NO. COA07-259

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

PAUL DAVID VISINGARD,
Defendant.

Gaston County
Nos. 05 CRS 18412
05 CRS 50251
05 CRS 50253
05 CRS 50254

Appeal by defendant from judgments entered 11 May 2006 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 13 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Paul David Visingard appeals from his convictions of attempted first degree rape of a child, first degree sexual offense, taking indecent liberties with a child, and contributing to the delinquency of a juvenile.[1] On appeal, defendant advances the same argument as to each of the challenged convictions: that the trial court erred in denying his motion to dismiss each charge because the evidence in general, and the alleged victim's

[1]Defendant has specifically abandoned his assignment of error regarding his conviction of contributing to the delinquency of a juvenile.

"uncorroborated testimony" in particular, is insufficient to establish every element of each offense. Our review of the record, however, indicates that substantial evidence does exist to support defendant's convictions, and, therefore, the trial court properly denied defendant's motion to dismiss.

Facts

At trial, the State's evidence tended to show the following facts. "Betty," the alleged victim in this case, was born in 1992.[2] Defendant is Betty's mother's cousin's husband. Betty testified that she has known defendant since she was three or four years old, and she viewed him as a father figure and part of her family.

Defendant began engaging in sexual conduct with Betty when she was approximately 11 years old. On one occasion, she was staying with him at his home to help him watch his children. It was late at night, and she and defendant were the only two people still awake. She was lying on the couch, still in her clothes, trying to go to sleep. Defendant approached Betty, held her hands down on the couch with his knees, and pulled down her jeans. Although Betty told him to stop, he did not. Defendant inserted his penis in Betty's vagina and began "going real fast." While this was occurring, defendant's defibrillator went off, and he had to go to the hospital.

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[2]The pseudonyms "Betty" and, for a minor witness, "Andy," will be used throughout the opinion to protect the children's privacy and for ease of reading.

On another occasion, when defendant's wife was out of the house, defendant pushed Betty onto his bed. He then got on top of her, trying to grab her hands and pin her down, but she was able to hit back at him. As they struggled, defendant's wife returned home, and defendant stopped.

On a third occasion, defendant, his four-year-old daughter, and Betty were watching a movie in defendant's bedroom. During the movie, he moved close to Betty and asked her to "do it" with him one last time for $20.00. When Betty refused, defendant threw a shoe at her and dropped her off at her grandmother's house at 4:30 in the morning.

Sometime in July 2004, defendant picked up Betty and her friend, "Andy," a boy who was 11 years old, and took them back to defendant's house. On the way, defendant stopped to purchase wine coolers and vodka. Later that night, after the rest of the household was asleep, defendant came into the bedroom where Betty and Andy were still up talking. He gave the two children wine coolers and, after they became intoxicated, persuaded them to kiss while he watched. He then had Andy suck on one of Betty's breasts while he sucked on the other.

The final incident occurred on Thanksgiving, 25 November 2004. Betty spent the holiday with defendant's family because her mother was out of town. Sometime that evening, defendant pushed Betty onto a bed, pulled her pants down, and digitally penetrated her vagina. After that, defendant also inserted his penis into her anus. According to Betty, defendant wanted her to "suck his

thing," but she refused. Afterward, Betty asked defendant to take her to her grandmother's house. She told her grandmother and aunt what had happened, and her mother contacted the police when she returned home.

Betty was taken to Cleveland Regional Medical Center where she was examined on 1 December 2004 by an emergency room doctor, Dr. Darlene Toscano. Dr. Toscano interviewed Betty and recorded Betty's recollection of what occurred in her notes. Dr. Toscano found no physical evidence of vaginal or rectal tearing or bruising, but noted that the lack of findings was not necessarily inconsistent with Betty's report given the time frame involved.

On 6 June 2005, defendant was indicted for first degree statutory sexual offense (alleged to have occurred on 25 November 2004), indecent liberties with a child (alleged to have occurred between 1 July 2004 and 1 August 2004), contributing to the delinquency of a minor (with Andy identified as the minor and an offense date of 1 July 2004 to 1 August 2004), and a crime against nature (alleged to have occurred on 25 November 2004). On 17 October 2005, defendant was also indicted for first degree statutory rape and first degree statutory sexual offense (each alleged to have occurred on 25 November 2004).

On 18 May 2006, a jury returned verdicts convicting defendant of first degree sexual offense (by digital penetration on 25 November 2004), attempted first degree rape of a child (on 25 November 2004), taking indecent liberties with a child (on or about 1 July 2004 until 1 August 2004), and contributing to the

delinquency of a juvenile, Andy. The jury found defendant not guilty of both first degree sexual offense by anal intercourse and a crime against nature. The trial court sentenced defendant to a term of 240 to 297 months imprisonment for the first degree sexual offense conviction and a concurrent term of 157 to 198 months imprisonment for the attempted first degree rape conviction. The trial court consolidated the convictions of indecent liberties and contributing to the delinquency of a juvenile and sentenced defendant to a term of 16 to 20 months imprisonment to be served consecutive to the first degree sexual offense sentence. Defendant timely appealed to this Court.

