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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-50

Filed: 17 March 2020

Lincoln County, Nos. 10CRS052580-82, 11CRS000852-56

STATE OF NORTH CAROLINA

v.

ROBERT RANDOLPH HUGHES, Defendant.

Appeal by Defendant from judgments and order entered 23 March 2018 by Judge Lisa C. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra Gruber and Associate Attorney Amber I. Davis, for the State.

Daniel M. Blau Attorney at Law, P.C., by Daniel M. Blau, for the Defendant.

DILLON, Judge.

Defendant Robert Randolph Hughes appeals from judgments finding him guilty of various sex offenses and from an order requiring Defendant to register as a sex offender and to enroll in satellite-based monitoring (“SBM”) for the rest of his natural life.

I. Background

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In September 2010, Defendant was indicted for numerous sex offenses stemming from an ongoing sexual relationship with his daughter, Olivia.¹ A jury trial was held in Lincoln County in March 2018.

The jury found Defendant guilty of eight charges. The charges were consolidated into two judgments, each including a sentence of 200-249 months imprisonment. The trial court also ordered Defendant to register as a sex offender and to enroll in SBM for the rest of his natural life. Defendant timely appealed.

II. Analysis

On appeal, Defendant makes a number of arguments. We address each in turn.

A. Jury Instructions

Defendant first argues that the trial court erred in refusing to give a jury instruction concerning habit evidence, specifically that Olivia had a habit of lying when confronted with trouble.

We review a trial court's decision concerning jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). And "[i]f a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance." *State v. Ligon*, 332 N.C. 224, 242, 420 S.E.2d 136, 146 (1992). Also, we

¹ A pseudonym is used to protect the victim's identity.

examine whether the defendant, otherwise, received “the full benefit of the principles of law he [sought] to have applied to the facts.” *Lloyd v. Bowen*, 170 N.C. 216, 219, 86 S.E. 797, 798 (1915).

In the underlying case, the trial court refused to give the requested habit instruction concerning Olivia’s lying when confronted with trouble and, instead, recited the pattern jury instruction on character evidence of truthfulness. *See* N.C.P.I. Crim. 105.30 (2018).

Rule of Evidence 406 provides that “[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit[.]” N.C. Gen. Stat. § 8C-1, Rule 406 (2018). “Habit” is described as a “person’s regular practice of meeting a particular kind of situation with a specific type of conduct.” N.C. Gen. Stat. § 8C-1, Rule 406 cmt.

At trial, Defendant presented evidence from a number of witnesses that Olivia had a habit of lying when she got in trouble and about specific instances when she had lied when confronted about something.

We conclude that even without the “habit” instruction, Defendant received “the full benefit of the principles of law he [sought] to have applied to the facts” as the witnesses were allowed to testify concerning Olivia’s habit and the jury was instructed on a witness’s character of truthfulness and on impeachment. *Lloyd v. Bowen*, 170 N.C. at 219, 86 S.E. at 798. But assuming that the trial court erred, we

conclude that Defendant was not prejudiced by the omission of the instruction. Based on the evidence and the other instructions given, we conclude that it was not reasonably possible that the jury would have made a different determination concerning Olivia's credibility had they received the "habit" instruction.

B. Hearsay Evidence

Defendant next argues that the trial court erred in allowing the State to introduce a recorded interview of Olivia with the child-advocacy center ("CAC") where she described various incidents of sexual abuse by Defendant, because the interview contained hearsay. As Defendant did not object to the admission of this evidence at trial, we review for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In order to demonstrate plain error, a defendant must show "that the jury probably would have returned a different verdict had the error not occurred." *State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012).

The introduction of the alleged hearsay statement that Defendant complains of – a statement by Olivia that her sister-in-law told her that Defendant was "acting really guilty" – does not amount to a fundamental error. At trial, Olivia testified regarding the years of abuse she experienced. A number of additional witnesses also testified regarding Defendant's abuse and rape of Olivia. Moreover, as the State points out, Defendant utilized the same evidence he complains of during direct and cross-examination. *See* N.C. Gen. Stat. § 15A-1443(c) (2018).

