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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-172

Filed: 6 December 2016

Forsyth County, Nos. 14 CRS 110, 54254

STATE OF NORTH CAROLINA

v.

DAVID OBADIAH CROSBY

Appeal by defendant from judgment entered 17 June 2015 by Judge Edwin G. Wilson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Anita LeVeaux, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

CALABRIA, Judge.

David Obadiah Crosby (“defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of three counts of indecent liberties with a child. The trial court denied defendant’s motion to dismiss one of two convictions of indecent liberties. We find no error.

On 22 April 2014, defendant went to the mall with Abby¹, Abby’s mother, and her brother. Defendant and Abby’s mother were dating and met at work where

¹ Pseudonym used to protect the identity of the minor. N.C.R. App P. Rule 3.1(b) (2016).

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Abby's mother was a waitress and defendant worked as a chef. Abby, her brother, and her mother all lived in a one bedroom apartment. Abby's mother slept in the bedroom and Abby and her brother each slept on one of two couches in the living room. Around midnight, Abby's mother picked up defendant from his friend's house, where he had been drinking. Abby's mother and defendant returned to the apartment and soon after Abby awoke to what she believed was an argument between defendant and Abby's mother, because defendant wanted to "fool around" and Abby's mother did not. However, defendant calmed down and eventually got into bed with Abby's mother. Abby was then able to fall back asleep.

Early in the morning on 23 April 2014, Abby woke up to defendant lying behind her on the couch bed ("couch") where she was sleeping. Defendant was rubbing the tips of his fingers down Abby's arms and fondling her body, over her clothes. At this time, Abby had on a shirt and shorts. Abby again fell back asleep and was awakened, after an unspecified time, with her shorts on the floor and defendant touching her skin with his fingertips, under her bra and bikini underwear into her vaginal area. Defendant continued to fondle her more deeply into the vaginal area, though not penetrating her vagina. Defendant asked Abby to turn around and look at him, which she refused. Instead, Abby told defendant that she had to use the bathroom. Abby went into the bathroom and because the bathroom did not lock, she pushed her feet against the door in order to hold it shut. Defendant followed Abby to the bathroom

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and tried to enter. Defendant told Abby that he had to use the bathroom and Abby told him to go outside.

When Abby exited the bathroom, defendant followed Abby and returned to her couch. Abby went into her mother's room and tried to awaken her mother, but was unsuccessful. Abby then went to the recliner because defendant was on her couch. Defendant, located across from Abby, began to masturbate. Abby testified that this occurred between 2:30 and 3:00 a.m., and described seeing defendant's hand move up and down on his penis, and then seeing a white runny liquid on her Barbie Bratz blanket. Abby tried to cover her face. When defendant finished, he rolled over and fell asleep.

Abby texted her mother from her Ipod Touch at 3:02 a.m., describing some of defendant's inappropriate behavior that night/early morning. Abby fell back asleep. Around 5:00 a.m., defendant awakened Abby by touching her upper thighs around her vaginal area. Abby kicked defendant's hand away. Abby was wearing her shorts and was still in the recliner, where she had fallen asleep. Abby fell back asleep and woke up late for school, rushed to get herself and her brother ready and then ran after the school bus.

When Abby arrived at school, she told her teacher that she needed to talk with someone about defendant's inappropriate behavior in the early morning. Abby spoke with her teacher, the assistant principal, and the guidance counselor. The guidance

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counselor called law enforcement and Abby's mother. Abby gave statements to the investigating officers and Fulton McSwain, an expert in the field of social work who specializes in helping children who have been sexually abused. Abby's blanket was taken by the SBI to be processed. However, defendant's DNA was not found on the blanket.

Defendant was charged with one count of sex offense with a child and two counts of indecent liberties on 23 April 2014. On 4 August 2014, defendant was indicted for one count of indecent liberties with a child (14 CRS 110), and two counts of indecent liberties with a child and one count of sexual offense with a child (14 CRS 54254), as a result of the events from 23 April 2014.

At the conclusion of the State's case, defendant made a motion to dismiss all the charges. The trial court only dismissed the charge of sex offense due to insufficiency of evidence. On 17 June 2015 the jury returned verdicts finding defendant guilty of three counts of indecent liberties with a child. After the jury returned its verdict, defendant renewed his motion to dismiss, contending that "two convictions for the same act are not permitted" according to the statute and case law, specifically arguing that one of the two convictions for indecent liberties in 14 CRS 54254 should be dismissed. On 17 June 2015, the trial court sentenced defendant to three consecutive active sentences of a minimum term of 19 months to a maximum

term of 32 months in the custody of the North Carolina Department of Adult Correction. Defendant appeals.

