NO. COA08-240

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 06 CRS 36461
06 CRS 57682

GARY LEE WAGNER

Appeal by defendant from judgment entered 24 July 2007 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 8 December 2008.

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

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments entered 24 July 2007 after a jury found defendant guilty of a statutory sex offense, taking indecent liberties with a child, and contributing to the delinquency of a minor. For the reasons stated below, we hold no error.

Defendant was initially indicted for statutory rape, taking indecent liberties with a child, contributing to the delinquency of a juvenile, and two counts of statutory sex offense. Defendant was subsequently indicted for offering bribes, intimidating or interfering with a witness, and felony conspiracy to intimidate or

interfere with a witness. On the State's motion, the trial court joined for trial these two groups of offenses.

The evidence presented at trial tends to show that on 16 June 2006, two fourteen-year-old girls, C.B. and E.H., went to a home for the purpose of babysitting. Defendant was present in the home when the girls arrived. As defendant departed with the other adults who were in the residence at the time, he asked the girls whether they wanted to "party." Defendant subsequently returned with a bottle of vodka. He served cups of vodka to C.B., who drank them and became intoxicated to the point she could not stand or walk. Defendant carried C.B. upstairs to a bedroom. C.B. testified that defendant removed her pants and his shorts, inserted his penis into C.B.'s mouth, and attempted to penetrate her vagina with his penis.

After defendant had been gone for about twenty minutes, E.H. walked upstairs to check on C.B. Defendant, adjusting his belt, passed E.H. as she walked up the stairs. E.H. found C.B. lying in the bed unconscious and naked from the waist down.

E.H.'s mother and her fiancé arrived at the residence just as defendant was leaving. E.H.'s mother cleaned vomit out of C.B.'s mouth and directed her fiancé to call an ambulance.

C.B. was treated at a hospital for alcohol intoxication. Her blood alcohol count was 248.4 milligrams per deciliter. Semen retrieved from C.B.'s mouth and underwear matched defendant's DNA.

The State also presented evidence of still photos extracted from a surveillance camera of the Alcoholic Beverage Control Store

in Kernersville which showed defendant purchasing a bottle of vodka in the store on 16 June 2006. A law enforcement officer retrieved an empty bottle of vodka and a receipt issued by the Triad ABC Board out of the trash can in the residence. The officer also retrieved a receipt showing purchase of the bottle of vodka.

Defendant's girlfriend testified that she and defendant had sexual intercourse on the bed in question during the prior evening and again the morning of 16 June 2006. Defendant did not wear a condom during sex and both defendant and his girlfriend cleaned semen off of themselves.

Prior to trial the prosecutor made a motion to join charges of bribery and tampering with a witness with the charges arising out of the 16 June 2006 events. The prosecutor stated that the evidence would show that E.H. received a call from defendant during Christmas break in 2006 in which he offered to pay C.B.'s family $10,000 if they would testify that nothing happened. Defendant asked her how he could get in contact with C.B.'s mother. C.B.'s mother received a call from defendant offering to pay $10,000 if C.B. would testify to lack of memory of what happened. Defendant offered to pay $2,500 up front. C.B.'s mother subsequently met defendant's mother, who handed her an envelope containing $2,500. Finding the charged offenses were all related to or part of a common scheme, the court in its discretion allowed the motion for joinder.

At the close of the State's evidence, the trial court dismissed the charges of offering a bribe, intimidating or

interfering with a witness, and felony conspiracy to intimidate and interfere with a witness. At the close of all the evidence, the jury found defendant not guilty on the charge of statutory rape and one count of statutory sexual offense, but guilty of taking indecent liberties with a child, contributing to the delinquency of a juvenile, and one count of statutory sexual offense. Defendant appeals.

The sole issue before this Court is whether the trial court erred by joining for trial the charges of bribery, intimidating or interfering with a witness, and felony conspiracy to intimidate and interfere with a witness with the charges of statutory rape, statutory sexual offense, taking indecent liberties with a child, and contributing to the delinquency of a juvenile.

"Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2007). Stated another way, some "transactional connection" between separate offenses must be present in order for joinder to be permitted. *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). In deciding whether or not to permit joinder, the trial court must determine "whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Corbett*, 309 N.C. 382,

389, 307 S.E.2d 139, 144 (1983). In reviewing the court's decision, "we must look to whether defendant was hindered or deprived of his ability to defend one or more of the charges." *Id.* "Whether joinder of offenses is permissible under this statute is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial." *State v. Wilson*, 108 N.C. App. 575, 582, 424 S.E.2d 454, 458 (1993).

We are not persuaded that the joinder of the offenses deprived defendant of a fair trial. "An attempt by an accused to induce a witness to testify falsely in his favor may be shown against him. Such conduct indicates a consciousness on his part that his cause cannot rest on its merits, and is in the nature of an admission that he is wrong in his contention before the court." *State v. Minton*, 234 N.C. 716, 723, 68 S.E.2d 844, 849 (1952). Thus, evidence of defendant's subsequent attempts to bribe the victim and her family could have been admitted even if the offenses had not been joined for trial. Moreover, the evidence of defendant's guilt of the charges of statutory sex offense, taking indecent liberties with a minor, and contributing to the delinquency of a minor is so overwhelming that it is not reasonably possible a different result could have occurred had the offenses not been joined. *See* N.C. Gen. Stat. § 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.").

We hold defendant had a fair trial, free of prejudicial error, and accordingly, defendant's assignment of error is overruled.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).