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to dismiss. A defendant's motion to dismiss should be denied if there is substantial evidence of each essential element of the offense charged and 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 it the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal, but rather are for the jury to resolve. *Id.*

Attempted Rape

Under N.C. Gen. Stat. § 14-27.2(a)(1) (2007), a person is guilty of rape in the first degree if the person engages in vaginal intercourse with a child under the age of 13 and the defendant is at least 12 years old and at least four years older than the victim. In this case, in response to defendant's motion to dismiss, the State acknowledged that the evidence might not be sufficient to establish vaginal penetration and, therefore, asked that the charge be submitted to the jury as attempted first degree rape of a child. *See State v. Sines*, 158 N.C. App. 79, 83-84, 579 S.E.2d 895, 899 ("A conviction for an attempt or incomplete crime can be based upon an indictment that charges a defendant with the completed crime."), *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003). "In order to prove an 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." *Id.* at 85, 579 S.E.2d at 899 (internal quotation marks omitted).

Defendant argues with respect to the charge of attempted first degree rape that the State failed to present sufficient evidence that defendant intended to engage in vaginal intercourse or made an overt act in an attempt to engage in vaginal intercourse. In making this argument, defendant has addressed only Betty's testimony.

At trial, however, the State also called Dr. Toscano to testify about her examination of Betty. During the course of Dr. Toscano's testimony, the court admitted, without any objection, the

medical records relating to that examination. Dr. Toscano then read to the jury, again without objection, her notes regarding what Betty told her had happened on Thanksgiving: "[O]n Thanksgiving night [defendant] came into her room, held her down, and tried to have sexual intercourse with her. She states that he put his penis in her but only just a little. She states that he also tried to put it in her bottom but she would not let him."

Defendant neither objected to the admission of this testimony nor requested a limiting instruction that the jury consider it for corroborative purposes only. This evidence, therefore, constitutes substantive evidence that may be considered in connection with defendant's motion to dismiss. *See State v. Goforth*, 170 N.C. App. 584, 588, 614 S.E.2d 313, 316 (holding that nurse's "testimony was admissible as corroborative and substantive evidence because defendant did not object to her testimony or request a limiting instruction"), *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005).

The medical records and Dr. Toscano's testimony were sufficient to support the charge of attempted first degree rape since a jury may view the reference to "sexual intercourse" as indicating vaginal penetration. *See State v. Ashford*, 301 N.C. 512, 514, 272 S.E.2d 126, 127 (1980) ("The prosecutrix's testimony here that defendant had 'sex' and 'intercourse' with her likewise was sufficient to support a finding by the jury that there was penetration."); *State v. Kitchengs*, __ N.C. App. __, __, 645 S.E.2d 166, 171-72 (holding that evidence of vaginal penetration was sufficient when victim testified that defendant helped take off her

clothes, she was laying down, defendant "'took his thing out,'" and they "'had sex'"), *disc. review denied*, 361 N.C. 572, 651 S.E.2d 370 (2007). The trial court, therefore, properly denied the motion to dismiss the charge of attempted first degree rape.

First Degree Sexual Offense

The jury also convicted defendant of first degree sexual offense by digital vaginal penetration. Under N.C. Gen. Stat. § 14-27.4(a)(1) (2007), "[a] person is guilty of a sexual offense in the first degree if the person 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 . . . ." The term "sexual act" is defined to include, among other acts, "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) (2007). Our Supreme Court has held that digital penetration amounts to a "sexual act" for purposes of § 14-27.1(4). *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981).

Defendant argues that the State's evidence, including Betty's testimony, was insufficient to support a finding of digital vaginal penetration. Analogizing to *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), in which the Supreme Court held that the alleged victim's testimony that the "defendant 'put his penis in the back of me'" was insufficient evidence of first degree sexual offense, *id.* at 90, 352 S.E.2d at 427, defendant contends that Betty's

testimony is "overly contradictory, ambiguous, lacking in corroboration, and too vague to support his conviction."

On direct examination, the following exchange occurred between the prosecutor and Betty regarding the incident on 25 November 2004:

> Q. Did [defendant] touch you in any other way besides putting [his penis] inside you, do you remember?
>
> A. No.
>
> Q. What about his hand?
>
> . . . .
>
> A. He stuck his fingers in me.
>
> Q. What part of you?
>
> A. My vagina.
>
> Q. How far in?
>
> A. All the way.

Similarly, on cross-examination, Betty unequivocally answered "Yes" when asked whether "at some point . . . [defendant] stuck his fingers in your vagina?"

Contrary to the ambiguous statement in *Hicks* — from which no one could determine precisely what occurred — Betty's testimony is sufficient to permit a jury to find that defendant digitally penetrated her. Although defendant argues that the evidence was insufficient because of ambiguities and contradictions in aspects of Betty's testimony and because of the lack of corroborating physical evidence, it is "well-settled that the testimony of a single witness is adequate to withstand a motion to dismiss when

that witness has testified as to all the required elements of the crimes at issue." *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 914 (2006). "The credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Begley*, 72 N.C. App. 37, 43, 323 S.E.2d 56, 60 (1984).

