on one count of first degree sex offense and one count of indecent liberties with a minor. Defendant was found guilty on both counts and was sentenced to 240 to 297 months. Defendant appeals.

The indictment for first degree sexual offense alleged that defendant "unlawfully, willfully and feloniously did engage in a sex offense with S.W. . . ., by force and against [her] will" on or between the "1st day of May, 2001 and the 31st day of May, 2001." The indictment for indecent liberties with a minor alleged the same

dates for the commitment of that offense. Before trial, the State tried to amend the indictment to include a time period from 1 August 2000 to 31 May 2001. After arguments from both sides, the State withdrew the motion and proceeded to trial.

At the time of the trial in April 2003, S.W. was 10 years old. In May of 2000, S.W.'s parents separated. S.W. and her two siblings lived primarily with their mother. S.W.'s mother met and began dating defendant in July of 2000.

S.W. testified that defendant often spent the night in their home while he was dating her mother. S.W. testified that in September of 2000, while she was alone in her mother's room watching television, defendant entered the room, reached under S.W.'s clothing and inserted his finger in her "private." This occurred early in the morning, after defendant had spent the night and after S.W.'s mother had gone to work. S.W. testified to several other instances of defendant inserting his finger into her vagina. She also testified that defendant placed his penis on her cheek and "something wet came out." S.W. also described an instance where defendant asked her to touch his penis and took her hand and forced her to squeeze his penis. Also, on one occasion, S.W. testified that defendant undressed her, kissed her from "on [her] lips down to [her] privates" and that "when [defendant] was kissing me down here he spread the, where my private is, where." During most of these incidents, S.W. testified that her mother was at work. These incidents occurred starting in August or September

of 2000 through March of 2002, when S.W. was taken from her mother's custody.

S.W. testified that she told people about what defendant was doing to her. S.W. first told her mother's cousin, Glenda, that defendant had touched her. Glenda told S.W. that she should tell her mother about what defendant was doing. S.W. testified that she told her mother, but that her mother punished her for lying. S.W. also told her friend, B.S., that defendant was touching her. Both Glenda and B.S. testified that S.W. told them that defendant was touching her.

Teresa, S.W.'s mother, testified that she began dating defendant in July of 2000. However, she denied that defendant ever spent the night at her home in September of 2000 while the children were home, the time S.W. testified defendant first started touching her. Teresa testified that defendant did not spend the night at her home while the children were there until Christmas of 2000. Further, she did not know anything about defendant touching S.W. until S.W. was removed from her home in March of 2002.

Defendant denied S.W.'s allegations. He asserted that he never spent the night at Teresa's home while the children were there until Christmas of 2000. The jury found defendant guilty on both charges. Defendant appeals.

Defendant argues on appeal: (1) that the trial court erred in denying his motion to dismiss based on the variance between the evidence presented and the dates listed in the indictment; (2) that the trial court erred in instructing the jury that the State was

not required to prove a definite time of the offense; (3) that the trial court erred in denying his motion to dismiss the charge of first degree sexual offense based on a variance between the type of offense the indictment charges and the evidence presented; and (4) that the trial court committed plain error in instructing the jury on the sex offense charge.

Defendant failed to set out several of his assignments of error in his brief. Because he has neither cited any authority nor stated any reason or argument in support of those assignments of error, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

Defendant first argues that there was a fatal variance between the dates alleged in the indictments and the evidence presented at trial. The indictments alleged that defendant committed both offenses between 1 May 2001 and 31 May 2001. However, S.W. was allowed to testify broadly to events that spanned from September of 2000 until March of 2002. Defendant argues that while he was prepared to answer the charges found in the indictments, the dramatic difference between the dates in the indictments and the evidence prejudiced him by depriving him of the opportunity to adequately present his defense.

