NO. COA06-968

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v. Nash County
No. 04 CRS 003954

ANDY EDWARD FAIRCLOTHE

Appeal by Defendant from judgment dated 15 February 2006 by Judge Cy A. Grant in Superior Court, Nash County. Heard in the Court of Appeals 22 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Jennie W. Hauser, for the State.

John T. Hall for Defendant.

McGEE, Judge.

Andy Edward Fairclothe (Defendant) was charged with two counts of statutory rape, one count of first-degree sexual offense, and one count of taking indecent liberties with a child. The jury found Defendant not guilty of the charges of statutory rape and first-degree sexual offense and guilty of one count of taking indecent liberties with a child. The trial court sentenced Defendant in the presumptive range to a term of sixteen months to twenty months in prison. Defendant appeals.

L.J. testified she was ten years old at the time of trial. She knew Defendant because he had been a family friend, and two or

three years earlier had lived with her family for two months. L.J. testified that she had a "physical relationship" with Defendant on three occasions. On the first occasion, L.J. was alone with Defendant at Defendant's house when Defendant touched L.J. outside her clothing "on [her] chest and down between [her] legs." L.J. pushed Defendant's hands away and told him to stop, but Defendant continued to touch her for about thirty minutes.

L.J. testified that on a second occasion when she and Defendant were alone at Defendant's house, L.J. was in Defendant's bedroom watching cartoons. L.J. said Defendant came into the bedroom, took off his clothes, and got on top of her. Defendant took off L.J.'s clothes and penetrated her mouth and vagina with his penis. L.J. also testified that on a third occasion, while Defendant was living at L.J.'s house, Defendant grabbed her by the arm and took her to a bedroom. No one else was in the house at the time. Defendant took off L.J.'s clothes, duct-taped her to the bed, got on top of her, and penetrated her vagina with his penis.

L.J.'s father, D.J., testified that he had known Defendant for more than twenty years and that Defendant was approximately forty-two years old. D.J. testified he did not have cable television at his house and that in 2002 he let L.J. spend the night at Defendant's house on two or three occasions so she could watch cartoons. D.J. also testified that Defendant and Defendant's wife moved into D.J.'s house in 2003 for two to three months. On one occasion, D.J. and Defendant's wife took L.J.'s sister to the hospital and left L.J. alone with Defendant for two to three hours.

L.J.'s grandmother testified that she saw L.J. often in 2003. On one occasion in 2003, L.J. told her grandmother that she had been raped by Defendant.

Sonya Moultrie (Ms. Moultrie), a child protective service investigator with the Nash County Department of Social Services, testified that she spoke with Defendant in August 2003. Ms. Moultrie testified that Defendant said "he had used a rag to show [L.J.] how to clean herself. And that . . . [h]e told [L.J.] how to spread her lips apart to get the feces out."

Defendant testified on his own behalf at trial. Defendant testified that he had tried to show L.J. how to clean her anal-genital area on approximately three occasions. On one occasion, when Defendant and L.J. were alone, Defendant testified that L.J. "used the bathroom on herself" and he told her to lie down. Defendant got a wash rag and "cleaned her up." Defendant did not tell L.J.'s father about this incident.

I.

Defendant argues the trial court erred by denying his motion to dismiss the charge of taking indecent liberties with a child on the ground that the State presented insufficient evidence of an intent to arouse or satisfy a sexual desire. In order to withstand a motion to dismiss a charge of indecent liberties under N.C. Gen. Stat. § 14-202.1, the State must prove:

> (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). "The fifth element, that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Id.* at 105, 361 S.E.2d at 580.

On a motion to dismiss for insufficiency of the evidence, a trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). A trial court views the evidence in the light most favorable to the State, drawing all inferences in the State's favor. *Id.* at 584, 461 S.E.2d at 663. Our Court does not review the credibility of witnesses or the weight of the testimony. *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323, *cert. denied*, *Buckom v. North Carolina*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997).

In the present case, L.J. testified that the first time she had a "physical relationship" with Defendant was at Defendant's house. On that occasion, L.J. was alone with Defendant and Defendant touched L.J. outside her clothing "on [her] chest and down between [her] legs." L.J. pushed Defendant's hands away and told him to stop, but Defendant continued to touch her for about

thirty minutes. This evidence is sufficient to permit the inference that Defendant acted with the purpose of arousing or gratifying his sexual desires.

