NO. COA02-307

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Lenoir County
Nos. 00 CRS 5799
00 CRS 5800

CURTIS JEROME JONES

Appeal by defendant from judgments entered 24 October 2001 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

CAMPBELL, Judge.

Defendant was found guilty of attempted first degree statutory rape, statutory rape, and two counts of taking indecent liberties.

The State presented evidence tending to show that on 21 May 2000, two juveniles, C.S., born on 1 September 1985, and E.B., born on 26 December 1988, ran away from a group home in Kinston operated by Nova, Inc. C.S. testified that after the two of them received a ride from a man, they walked to a house where a man was standing outside. They asked the man, whom C.S. identified as defendant, for permission to use the bathroom. After they used the bathroom,

they smoked cigarettes and crack cocaine with defendant and another man named "Eric." The four of them subsequently went into a bedroom of the house. Defendant and E.B. undressed and had sexual intercourse. Eric and C.S. undressed and had vaginal intercourse. They subsequently switched partners and C.S. engaged in vaginal intercourse with defendant. The two girls left the house when defendant asked them to leave.

Defendant did not present any evidence.

Defendant presents four questions for review. For the following reasons, we answer the questions adversely to defendant.

First, defendant contends that the indictment charging defendant with the attempted statutory rape of E.B. is defective because it fails to allege all of the elements of the offense. The first count of the indictment in this case charged that defendant "did carnally know and abuse [E.B.], a child under the age of 13 years" in violation of N.C. Gen. Stat. § 14-27.2. A person is guilty of first degree statutory rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) (2001) if the defendant is at least twelve years old and is at least four years older than the victim, who must be a child under the age of thirteen years. Defendant challenges the indictment's failure to allege the elements of defendant's age and the difference between his age and that of E.B.

Our legislature has decreed that an indictment charging one with first degree rape is sufficient if it alleges the accused "unlawfully, willfully, and feloniously did carnally know and abuse" a named child under the age of 13. N.C. Gen. Stat. § 15-

144.1(b) (2001). Our Supreme Court has held that the failure of the short form indictment to state all of the elements does not render the indictment constitutionally infirm. *State v. Wallace*, 351 N.C. 481, 503-08, 528 S.E.2d 326, 340-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

Nonetheless, the indictment does charge the element of the defendant's age. The indictment also charged, with regard to the other counts in the single multiple-count indictment, that defendant was over sixteen years old and more than five years older than the victim, E.B., on the common date of the offenses, 21 May 2000. The indictment, viewed as a whole, thus by extrapolation charged that defendant was at least twelve years old and at least four years older than the victim within the wording of N.C. Gen. Stat. § 14-27.2(a)(1).

Defendant next contends that the court erred by admitting hearsay testimony as to the age of E.B., who did not testify. Regardless of the availability of the declarant to testify, records of regularly conducted activity, and declarations contained in those records, are admissible if the record is made at or near the time by, or with information transmitted by, a person with knowledge and if it is the regular practice of the entity to make the record. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2001). Here, Sharon Jones, a social worker with Nova, Inc., the corporate entity that operated the group home occupied by E.B. and C.S., testified that the group home keeps a file on each child. When the child is admitted to the home, a photograph is taken of the child and other

information is obtained about the child from the child's parent or guardian, including the child's date of birth. The home also obtains a copy of the birth certificate of the child and keeps it in the file. Based upon the foregoing foundation, we hold the court properly utilized the business records exception to admit evidence from the file as to the date of birth of E.B.

Moreover, we note that other evidence regarding the age of E.B. was admitted without objection. For instance, C.S. testified that E.B. was eleven years old at the time. Ms. Jones testified that E.B. was in the fifth grade of school. When evidence of similar import is admitted without objection, the benefit of the objection is lost. *State v. Morgan*, 315 N.C. 626, 641, 340 S.E.2d 84, 94 (1986).

Defendant next contends the evidence is insufficient to withstand his motion to dismiss. He argues there is no competent evidence to establish the ages of E.B. and defendant.

Regardless of competency, all evidence that is admitted is considered in ruling upon a motion to dismiss. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). The evidence is judged in the light most favorable to the State in determining whether there is substantial evidence of each element of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-67, 296 S.E.2d 649, 651-52 (1982). Ms. Jones and C.S. testified that E.B. was eleven years old. Detective Jeffrey Herring of the Lenoir County Sheriff's Department testified that defendant told him his date of birth was 16 October 1957, and at the time of defendant's arrest on

25 May 2000, defendant was 42 years old. The foregoing is substantial evidence that E.B. was under the age of thirteen and that defendant was over the age of sixteen and more than five years older than the victim.

Finally, defendant contends the court committed plain error by failing to instruct the jury that in order for defendant to be convicted of attempted statutory rape, defendant must have had the specific intent to engage in sexual intercourse with a person under the age of thirteen. He argues that because attempt has the element of specific intent, it must be shown that the defendant knew the victim was under the age of thirteen.

To show plain error, the defendant must demonstrate that the error had a probable impact on the jury's finding of guilt and that the error is so fundamental justice cannot have been done. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983). Ordinarily, an instruction must be given if it is a correct statement of the law and the instruction is supported by evidence. *State v. Rose,* 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). As defined by the Supreme Court in *State v. Griffin*, 319 N.C. 429, 434, 355 S.E.2d 474, 477 (1987), the elements of attempted statutory rape are: (1) the victim was less than thirteen years old; (2) the defendant is at least twelve years old and four years older than the victim; (3) the defendant intended to engage in sexual intercourse with the victim; and (4) the defendant committed an act that went beyond mere preparation but fell short of commission of intercourse. Nowhere in these elements is a

requirement that the defendant knew the victim was under the age of thirteen. Moreover, there is no evidence that defendant did not know E.B. was under the age of thirteen.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).