IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-775

No. COA22-24

Filed 15 November 2022

Union County, Nos. 18 CRS 55715, 18 CRS 55717, 18 CRS 55721

STATE OF NORTH CAROLINA

v.

DARAN MARTE WINGO, Defendant.

Appeal by Defendant from judgments entered 23 April 2021 by Judge Nathan H. Gwyn, III, in Union County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Tackett for the State of North Carolina.

William D. Spence for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Daran Marte Wingo ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of statutory sex offense with a child less than 15 years of age, and two counts of indecent liberties with a child. For the reasons detailed below, we hold that there was no error.

I. Background

¶ 2 Defendant began dating S.S.'s[1] mother when S.S. was approximately two years old. Defendant took on a stepfather role in S.S.'s life. Defendant and S.S.'s mother never married, but Defendant lived with S.S.'s mother and S.S. until S.S. was 14 years old. When S.S. was nine years old, in 2013, Defendant touched her for the first time in a manner that made her feel uncomfortable. S.S. had returned from school and was napping on a footstool in the living room when she woke up to Defendant placing his entire body on top of her. She felt Defendant's penis on her backside. When she woke up, Defendant acted like he was attempting to get her up to go get in her bed.

¶ 3 From that point on, the situation escalated. S.S. cannot "count on her hands or toes" the number of times that Defendant touched her in an inappropriate manner from the time she was nine until the time she was 14. The conduct ranged from Defendant putting his fingers in S.S.'s vagina, Defendant trying to penetrate S.S.'s vagina or anus with his penis, and Defendant sucking on and touching S.S.'s breasts. The only times when Defendant did not regularly assault S.S. was when she shared a room with her sister, and when her brother's girlfriend lived in the home with them.

¶ 4 When S.S. was 14, in August of 2018, she woke up to Defendant putting his finger into her vagina. Defendant then tried to get on top of S.S. and put his penis in

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[1] We use this pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

her vagina. Defendant took S.S.'s breast out and started touching and sucking on it. Defendant then put his penis on S.S.'s lips and ejaculated. Defendant left when S.S.'s brother arrived home.

¶ 5 Approximately one to two days after this last incident, S.S. texted her older sister about what Defendant had done. S.S. also texted her mother. S.S., S.S.'s mother, and Defendant sat down together to discuss what had been happening. Defendant denied everything. After this meeting with S.S. and Defendant, S.S.'s mother filed a police report.

¶ 6 Defendant was indicted on one count of statutory rape and two counts of statutory sex offense occurring between 1 January 2017 and 1 August 2018, in 18 CRS 55715; one count of statutory sex offense occurring between 1 August 2018 and 31 August 2018, in 18 CRS 55716; one count of indecent liberties occurring between 1 January 2013 and 1 January 2014, in 18 CRS 55717; one count of indecent liberties occurring between 1 January 2014 and 1 January 2015, in 18 CRS 55718; one count of indecent liberties occurring between 1 January 2015 and 1 January 2016, in 18 CRS 55719; one count of indecent liberties occurring between 1 January 2016 and 1 January 2017, in 18 CRS 55720; and one count of incident liberties occurring between 1 January 2017 and 19 August 2018, in 18 CRS 55721. Defendant was brought to trial for these charges at the 5 April 2021, Criminal Session of Superior Court in Union County.

¶ 7 At the close of the State's evidence, the trial court dismissed the charges in 18 CRS 55718, 18 CRS 55719, and 18 CRS 55720 for lack of substantial evidence of those charges. The jury found Defendant guilty of statutory sex offense with a child less than 15 year of age by digital penetration in 18 CRS 55715—count II, indecent liberties in 18 CRS 55717, and indecent liberties in 18 CRS 55721. The jury found Defendant not guilty of statutory rape in 18 CRS 55715—count I, statutory sex offense by anal penetration in 18 CRS 55715—count III, and statutory sex offense in 18 CRS 55716.

¶ 8 Defendant was sentenced to a term of 276 months to 392 months in 18 CRS 55715—count II. Defendant was sentenced to 19 months to 32 months in 18 CRS 55717, to run consecutively with 18 CRS 55715. Defendant was sentenced to 19 months to 32 months in 18 CRS 55721, to run concurrently with 18 CRS 55717.

¶ 9 Defendant orally noticed appeal.

