

NO. COA14-613

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.	Burke County
	Nos. 10 CRS 52270-71
MAT DALLAS PIERCE,	12 CRS 287
Defendant.	12 CRS 289

Appeal by defendant from judgments entered 18 October 2013
by Judge C. Thomas Edwards in Burke County Superior Court.
Heard in the Court of Appeals 9 October 2014.

*Attorney General Roy Cooper, by Assistant Attorney General
Sarah Y. Meacham, for the State.*

*Cheshire Parker Schneider & Bryan, PLLC, by John Keating
Wiles, for defendant-appellant.*

GEER, Judge.

Defendant Mat Dallas Pierce appeals his Burke County
convictions of indecent liberties with a child, rape of a child,
and sexual offense with a child by an adult. Defendant also
appeals his Caldwell County convictions of first degree sexual
offense and two counts of indecent liberties with a child. The
victim of the Burke County indecent liberties offense is

defendant's daughter "Maggie." The victim of the remaining offenses is defendant's daughter "Melissa."¹

On appeal, defendant primarily argues that the trial court erred in denying his motion to dismiss two of the charges involving Melissa: one count of indecent liberties occurring in Caldwell County and one count of sexual offense with a child occurring in Burke County. With respect to the Caldwell County charges, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. Defendant argues that this evidence only supports one count of indecent liberties with a child. We disagree. Pursuant to *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties. Accordingly, we hold that the evidence presented by the State is sufficient to support defendant's two convictions for indecent liberties.

With respect to the Burke County sexual offense charge, we agree with defendant that the State failed to present substantial evidence that a sexual act as defined by N.C. Gen.

¹For ease of reading and to protect the privacy of the minor children, we use pseudonyms throughout this opinion. We also use the pseudonyms "Laura," "Lisa," "Abby," "Nina," and "Cathy" to identify the 404(b) witnesses.

Stat. § 14-27.4A (2013) occurred between defendant and Melissa in Burke County. The only evidence presented by the State regarding a sexual act that occurred in Burke County -- testimony by Melissa that defendant placed his finger inside her vagina while alone in their kitchen in Burke County -- was not admitted as substantive evidence. The State presented specific evidence that defendant performed oral sex on Melissa -- a sexual act under the statute -- but that act occurred in Caldwell, not Burke, County. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of N.C. Gen. Stat. § 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. This evidence is insufficient to support the Burke County sexual offense conviction.

Accordingly, we hold that the trial court erred in denying defendant's motion to dismiss the Burke County sexual offense with a child charge and remand for resentencing on the Burke County offenses. Because we find defendant's remaining arguments unpersuasive, we hold that defendant received a trial free of prejudicial error on the remaining charges.

Facts

The State's evidence tended to show the following facts. Melissa and Maggie are twin daughters of defendant. In 2009, when the girls were 10 years old, they lived with defendant, their mother, and their brother in a yellow house in Burke County, North Carolina. In the fall of 2009, after school had started, but before Christmas, defendant took Melissa into the kitchen of the yellow house, pulled down her pants, and "put his penis on [her] vagina [and] started moving back and forth." On a different occasion, defendant had vaginal intercourse with Melissa while they were in the basement of the yellow house. Defendant had vaginal intercourse with Melissa more than five times.

Sometime in January or February of 2010, defendant, Melissa, and defendant's girlfriend, "Laura," spent the night at the house of defendant's nephew, Mikey, in Caldwell County. Melissa slept on a bed while defendant and Laura slept on a couch in the same room. During the night, Melissa was awakened by defendant and Laura having sex. Defendant asked Melissa to join them and told her to go over to the couch. Defendant took off Melissa's pants and started licking her vagina. He then asked Laura to perform oral sex on Melissa, and she complied.

When asked if defendant ever put anything other than his mouth or penis on her vagina Melissa testified "yes."² On redirect examination, Melissa responded affirmatively to the State's questions whether defendant "sexually assaulted" her more times than she had described to the jury, whether "it happen[ed] more than ten times" and whether "[o]nce it started, . . . it continue[d]." Defendant told Melissa not to tell anyone about the sexual conduct because if she did, he would go back to prison.

Maggie testified that when she was home sick from school and no one else was in the house, defendant touched her vagina with his hand underneath her clothes. Defendant touched her vagina, both over and under her clothes, more than five times. On one occasion, defendant was helping Maggie with her homework in the kitchen and he touched her inside her pants.

