NO. COA08-98

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Graham County
Nos. 06 CRS 464
06 CRS 50388

ROBERT SCOTT ALLEN

Appeal by defendant from judgments entered 25 July 2007 by Judge C. Philip Ginn in Graham County Superior Court. Heard in the Court of Appeals 15 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Thomas R. Sallenger, for defendant.

ELMORE, Judge.

Robert Scott Allen (defendant) appeals from judgments dated 25 July 2007 and entered consistent with jury verdicts finding him guilty of indecent liberties with a child and statutory sex offense of a person thirteen, fourteen or fifteen years old. The trial court sentenced defendant to consecutive terms of imprisonment of 336 to 413 months for the conviction for statutory sexual offense and 21 to 26 months for the conviction for indecent liberties with a child. Defendant gave oral notice of appeal in open court on 23 July 2007.

Defendant first argues the trial court erred in denying his motion to dismiss the charges of statutory sexual offense of a person who is thirteen, fourteen or fifteen years old and of taking indecent liberties with a child for insufficiency of the evidence. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). In considering a motion to dismiss, "the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

"A defendant is guilty of a Class B1 felony if the defendant engages . . . a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2007). Similarly, a defendant is guilty of taking indecent liberties with a child if he is at least sixteen years old and five years older than the child and "[w]illfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the

body of any child of either sex under the age of 16 years." N.C. Gen. Stat. § 14-202.1(a) (2007). Defendant only argues that the State presented insufficient evidence of his age and whether he was at least five or six years older than the victim. We disagree.

Here, the victim testified that he was born on 11 December 1992. The victim further testified that defendant engaged in sexual acts with him in May of 2006, making the victim thirteen years old at the time of the incident. No direct evidence of defendant's age was introduced at trial. However, sufficient circumstantial evidence of defendant's age was presented at trial through defendant's own witnesses to establish that defendant was more than six years older than the victim. *See State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989) (holding there was "no shifting the burden of proof on the age element [of a statutory rape charge] to defendant . . . because the State presented adequate circumstantial evidence from which the jury could determine defendant's age"). Defendant's younger sister testified that she had three children, the oldest of whom was eighteen years old at the time of the trial in July of 2007. Given that defendant's younger sister has a child who was at least four years older than the victim, it is biologically impossible for defendant to be under nineteen years of age or less than six years older than the victim. *See State v. Wiggins*, 161 N.C. App. 583, 591, 589 S.E.2d 402, 408 (2003) (holding "it was biologically impossible for defendant to be less than six years older than [the victim] and to

be her father"), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004). These assignments of error are overruled.

Defendant also argues the trial court erred in giving a jury instruction regarding defendant's character. The defendant requested in writing that "the jury be instructed in accord with N.C.P.I.-Crim.-105.60 EVIDENCE OF THE DEFENDANT'S CHARACTER TRAIT, said character trait being the defendant's character for proper behavior concerning children." At the charge conference the trial court informed defendant the requested instruction would be included, but that the character trait would be that of "proper behavior around children in a group setting." Defendant objected to the modification of the instruction but did not withdraw his request to instruct the jury on his character traits. During the charge to the jury, the trial court gave the following instruction:

> In addition to that, ladies and gentlemen, there has been some evidence which has been admitted with regard to the Defendant's character trait for honesty and proper behavior around children in group settings. The law requires that a person having such character may be less likely to commit the alleged crime than one who lacks that character trait. Therefore, if you believe from the evidence that the Defendant possesses the character trait of honesty and proper behavior around children in a group setting you may consider this fact in your determination of the Defendant's guilt or innocence, and you may give such weight to it as you decide it should receive in connection with all the other evidence that you believe.

Defendant contends the trial court erred in submitting the modified instruction because the evidence supports the original requested instruction, and further argues the modification is an

impermissible expression of opinion by the trial court regarding the evidence in the case. We disagree.

It is well established that "a trial court is not required to give a requested instruction verbatim. Rather, when the request is correct in law and supported by the evidence, the court must give the instruction in substance." *State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989). Here, several relatives of defendant testified he had always acted properly around their children. However, all of the testimony involved the perceptions of the adult relatives in observing defendant around their children. There was no testimony from anyone that would support an instruction that defendant acted appropriately when alone with children. Defendant's original instruction on his behavior around children was not fully supported by the evidence. The instruction given as modified by the trial court was supported by the evidence and was not an expression of opinion of the evidence presented at trial. This assignment of error is overruled.

The remaining assignments of error presented by defendant in the record on appeal but not set out or argued in his brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).