NO. COA08-616

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

STATE OF NORTH CAROLINA

v. From Lenoir County
No. 06 CRS 055192

VANETTI T. MOORE

Appeal by defendant from judgment entered 31 January 2008 by Judge Jay D. Hockenbury in Lenoir County Superior Court. Heard in the Court of Appeals 12 January 2009.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State.

MARTIN, Chief Judge.

Vanetti Tarrence Moore ("defendant") appeals from the judgment entered upon his conviction by a jury of taking indecent liberties with a child. For the reasons stated below, we find no error.

At trial, the State presented evidence which tended to show that, on the evening of 6 November 2006, while her mother was vacationing in the Bahamas, fifteen-year-old B.M. was home alone with defendant, her stepfather. After the two had returned home from grocery shopping at Wal Mart, B.M. took a bath, went into her bedroom, closed the door, and changed into her nightgown. As B.M. lay on her bed and flat-ironed her hair, she talked with her

boyfriend Calvin Pollock ("Pollock"). While B.M. was on the phone with Pollock, defendant entered the bedroom, lifted up B.M.'s nightgown, and began touching her genitals. Defendant rubbed the outside of B.M.'s vagina, got on his knees, and asked B.M. if he could "taste it." B.M. said no and told defendant to "get off" of her. At this point, Pollock could hear commotion over the phone and B.M. saying "stop touching me," "get off me," and "don't touch me no more." Defendant hesitated, then stood up and exited B.M.'s bedroom.

After defendant left the room, B.M. began crying and got in bed under the covers. She continued talking with Pollock on the phone, telling him that defendant had been "touching her and trying to rape her." B.M. then asked Pollock to telephone Jalesa Malone ("Malone"), a family friend from church. Pollock called Malone using three-way calling, allowing him to remain on the line while B.M. told Malone that defendant was "fondling" her, had "asked can he kiss below," and "rubbed on [her] thigh." While B.M. was on the phone with Malone and Pollock, defendant again entered B.M.'s bedroom, asking, "so I'm not going to get a goodnight hug and kiss?" After B.M. gave defendant a hug and kiss on the cheek, he again exited the bedroom.

At this point, Malone told B.M. to stay calm while she contacted Herbert Allen, a deacon at their church. Mr. Allen contacted Alice Whitaker, B.M.'s aunt, who in turn called B.M.'s cousin Shawn Kinney, who, at approximately 11:30 p.m., contacted the Lenoir County Sheriff's Office. Detective Jenkins, Deputy

Smith, and Deputy Dixon responded to the call. Upon arriving at defendant's residence, Detective Jenkins approached the front door and saw defendant standing inside in his boxer shorts. Detective Jenkins informed defendant that he had received a call and wanted to check on B.M. to make sure she was okay. After defendant consented, Detective Jenkins walked inside, while Deputy Smith asked defendant to sit in Detective Jenkins' patrol car. Detective Jenkins found B.M. in her room, under the covers and crying into the telephone. B.M. told Detective Jenkins that defendant had touched her and asked to "kiss it." She later gave a similar statement to Deputy Dixon.

After speaking with B.M., Detective Jenkins joined defendant in the patrol car. When Detective Jenkins asked if defendant could tell him what happened, defendant responded by asking if he was under arrest. Detective Jenkins exited the patrol car, informed defendant that he was under arrest for taking indecent liberties with a minor, and placed handcuffs on defendant. Detective Jenkins then allowed defendant to go back into the house, retrieve his wallet, and lock the door. Once defendant was again seated in the patrol car, Detective Jenkins read defendant his *Miranda* rights, which defendant indicated he understood. At this point Detective Jenkins began driving defendant to the Sheriff's Department. During the drive, defendant stated:

> Hey man, I know whatever I say to you is like talking into a recorder so . . . you know, man, it was bedtime and I usually say goodnight to [B.M.]. I went to her bedroom and opened the door and, you know man, she was kicked back with no panties or bra on, just a

> nightgown, I mean, she saw me looking I guess and she laughed and closed her legs. That was all I could see so I said: go on and let me see. Before I knew it I was down there rubbing all on her. She even was talking about her hair growing back where it was shaved.
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> I was down there and then I was like: oh man, what am I doing? So I got up and went out, went out of her room and I went back into my room. I laid there for a few minutes. And then I was like, well she would always come in and give me a kiss goodnight so I went back to the door and opened it and said: well don't I still get a kiss? She got up and gave me a kiss. I closed her door and went to bed. You know, man, that bothered me, it really bothered me. I try to teach her not to move too fast and here I am. That's why I was awake, shook, when you came to the door - - came to the door. I know it was wrong, man.