With respect to Maggie, defendant was indicted in Burke County for indecent liberties with a child. With respect to Melissa, defendant was indicted in Burke County for rape of a child by an adult and sexual offense with a child by an adult,

²Melissa testified that one time when she was home alone with defendant in their kitchen, defendant put his hand down her pants and placed his finger on the outside of her vagina. On a different occasion, defendant was helping Melissa with her homework in the kitchen and he put his hand down her pants and his finger inside her vagina. However, this testimony was not admitted as substantive evidence because the State failed to disclose these specific incidents during discovery.

and in Caldwell County, for rape of a child by an adult, sexual offense with a child, and two counts of taking indecent liberties with a child. The Caldwell County cases were transferred to Burke County for trial.

The cases came on for trial on 15 October 2013. At the conclusion of the evidence, the trial court dismissed the Caldwell County rape charge. The jury found defendant guilty of the remaining charges. The trial court consolidated the Burke County charges for judgment and sentenced defendant to a presumptive-range term of 350 to 429 months imprisonment. The trial court consolidated the Caldwell County charges for judgment and sentenced defendant to a presumptive-range term of 386 to 473 months imprisonment. The sentences were to run concurrently.³ Defendant timely appealed the judgments to this Court.

I

Defendant first argues that the trial court erred in permitting Elizabeth Osbahr, the nurse who performed a forensic physical examination of Melissa, to state her opinion that her medical findings were consistent with Melissa's assertion that

³Although it appears from the transcript that the trial judge may have intended for the sentences to run consecutively, neither judgment specified that the sentence was to run at the expiration of the other sentence.

she had been sexually abused. Because defendant did not object to the testimony at trial, we review 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).

In a prosecution for a sexual offense involving a child victim, absent physical evidence of sexual abuse, expert opinion that sexual abuse has in fact occurred constitutes an impermissible opinion regarding the victim's credibility and is inadmissible. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789.

In this case, Nurse Osbahr was tendered without objection as an expert in her field as a pediatric nurse practitioner.

She testified that she performed a physical examination of Melissa after observing a social worker's interview of Melissa. She walked through the steps that she takes in conducting a physical examination and explained that in girls that were going through puberty, it was very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to Melissa, Nurse Osbahr testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked:

Q Now, you watched her interview there at the Children's Advocacy Center. Were your medical findings consistent with her disclosure in the interview?

A They were.

Defendant contends that Nurse Osbahr's "second opinion -- i.e., that her medical findings with respect to [Melissa] were 'consistent with her *disclosure*' (emphasis added) -- vouched for [Melissa's] credibility." However, our Supreme Court has addressed similar testimony and found it to be admissible. In *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988)

("Aquallo II"),⁴ a pediatrician testified that the results of the victim's physical examination were consistent with the victim's pre-examination statement that she had been sexually abused. On appeal, the Supreme Court rejected the defendant's argument that the pediatrician's testimony was a comment on the victim's truthfulness or the guilt or innocence of the defendant, explaining:

Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

Id.

Likewise, here, Nurse Osbahr did not testify as to whether Melissa's account of what happened to her was true. Rather, she merely testified that the lack of physical findings was

⁴*Aquallo II* is the defendant's appeal from his second trial after having been granted a new trial in *State v. Aquallo*, 318 N.C. 590, 350 S.E.2d 76 (1986) ("*Aquallo I*").

consistent with, and did not contradict, Melissa's account. Nurse Osbahr gave this testimony after laying a proper foundation by explaining her credentials, including her experience and knowledge of the profiles of sexually abused children, and by explaining the examination procedure she used with Melissa. Her testimony amounted to an opinion that the lack of physical findings of sexual abuse was consistent with the profiles of other similarly developed children who had been sexually abused. Such testimony is admissible under both *Stancil* and *Aguallo II*. See also *State v. May*, ___ N.C. App. ___, ___, 749 S.E.2d 483, 492 (2013) (holding expert testimony that victim showed no signs of sexual assault was admissible where expert did not testify that sexual abuse had in fact occurred, and expert merely testified as to her examination procedures, her experience and knowledge of the profiles of sexually abused children, and whether the victim's symptoms were consistent with sexual abuse), *disc. review allowed*, 367 N.C. 293, 753 S.E.2d 663 (2014); *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987) (finding no error in admission of physician's opinion that victim's symptoms were consistent with sexual abuse).

Defendant, however, cites *Aguallo I*, *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Driver*, 162 N.C.