II. Analysis

¶ 10 Defendant makes five arguments on appeal: (1) the trial court erred in allowing the State to amend the indictment in 18 CRS 55715 to change the date range of the sexual act by digital penetration on S.S.; (2) the trial court erred in denying Defendant's motion for a mistrial; (3) the trial court erred in denying Defendant's motion to dismiss the charge of statutory sex offense in 18 CRS 55715; (4) the trial court erred in denying Defendant's motion to dismiss the charge of indecent liberties

with a child in 18 CRS 55717; and (5) the trial court erred in signing written judgments for the two indecent liberties convictions that did not reflect the sentence orally announced by the court.

A. Amended Indictment

¶ 11 Defendant first contends that the trial court erred in allowing the State to amend the indictment in 18 CRS 55715 during trial. Defendant asserts that when the State was allowed to amend the date of the alleged offense from having occurred between 1 January 2017 and 31 July 2018, to having occurred between 1 August 2018 and 20 August 2018, he was deprived of his ability to adequately present a defense.

¶ 12 We review a trial court's grant of the State's motion to amend an indictment *de novo*. *State v. Pierce*, 238 N.C. App. 141, 146, 766 S.E.2d 854, 858 (2014).

¶ 13 Pursuant to N.C. Gen. Stat. § 15A-924(a)(4), an indictment must contain "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." The failure to comply with this requirement is a subject matter jurisdictional error, "unless the failure is with regard to a matter as to which an amendment is allowable." N.C. Gen. Stat. § 15A-924(e) (2021).

¶ 14 "A change of date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment." *Pierce*, 238 N.C. App. at 146, 766 S.E.2d at 858. An amendment to the offense date in an indictment does not

substantially alter the charge if time is not an essential element of the crime. *Id.*

¶ 15 Our appellate courts have repeatedly held that, in child sex abuse cases, no exact or definite match is required between the offense dates alleged in the indictment and the offense dates proven at trial. *See State v. Blackmon*, 130 N.C. App. 692, 696, 507 S.E.2d 42, 45 (1998); *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). In *Wood*, our Supreme Court noted that "young children cannot be expected to be exact regarding times and dates[.] Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense." 311 N.C. at 742, 319 S.E.2d at 249.

¶ 16 In *State v. McGriff*, 151 N.C. App. 631, 566 S.E.2d 776 (2002), during trial for statutory rape and indecent liberties with a child, the State moved to amend the indictment to change the time from between 4 January 1999 and 27 January 1999, to between 1 December 1998 and 27 January 1999. *Id.* at 637, 566 S.E.2d at 780. Just as Defendant in this case, the defendant there objected, contending that the change would substantially prejudice his ability to prepare a defense. *Id.* We held that there was no error in the defendant's trial, noting that error as to a date or its omission in an indictment only exists if time is of the essence. *Id.* at 637-38, 566 S.E. 2d at 780.

¶ 17 Here, the State moved to amend the indictment in 18 CRS 55715 to change the

date range of the offense after S.S. testified. The original date of the offense as described in the first superseding indictment was between 1 January 2017 and 31 July 2018. However, during S.S.'s testimony, she stated that the conduct alleged in that indictment—that Defendant digitally, anally, and vaginally penetrated her—occurred the day before she reported Defendant's conduct to her family for the first time. Her mother called the police after S.S. told her what Defendant had done, and the police report indicates a date of 21 August 2018. The trial court granted the State's motion to amend the indictment to reflect this change in the date range of the offense**.**

¶ 18 In light of S.S.'s young age at the time the offense took place, we hold that leniency in reviewing the trial court's decision to allow a motion to amend the date of the occurrence is warranted here, as in *McGriff*. That is, we hold that the change of date permitted by the trial court did not amount to a substantial alteration in the charge set forth in the indictment. We also note that other charges against Defendant in this case implicated offenses that did take place during the 1 August 2018 to 20 August 2018, date range. Specifically, the indictment for one count of statutory sex offense in 18 CRS 55716 was for the date range of between 1 August 2018 to 31 August 2018, and the indictment for one count of incident liberties in 18 CRS 55721 was for the date range of 1 January 2017 to 19 August 2018. We therefore reject Defendant's argument that his ability to prepare an alibi or other defense was

impaired, as he was already on notice that the State was pursuing charges for offenses during the August 2018 time frame. Accordingly, the trial court did not err in allowing the State to amend the indictment.

B. Mistrial

¶ 19 Defendant next contends that the trial court erred in denying his motion for mistrial after a witness impermissibly testified about the United States Marshal's search for Defendant. We disagree.

