NO. COA09-1393

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Martin County
Nos. 08 CRS 1277
08 CRS 50271-72

KEITH RAY SMITH

Appeal by defendant from judgments entered 2 April 2009 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 12 April 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Duncan B. McCormick, for defendant-appellant.

JACKSON, Judge.

Keith Ray Smith ("defendant") appeals his 2 April 2009 convictions of (1) two counts of statutory rape of a fifteen-year-old; (2) two counts of statutory sexual offense of a fifteen-year-old; (3) two counts of incest with a fifteen-year-old; and (4) one count of incest. For the reasons stated herein, we hold no error.

Defendant is the biological father of the child ("S.L.R."). After being estranged from S.L.R. for most of her life, except for

one visit when she was six years old, defendant resumed contact with her in March 2005. S.L.R. was fifteen years old at the time; her birthday is 24 December.

On 12 March 2005, defendant visited with S.L.R. and her mother ("J.R.C.") at a restaurant, and they established times for defendant to visit S.L.R. in her mother's home in Tyrell County. S.L.R. alleged that defendant first touched her during his second or third visit to J.R.C.'s home. In August 2005, after about ten visits in J.R.C's home, defendant was allowed to have S.L.R. stay with him overnight at the home he shared with his mother in Martin County. These visits continued until January 2008, when S.L.R. was eighteen. At that time, S.L.R. alleged that defendant had sexually molested her during the time period of March 2005 through January 2006.

S.L.R. testified that she and defendant first had sexual intercourse at his home in Martin County in September 2005. S.L.R. was fifteen years old at the time of the incident. S.L.R. alleged that the first sexual encounter occurred in defendant's living room. Defendant was sitting on the couch next to S.L.R. and grabbed her breast for about ten minutes. He then removed his pants and S.L.R.'s pants while she was sitting in his lap. Defendant inserted his penis into her vagina, and they had sexual intercourse for approximately fifteen to twenty minutes.

S.L.R. alleged that, two weeks later, defendant drove her in his truck into the woods in Martin County, parked, and got into the backseat of the truck with her. During this incident, defendant

put his hand down her shirt to fondle her and also put his hand down her pants and penetrated her vagina with his finger.

S.L.R. alleged that another incident of sexual intercourse occurred sometime in October 2005 in a motel room in Martin County. Defendant took S.L.R. to a Wal-Mart, where he bought candles and bubble bath. At the motel, he showed her pornography and then removed their pants and pulled her on top of him. They had vaginal intercourse for approximately ten to fifteen minutes in the bedroom and again for another ten minutes in the bathtub. During the time in the bedroom, defendant also penetrated S.L.R.'s vagina with his finger.

In late October 2005, defendant drove S.L.R. back to the same place in the woods. In the backseat of his truck, defendant fondled her while she sat on his lap, and they had sexual intercourse for approximately ten to fifteen minutes. One month later — sometime in November 2005 — defendant took S.L.R. back to the same motel. They watched pornography, removed their clothes, and performed oral sex on each other. On this date, defendant told S.L.R. that "[he] could get in a lot of trouble" for what they were doing.

Sometime during December 2005, another incident of vaginal intercourse occurred on the couch at the home defendant shared with his mother. While watching television, defendant began to tickle S.L.R. while she sat on his lap. They had sexual intercourse for approximately ten to fifteen minutes, and defendant turned up the volume on the television so that they would not be heard. The

following morning, defendant penetrated S.L.R.'s vagina with his finger while she lay in his bed.

According to S.L.R., she had sexual relations with defendant at least fifteen more times after she turned sixteen on 24 December 2005. Defendant and S.L.R. continued to have visits throughout 2006 and 2007, but their last sexual encounter occurred in November 2006.

On 21 January 2008, S.L.R. filed a complaint with the Williamston Police Department, and on 23 January 2008, she gave a statement to a detective in the department.

