NO. COA05-1590

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Macon County
No. 03 CRS 1082; 1086

THOMAS JOSEPH CRAGHER,
Defendant.

Appeal by defendant from a judgment entered 19 November 2004 by Judge E. Penn Dameron, Jr. in Macon County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Celia Grasty Lata, for the State.

Mark Montgomery for defendant-appellant.

BRYANT, Judge.

A jury found Thomas Joseph Cragher (defendant) guilty as charged of first degree sex offense with a child. From a judgment entered 19 November 2004 imposing an active term of imprisonment of a minimum of 288 months and a maximum of 355 months, defendant appeals.

Facts

The State presented evidence tending to show that the prosecuting witness, a female child six years old at the time of trial, visited defendant's home on 18 April 2003, her birthday. The child testified that while they were alone in the living room

defendant touched her "privates." Defendant "stuck his finger under [her] panties" and pushed twice. Defendant hurt her and caused her to cry. The child's mother soon came and took her away. The child told her brother and mother about the incident. Her mother took her to the hospital later that day. She saw a doctor and told the doctor she had been hurt. She also talked to a law enforcement officer about what happened.

The child's mother testified she came to defendant's house to get her child. She observed that her child's pants were unbuttoned. She asked her child why they were unbuttoned. The child started to cry and said nothing had happened. Later that day the child told her that defendant touched her and put his finger in her "private." She took the child to the Angel Medical Center, where she met a law enforcement officer who talked to the child. A physician also examined the child.

Don Willis, juvenile investigator with the Macon County Sheriff's Department, testified he met the child and her mother at the Angel Medical Center on 18 April 2003. The child told him that defendant had touched her vagina and "put his fingers inside her."

Dr. Jennifer Brown, a pediatrician, testified she examined the child on 18 April 2003. The child told Dr. Brown that defendant had touched her in her vaginal area. The child demonstrated to her where defendant touched her by running her finger along her vagina. She examined the child and observed that her vaginal area was very red and tender. She noted a "notch" going partly through the hymen. Dr. Brown further testified that the redness and tenderness

indicated recent injury or trauma to the vagina and that the notch indicated a "penetrating injury."

Defendant's wife testified on defendant's behalf that the child came into her house on 18 April 2003 and asked to eat some fruit that was in a package she had received from her sister. She left the child sitting on a barstool at a bar separating the kitchen and living room while she went into her bedroom to change clothes. When she returned approximately three minutes later, the child was standing on the barstool. She removed the child from the barstool and seated her on the couch between herself and defendant. The child's mother came into the house, visibly upset with her daughter for being there. The child was upset because her mother was upset with her. The child never said anything about defendant touching her.

Defendant's two sons and their friend testified that at the time the child came into the house they were in a bedroom about twenty feet from the living room and that they never heard anything in the living room.

Defendant testified that he picked up a package shipped by his sister-in-law that contained a number of food items, including fruit. The child came into the house and his wife gave the child some of the fruit. He sat on a couch in the living room watching television. His wife and the child subsequently sat on the couch with him. The child's mother arrived and got her child. As the child was leaving, she told her mother, "Tom was messing with me." Defendant denied touching the child except on her cheek. Defendant

testified the nearest he came to the child was within two to three feet when she sat on the couch with him and his wife.

Defendant presents two issues on appeal: (I) whether the trial court erred in denying defendant's motion to dismiss, and (II) whether the trial court erred as a matter of law in referring to the complainant as a "victim" in its instructions to the jury.

I

Defendant first contends the court erred by denying his motion to dismiss for insufficient evidence. A motion to dismiss requires the court to determine whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). In deciding a motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "The trial court's function is to determine whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crimes charged." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). "If there is substantial evidence -- whether direct, circumstantial or both -- to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

The definition of first degree sexual offense as applicable to the indictment in this case is "engag[ing] in a sexual act . . . with 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); *State v. Manley*, 95 N.C. App. 213, 214, 381 S.E.2d 900, 900 (1989). A "sexual act" is defined in N.C. Gen. Stat. § 14-27.1(4) as "penetration, however slight, by any object into the genital or anal opening of another person's body." *State v. Jennings*, 333 N.C. 579, 642, 430 S.E.2d 188, 222, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Defendant argues the evidence is insufficient to establish that he penetrated the child's vagina with some object.

The child testified that defendant stuck his finger under her panties, touched her "private" and pushed twice, hurting her and causing her to cry. The pediatrician, Dr. Brown, who examined the child later that day testified that the child touched her vagina as she showed where defendant touched her. Dr. Brown also testified that the child's genital opening was very red and tender to the touch, and that there was a "notch," or "interruption," in her hymen. Dr. Brown testified that the redness and tenderness indicated recent injury to the vagina and that the notch is "consistent with penetrating injury."

We conclude that the foregoing evidence is substantial evidence to support a finding that defendant engaged in a sexual act with the child. We overrule this assignment of error.

II

By his remaining assignment of error, defendant contends the court "erred as a matter of law in instructing the jury that the complainant in this case was a 'victim.'" Defendant did not object to the court's instructions to the jury. Thus, in order to obtain appellate review of this issue, he must show that he is excepted from the requirement of making an objection at trial by some exception or rule of law. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Defendant has failed to make this showing. The case defendant cites, *State v. Perry*, 231 N.C. 467, 57 S.E.2d 774 (1950), predates the Rules of Appellate Procedure and does not hold that appellate review is mandated in the absence of an objection. Appellate review is nevertheless available "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). Defendant makes no such specific contention, however. This assignment of error is therefore not properly before this Court.

The assignments of error listed in the record on appeal but not brought forward and argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6); *State v. Smith*, 152 N.C. App. 514, 519, 568 S.E.2d 289, 293, *appeal dismissed and disc. rev. denied*, 356 N.C. 623, 575 S.E.2d 757 (2002).

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).