In light of the litany of evidence presented, we conclude that the admission of potential hearsay that “[Defendant was] acting really guilty” did not have a probable impact on the jury’s verdict. *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327.

C. Judgment on Crime Against Nature

Defendant further argues, and the State concedes, that the trial court erred in entering a judgment for the charge of crime against nature.

While Defendant was indicted on one count of crime against nature and the jury was instructed on such charge, no verdict form for crime against nature was presented to the jury. Rather, the jury received a duplicate verdict form of indecent liberties with a child. As the jury never returned a verdict as to the charge of crime against nature, a judgment should not have been entered on the charge. *See State v. Sanders*, 280 N.C. 81, 87, 185 S.E.2d 158, 162 (1971) (“A verdict should answer the issue raised by the State’s charge of guilt contained in the indictment[.]”). Thus, Defendant’s conviction of crime against nature in 10 CRS 52581 is vacated.

While the trial court did err in convicting Defendant of crime against nature, it did not err in its sentencing of Defendant. The conviction for crime against nature was consolidated with two others, one of which alone “ha[d] a presumptive range of 192 to 240 months [imprisonment.]” Thus, the trial court’s sentencing of 200 months for all three charges does not appear to be the result of an adverse influence of the

trial court's consolidating the offenses for judgment. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). Defendant's sentence is upheld.

D. Ambiguous Verdict Forms

Lastly, Defendant contends that the verdict forms for statutory rape and for statutory sex offense were ambiguous. Specifically, though Defendant was adequately indicted for these two separate charges and the jury was correctly instructed on one count of statutory rape and on one count of statutory sex offense, the two verdict forms for these charges *each* listed the charge in the same way, as "Statutory Rape/Sex Offense" and provided the option of "Not Guilty" or "Guilty of Statutory Rape/Sex Offense." This combining of the charges is what Defendant complains of and alleges created ambiguity and confusion in the jury, thereby depriving him of his right to be convicted by a unanimous jury. N.C. Const. art. I § 24. We agree.

In so arguing, Defendant cites to *State v. McLamb* and *State v. Diaz*, in which our Supreme Court "held that a verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective." *State v. Diaz*, 317 N.C. 545, 553, 346 S.E.2d 488, 494 (1986) (citing *State v. McLamb*, 313 N.C. 572, 577, 330 S.E.2d 476, 480 (1985)). Indeed, an ambiguity was created by listing both statutory rape and statutory sex offense on both verdict forms – when announcing the verdicts in open court, the clerk

announced that the jury found Defendant “guilty of statutory rape” on both verdict forms, when only one verdict form was supposed to be for statutory rape.

However, even assuming that our review is to consider whether the error was harmless beyond a reasonable doubt, *see* N.C. Gen. Stat. § 15A-1443(b), we conclude that any ambiguity created by the verdict forms was not fatal to the verdicts in this case. *See Diaz*, 317 N.C. at 554, 346 S.E.2d at 494 (“Our decision . . . does not mean that a simple verdict of guilty based on an indictment and instruction charging crimes in the disjunctive will always be fatally ambiguous. An examination of the verdict, the charge, the initial instructions by the trial judge to the jury as required by N.C.G.S. § 15A-1213, and the evidence in a case may remove any ambiguity created by the charge.”).

E. Sex Offender Registration and Satellite-Based Monitoring

Defendant also asks our Court to vacate the trial court’s order requiring him to register as a sex offender and to submit to SBM should we reverse his convictions. But since we do not reverse his convictions, we do not vacate the order concerning his registration as a sex offender and his submission to SBM.

III. Conclusion

We conclude that Defendant was not prejudiced by the trial court’s failure to give an instruction on habit evidence, admitting the CAC interview into evidence, or entering a verdict on ambiguous verdict forms.

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However, as the jury rendered no verdict for the charge of crime against nature in 10CRS052581, this conviction is reversed and arrested. Nevertheless, Defendant's sentence is upheld. As we do not reverse Defendant's convictions, we do not vacate his registration as a sex offender nor his submission to SBM.

NO ERROR IN PART; VACATED IN PART.

Judges STROUD and BERGER concur.

Report per Rule 30(e).