Here, Betty's testimony was not inherently incredible; nor did her testimony conflict with any physical conditions. Thus, any inconsistencies or ambiguities in that testimony were for the jury to assess. The trial court, therefore, properly denied defendant's motion to dismiss the charge of first degree sexual offense.

Indecent Liberties

Defendant was convicted of taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1 (2007) for acts allegedly committed between 1 July 2004 and 1 August 2004. To obtain a conviction for indecent liberties, this Court has held that the State is required to prove the following elements: "(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. Thaggard*, 168 N.C. App. 263, 282, 608 S.E.2d 774, 787 (2005). Defendant contends that "[t]here

was no direct evidence that he acted for the purpose of 'arousing or gratifying sexual desire.'"

In *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987), our Supreme Court observed that "[t]he 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." Likewise, in *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981), we explained that "[a] defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference."

The State's evidence indicated that sometime during the period stated in the indictment, 1 July 2004 to 1 August 2004, defendant pinned Betty down on a couch and tried to have sex with her. *See State v. Hewett*, 93 N.C. App. 1, 12, 376 S.E.2d 467, 474 (1989) ("The children's testimony showed that defendant raped each of them . . . and this same evidence, therefore, supported a finding that he had taken indecent liberties with them."). Also during this period, defendant persuaded Betty and Andy to kiss while he watched, and defendant then had Andy suck on one of Betty's breasts while he sucked on the other. The inherently sexual nature of these acts — especially in the context of defendant's ongoing sexual behavior towards Betty — is sufficient to give rise to an inference that defendant was acting either to arouse or gratify sexual desire. *See Campbell*, 51 N.C. App. at 421, 276 S.E.2d at 729 (holding that motion to dismiss was proper when acts "were of a sexual nature and were performed at his request"). Indeed,

defendant has proposed no innocent, non-sexual, explanation for the acts.

The lack of any non-sexual interpretation of the acts distinguishes this appeal from the two decisions relied upon by defendant: *State v. Stanford*, 169 N.C. App. 214, 609 S.E.2d 468, *appeal dismissed and disc. review denied*, 359 N.C. 642, 617 S.E.2d 657 (2005), and *State v. Brown*, 162 N.C. App. 333, 590 S.E.2d 433 (2004). In *Stanford*, 169 N.C. App. at 217, 609 S.E.2d at 470, this Court held that the victim's testimony that the "defendant's hand 'brush[ed] against' [her] breast" indicated an "accidental encounter" in the absence of some evidence that the contact was "for some purpose of arousal." In *Brown*, 162 N.C. App. at 338, 590 S.E.2d at 436-37, the Court held that evidence of telephone conversations between the defendant and the alleged minor victim was insufficient to survive a motion to dismiss because, although the calls were socially inappropriate, "the conversations were neither sexually graphic and explicit nor were they accompanied by other actions tending to show defendant's purpose was sexually motivated."

The testimony in this case, if believed, shows that defendant engaged in explicitly sexual acts, which, by their nature, would permit a jury to conclude that they were committed for the purpose of arousing or gratifying defendant's sexual desire. With respect to the incident involving Andy, further evidence of defendant's intent exists in that defendant apparently planned the event — buying wine coolers in advance — and then waited until late at

night when no one else was awake to use the wine coolers to induce the children to do as he asked. Thus, we are not confronted with the ambiguous conduct present in both *Stanford* and *Brown*, but rather have sufficient evidence of defendant's intent to support his conviction. *See, e.g.*, *State v. Hammett*, 182 N.C. App. 316, 322-23, 642 S.E.2d 454, 459 (jury could find that defendant's actions in telling child to kiss him like she loved him while "french kissing" her were intended to arouse sexual desire in defendant), *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007); *State v. Fuller*, 166 N.C. App. 548, 557, 603 S.E.2d 569, 576 (2004) (finding sufficient evidence of purpose to gratify sexual desire based on victim's testimony that defendant kissed her breasts and private area and digitally penetrated her); *State v. Bruce*, 90 N.C. App. 547, 551, 369 S.E.2d 95, 98 (finding sufficient evidence of intent when defendant locked door and began rubbing victim's breasts under her shirt, but stopped when victim's brother arrived), *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988).

Defendant additionally contends that Betty's uncorroborated testimony was insufficient to withstand his motion to dismiss. Our Supreme Court has, however, specifically held: "The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993). Moreover, Betty's testimony was not uncorroborated. Andy testified that "[defendant] told [Betty] to lift up her shirt, and

he told me to suck on her titty. And then when I started sucking on her titty, he started sucking on her other titty." We see no basis for removing the question of Betty's and Andy's credibility from the jury. The trial court, therefore, properly denied defendant's motion to dismiss.

No error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).