NO. COA05-1217

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

STATE OF NORTH CAROLINA

v. Randolph County
Nos. 02 CRS 11019
02 CRS 53703

JOSE OSCAR GONZALEZ-MURO,
Defendant.

Appeal by defendant from judgment entered 17 March 2005 by Judge Edwin G. Wilson, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 6 June 2006.

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

Brian Michael Aus for defendant-appellant.

GEER, Judge.

Defendant Jose Oscar Gonzalez-Muro appeals from convictions of first degree statutory sexual offense and taking indecent liberties with a child. On appeal, defendant principally argues that the trial court erred by denying his motion to dismiss the first degree statutory sexual offense charge for insufficient evidence, because, according to defendant, the State presented no evidence that he committed a "sexual act" upon the victim. We hold that the evidence, when viewed in the light most favorable to the State, as required by our standard of review, is sufficient to permit a jury to find that defendant penetrated the child digitally, and the

trial court, therefore, properly denied the motion to dismiss. We find defendant's remaining arguments likewise to be without merit and, consequently, hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence at trial tended to show the following facts. On 13 June 2002, "Matthew" and his wife, "Barbara," took their four-year-old daughter, "Tina", to the home of her babysitter, Vereanda Flores, as they had been doing regularly for approximately seven months.[1] When Barbara picked up Tina several hours later, she was crying and complaining of pain in her vaginal area.

Matthew suspected Tina was "dirty," and Barbara took Tina into the bathroom to give her a bath. There, Tina told Barbara that she had to urinate, but "wouldn't do it because she said it hurt." Tina reported that, while she was at Mrs. Flores' home, defendant, who was Mrs. Flores' husband, had taken Tina into a room, pulled her pants down, and "got her . . . part with his hands." Tina was pointing to her vaginal area while describing where defendant had "got[ten] her."

After Barbara told Matthew what Tina had said, they returned to Mrs. Flores' house to confront her. Mrs. Flores called defendant, who had since gone to work, and he returned home.

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[1]The pseudonyms Matthew, Barbara, and Tina, will be used throughout the opinion to protect the child's privacy.

Defendant denied the accusations, but, according to Matthew, acted "really nervous" and not "angry."

Matthew and Barbara went back home and took Tina, who was still crying and saying that her vaginal area hurt, to Randolph County Hospital. While there, Tina was examined by Dr. Michael Anthony Polito, whose examination included an assessment of Tina's genital area to find "any sign of penetration or injury." Dr. Polito found "a very small skin tear at the inferior border of the vagina, where the mucosa or mucosal part of the vagina meets the skin, very small, a couple of millimeters." Dr. Polito believed that the injury likely occurred within the past 24 hours and was consistent with Tina's complaints of sexual abuse.

Detective James Rex Briles, Jr. of the Asheboro City Police Department interviewed Tina. Upon the detective's arrival at the hospital, he noticed that "[i]t was obvious . . . that [Tina] had been crying." After interviewing Tina, Detective Briles spoke with defendant. Defendant said that he had been at home when Tina was there and had been watching television while Tina and several other children were sleeping on the floor. Defendant denied any wrongdoing and told Detective Briles he had never been in a bedroom alone with Tina. His wife, however, told Detective Briles that she had observed defendant exiting his bedroom with Tina.

On 2 December 2002, defendant was indicted for first degree statutory sexual offense with a child and taking indecent liberties with a child. On 17 March 2005, a jury convicted him of both charges. The trial court consolidated both charges for judgment

and entered a sentence in the mitigated range of 144 to 182 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends that the trial court erred by denying his motion to dismiss the charge of first degree statutory sexual offense. A motion to dismiss for insufficiency of the evidence should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal of the case, but, rather, are for the jury to resolve. *Id.*

A defendant is guilty of first degree statutory sexual offense if the defendant engages in a sexual act "[w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4(a)(1) (2005); *see also State v. Ludlum*, 303 N.C. 666, 667, 281 S.E.2d 159, 160 (1981) (conviction for first degree statutory sexual offense requires the State to prove: "(1) the defendant engaged in a 'sexual act,' (2) the victim was at the

time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim."). On appeal, defendant challenges only the sufficiency of the evidence to show that he performed a "sexual act."

A "sexual act" is defined as: "[C]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.1(4) (2005). The phrase "'penetration . . . by any object'" includes penetration by a finger. *State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981) (quoting N.C. Gen. Stat. § 14-27.1(4)). Defendant argues that the State presented no evidence that he actually penetrated Tina's vaginal opening.