¶ 20 "[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Dye*, 207 N.C. App. 473, 481, 700 S.E.2d 135, 140 (2010). We review a denial of a motion for mistrial for abuse of discretion. *Id.* at 482, 700 S.E.2d at 140. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

¶ 21 Before trial, Defendant moved to exclude any statements that would permit the jury to infer flight or refusal by Defendant to turn himself in as evidence of guilt. Specifically, Defendant wanted to exclude evidence or testimony that the United States Marshal was called in to assist with bringing Defendant into custody. The trial court granted Defendant's motion to prevent such evidence or testimony "in opening statements or through any other witness to the fact of flight or involvement

of the U.S. Marshal's service unless and until the State has made a proffer of proof or there is a factual basis under which I can make a more fully informed call."

¶ 22 During trial, on Defendant's cross examination of S.S.'s mother the following exchange occurred:

> Q: Okay. Have you ever posted about this case on Facebook before?
>
> A: Never.
>
> Q: You never posted pictures or information about Mr. Wingo being charged about this case on Facebook?
>
> A: No. I shared when the — when the U.S. Marshal was looking for him. I shared that.
>
> Q: On Facebook?
>
> A: On Facebook, yes. It was public, like, on the news. So, it was shared.

¶ 23 After this line of questioning, Defense counsel asked to make an offer of proof. Defendant objected to S.S.'s mother's testimony as violative of the trial court's pretrial ruling. The State argued that Defendant opened the door. The trial court ruled that the description of the involvement of the U.S. Marshal Service was not necessary in the answer to the question asked and struck the reference. Defendant then moved for a mistrial, which the trial court denied. After calling the jury back in, the trial court instructed it:

> Okay. Ladies and gentlemen, thank you for coming back. I think I brought you back a minute or two early. In any

> event, I'm instructing you not to consider the last witness's reference to the United States Marshal Service looking for the defendant. Are all of you able to hear that instruction?

¶ 24 Defendant argues that the trial court's curative instruction was insufficient to remedy the prejudicial effect of S.S.'s mother's statements. We disagree.

¶ 25 A trial court is in a superior position to an appellate court to be able to determine "whether the degree of influence on the jury is irreparable," and therefore the decision to deny or grant a mistrial is afforded great deference by our Court. *State v. Crump*, 273 N.C. App. 336, 339-40, 848 S.E.2d 501, 503 (2020). "Often, any potential prejudice is cured by the trial court's instruction to the jury to not consider the remark." *Id*.

¶ 26 Considering the trial court's instruction to the jury, as well as the striking of the offending statements, we hold that the denial of the motion for mistrial in this case was not an abuse of discretion.

C. Motion to Dismiss

¶ 27 At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court granted the motion to dismiss with respect to 18 CRS 55718, 18 CRS 55719, and 18 CRS 55720. The trial court denied the motion to dismiss with respect to 18 CRS 55715, statutory rape, statutory sex offense by digital penetration, and statutory sex offense by anal penetration, 18 CRS 55716, statutory sex offense, 18

CRS 55717, indecent liberties, and 18 CRS 55721, indecent liberties. The jury found Defendant not guilty of statutory rape and statutory sex offense by anal penetration in 18 CRS 55715—counts I and III. Defendant appeals the denial of his motion to dismiss the charge of statutory sex offense by digital penetration in 18 CRS 55715—count II, and the denial of his motion to dismiss the charge of indecent liberties in 18 CRS 55717.

¶ 28 "When ruling on a motion to dismiss, the trial court must decide 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." *State v. Wallace*, 179 N.C. App. 710, 718, 635 S.E.2d 455, 462 (2006). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Ware*, 188 N.C. App. 790, 794, 656 S.E.2d 662, 664 (2008). We review the trial court's denial of a motion to dismiss *de novo*. *State v. Houseright*, 220 N.C. App. 495, 497, 725 S.E.2d 445, 447 (2012).

1. Statutory Sex Offense

¶ 29 Defendant first argues that the trial court erred in denying his motion to dismiss the charge of statutory sex offense by digital penetration in 18 CRS 055715—count II.

¶ 30 N.C. Gen. Stat. § 14-27.30 makes it a crime for a defendant to engage "in a sexual act with another person who is 15 years of age or younger and the defendant

is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person."

