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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-994

Filed: 19 May 2020

Onslow County, No. 17CRS55168

STATE OF NORTH CAROLINA

v.

EDDIE DAVID LEWIS, JR., Defendant.

Appeal by Defendant from judgment entered 3 June 2019 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 15 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for the State.

Michael E. Casterline for Defendant Appellant.

INMAN, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented at trial tended to show the following:

Defendant Eddie David Lewis, Jr. (“Defendant”) began dating Latoya Duncan (“Duncan”) in the summer of 2016. The couple lived together with three of Duncan’s

children, including eleven-year-old Rachel,¹ in a trailer (the “Lake Cole Road home”). Defendant stayed home to take care of the children after losing his job. The family’s housing situation was unstable, and after leaving the Lake Cole Road home the couple and the children lived with a friend, Christina, for several months, in their car, and in a room at a Motel 6.

In July 2017, Duncan took Defendant to the hospital where he was diagnosed with chlamydia. Around that same time, the Onslow County Department of Social Services (DSS) received a report concerning possible neglect and inappropriate touching of Rachel by Defendant. During the DSS investigation, Rachel told a social worker that Defendant inappropriately touched her several times, including at the Lake Cole Road home. She also told her grandmother about the abuse she suffered from Defendant. DSS then removed Duncan’s children from her custody and placed them with their grandmother. Rachel received a medical examination and was diagnosed with chlamydia.

After learning about Rachel’s diagnosis, Defendant contacted Duncan to “come clean” and admitted to Duncan both on the phone and in text messages that he had penetrated Rachel’s vagina with his penis. Despite initially telling Duncan that this only happened once, Defendant admitted the next day in a phone call with Duncan that he had penetrated Rachel with his penis twice: once while they lived at the Lake

¹ We refer to the minor victim under a pseudonym to protect her identity.

Cole Road home and once while they lived with Christina. Later, during an interview with a detective, Duncan made a controlled and recorded phone call to Defendant. Defendant again admitted, and clarified when asked, that he put his penis in Rachel's vagina on two separate occasions.

Defendant was indicted for two counts of statutory rape of a child by an adult and one count of indecent liberties with a child. Rachel testified at trial that Defendant touched her vagina with his penis "more than one" time. She described in detail the incident at the Lake Cole Road home when Defendant entered her bedroom during the night and she said it felt "[l]ike a scratch" when "[h]is male part" was in her vagina. She testified that her "pee . . . burned" after that incident. She further explained that "it" also happened at "Christina's house and the motel."

Duncan testified about Defendant's admission to her, in various communications, that he had raped Rachel more than once. She read to the jury the text messages in which Defendant admitted that he "stroked [Rachel] two times" at the Lake Cole Road home. After the jury heard the controlled and recorded call between Defendant and Duncan, Duncan testified that Defendant told her he put his penis in Rachel's vagina twice.

The jury found Defendant guilty of all three charges: two counts of statutory rape of a child by an adult and one count of taking indecent liberty with a child. Defendant appeals.

II. ANALYSIS

Defendant argues that the trial court erred by failing to sufficiently distinguish the two counts of statutory rape on the verdict sheet and in its instructions to the jury, thereby depriving him of his constitutional right to a unanimous jury verdict on each charge. He argues this right was violated because there was insufficient detail in the indictment, verdict form, and Rachel's testimony to ensure that the jury's verdict was unanimous as to two specific instances of statutory rape of a child by an adult. We disagree.

Article I, Section 24 of the North Carolina Constitution and Sections 15A-1201 and 15A-1237(b) of our General Statutes guarantee criminal defendants the right to a unanimous jury verdict. Violations of this right "are not waived by a failure to object at trial and may be raised for the first time on appeal." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citations omitted).

When a defendant is charged with multiple counts of the same offense, his right to a unanimous decision on each count can be implicated. Unanimity is not an issue if the verdict sheet or jury instructions assign distinguishing facts, such as separate dates, to each count. *State v. Kennedy*, 320 N.C. 20, 25, 357 S.E.2d 359, 362 (1987). In this case, the verdict sheet did not contain information that distinguished between the two counts of statutory rape of a child by an adult. This is not required, however: unanimity is not implicated if the evidence presented at trial is sufficient to

allow the jury to properly understand the instructions and verdict sheets. *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409.

