NO. COA08-410

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 06 CRS 52324
06 CRS 52325

RODNEY KYLE CORBETT,
Defendant.

Appeal by defendant from judgments entered 11 October 2007 by Judge Howard E. Manning in Alamance County Superior Court. Heard in the Court of Appeals 12 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Rodney Kyle Corbett appeals from his convictions of first degree sex offense and indecent liberties with a child. On appeal, defendant primarily contends that the trial court erred when it denied his motion to dismiss both charges because the State relied solely on the testimony of the alleged victim. We disagree. It is well established that the testimony of a single witness is sufficient to defeat a motion to dismiss if, as here, that testimony encompasses each of the elements of the charged offense. Any inconsistencies in the witness' reports of what occurred presented issues of credibility for the jury to decide.

Facts

The State's evidence tended to show the following facts. The prosecuting witness ("Amy") was 15 years old at the time of trial.[1] Amy's mother married defendant in 1995, when Amy was about three years old. When Amy was seven or eight years old, her mother worked third shift while defendant watched Amy and her siblings. One night when Amy was alone in bed, defendant came into her bedroom, put his hands down her pants, and touched her vagina. Defendant then took off Amy's pants and underwear and put his penis in her "bottom." Afterward, defendant wiped Amy's bottom with a wet rag. On other occasions around the same time period, defendant put his erect penis in Amy's mouth. In some instances, defendant picked Amy up out of her bed and took her into her mother's bedroom to perform these acts. Amy testified that these incidents occurred at least three to five times during that time frame. Defendant told Amy not to tell anyone and offered her money, candy, and other items to remain quiet. Initially, Amy did not tell her mother about the incidents because she was afraid her mother would get angry at her.

The family moved to a different apartment, and Amy's mother spent time in the hospital with one of the other children. While Amy's mother was in the hospital, defendant came into Amy's room three times in one night. The first two times, defendant left

[1]We use the pseudonym "Amy" to protect the privacy of the minor and for ease of reading.

after Amy threatened to tell her mother. The third time, defendant signaled for Amy to be quiet and then put his hands down her pants and rubbed the outside of her vagina. Amy told her mother about the incident when her mother came home the next morning. Defendant denied Amy's allegations.

Amy's mother testified that defendant left their home in the winter of 2002, after the mother had learned about the incidents. Amy and her mother went to the police, but Amy told the police that defendant had touched her hip. Defendant returned and continued to live with the family. On one occasion, Amy's mother found defendant in bed with Amy. Defendant said he mistakenly went into Amy's room when he got up to use the bathroom. Defendant again left the home, but Amy's mother allowed him to move back in about a month later. Amy's mother testified that when she subsequently confronted defendant, defendant told her "he had did something wrong, and he just couldn't say what it was." Ultimately, after Amy told some friends about the incidents, Amy, her mother, and defendant all went to the Graham Police Department in March 2006.

Detective Winona Dunnegan interviewed Amy who told her that on several occasions when she was eight years old, defendant got into her bed and touched her vagina. Afterward, defendant wiped off Amy with a wet rag. Amy also told Detective Dunnegan that defendant put his penis in her mouth and that he offered her money and candy not to tell anyone. Amy told Detective Dunnegan that she did not tell her mother because she was afraid to do so. Detective Wendy Jordan interviewed defendant. Defendant denied touching Amy

inappropriately, but admitted that he got into bed with her one night by mistake after drinking.

Dr. Joseph Pringle, a pediatrician, examined Amy in May 2006. Amy told Dr. Pringle that defendant had been in bed with her and put his "private parts" into her "butt hole." Dr. Pringle's physical examination of Amy did not reveal any abnormalities, but Dr. Pringle testified he would not expect to find any injuries because it had been four years since the incidents occurred.

Defendant was indicted for one count of taking indecent liberties with a child and two counts of first degree sex offense. The jury found defendant guilty of the indecent liberties charge and guilty of first degree sex offense based on fellatio. It found defendant not guilty of first degree sex offense based on anal intercourse. The trial court sentenced defendant to a presumptive-range term of 275 to 339 months imprisonment on the first degree sex offense charge followed by a consecutive presumptive-range term of 21 to 26 months on the indecent liberties charge. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred when it denied his motion to dismiss. "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307

N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252, 124 S. Ct. 2818 (2004). The testimony of a single witness is sufficient to withstand a defendant's motion to dismiss if that testimony establishes all the elements of the offense. *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 914 (2006).

A person is guilty of first degree sex offense if he commits a sexual act with a victim under the age of 13 and he is at least 12 years old and at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a)(1) (2007). The term sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2007). "[F]ellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person." *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 158 (1992).