Our Supreme Court has held that evidence a defendant entered the labia is sufficient to prove the element of penetration for a charge of rape. *State v. Johnson*, 317 N.C. 417, 434, 347 S.E.2d 7, 17 (1986), *superseded by statute on other grounds as stated by State v. Moore*, 335 N.C. 567, 440 S.E.2d 797, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174, 115 S. Ct. 253 (1994). This Court adopted this standard for showing penetration for statutory sexual offense cases in *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005), *appeal dismissed and disc. review denied*, 360 N.C. 290, 628 S.E.2d 384 (2006), where we concluded that when the victim testified that she had "felt the barrel of [defendant's] gun on the *inside* of her labia," the State had shown sufficient

evidence to support the penetration element of first degree statutory sexual offense. *Id.* at 657, 617 S.E.2d at 88.

At trial, Tina, then seven years old and testifying through a Spanish-speaking interpreter, was asked, "How much of [defendant's] hand went to your private place?" Tina responded that defendant put his hand "[u]p in here" while gesturing towards her genital area. Moreover, Dr. Polito testified that the small skin tear injury Tina suffered was located in "the *interior aspect* of the vagina." (Emphasis added.) The doctor went on to explain in greater detail that the torn tissue was inside the labia majora.

This evidence, which we are required to view in the light most favorable to the State, *Scott*, 356 N.C. at 596, 573 S.E.2d at 869, is sufficient under *Bellamy* to satisfy the State's burden of showing the penetration element of first degree statutory sexual offense. This assignment of error is, therefore, overruled.

II

Defendant next argues that the State's indictment charging him with first degree statutory sexual offense was fatally defective. First degree statutory sexual offense may properly be charged using a short-form indictment. *See State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, 121 S. Ct. 581 (2000). When the victim is under 13 years old, such an indictment need only "allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, nam[e] the child, and conclud[e] as aforesaid." N.C. Gen. Stat. § 15-144.2(b) (2005).

Here, the opening caption on defendant's indictment reads "Indictment First Degree Statutory Sexual Offense" and denotes it is an "Offense in Violation of G.S. 14-27.4(a)(1)." The body of the indictment goes on to state that:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [Tina], a child under the age of 13 years.

By tracking the language of N.C. Gen. Stat. § 15-144.2(b) and identifying the victim by name, the indictment "contains all the information necessary to charge defendant" with first degree statutory sexual offense by short-form indictment and, therefore, is legally sufficient. *State v. Dillard*, 90 N.C. App. 318, 320, 368 S.E.2d 442, 444 (1988).

Defendant nevertheless argues that his indictment was fatally defective because it did not include the phrase "by force and against the will of [the] victim," citing N.C. Gen. Stat. § 15-144.2(b). While the language sought by defendant constitutes an element of N.C. Gen. Stat. § 14-27.4(a)(2) (providing that first degree sexual offense involves a sexual act "[w]ith another person by force and against the will of the other person"), it is not an element of the charge at issue here: a sexual act "[w]ith a victim who is a child under the age of 13 years . . . ." N.C. Gen. Stat. § 14-27.4(a)(1). Since proof that defendant committed the offense "by force and against the will of [the] victim" was not required for conviction, the indictment was not required to include that

language. *See* N.C. Gen. Stat. § 15-155 (2005) ("No judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed *for the want of the averment of any matter unnecessary to be proved* . . . ." (emphasis added)). Indeed, in *State v. Daniels*, 164 N.C. App. 558, 565, 596 S.E.2d 256, 260-61, *disc. review denied*, 359 N.C. 71, 604 S.E.2d 918 (2004), this Court held that a short-form indictment using nearly identical language to the indictment at issue in this case was sufficient. This assignment of error is, therefore, overruled.

III

Finally, defendant contends that the trial court erred when it allowed Dr. Polito to testify that Tina's injuries were consistent with child sexual abuse. In *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam), our Supreme Court concluded that "the trial court should not admit expert opinion that sexual abuse has *in fact* occurred . . . absent physical evidence supporting a diagnosis of sexual abuse, [as] such testimony is an impermissible opinion regarding the victim's credibility." *Id.* at 266-67, 559 S.E.2d at 789. In so holding, our Supreme Court modified and affirmed the prior conclusion of this Court that the defendant had failed to establish plain error when the State's expert testified that, despite an absence of any physical abnormalities, "the child 'was sexually assaulted and [that there was] maltreatment, emotionally, physically and sexually.'" *State v. Stancil*, 146 N.C. App. 234, 238, 552 S.E.2d 212, 214 (2001) (alteration in original), *modified and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002).

Here, Dr. Polito testified that Tina's injury was "consistent with [her] complaint" that she had been sexually assaulted. When asked to explain, Dr. Polito testified: "Well, the child is stating that a finger was inserted in that area, that would be force to that area, *and there is evidence of some type of force or injury*." (Emphasis added.) Thus, unlike in *Stancil*, where there was no physical evidence supporting a diagnosis of sexual abuse, Dr. Polito was testifying that the physical evidence present was consistent with trauma such as described by the child. *Stancil* does not prohibit such testimony, and, accordingly, this assignment of error is overruled.

No error.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).