NO. COA09-576

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Person County
No. 08 CRS 441

LAWRENCE EDWARD CLAIBORNE

Appeal by defendant from judgment entered 27 January 2009 by Judge Donald W. Stephens in Person County Superior Court. Heard in the Court of Appeals 27 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Jon W. Myers for defendant.

BRYANT, Judge.

On 26 January 2009, defendant Lawrence Edward Claiborne was tried before a jury on charges of indecent liberties with a minor and first-degree sexual exploitation of a minor. Defendant moved to dismiss the first-degree sexual exploitation of a minor charge at the close of the State's evidence and again at the close of all evidence, contending that the State had failed to prove the element of live performance; the trial court denied these motions. On 27 January 2009, the jury found defendant guilty of first-degree sexual exploitation of a minor. The trial court sentenced defendant to an active sentence of seventy to ninety-three months

in prison. Defendant appeals. For the reasons discussed below, we find no error.

Facts

The evidence at trial tended to show the following. On 17 February 2007, T.H., then aged fourteen, was spending time with friends in Roxboro when she heard that her mother, G.H., was looking for her. Not wanting to go home, T.H. walked to a nearby convenience store and hid. Defendant, T.H.'s stepfather, later found her in the store and took her outside to his truck. When T.H. said she did not want to go home, defendant offered to rent her a hotel room. Defendant rented a room and took T.H. to it, saying he would leave her there and return home. T.H. got into bed immediately and turned off the lights. Instead of leaving, defendant then got into bed with his stepdaughter and began touching and rubbing against her. T.H. told defendant to stop and he complied. T.H. then asked defendant if her friend, S., could come to the hotel room. Defendant called S.'s mother and said there was an emergency. Defendant then drove to S.'s house and brought her back to the hotel room. Once S. was in the room, defendant repeatedly asked the girls to "do something" with each other and stated "I didn't get this room for no reason; y'all need to do something." Defendant also asked if he could join the girls if they "did something." The girls eventually fell asleep on the bed. The following morning at approximately 8:30 a.m., the girls were lying in bed while defendant sat in a chair across the room watching them. T.H. and S. began kissing and touching each other

in a sexual manner. When defendant came to the bed and touched T.H., the girls stopped what they were doing and defendant yelled at them "to go ahead and do something." The girls did not resume and left the hotel room with defendant shortly thereafter. The victim's mother, G.H., later became suspicious of the relationship between T.H. and defendant and asked T.H.'s guidance counselor at school to question her daughter. T.H. told the counselor what had occurred in the hotel room and later testified about other incidents of sexual contact between defendant and herself.

Defendant made five assignments of error but argues only one in his brief to this Court: the trial court erred in denying his motion to dismiss the first-degree sexual exploitation charge for insufficiency of the evidence. We find no error.

Analysis

It is well-established that

> [i]n ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. The trial court must examine the evidence in the light most favorable to the State, granting the State every reasonable inference to be drawn from the evidence.

State v. Call, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (internal citations omitted). On appeal, this Court must "review defendant's contentions in light of the foregoing principles." *Id.*

North Carolina General Statute section 14-190.16 provides, in pertinent part:

> A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:
>
> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16(a) (2009). The phrase "live performance" is not defined in the statute, but defendant offers the following definition: "actions by one or more individuals conducted in front of at least one person for that person's entertainment." Defendant contends that the evidence does not show a live performance occurred because he was an active participant in the encounter between T.H. and S. in the hotel room and, therefore, the encounter could not have been a performance for his entertainment. Defendant goes on to assert that "[i]t is impossible for an activity to take place in front of a person in a 'live performance' while the person is simultaneously engaged in that activity." Defendant's argument is without merit.

Defendant himself testified that he sat in a hotel room chair and watched the girls kiss and touch each other sexually; this was a live performance. That defendant hoped to participate in the encounter or even that he attempted to do so after watching the girls is irrelevant. Taken in the light most favorable to the State, this evidence fully supports the element of a live performance.

Defendant's brief also contains an argument that N.C.G.S. § 14-190.16 is unconstitutionally vague. Defendant did not make this constitutional argument in the trial court and did not assign error on this basis. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001).

NO ERROR.

Judges WYNN and MCGEE concur.

Report per Rule 30(e).