Defendant contends that the trial court erred in not dismissing one of the two charges of taking indecent liberties with a child in 14 CRS 54254. Specifically, defendant argues that the trial court erred in denying his motion to dismiss because both instances of touching occurred during a single encounter, and that there was insufficient evidence to prove that there were two separate instances of indecent liberties. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is 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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving

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the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)).

Pursuant to N.C. Gen. Stat. § 14-202.1(b), “[t]aking indecent liberties with [a] child[] is punishable as a Class F felony.” N.C. Gen. Stat. § 14-202.1(b) (2015). The essential elements of taking indecent liberties with a child are: (1) defendant is “16 years of age or [older] and at least five years older than the child in question,” and (2) defendant “[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[,]” or (3) “[w]illfully 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.” *Id.* § 14-202.1(a).

In the instant case, defendant argues that the acts alleged, other than the act of masturbation, can only support one additional conviction of indecent liberties with a child, rather than two separate convictions. Defendant does not contest the validity of his conviction for indecent liberties regarding the act of masturbation, nor does he deny the purpose of his acts. Specifically, defendant contends that “the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts.” *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). Defendant relies on *State v. Laney* and its assertion that “‘a

single act can support only one conviction.’ ” *State v. Laney*, 178 N.C. App. 337, 340, 631 S.E.2d 522, 524 (2006) (quoting *State v. Jones*, 172 N.C. App. 308, 315, 616 S.E.2d 15, 20 (2005)).

In *State v. Laney*, the defendant entered the room of the child, proceeded to her bed, and “touch[ed] the [child’s] breasts over her shirt.” *Id.* at 338, 631 S.E.2d at 523. “The [child] pushed [the] defendant’s hand away” but he continued and “put his hand under the waistband of her pants.” *Id.* “The [child] rolled over in . . . bed to stop [the] defendant” but he touched her “over her pants.” *Id.* The above described touching all occurred on the same morning at approximately the same time. *Id.* This Court found that only “one transaction [had] occurred” and that “[t]he sole act involved was touching—not two distinct sexual acts.” *Id.* at 341, 631 S.E.2d at 524. We noted that “there was no gap in time between [the] two incidents of touching, and the two acts combined were for the purpose of arousing or gratifying defendant’s sexual desire.” *Id.*

In the instant case, defendant contends that the touching of Abby’s vaginal area and the touching of her breast area were one singular act, rather than two distinct sexual acts. However, the State presented evidence that there were at least two distinct sexual acts, if not more. Abby awoke, sometime after midnight, because defendant was lying behind her on the couch, rubbing her upper breast area, her breasts, and the backside of her belly, over her clothes. Abby went back to sleep,

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wearing her bra, shirt, underwear, and shorts. Abby awoke again without her shorts on and defendant then fondled Abby with his fingertips, under her bra, underwear and into her vaginal area. Abby then told defendant she needed to use the bathroom, went to the bathroom, and attempted to hold the door shut and keep defendant out of the bathroom. Abby left the bathroom and attempted to wake up her mother. Abby went to the recliner upon refusing to return to the couch with defendant. Defendant then took his penis and began rubbing it up and down. Abby testified to seeing defendant's hand moving up and down and seeing a white runny liquid. Abby testified that she believed the act of masturbation occurred between 2:30 and 3:00 a.m. Abby texted her mother about everything that had happened. Abby again fell asleep. Abby awoke again at 5:00 a.m. to defendant touching her upper thighs, around her vaginal area; Abby had her shorts on at this time. Abby fell back asleep again, awaking at 7:55 a.m., late for school, and rushed around to get herself and her brother to school on time.

In viewing the evidence in the light most favorable to the State, the State presented substantial evidence not only of the indecent liberty offense of masturbation, but also two separate and distinct acts of taking indecent liberties with a child, touching Abby in her breast area, and touching Abby in her vaginal area. The State presented evidence as to breaks in time when defendant took separate and distinct indecent liberties. For the first act, defendant was lying on the couch with

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Abby, touching her with all of her clothes on. The second act occurred when Abby woke up because defendant was touching her into her vaginal area with her shorts off. For the third, defendant's uncontested masturbation occurred after Abby went into the bathroom and then to her mother's room. Finally, Abby awoke in the recliner with defendant touching her upper thigh and vaginal area. Thus, the State has adequately shown at least three separate and distinct indecent liberties taken by defendant, separated by gaps of time, making the instant case distinguishable from *State v. Laney*.

The trial court did not err in denying defendant's motion to dismiss one of the two counts of indecent liberties with a child in 14 CRS 54254.

NO ERROR.

Judges Davis and Tyson concur.

Report per Rule 30(e).