NO. COA06-766

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Forsyth County
No. 03-CRS-61612

PRESTON ADAMS-MACON DAVIS

Appeal by defendant from judgment entered 21 February 2006 by Judge Andy Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth L. Oxley, for the State.

Terry W. Alford for defendant-appellant.

MARTIN, Chief Judge.

Preston Adams-Macon Davis ("defendant") was convicted by a jury of attempting to take an indecent liberty with a child. The trial court sentenced defendant to an active prison term of 24 to 29 months. For the reasons stated below, we find no error.

At trial, the State put forth evidence to show that on 13 October 2003, S.N.D. was twelve years old. S.N.D. testified that on that date she was alone in her apartment while her mother, Revonia Holman, visited a friend across the street. She received a telephone call, and a man's voice was on the line. She had never before heard the voice. The man asked to speak with S.N.D.'s

mother concerning an offer to sell X-rated movies. S.N.D. indicated that there was no adult in the house. The man asked S.N.D. if she knew about "sucking dick and stuff" to which she replied she had "heard about it in school." The man asked S.N.D. for her address and how to get to her apartment. He told her not to tell her mother and then hung up the phone. The man called back to tell S.N.D. that he was on the road looking for her apartment. She told the man it was near a Carmike Movie Theater.

S.N.D. got off the phone and ran across the street to find her mother. While explaining what happened, S.N.D. and Ms. Holman observed a man, later identified as defendant, park a pickup truck and walk to Ms. Holman's apartment door. Ms. Holman testified that she saw defendant knock on her front door. Defendant was carrying a dark briefcase. Ms. Holman walked outside and approached defendant. Without revealing that she lived in the apartment, she asked defendant what he was selling. After a brief exchange in which he said he was selling insurance, defendant left the scene. Ms. Holman's friend wrote down defendant's license plate number. Ms. Holman called the police. Ms. Holman testified as to the content of notes taken as S.N.D. attempted to provide a verbatim recollection of the phone conversation with defendant. According to the notes, defendant ended the phone call saying: "Don't tell your mom that I'm coming because I want you to see this for yourself."

Officer Durry Gann testified that he responded to Ms. Holman's call. Officer Gann looked up the license plate number and found

the vehicle to be registered to defendant. Officer Gann and another officer drove to defendant's home and spoke with him. After initial denials, defendant admitted he made the telephone calls and drove to the apartment. Defendant told the officers he thought the individual on the telephone was fifteen and admitted he "knew better and it was all a mistake." He gave consent for the officers to search his residence and told the officers where to find his briefcase. The officers found an X-rated video inside the briefcase. Defendant stated that the video was his and that he used the tape to "hook up with women."

The trial court denied defendant's motion to dismiss made at the close of the State's evidence. The defendant did not present any evidence. Defendant renewed the motion to dismiss, which was denied.

Defendant first argues that the trial court committed reversible error in denying his motion in limine to prevent the State from showing a portion of the seized X-rated video. Defendant contends that any relevance that the video may have was substantially outweighed by the danger of unfair prejudice under Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (mandating the exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]") We reject defendant's argument.

A trial court's decision to exclude or allow evidence under Rule 403 will remain undisturbed on appeal absent an abuse of

discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). An abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993).

Defendant arrived at S.N.D.'s house with the video in his briefcase. S.N.D. recalled portions of her phone call with defendant that suggest that defendant planned to show her the video. In addition, defendant told the officers searching the home that he used the tape to help him "hook up with women." The video was highly probative to defendant's charge of attempting to take an indecent liberty with a child. The trial court has not abused its discretion as the probative value of the evidence substantially outweighs the danger of unfair prejudice.

Defendant next argues that the trial court erred in denying his motion to dismiss the charge at the close of the State's evidence and all of the evidence. A motion to dismiss is properly denied provided that there is substantial evidence of each essential element of the offense charged, or a lesser offense included therein, and of defendant being the perpetrator of such offense. *State v. Thaggard*, 168 N.C. App. 263, 280-81, 608 S.E.2d 774, 786 (2005) (citation omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *Id.* at 281, 608 S.E.2d at 786 (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). All evidence

must be considered in a light most favorable to the State. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Defendant was charged with and convicted of attempting to take an indecent liberty with a child. To prove the attempt of any crime, the State must show "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). To prove the substantive offense, taking indecent liberties with a minor, the State must show "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987); *see also* N.C. Gen. Stat. § 14-202.1 (2005).

In the present case, the State presented substantial evidence of each essential element of the offense charged. Defendant was thirty-five years old and S.N.D. was twelve on 13 October 2003. A reasonable mind could conclude that it was defendant's intent to take an indecent liberty with the child. In talking with S.N.D. on the phone, defendant discovered that there was no adult in her residence. He asked her if she knew about certain sex acts. He asked S.N.D. for her address and directions to her apartment.

Defendant later told officers that he thought S.N.D. was fifteen. Defendant took an overt act toward the commission of the offense when he arrived at S.N.D.'s apartment with an X-rated video. His phone conversation and the X-rated video both suggest that defendant arrived at S.N.D.'s apartment for the "purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-202.1 (1) (2005). Defendant's assignment of error is without merit.

No error.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).