App. 360, 590 S.E.2d 477, 2004 WL 77831, 2004 N.C. App. LEXIS 131 (2004) (unpublished), in support of his argument that Nurse Osbahr's testimony is inadmissible. The testimony of the experts in these cases, however, is materially different from Nurse Osbahr's testimony. In *Aguallo I*, the examining physician testified that the child victim was "believable." 318 N.C. at 599, 350 S.E.2d at 81. In *Trent*, the examining physician testified that he believed that the victim had in fact been sexually abused. 320 N.C. at 613, 359 S.E.2d at 465. Similarly, in *Driver*, the examining physician testified that "[her] opinion at the completion of our evaluation was that with reasonable medical certainty the patient had experienced and received the medical diagnosis of sexual abuse." 2004 WL 77831 at *1, 2004 N.C. App. LEXIS 131 at *3. Although the physician in *Driver* testified that the exam was consistent with the victim's disclosure, she further asserted that "[d]ue to [the victim's] highly detailed and consistent disclosure, we believe that sexual abuse is probable." *Id.* Thus, the testimony in each of these cases, unlike the testimony of Nurse Osbahr, amounted to an opinion regarding the truthfulness of the victim and the guilt of the defendant. Accordingly, we hold that defendant has failed to demonstrate that the trial court

committed plain error in admitting the testimony of Nurse Osbahr.

II

Defendant next argues that the trial court erred in admitting testimony from several witnesses concerning previous instances of sexual abuse by defendant under Rules 404(b) and 403 of the Rules of Evidence. This Court "review[s] de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

The State contends, citing *State v. Ray*, 364 N.C. 272, 277-78, 697 S.E.2d 319, 322 (2010), that plain error review applies because defendant failed to preserve this issue by not objecting to the 404(b) witnesses in the presence of the jury. Defendant concedes that objections were not made in the presence of the jury, but argues that pursuant to *State v. Hazelwood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007), the objections were sufficiently contemporaneous to preserve this issue for appellate review. We need not determine whether plain error review applies because even assuming, without deciding, that defendant's objections were sufficient, we hold that the testimony was admissible.

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This Rule is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one *exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

"Though it is a rule of inclusion, Rule 404(b) is still 'constrained by the requirements of similarity and temporal proximity.'" *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them," but the similarities need not "rise to the level of the unique and bizarre." *Id.* (internal quotation marks omitted).

In this case, the testimony of "Cathy" constituted the earliest evidence of sexual abuse by defendant. Cathy testified

regarding numerous instances of sexual abuse by defendant from approximately 1988 until 1994, when Cathy was between the ages of eight and 15. During that time, defendant was married to Cathy's aunt. When Cathy was eight years old, defendant touched her vagina while she was staying at defendant's home and sleeping with her cousins in their bedroom. Defendant first had sexual intercourse with Cathy when she was 11 years old, and had anal intercourse with her when she was in sixth grade. She estimated that defendant had sex with her over 30 times. One time, defendant and Cathy's aunt took her to a motel where defendant had sex with Cathy and her aunt in one another's presence. Charges were filed against defendant in 1994 for his conduct with Cathy, and he was convicted of indecent liberties with a child in 1996.

"Lisa" was the next Rule 404(b) witness. In 1999, defendant was released from prison and began dating and living with Lisa's mother, "Abby." Defendant lived with Lisa and Abby from 1999 until 2003 or 2004, when Lisa was between the ages of three and eight years old. Lisa testified that defendant had her sleep in the living room, even though she had a bedroom. One night, Lisa was sleeping in the living room and woke up as defendant was licking her vagina. Defendant also put his finger in her vagina and tried to get Lisa to perform oral sex. Lisa

estimated that this happened more than 10 times and did not stop until defendant went to prison on drug charges around 2004. Lisa did not tell her mother about the abuse because defendant threatened to kill her family if she did.

Abby's testimony corroborated the accounts of Cathy and Lisa. Abby testified that she began dating defendant in 1999 after he was released from prison and that he told her that he went to prison for sleeping with Cathy when she was 15 years old. In 2004, Abby learned that defendant had molested Lisa. While in prison, defendant telephoned Abby as a part of a 12-step program and admitted that he started touching Lisa when she was four years old and that he touched her vaginal area while she sat in his lap, and he rubbed his penis between her legs. When defendant was released from prison in 2009, he visited Abby and Lisa at a family Easter gathering and apologized to them for what he had done.

Nina, defendant's oldest daughter, also corroborated the testimony of Cathy and Lisa. She testified that defendant went to jail the first time for having sex with Cathy when she was 15 years old and that Cathy was sold to defendant for drugs or money. She stated that in 2003, while defendant was in prison, he admitted to her that he rubbed Lisa's vagina as she sat on his lap. Defendant later admitted to Nina that he rubbed his

penis on Lisa's vagina, ejaculated on her belly, and put his penis in her face and on her lips.