¶ 31 S.S. testified that in August 2018, around three days prior to when she and her mother went to the police about Defendant's conduct, she woke up to Defendant putting his finger into her vagina. S.S. further testified that she was 14 when this took place. Defendant contends that S.S.'s testimony calls into question her credibility, specifically that she testified that she could not recall what she was wearing at the time, she did not call for help or ask Defendant to stop, and that she did not immediately tell anyone what happened.

¶ 32 However, despite Defendant's assertion, S.S. reported Defendant's conduct to her sister and her mother shortly after this conduct occurred. S.S. specifically told her mother that Defendant had touched her vagina. Her mother then filed a police report disclosing the abuse. S.S. recounted this specific instance of abuse in an interview with Treehouse Advocacy Center, which was recorded and played for the jury as corroborating testimony.

¶ 33 Defendant concedes the long-held principle that determinations of witness credibility are for the jury. *See State v. Daw*, 277 N.C. App. 240, 268-69, 2021-NCCOA-180 ("[W]e do not make credibility assessments as an appellate court."). However, he cites an exception carved out in our Supreme Court's decision in *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902, (1967). *Miller* stands for the proposition that

when the evidence presented is "inherently impossible or in conflict with indisputable physical facts or laws of nature," it is not sufficient to go to a jury. *Id*. at 731, 154 S.E.2d at 905. *Miller* is inapplicable here. There is nothing in S.S.'s testimony or the corroborating testimony about her assault that indicates inherent impossibility or irreconcilable conflict. S.S. was unequivocal in her testimony that Defendant placed his finger in her vagina. This evidence was sufficient to take the charge of statutory sex offense to the jury. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

2. Taking Indecent Liberties with a Child

¶ 34 Defendant next contends that the trial court erred in denying his motion to dismiss the charge of indecent liberties in 18 CRS 55717. The indictment for 18 CRS 55717 alleges indecent liberties committed between 1 January 2013 and 1 January 2014, when S.S. was nine years old.

¶ 35 A person is guilty of taking indecent liberties with a child:

> [I]f, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 for the purposes 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 of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (2015).

¶ 36 S.S. testified that the first time Defendant touched her in a way that made her feel uncomfortable was when she was nine years old. She had just returned home from school and was napping on a footstool in her family's living room when she woke up to Defendant putting his whole body on top of her. Both her and Defendant were fully clothed at the time. S.S. described feeling Defendant's penis on her butt and that it was "long and big." She testified it felt like somebody was putting pressure on her back. When S.S. woke up Defendant "tried to play it off like he was trying to wake me up to go get in my bed."

¶ 37 Defendant contends that S.S.'s uncorroborated testimony is insufficient to convict him for this charge, and that the act alleged does not have the required "sexual undertones." We disagree.

¶ 38 Our Supreme Court has held that "[t]he uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993).

¶ 39 Taking the evidence in the light most favorable to the State, Defendant's purpose in lying on top of S.S. can be inferred from the circumstances as described by S.S. Her description of his penis as "long and big" and feeling like someone was putting pressure on her back was sufficient evidence for the jury to infer that Defendant was in a state of sexual arousal.

¶ 40 While Defendant does not appear to contest this, the State also presented sufficient evidence that S.S. was under the age of 16 and that Defendant was at least 16 years of age and five years older than S.S. at the time of the inappropriate touching. Accordingly, the State presented sufficient evidence of each element of taking indecent liberties with a child. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

D. Written Judgment

¶ 41 Defendant's final contention is that the trial court erred in signing written judgments in the two convictions for taking indecent liberties with a child when the written judgments did not reflect the sentence announced in open court. We disagree.

¶ 42 In criminal cases, judgment is entered when sentence is pronounced. N.C. Gen. Stat. § 15A-101(4a) (2021). If the written judgment does not reflect the sentence as pronounced, the written judgment may be considered the result of clerical error and should be remanded for correction. *See State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11-12 (1971).

¶ 43 Here, the trial court orally pronounced, with respect to the indecent liberties convictions, "[t]he two indecent liberties offenses, while not consolidated into one judgment, the time imposed is to run concurrent." The written judgments reflect that Defendant was sentenced to a minimum of 19 months to a maximum of 32 months incarceration in 18 CRS 55717, and a minimum of 19 months to a maximum of 32

months incarceration in 18 CRS 55721. The sentence in 18 CRS 55721 is to run concurrent to the sentence in 18 CRS 55717. The written judgments are not at odds with the trial court's oral pronouncement.

III. Conclusion

¶ 44 For the reasons stated above, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).