Once Detective Jenkins and defendant arrived at the Sheriff's Department, Detective Jenkins processed defendant and read his *Miranda* rights to him again. Defendant signed a *Miranda* rights form stating he understood his rights, then requested an attorney. Approximately two hours after arriving at the Sheriff's Department, Detective Jenkins transcribed from memory the statement defendant made en route to the Sheriff's Department. Defendant did not read or sign the detective's written copy of the statement.

Defendant was later indicted by the Lenoir County Grand Jury on one count of taking indecent liberties with a child. At trial, defendant sought to introduce evidence of a prior accusation of sexual abuse by B.M. The alleged incident had occurred when B.M. was six years old and involved her mother's then-boyfriend, Randy Johnson. Upon the State's objection to the introduction of this evidence, the trial court held a voir dire hearing, during which it

heard the testimony of Lenoir County Department of Social Services Social Worker Michelle Hayes, B.M., and B.M.'s mother. Thereafter, the trial court entered the following findings of fact:

> It appearing that Melissa Hayes who was employed by the Department of Social Services had occasion to question [B.M.] and her mother about any prior allegations of sexual molestation during the course of the Department of Social Services investigating - investigation concerning the protection of the minor child after the alleged assault on her on [6 November 2006] by her stepfather.
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> It appeared during that investigation that Ms. Hayes asked the mother if there was a prior act of molestation between the daughter and a perpetrator and the mother said that there was and recited to the officer the prior episode which occurred when [B.M.] was six years old and that live-in boyfriend, Randy Johnson, while the mother was at work, came in her room in underclothes and got on top of her grinding her, putting his fingers in her vagina.
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> The same night it happened [B.M.] told her mother and the matter was reported to the police and there was no action taken. The perpetrator left the area. These events were corroborated by the victim, [B.M.], during the proffer of evidence.

Based on these findings, the trial court concluded that B.M.'s prior accusation against Randy Johnson was a "sexual act under Rule 412 [of the North Carolina Rules of Evidence]," since "defendant had not put on any evidence to show that the victim's prior accusations were false or inconsistent or that the proffered evidence would be relevant to show that someone other than the defendant committed the crime that's before us at trial." Based on this conclusion, the trial court ruled that the prior accusation

was inadmissible. Defendant's subsequent objection to this ruling by the trial court was overruled.

At the close of evidence, defendant made a motion to dismiss the charge of taking indecent liberties with a minor on grounds of insufficient evidence. The trial court denied defendant's motion. Subsequently, the jury returned a verdict of guilty, in accordance with which the trial court entered an order sentencing defendant to an active sentence of a minimum of 19 months to a maximum of 23 months.

On appeal, defendant makes several assignments of error concerning the trial court's exclusion of evidence of B.M.'s prior accusation of sexual abuse. Defendant argues that Rule 412 does not bar evidence of B.M.'s accusation against Randy Johnson because Johnson was never charged with a crime. This fact, defendant contends, is evidence that the accusation was likely false. Defendant further contends that, if false, B.M.'s prior accusation is relevant to B.M.'s credibility and otherwise not barred by Rule 412. We disagree.