Finally, Laura, defendant's girlfriend after he was released from prison in 2009, testified as to events occurring between defendant and Melissa in 2009 and 2010. Laura testified regarding the night in Caldwell County when defendant forced Laura to perform oral sex on Melissa while he watched. She also testified that one time when they were staying at a friend's house in Burke County, defendant refused to let Melissa sleep in the living room on the couch and made her sleep in the bed with him and Laura. That night, Laura witnessed defendant rub his penis between Melissa's legs -- an act defendant referred to as "slip-legging."

Defendant argues that the testimony regarding what happened to Cathy and Lisa is too remote in time to fall within Rule 404(b). We disagree. With respect to temporal proximity of other acts of sexual abuse, our Supreme Court has explained:

While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (internal citation omitted). Moreover, "[t]emporal proximity is not eroded when the remoteness in time can be reasonably explained" such as by lack of access to a victim or by the defendant's incarceration. *State v. Barnett*, ___ N.C. App. ___, ___, 734 S.E.2d 130, 134 (2012), *disc. review denied*, 366 N.C. 587, 739 S.E.2d 844 (2013).

Although the sexual abuse of Cathy and Lisa occurred between 10 and 20 years prior to trial, the lapses of time between the instances of sexual misconduct involving Cathy, Lisa, Melissa, and Maggie can be explained by defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to Cathy and Lisa and what happened to Melissa and Maggie. At the time of the sexual misconduct, each victim was a minor female who was either the daughter or the niece of defendant's spouse or live-in girlfriend. The abuse frequently occurred at defendant's residence, at night, and while others slept nearby. Defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that defendant engaged in a pattern of conduct of sexual abuse over a long period of time.

Accordingly, we hold that the evidence of past instances of sexual abuse of Cathy and Lisa meets Rule 404(b)'s requirements

of similarity and temporal proximity. See *State v. Register*, 206 N.C. App. 629, 641, 698 S.E.2d 464, 473 (2010) (holding that evidence that defendant had sexually abused other children 14, 21, and 27 years prior to the start of defendant's alleged sexual abuse of victim was evidence of a common plan and thus was admissible as other bad acts evidence, despite the remoteness in time of the first incident; evidence indicated that defendant was married to victims' mothers or aunt, that the sexual abuse occurred when the children were prepubescent, that, at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and that the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed).

Defendant makes no specific argument as to why Laura's testimony is inadmissible other than to note that she "testified about her own sexual conduct with [Melissa] and some other (uncharged) conduct of defendant with [Melissa]." Laura's sexual conduct with Melissa was at the behest of defendant and in his presence, and it corroborated Melissa's testimony regarding what occurred that night in Caldwell County. Further, the uncharged conduct of defendant, which he called "slip-legging," is the same act that Melissa testified defendant did to her in the yellow house in Burke County. Thus, Laura's

testimony involved substantially similar acts by defendant against the same victim and within the same time period. Accordingly, we hold that Laura's testimony also falls under Rule 404(b).

Having determined that the evidence is admissible under Rule 404(b), we now review the trial court's Rule 403 determination for abuse of discretion. Here, the trial judge first heard the testimony of the 404(b) witnesses outside the presence of the jury and then heard arguments before ruling on admissibility of each witness. As to Nina, defendant's daughter, the trial court excluded testimony regarding an incident when Nina was 18 years old and defendant bought her ecstasy and another incident when defendant asked Nina to "show him her monkey" because it was not sufficiently similar to the charged crimes. The trial court also excluded testimony of Laura regarding Cathy and Cathy's mother because Laura's testimony did not disclose enough information for the court to determine at that time if those events were temporally related. The trial judge's exclusion of this evidence indicates that he carefully weighed the evidence in making his rulings. See *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (noting that "[t]he judge excluded testimony about one incident that did not

share sufficient similarity to the charged actions, thus indicating his careful consideration of the evidence").

Furthermore, "'a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury.'" *Id.*, 726 S.E.2d at 160 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)). The trial court instructed the jury to only consider the testimony for the purpose of showing defendant's motive, knowledge, intent, plan, or scheme, and not as substantive evidence of the crimes charged. This limiting instruction diminished the danger of unfair prejudice to defendant.

Given the similarities in the accounts of the 404(b) witnesses to those of Melissa and Maggie and the persistence of defendant's conduct with similar victims over a long period of time, we hold that the trial court could reasonably conclude that the testimony of the 404(b) witnesses provided strong evidence of a common plan that outweighed any unfair prejudice to defendant. See *Register*, 206 N.C. App. at 641, 698 S.E.2d at 473 (holding that trial court did not abuse its discretion in concluding that testimony showing pattern of sexually abusive behavior by defendant over period of 31 years constituted strong

evidence of common plan that outweighed any unfair prejudice to defendant).