Here, Amy testified that defendant, her stepfather, put his erect penis in her mouth when she was seven or eight years old. Defendant contends, relying upon *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), that her testimony was insufficient because it was ambiguous. In *Hicks*, the Supreme Court held that a child's testimony that the defendant "'put his penis in the back of me'"

was too ambiguous to support a claim of anal intercourse. *Id.* at 90, 352 S.E.2d at 427. In this case, Amy testified:

> Q While you were living at Beaumont Apartments, did Rodney ever touch you in any other way?
>
> A He put his penis in my mouth, but he didn't do anything else.

We find this testimony unambiguous and sufficient to permit a jury to conclude that defendant committed first degree sexual offense. *See State v. Watkins*, 318 N.C. 498, 501, 349 S.E.2d 564, 566 (1986) (holding seven-year-old witness' testimony sufficient to support jury instruction).

Defendant's arguments regarding inconsistences in Amy's reports and testimony were questions for the jury to decide and cannot be the basis for granting defendant's motion to dismiss. "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, Amy's testimony was neither inherently incredible nor in conflict with any physical conditions.

With respect to the indecent liberties charge under N.C. Gen. Stat. § 14-202.1 (2007), defendant first repeats his argument regarding Amy's purportedly uncorroborated testimony. 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).

Defendant, however, also argues that there was insufficient evidence that defendant's purpose was to gratify his sexual desire as required by N.C. Gen. Stat. § 14-202.1. In *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987), our Supreme Court observed that the final element of the charge, "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."

Here, Amy testified that defendant got into bed behind her, put his hand down her pants, and touched her vagina. A jury could infer an intent to arouse or gratify sexual desire from these circumstances. *See State v. Smith*, 180 N.C. App. 86, 95, 636 S.E.2d 267, 273 (2006) (holding that evidence was sufficient on charge of indecent liberties when defendant ran his hand up victim's leg and tried to get his hand into her pants). Defendant's purpose may also be inferred from the testimony that he tried to persuade Amy to remain silent about the incidents by offering her gifts. *See Campbell*, 51 N.C. App. at 421, 276 S.E.2d at 729 (holding that purpose of gratifying sexual desire could be inferred from fact defendant offered to give children money for performing acts and keeping quiet). Thus, viewing the evidence in

the light most favorable to the State, the trial court did not err when it denied defendant's motion to dismiss.

II

Defendant also contends that the trial court committed reversible error when it sent a note to the jury denying the jury's request to review a transcript of Amy's testimony and other evidence. Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1233(a) (2007), which provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

We disagree.

During deliberations, the jury sent out a note that the trial court read in open court: "The jurors request a copy of court transcripts and any copies of any evidence we can have to review." In response, the trial court told counsel:

> So what I'm going to do . . . I'm going to send a note back: I have reviewed your question. There are no transcripts or copies of any evidence to review. There was no documentary evidence introduced at trial. You will have to rely on your own recollection of the testimony during the evidentiary portion of the case. Sincerely, me. Satisfactory?

Both defense counsel and the prosecutor replied, "Yes, sir."

The next morning, the jury sent out another note that the trial court read in open court: "May we have [Amy's] portion of testimony read to us?" The trial court told both parties, "I'm going to send a note back in there. I am sorry, but this information, this transcript is not available. Is that satisfactory?" Again, both the prosecutor and defense counsel replied, "Yes, sir." The trial court stated, "This, what happens is that they get, you don't know what portions they're going the [sic] look at. It's just." Defense counsel noted, "That was a considerable amount of testimony." The trial court agreed, restated that the jurors would have to rely on their own recollection, and again asked whether its response to the jury notes was satisfactory to counsel. Defense counsel agreed to the trial court's proposed course of action for a third time.

N.C. Gen. Stat. § 15A-1233(a) "imposes two duties upon the trial court when it receives a request from the jury to review evidence." *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). "First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *Id.* Nevertheless, "when a defendant's lawyer consents to the trial court's communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert a ground for appeal based on

failure to bring the jury back into the courtroom." *State v. Pointer*, 181 N.C. App. 93, 99, 638 S.E.2d 909, 913 (2007).

In this case, when the trial court received the jury's initial note requesting review of the transcript and other evidence, the court informed both parties that it intended to deny the request by sending the jury a note. Defendant's trial counsel ultimately consented to the trial court's method of responding to the jury's request three times. Although defendant was not required to object to preserve this issue for appellate review, he waived his right to argue that it was error by expressly consenting to it.

Furthermore, the trial court exercised its discretion in declining to submit a transcript of Amy's testimony to the jury. The trial court's discussion with counsel regarding the jury's request demonstrated that the trial court, as well as defense counsel, realized that the transcript of Amy's testimony would be lengthy and that the jury was better served by relying on its own recollection of the evidence. The trial court also expressed concern that the jury would be tempted to place undue emphasis on a transcript at the expense of other evidence. These observations indicate that the trial court exercised its discretion when it denied the jury's request. *See State v. Perez*, 135 N.C. App. 543, 554-55, 522 S.E.2d 102, 110 (1999), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000). As a result, we find no error.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).