On 6 February 2008, an agent of the North Carolina State Bureau of Investigation ("SBI agent") administered a polygraph test to defendant. Defendant passed the polygraph test. At the outset of an interview on 13 February 2008, the SBI agent informed defendant that he had failed the polygraph test. Defendant then gave a statement of confession. In his statement, defendant stated that he had engaged in multiple incidents of vaginal intercourse and other sexual acts with S.L.R. while she was sixteen years old. Defendant stated that he had penetrated S.L.R. with his finger at least four times in various locations — at J.R.C.'s house in Tyrell County, in the motel in Martin County, and in the backseat of his truck in the woods. Defendant also estimated that he had engaged in sexual intercourse with S.L.R. between twenty and twenty-five times. Defendant stated that he believed that they did not have sexual contact until February 2006 and did not have intercourse until February 2006. Defendant corrected the statement, initialed

throughout, and signed at the end. The SBI agent then read defendant's statement aloud to him and gave it to defendant to read.

On 23 September 2008, defendant was indicted on two counts of statutory rape of a victim who was fifteen years old, two counts of statutory sexual offense of a victim who was fifteen years old, two counts of incest with a person fifteen years of age, and one count of incest. On 1 August 2008, the State filed a notice of intention to introduce evidence of a statement made by defendant. During the 22 January 2009 trial, defendant filed a motion to suppress the 13 February statement he had given and signed. On 1 April 2009, the trial court denied the motion to suppress. On the same date, the trial court overruled defendant's attempt to introduce evidence of the polygraph test, its results, or the misrepresentation by the SBI agent. On 2 April 2009, defendant was found guilty of all charges. Defendant appeals.

Defendant first contends that the trial court abused its discretion when it excluded evidence from trial that an SBI agent had misrepresented to defendant the results of his polygraph test. Defendant argues that this information was relevant to the jury's assessment of his confessions. We disagree.

North Carolina General Statutes, section 8C-1, Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2003). We review the trial court's

decision to exclude evidence pursuant to Rule 403 pursuant to an abuse of discretion standard. *State v. McDougald*, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994). "[The] Court will find an abuse of discretion 'only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.'" *Id.* (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Here, the trial court conducted a *voir dire* to consider defendant's objection to the exclusion of the results of the polygraph test. It concluded, based upon defendant's testimony, that he had given the corroborating statement to the SBI agent — following the polygraph test and the misrepresentation of its results — of his own free will and that he was given an opportunity to read and correct his written statement for any falsehoods or misrepresentations. These indications that defendant's statement of confession was reliable were not altered significantly by the SBI agent's misrepresentation.

We also note that courts allow law enforcement officers some latitude with respect to the tactics they employ. Although the State did not argue this point in its brief, our Supreme Court has explained that

> [t]he general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

> False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession.

State v. Jackson, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) (internal citations omitted). We revisited the issue in *State v. Barnes*, 154 N.C. App. 111, 114, 572 S.E.2d 165, 168 (2002), explaining that "deceptive law enforcement tactics and false statements during questioning are not commendable practices. However, only in limited circumstances are deceptive methods and attendant consequences sufficient to render a confession invalid." *Id.* (citing *Jackson*, 308 N.C. at 574, 304 S.E.2d at 148). Therefore, although we do not commend the SBI agent's false statement to defendant, the agent's action falls within the scope of behavior previously allowed by North Carolina's appellate courts. *See Jackson*, 308 N.C. at 574, 304 S.E.2d at 148 (explaining that "[t]he basic technique used . . . was to tell the defendant that the police had recovered certain items of physical evidence which implicated him and then ask the defendant to explain this evidence. It is true that the officers made false statements in so doing and in using trickery with their presentation to the defendant."); *Barnes*, 154 N.C. App. at 112-14, 572 S.E.2d at 166-68 (explaining that a police officer's statement to the defendant that the defendant's daughter was pregnant during an investigation of her alleged rape and sexual abuse did not render the defendant's confession inadmissible).

In addition, our Supreme Court has mandated that polygraph evidence, including the results of a polygraph test, cannot be admitted into evidence for any reason during trial. In a lengthy opinion, the Court held in *State v. Grier* that "in North Carolina, polygraph evidence is no longer admissible in any trial. This is so even though the parties stipulate to its admissibility. The rule . . . shall be effective in all trials[.]" 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). Even though defendant wished to introduce the fact that the SBI agent had misrepresented defendant's polygraph results, the actual results of the polygraph likely would have been revealed to the jury as well, which would have violated *Grier*.