"It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation." *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) (citing N.C. Const. art. I, § 23; *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972)). The scope

of cross-examination, however, lies within the sound discretion of the trial court and shall not be disturbed absent an abuse of that discretion. *State v. Wrenn*, 316 N.C. 141, 144, 340 S.E.2d 443, 446 (1986). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

Rule 412, the Rape Shield Statute, "prohibits the introduction of evidence concerning 'previous sexual activity of a complainant in a rape or sex offense case.'" *State v. Bass*, 121 N.C. App. 306, 309, 465 S.E.2d 334, 336 (1996) (quoting *State v. McCarroll*, 336 N.C. 559, 563, 445 S.E.2d 18, 20 (1994)). The rule provides in part, "the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.R. Evid. 412(a) (2007). "Rule 412 does not prevent evidence that a complainant has *falsely* accused a person of sexual activity because a false accusation is not sexual activity." *McCarroll*, 336 N.C. at 563, 445 S.E.2d at 20 (citations omitted). "Such evidence is relevant because it tends to impeach the witness." *Id.*

However, we have held that a trial court does not abuse its discretion or commit constitutional error by excluding evidence of a complainant's prior accusations where there is no evidence tending to show that the prior accusations were false. *See State*

v. Anthony, 89 N.C. App. 93, 97, 365 S.E.2d 195, 197 (1988). In *Anthony*, this Court affirmed the trial court's exclusion of evidence of the victim's previous accusations of sexual abuse against her father and stepfather. *See id.* Although the charges were dismissed in that case, this Court reasoned that the dismissal of the charges did not show that the victim's accusations were false, noting that "there are many reasons why charges . . . [may be] dropped." *Id.* Just as there was no evidence of false accusations in *Anthony*, here, there is no evidence that B.M.'s accusations against her mother's former boyfriend were false. Charges of sexual abuse may have never been brought against Randy Johnson for any variety of reasons. Therefore, the trial court did not err in excluding evidence of the victim's prior accusation of sexual abuse.

Defendant next assigns error to the trial court's denial of his motion to dismiss for insufficiency of the evidence at the close of all evidence. Defendant contends there is insufficient evidence that he willfully took or attempted to take indecent liberties with B.M. or that the action taken by defendant was for the purpose of arousing or gratifying sexual desire. Defendant asserts that, because the State's case is based on "he said, she said," uncorroborated evidence and the conflicting testimony of the State's witnesses, his motion should have been granted. We disagree.

In ruling on a motion to dismiss for insufficient evidence, a trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002) (citing *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993)). If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied. *Id.* at 178, 571 S.E.2d at 620-21. The defendant's evidence is not to be considered unless it is favorable to the State. *Id.* (citing *Roddey*, 110 N.C. App. at 812-13, 431 S.E.2d at 247).

To support a conviction of taking indecent liberties with a child, the State must 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, 786-87 (2005) (citations omitted); *see also* N.C. Gen. Stat. § 14-202.1(a) (2007). The fifth element "may be inferred from the evidence of the defendant's actions." *State v. Verrier*, 173 N.C. App. 123, 127, 617 S.E.2d 675, 678 (2005) (citing *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987)).

At the time of defendant's arrest, B.M. was fifteen and defendant was forty-four years old. B.M. testified that defendant

came into her bedroom, lifted up her nightgown, touched her vagina, and asked her if she would let him "taste it." Malone, Shawn Kinney, Social Worker Michelle Hayes, Deputy Dixon, Detective Jenkins, and B.M.'s mother each testified that B.M. had stated defendant touched her vagina, and the testimony of each of these witnesses was consistent with B.M.'s testimony. Furthermore, defendant's statement to Detective Jenkins was consistent with B.M.'s version of the incident. Defendant points to Pollock's testimony, however, as inconsistent with that of the other witnesses. Pollock testified that, while on the phone with B.M., he heard a "boom" and the sound of B.M. struggling and B.M. cursing at someone, but did not hear defendant ask if he could "taste it."

It is well established that "[a]ny discrepancies and inconsistencies in the evidence, and matters of credibility, are to be resolved by the jury. *State v. Workman*, 309 N.C. 594, 601, 308 S.E.2d 264, 268 (1983) (citing *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980)). Bearing this in mind, we conclude that, when viewed in the light most favorable to the State, the evidence presented at trial was sufficient to prove defendant willfully took indecent liberties with B.M. for the purpose of arousing or gratifying sexual desire.

No error.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).