III

Finally, defendant argues that the trial court erred in denying his motion to dismiss two of the offenses involving Melissa: one count of indecent liberties with a child in Caldwell County and the Burke County charge of sexual offense with a child by an adult. "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 (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). "'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'" *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919).

With respect to the Caldwell County charges, defendant concedes that the evidence that defendant performed oral sex on Melissa at Mikey's house in Caldwell County supports a conviction for sexual offense and indecent liberties, but he argues that a second indecent liberties conviction is not supported by the evidence. We disagree.

"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). "[I]t is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C.G.S. 14-202.1." *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981).

For example, in *State v. Ainsworth*, 109 N.C. App. 136, 147, 426 S.E.2d 410, 417 (1993), this Court held that there was sufficient evidence to support a conviction of indecent liberties where the defendant had sex with another woman in the presence of her child and then watched her son have sex with the woman. Additionally, "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38 (upholding defendant's convictions of three counts of indecent liberties for touching and sucking victim's breasts, performing oral sex on her, and having sexual intercourse with her).

In this case, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa,

performed oral sex on Melissa, and then watched as his girlfriend performed oral sex on Melissa. Although these actions occurred during a single encounter, they constitute more than one sexual act and, under *James*, support defendant's conviction of more than one count of indecent liberties.

Defendant next argues that there is insufficient evidence of a sexual offense occurring in Burke County. We agree. "A person is guilty of sexual offense with a child 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. § 14-27.4A(a). A "'[s]exual act' means 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) (2013).

Here, Melissa testified as to two specific incidents where a sexual act occurred between defendant and Melissa: (1) defendant placed his fingers inside her vagina while they were alone in the kitchen in her house in Burke County, and (2) defendant performed oral sex on Melissa at Mikey's house in Caldwell County. Neither of these incidents constitutes substantial evidence that would support the Burke County sexual

offense. The evidence regarding the kitchen incident was not admitted as substantive evidence because the State had failed to disclose it in discovery. Therefore, consistent with the trial court's limiting instruction, this evidence may only be considered for the limited purpose of establishing defendant's motive, knowledge, or common plan for the crimes charged. While the evidence of oral sex occurring in Caldwell County was admitted as substantive evidence, it does not support a conviction for a sexual offense occurring in Burke County.

The State, however, points to Melissa's testimony that defendant "sexually assaulted" her more than 10 times and that once it began, it continued. The State argues, citing *State v. Bullock*, 178 N.C. App. 460, 472, 631 S.E.2d 868, 876 (2006), that this testimony, when considered with Melissa's testimony that defendant performed a sexual act on her in Caldwell County, is substantial evidence that a sexual act occurred in Burke County.

In *Bullock*, this Court addressed the issue "whether the State is required to present evidence of specific and unique details of each charge to the jury, or whether a count can be submitted to the jury based upon the victim's testimony that repeated incidents occurred over a period of time." *Id.* There, defendant was convicted of 11 counts of rape. *Id.* at 464, 631

S.E.2d at 872. 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. In holding that this generic testimony was sufficient to support the defendant's convictions of 10 additional counts of rape, the Court explained:

While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event.

Id. at 473, 631 S.E.2d at 877.

Here, unlike in *Bullock*, defendant was charged with various offenses that required proof of different elements, locations, and time periods. Instead of testifying specifically which act occurred more than one time, Melissa testified generally that defendant "sexually assaulted" her more than 10 times. It is unclear from the testimony whether this statement referred to acts amounting to vaginal intercourse, sexual acts within the meaning of the statute, or indecent liberties with a child.

We decline to extend *Bullock* to cases where, as here, there was no substantive evidence admitted as to each element of the offense occurring at the time and location alleged in the

indictment, and it is unclear from the transcript whether the generic testimony that the victim was "sexually assaulted" multiple times encompasses the specific offense at issue. Compare *State v. Khouri*, 214 N.C. App. 389, 391, 716 S.E.2d 1, 4 (2011) (holding that State submitted substantial evidence to support charges of sexual offense where State presented evidence that defendant initiated acts of touching and oral sex with victim and "[victim] continued performing oral sex on defendant a few times a week"), *disc. review denied*, 356 N.C. 546, 742 S.E.2d 176 (2012). Therefore, we hold that defendant's Burke County sexual offense conviction must be vacated.

We note that this conviction was consolidated with the Burke County offenses of rape of a child and indecent liberties. Even though both the rape and the sexual offense crimes are B1 felonies, our Supreme Court has held that "[s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

Accordingly, we remand for entry of judgment and resentencing on the Burke County offenses.

No error in part; vacated and remanded in part.

Judges STROUD and BELL concur.