Considering the holding in *Grier* and the trial court's determination during *voir dire* that the prejudicial nature of the polygraph evidence outweighed any probative value it may have had, we cannot say that the trial court's decision to exclude the SBI agent's misrepresentation as to the results of defendant's polygraph was "'manifestly unsupported by reason.'" *McDougald*, 336 N.C. at 457, 444 S.E.2d at 214 (citation omitted). Accordingly, we hold that the trial court did not abuse its discretion when it excluded the polygraph evidence.

Second, defendant argues that the trial court erred by failing to dismiss one of the charges of statutory sexual offense because the State did not have sufficient evidence to establish more than one count of statutory sexual offense in Martin County within the relevant time period. We disagree.

The standard of review for a motion to dismiss is whether the State has presented substantial evidence as to "'each essential element of the offense charged, or a lesser offense included therein . . . . If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 378-79, 526 S.E.2d at 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997) (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

A defendant is guilty of statutory sexual offense pursuant to North Carolina General Statutes, section 14-27.7A(a) "if the defendant engages in . . . a sexual act with another person who is . . . [fifteen] 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) (2003). A "sexual act" is defined in North Carolina General Statutes, section 14-27.1(4) as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration . . . by any object into the genital or

anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2003). "'Any object' in this context includes any part of the human body, including a finger." *State v. Smith*, 180 N.C. App. 86, 95, 636 S.E.2d 267, 273 (2006) (citing *State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981)).

In the instant case, the indictment charges defendant with two counts of statutory sexual offense against a victim who was fifteen years old — one count during the time period of 1 September 2005 through 30 September 2005 and one count during the time period of 1 October 2005 through 23 December 2005. Defendant argues that there is insufficient evidence to convict him of two separate statutory sexual offenses during the relevant time periods, because S.L.R. described only one incident in her statement and testimony of a "sexual act" in 2005 in Martin County.

Based upon the sworn testimony of S.L.R. and the corroborating statement of defendant, there was substantial evidence "'that a reasonable mind might accept as adequate'" to support the conclusion that defendant committed two separate statutory sexual offenses. *Cross*, 345 N.C. at 717, 483 S.E.2d at 434. S.L.R. testified under oath that a "sexual act" occurred during her second visit with defendant, in the backseat of his truck in a wooded area in Martin County. There, he penetrated her vagina with his finger. The record supports the finding that this offense occurred in September 2005, consistent with the first count in the indictment. "Two weeks after [that] incident[,]" another incident of sexual offense occurred in Martin County when defendant took S.L.R. to the

motel and penetrated her vagina with his finger after they had had sexual intercourse. One month later — which, according to the time line within S.L.R.'s testimony, would be November 2005 at the latest — S.L.R. and defendant returned to the motel in Martin County, and they performed oral sex on each other. Though the precise dates of the incidents are unclear, S.L.R.'s testimony supports the occurrence of all three incidents of sexual offense prior to her sixteenth birthday, which satisfies the elements of North Carolina General Statutes, section 14-27.7A(a). Viewing the evidence in the light most favorable to the State, a reasonable mind could accept this testimony as adequate for the conclusion that three incidents of statutory sexual offense occurred in Martin County while S.L.R. was fifteen years old.

In its indictment, the State charges defendant with two counts of "unlawfully, willfully and feloniously [engaging] in a sexual act with S.L.R., a person the age of [fifteen] years." The indictment does not identify a specific type of sexual act. Because both digital penetration and oral sex constitute a "sexual act" as defined by North Carolina General Statutes, section 14-27.1, S.L.R.'s testimony as to two separate incidents of defendant's penetrating her vagina with his finger and one act of oral sex within the relevant time period provides substantial evidence to support at least two statutory sexual offenses in Martin County, which is sufficient for the State to survive defendant's motion to dismiss. Accordingly, we do not address

defendant's argument as to the variance between the indictment and the evidence presented at trial.

We hold that the trial court erred neither in excluding the evidence of the SBI agent's misrepresentation to defendant prior to defendant's confession nor in denying defendant's motion to dismiss one of the counts of statutory sexual offense.

No error.

Chief Judge MARTIN and Judge BEASLEY concur.

Report per Rule 30(e).