NO. COA11-630

NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Guilford County
No. 09 CRS 102492

BRIAN DANIEL BARKER

Appeal by Defendant from judgment entered 18 November 2010 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 9 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

J. Clark Fischer for Defendant.

STEPHENS, Judge.

On 5 April 2010, Defendant Brian Daniel Barker was indicted for using a computer to solicit an unlawful sex act with a child. The charge arose from Defendant's communications in an online chat room[1] with Detective Crystal Overcash of the Guilford

[1] "Chat rooms" are Internet services that permit real time

County Sheriff's Department, who was posing as a 13-year-old girl named "Amy." These "chats" continued over a seven-month period between June and December 2009 and largely focused on sex, although more benign topics were also discussed. Overcash, the only witness for the State, presented copious excerpts of the "chats" between Defendant and "Amy," which included discussions of, *inter alia*, kissing, masturbation, oral sex, and sexual positions. Defendant also sent "Amy" five Internet links to online pornographic videos, which they each watched and then discussed. On 28 December 2009, Defendant, who was 42 years old, suggested to "Amy" that the two meet the following day for lunch. The following day, Defendant and "Amy" continued to discuss a meeting. Ultimately, Defendant and "Amy" agreed to meet at a restaurant where Defendant was arrested.

At the close of the State's evidence, Defendant moved to dismiss for insufficiency of the evidence. The trial court denied the motion. Defendant elected not to present evidence and renewed his motion to dismiss, which the trial court again denied. On 18 November 2010, the jury found Defendant guilty of the charge and the trial court sentenced him to 13-16 months in

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dialogue between users by transmitting messages almost immediately between the users' computers or other devices. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851-52, 138 L. Ed. 2d 874, 885 (1997).

prison. The trial court suspended the sentence and placed Defendant on supervised probation for 36 months. Defendant appeals. We find no error.

Standard of Review

> We review a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine 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. Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . .

State v. Fraley, __ N.C. App. __, __, 688 S.E.2d 778, 783 (internal quotation marks, brackets and citations omitted), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). "[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Wright*, 127 N.C. App. 592, 597, 492 S.E.2d 365, 368 (1997), *disc. review denied*, 347 N.C. 584, 502 S.E.2d 616 (1998).

Discussion

Defendant's sole argument is that the trial court erred in denying his motions to dismiss because the State failed to present substantial evidence of his intent to commit a sex act with "Amy." Defendant contends his "chats" with "Amy" showed only that he planned "a social get-together with a person he had grown . . . to consider a friend." We are not persuaded.

> A person is guilty of solicitation of a child by a computer if . . . the person knowingly, with the intent to commit an unlawful sex act, entices [or] advises, . . ., by means of a computer . . . a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.

N.C. Gen. Stat. § 14-202.3(a) (2009). Intent is a mental attitude that must ordinarily be inferred from a defendant's acts and conduct, rather than proved by direct evidence. *Wright*, 127 N.C. App. at 597, 492 S.E.2d at 368.

We have carefully reviewed the evidence, including the numerous graphic sexual discussions between Defendant and "Amy," and Defendant's sending of pornographic video links to "Amy" for her to watch along with him and then discuss. On 28 December 2009, Defendant suggested the two meet and asked "Amy" what she wanted to do. When "Amy" was noncommittal, Defendant responded,

"Guess we'll sit in the car till [sic] you think of something" and later said they would kiss. The following day, when "Amy" asked Defendant if they were "gonna [sic] do wild stuff or something" when they met, Defendant laughed and responded, "Depends on what you call 'wild.'" "Amy" and Defendant also discussed being excited and nervous about meeting. We acknowledge that Defendant did not explicitly suggest a sex act with "Amy." However, in the context of the flirtation and heavy sexual innuendo of his substantial online interactions with "Amy," Defendant's "chats" constitute substantial evidence of his intent to commit a sexual act with her at their proposed meeting. Simply put, because in the light most favorable to the State, the jury here could draw a reasonable inference from the evidence that Defendant intended to commit a sex act with "Amy," the trial court properly denied his motion and sent the case to the jury. Accordingly, we find

NO ERROR.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).