Our courts have addressed the question of unanimity when a defendant is charged with multiple counts of rape. In *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), the defendant was charged with and convicted of five counts of statutory rape. The victim testified that she had intercourse with the defendant thirty-two separate times, and specific evidence was provided as to five instances of statutory rape. 360 N.C. at 375, 627 S.E.2d at 613. The defendant argued that it was impossible to tell if the jury was unanimous because more criminal incidents were presented into evidence than charged. *Id.* at 373, 627 S.E.2d at 612. Our Supreme Court concluded that the defendant was unanimously convicted by the jury, despite the indictments and verdict sheets describing the offenses with identical language and dates of offense, noting:

(1) defendant never raised an objection at trial regarding unanimity; (2) the jury was instructed on all issues, including unanimity; (3) separate verdict sheets were submitted to the jury for each charge; (4) the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours; (5) the record reflected no confusion or questions as to jurors' duty in the trial; and (6) when polled by the court, all jurors individually affirmed that they had found defendant guilty in each individual case file number.

Id. at 376, 627 S.E.2d at 613.

In *State v. Bullock*, 178 N.C. App. 460, 631 S.E.2d 868 (2006), the defendant was charged with eleven counts of first-degree rape. At trial, the victim testified specifically only as to the first instance, but also testified that the defendant had sex with her more than two times a week for the next ten months. 178 N.C. App. at 471-72, 631 S.E.2d at 876. Defendant was charged for the first act and then once for each of the months of abuse. *Id.* We held, following *Lawrence* and applying the factors enumerated above, that evidence of more sexual acts than were charged did not render the verdict ambiguous, and that the victim's testimony was sufficient to show the verdict was unanimous. *Id.* at 473, 631 S.E.2d at 877. We noted that the realities of a continuous course of repeated sexual abuse renders it "difficult if not impossible" to present specific evidence of each event, but that such generic testimony did not implicate jury unanimity. *Id.* "Either the jury believed the testimony of the victim that these rapes occurred, or they did not." *Id.*

In this case, Rachel testified as to a specific instance at the Lake Cole Road home during which Defendant came into her room and put his penis in her vagina. She testified that similar instances happened in Christina's house and in the motel, and on cross-examination confirmed that, though she did not know the exact number of times it had occurred, Defendant had raped her more than once. Defendant also admitted to Rachel's mother, during a recorded phone call, that he had penetrated Rachel's vagina with his penis on two occasions. He told her that he had put his penis

in Rachel's vagina for the second time while they lived with Christina. As in *Lawrence* and *Bullock*, the fact that the State presented evidence that more rapes occurred than were charged does not call into question the unanimity of the jury's verdict: the jury believed Rachel's testimony and the other evidence that she was raped on at least two occasions, and it convicted Defendant on two charges of rape.

The *Lawrence* factors support this conclusion: (1) Defendant did not object at trial regarding unanimity; (2) the trial court instructed the jury on each element of statutory rape and that jurors must "unanimously agree[] upon a verdict as to each charge;" (3) although the jurors did not receive a separate verdict sheet as to each count, the sheet separated each count as in *Bullock*; (4) the jury deliberated for less than thirty minutes; (5) the jurors asked no questions during deliberation and did not indicate any confusion; (6) there was no poll of the jury, as none was requested by either party.

The evidence in this case showed that Defendant raped Rachel on at least two occasions and admitted to raping her on at least two occasions. *Cf. Bullock*, 178 N.C. App. at 473, 631 S.E.2d at 877 ("There was no possibility that some of the jurors believed that some of the rapes took place, and some believed that they did not."). Defendant's right to a unanimous verdict under Article I, Section 24 of the North Carolina Constitution and Sections 15A-1201 and 15A-1237(b) of our General Statutes was not violated.

III. CONCLUSION

The evidence introduced at trial demonstrates there was no possibility that the jury's verdict was not unanimous, and that the trial court did not err in its instructions or in the form of the verdict sheet.

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).