NO. COA01-1327

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Anson County
No. 97 CRS 84

TIM KIRBY

Appeal by defendant from judgment entered 9 May 2001 by Judge C. Preston Cornelius in Anson County Superior Court. Heard in the Court of Appeals 1 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for the State.

Jon Arrowood for defendant-appellant.

BRYANT, Judge.

Defendant Tim Kirby was charged with first degree statutory rape of a female child under the age of thirteen. The State's evidence tended to show that the victim, who was twelve years old at the time of trial, lived with her grandmother, Minnie McIver. The victim knew defendant from the neighborhood. She also had seen defendant come by her grandmother's house and buy drugs from her uncle, Jerry McIver. On 29 December 1996, the victim went to the convenience store to buy a soda for her grandmother. Defendant followed the victim to the store and then back to her grandmother's

house.

Upon returning, the victim gave the soda to her grandmother and retreated to her room. The victim heard a strange noise at her bedroom window. When the victim went to the window, defendant pulled a ring off of her finger. The victim told her grandmother she was going outside to retrieve her ring. As she exited the house, defendant grabbed her arm and put his hand over her mouth. Defendant put his shirt on the ground and told the victim to lie down. The victim testified that defendant "unbuttoned my pants and pulled them on down. He got on top of me and took his private part out and he put it in me." The victim pointed to the midsection of her body between her legs to illustrate the area where defendant put his private part. When the prosecutor asked the victim if she and defendant had sex, she answered "Yes."

Minnie McIver stepped outside when the victim did not return from outside and saw defendant lying on top of her granddaughter. She observed that defendant and her granddaughter had their pants down and that her granddaughter's legs were spread open. Minnie McIver yelled and defendant ran away. That night, Jerry McIver stopped by his mother's house. Minnie McIver told her son that she caught defendant and her granddaughter having sex. Jerry McIver called the Department of Social Services the next day.

Detective Craig Bradshaw interviewed the victim on 2 January 1997. The victim told Detective Bradshaw that defendant offered her a blunt for sex, that they had sex on the ground in the backyard, and that her grandmother caught them. Detective Bradshaw

obtained a copy of defendant's birth certificate and found his date of birth to be 12 April 1977.

Defendant did not present any evidence. A jury found defendant guilty as charged. The trial court sentenced defendant to 269 to 332 months imprisonment. Defendant appeals.

I.

Defendant first contends the trial court erred by allowing into evidence testimony of Jerry McIver concerning defendant's involvement with marijuana. Defendant argues his marijuana use was not relevant and was inadmissible under N.C.G.S. § 8C-1, Rule 404(b). We disagree.

Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (2001). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2001). Rule 404(b) provides:

> Evidence 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. . . .

N.C.G.S. § 8C-1, Rule 404(b) (2001).

During direct examination of the victim's uncle, the following colloquy occurred:

> Q: Did Tim Kirby ever have an occasion to

visit the 809 Salisbury Street location?

A: Yes, he has.

Q: Tell us how it was he came to visit that location.

A: His girlfriend's - at the time - mama came up. It was in the summer time and we was drinking beer on mama's porch.

Q: Was there ever any exchange of drugs between you and Mr. Kirby?

A: I had marijuana from Mr. Kirby.

Q: Did you ever use it together?

A: Yes, I have.

Q: How many times would you estimate you saw

[DEFENSE COUNSEL]: I object to this line of questioning. I don't really see how it's relevant to what we're doing.

[PROSECUTOR]: I haven't finished my question.

THE COURT: Let me hear the question and I'll rule on it.

Q: The question is this: How many times would you estimate Mr. Kirby was at the 809 Salisbury Street residence?

Here, Jerry McIver's testimony that he and defendant had smoked marijuana showed that he knew defendant, that he could identify defendant, and that defendant was familiar with the victim's home. Furthermore, Jerry McIver's testimony corroborates the victim's testimony that defendant would come over to the house and buy drugs from her uncle. More importantly, defendant cannot show that he was prejudiced by this line of questioning since the victim testified earlier at trial without objection that she had

seen defendant buy drugs from her uncle. *See State v. Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 122 (1990) (holding that where evidence is admitted over objection but the same or similar evidence has been previously admitted without objection, the benefit of the objection is lost). Therefore, this assignment of error is overruled.

II.

Defendant also contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. Defendant argues the victim's testimony was insufficient to prove vaginal intercourse. We disagree.

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson,* 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King,* 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

Here, the victim testified defendant "took his private part out and he put it in me[]" and pointed to the midsection of her body between her legs to illustrate the area where defendant put his private part. Moreover, the victim testified that she and the defendant had sex. This evidence, when viewed in the light most favorable to the State, is sufficient to support a jury's finding that there was penetration. *See State v. Ashford,* 301 N.C. 512, 514, 272 S.E.2d 126, 127 (1980) (stating the testimony of complaining witness that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration of the witness' private parts by defendant). Accordingly, the trial court properly denied defendant's motion to dismiss the charge of first degree statutory rape.

No error.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).