

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-759

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 99 CRS 37793, 54836

WESLEY OLIVER KING

Appeal by defendant from judgment dated 27 April 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Lisa S. Costner, P.A., by Lisa S. Costner, for defendant-appellant.

GREENE, Judge.

Wesley Oliver King (Defendant) appeals a judgment dated 27 April 2000 entered consistent with a jury verdict finding him guilty of taking indecent liberties with a child, N.C.G.S. § 14-202.1 (1999), and attempted statutory rape against a victim who was between thirteen and fifteen years old, N.C.G.S. § 14-27.7A(a) (1999).

The Forsyth County Grand Jury indicted Defendant on charges of statutory rape of a person who is thirteen, fourteen, or fifteen years old and of taking indecent liberties with a child. The State

presented evidence at trial tending to show the following: At 12:14 a.m. on 24 August 1999, Officer Christopher Fish (Officer Fish) responded to a suspicious vehicle report. Upon his arrival, Officer Fish observed a man who appeared to be nude in the back seat of the vehicle. The man, later identified as Defendant, had his arms down on the seat and his head up in the air. Defendant's eyes were closed, and "he was making thrusting motions back and forth with his hips." Defendant "appeared to be having what [Officer Fish] thought to be sexual intercourse."

After Officer Fish shined his flashlight into the rear window of the vehicle, the two occupants became aware of the officer's presence. Defendant sat down and started putting on some clothes. Officer Fish observed a young woman, later identified as the victim, lying on her back on the seat and was only wearing a shirt. Officer Fish instructed them to get dressed and get out of the vehicle. When he asked the victim for her age, she replied that she was twelve. Officer Fish placed the victim in the back of his patrol vehicle and then proceeded to speak with Defendant. Defendant initially identified himself as Bobby Brown and stated he was thirty-four years old. Officer Fish asked Defendant: "What were ya'll doing out here, having con[s]en[s]ual sex?" Defendant replied: "Yeah, that's what we were doing." When Officer Fish attempted to talk with the victim, "[s]he basically told [him] that [he] was interrupting their fun." Another officer contacted the victim's mother and was informed that the victim was fourteen years old.

Officer Fish arrested Defendant and transported him to the Forsyth County Detention Center. Defendant continued to identify himself as Bobby until Officer Fish asked the recipient of Defendant's telephone call, Defendant's mother, for Defendant's name. Detective Karen Watson (Detective Watson) recovered white panties with Mickey Mouse designs from the rear passenger side floorboard of the vehicle and a pair of Nike tennis shoes from the front passenger side floorboard. The victim's mother identified the panties and shoes as items which she had purchased for the victim. Defendant made a motion to dismiss the charge of statutory rape at the close of the State's evidence, which the trial court denied.

Defendant testified he and the victim were sitting in the vehicle's front seats when Officer Fish approached. He denied being unclothed or having any sexual contact with the victim, and he asserted he did not know the meaning of the word "con[s]en[s]ual" until later when he consulted a dictionary. The victim also testified she and Defendant were just sitting in the vehicle when the officer approached. She denied having sexual intercourse with Defendant and also denied telling Officer Fish that he "was interrupting their fun." The nurse who examined the victim at the hospital on the date in question testified she "could not say . . . with definitive evidence" that the victim had sexual contact with Defendant. She indicated it was "not normal to find physical evidence" in rape cases and stated "[t]here is little chance that you would have evidence in con[s]en[s]ual sex." The

nurse noted the victim was not wearing panties. During questioning by the nurse, the victim denied any sexual contact with Defendant.

Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court stated it would submit the indecent liberties with a child charge and a charge on the lesser-included offense of attempted statutory rape to the jury. Following the charge conference, the trial court submitted those charges to the jury. After the jury found Defendant guilty of attempted statutory rape and of indecent liberties with a child, the trial court consolidated the offenses for judgment and sentenced Defendant to a term of 192 to 240 months imprisonment.

The issue is whether the trial court erred in denying Defendant's motion to dismiss the statutory rape charge at the close of all the evidence.

Defendant contends the trial court erred in denying his motions to dismiss the statutory rape charge at the close of the State's evidence and at the close of all the evidence. In support of this contention, Defendant, in his brief, refers to his and the victim's denial of any sexual contact along with the lack of medical evidence showing that they had sexual intercourse. We are not persuaded by Defendant's argument.

In ruling upon a defendant's motion to dismiss, a trial court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference that can be drawn from the evidence presented. *State v. Davis*, 325 N.C. 693,

696, 386 S.E.2d 187, 189 (1989). "If there is substantial evidence--whether direct, circumstantial, or both--to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975).

The offense of statutory rape is committed by a "defendant engag[ing] in vaginal intercourse . . . with another person who is 13, 14, or 15 years old" with the defendant being "at least six years older than the [other] person." N.C.G.S. § 14-27.7A(a) (1999). In order to prove attempted statutory rape, the State must show "an overt act in partial execution of the crime which falls short of actual commission but which goes beyond mere preparation to commit." *State v. Chance*, 3 N.C. App. 459, 462, 165 S.E.2d 31, 32-33 (1969).

The evidence, viewed in the light most favorable to the State, established the following: Defendant was thirty-four years old on the date in question, and the victim was fourteen years old. Officer Fish observed Defendant in the back seat of the vehicle with his arms down on the seat and his head up in the air. Defendant, who was nude, "was making thrusting motions back and forth with his hips." The officer said Defendant "appeared to be having what [he] thought to be sexual intercourse." The victim was on her back in the back seat and only wearing a shirt. When the officer asked Defendant if they were having consensual sex, Defendant answered affirmatively. The victim complained that the

officer "was interrupting their fun." While the nurse who examined the victim "could not say . . . with definitive evidence" that the victim had sexual contact with Defendant, she indicated it was "not normal to find physical evidence" in rape cases and noted "[t]here is little chance that you would have evidence in con[s]en[s]ual sex." The nurse also observed that the victim was not wearing panties. The victim's mother identified the victim's panties which were recovered by Detective Watson from the vehicle. This evidence was sufficient to support the trial court's decision to deny Defendant's motion to dismiss the charge of statutory rape and to submit the attempted statutory rape charge to the jury. Defendant's assignment of error is therefore overruled.

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).