Moreover, Defendant testified that he had tried to show L.J. how to clean her anal-genital area on approximately three occasions. On one occasion, when Defendant and L.J. were alone, Defendant testified that L.J. "used the bathroom on herself" and he told her to lie down. Defendant got a wash rag and "cleaned her up." Defendant did not tell L.J.'s father about this incident. Defendant also told Ms. Moultrie that "he had used a rag to show [L.J.] how to clean herself. And that . . . [h]e told [L.J.] how to spread her lips apart to get the feces out." Under these circumstances, where Defendant used a rag on L.J.'s genital area while the two of them were alone and where Defendant did not tell L.J.'s father, the jury could have inferred that Defendant acted with the purpose of arousing or gratifying his sexual desires.

Furthermore, although the jury found Defendant not guilty of two counts of statutory rape and one count of first-degree sexual offense, L.J.'s testimony concerning the second and third "physical relationship" she had with Defendant was sufficient to establish the charge of indecent liberties. L.J. testified that on one occasion when she and Defendant were alone at Defendant's house, L.J. was in Defendant's bedroom watching cartoons. L.J. testified that Defendant came into the bedroom, took off his clothes, and got on top of her. L.J. further testified that Defendant took off her clothes. Although the jury could have rejected L.J.'s further

testimony that Defendant penetrated her with his penis, the jury could have accepted her other testimony as sufficient to infer Defendant's purpose was to arouse or gratify his sexual desires.

L.J. also testified that on another occasion, while Defendant was living at L.J.'s house, Defendant grabbed L.J. by the arm and took her to a bedroom. No one else was in the house at the time. Defendant took off L.J.'s clothes, duct-taped her to the bed, and got on top of L.J. Again, although the jury could have rejected L.J.'s further testimony that Defendant penetrated her with his penis, the other evidence was substantial evidence from which the jury could have inferred that Defendant acted with the purpose of arousing or gratifying his sexual desires. Accordingly, there was substantial evidence of the offense of indecent liberties, and the trial court did not err by denying Defendant's motion to dismiss.

II.

Defendant argues the trial court erred by sentencing him in the aggravated range without making any findings of aggravating factors. Defendant contends that because he was given a sentence that fell within both the presumptive and aggravated ranges, the trial court was required to make findings in aggravation. This argument has been repeatedly rejected by this Court, and is therefore without merit. *See State v. Allah*, 168 N.C. App. 190, 197-98, 607 S.E.2d 311, 316-17 (citing *State v. Ramirez*, 156 N.C. App. 249, 576 S.E.2d 714, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, *Ramirez v. North Carolina*, 540 U.S. 991, 157 L. Ed. 2d 388 (2003)), *disc. review denied*, 359 N.C. 636, 618

S.E.2d 232 (2005) (holding that the trial court did not err by giving the defendant a sentence that fell within both the presumptive and aggravated ranges without making findings of aggravating factors).

III.

Defendant argues the trial court erred by entering judgment on the jury's verdict of guilty of taking indecent liberties with a child because the statute was unconstitutionally applied to Defendant. Defendant first argues the indictment was insufficient because it did not specify the location or nature of the acts that were alleged to violate the statute. However, because Defendant failed to raise any constitutional objection to the indictment at trial, we do not address this argument. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (recognizing that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). Nevertheless, even assuming *arguendo* that Defendant preserved this challenge to the indictment, our Court has repeatedly upheld the constitutionality of short form indictments for the charge of taking indecent liberties with a child. *See State v. Miller*, 137 N.C. App. 450, 457, 528 S.E.2d 626, 630 (2000) (citing *State v. Blackmon*, 130 N.C. App. 692, 507 S.E.2d 42, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998)) (recognizing that an indictment which charges a violation of N.C.G.S. § 14-202.1 by using the statutory language is sufficient and does not need to allege the evidentiary basis for the charge). Therefore, we hold the trial court did not

err.

Defendant also argues the jury's verdict of guilty of taking indecent liberties with a child was fatally defective because it was ambiguous. Defendant argues the jury verdict was not unanimous because the verdict sheet "fail[ed] to indicate at what time or at what date or at what place such an offense may have taken place." However, our Supreme Court recently revisited this issue in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). Our Supreme Court recognized that "[u]nlike a drug trafficking statute, which may list possession and transportation, entirely distinct criminal offenses, in the disjunctive, the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties.'" *Id.* at 374, 627 S.E.2d at 612. "Thus, 'even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, "the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.'"'" *Id.* (quoting *State v. Lyons*, 330 N.C. 298, 305-06, 412 S.E.2d 308, 313 (1991) (quoting *State v. Hartness*, 326 N.C. 561, 565, 391 S.E.2d 177, 179 (1990))). Our Supreme Court held: "Under *Hartness* and *Lyons*, a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613.

Lawrence, *Lyons*, and *Hartness* are indistinguishable from the present case. Therefore, the jury's verdict was not ambiguous and was unanimous even though the jurors may have relied on different acts to convict Defendant of one count of taking indecent liberties with a child. We overrule this assignment of error.

No error.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).