An indictment must include a designated date or period of time within which the alleged offense occurred. N.C. Gen. Stat. § 15A-924(a)(4) (2003); *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001). However, a judgment should not be reversed when the indictment lists an incorrect date or time "if time was not of the essence" with respect to the offense, and "the error

or omission did not mislead the defendant to his prejudice.'" *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (quoting N.C. Gen. Stat. § 15A-924(a)(4)).

When the defendant relies on the date set forth in the indictment to prepare his defense, and the evidence produced by the State substantially varies to the prejudice of the defendant, defendant's motion to dismiss must be granted. *Stewart*, 353 N.C. at 518-19, 546 S.E.2d at 569-70 (where evidence covered a two and half year period, defendant was prejudiced where defendant relied on the one month period in the indictment to present his alibi defense); *State v. Booth*, 92 N.C. App. 729, 731-32, 376 S.E.2d 242, 244 (1989) (approximate three-month variance prejudiced defendant where defendant relied on date in the indictment to present his alibi defense).

When the case involves allegations of child sex abuse, temporal specificity requirements are further diminished. *Everett*, 328 N.C. at 75, 399 S.E.2d at 306. As children frequently cannot recall exact dates and times, any uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. *Id.* "Unless the defendant demonstrates that he was deprived of his [alibi] defense because of lack of specificity, this policy of leniency governs." *Id.*

In the instant case, defendant has not specifically presented an alibi defense. Rather, he relies on testimony that showed he did not spend the night at Teresa's home while the children were there until Christmas of 2000, and thus could not have committed

any offenses on any mornings before that time period. Defendant did not present evidence that specifically attempted to account for his whereabouts for every day in May of 2001, the period alleged in the indictment during which defendant was supposed to have committed these offenses. Accordingly, we conclude that the policy of leniency controls and defendant has not shown any prejudice. Defendant's assignment of error fails.

Defendant next argues that the trial court erred in instructing the jury that the State did not have to prove a definite time for when the offense was committed. Defendant argues that this instruction makes it virtually impossible for him to protect himself from subsequent prosecution for the same offense, thus raising the possibility of double jeopardy. "The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). We are not concerned with category (1) as there has been no prior acquittal, nor with category (2) as there has only been one prosecution. Further, defendant was charged with two distinct offenses, first degree sexual offense and indecent liberties with a minor. There was substantial evidence to support these independent convictions and thus defendant was not subjected to multiple punishments for the same offense. The concerns of double jeopardy are not implicated in this instance. We will not

speculate on possible future indictments based on defendant's conduct toward S.W. Defendant's assignment of error fails.

Finally, defendant argues that the trial court erred in not dismissing the count of first degree sexual offense and in its instructions to the jury on that count. The indictment in the instant case alleged that defendant "unlawfully, willfully and feloniously did engage in a sex offense with S.W. . . ., by force and against that victim's will." Defendant argues that the State presented no evidence that force as defined in the statute, N.C. Gen. Stat. § 14-27.4(a)(2), was involved in any of the alleged incidents and thus, that the State did not show substantial evidence of each essential element of the offense charged in the indictment. The State has conceded this error in its brief to this Court and we agree. This issue was decided by the Supreme Court in *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986), which held that a defendant must be convicted of the particular offense charged in the indictment.

Because the jury in this case was instructed and reached its verdict on the basis of the elements set out in N.C. Gen. Stat. § 14-27.4(a)(1), whereas defendant had been charged with sexual offense on the basis of the elements set out in N.C. Gen. Stat. § 14-27.4(a)(2), the indictment under which defendant was brought to trial cannot be considered to have been a valid basis on which to rest the judgment. Therefore, we hold that the instructions given to the jury pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) were

fundamentally in error. See also *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000).

As we are bound by the Supreme Court's holding in *Williams*, as the State concedes, we conclude that the trial court erred in not dismissing the charge of first degree sexual offense and that the jury instructions on that charge were fatally flawed; thus, defendant's conviction on that charge must be vacated.

No error in part; vacated in part.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).