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NO. COA09-273

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

VICTOR OWEN PORE

Moore County
Nos. 06 CRS 55445-46
07 CRS 2190

Appeal by defendant from judgments entered 7 August 2008 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 30 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Geoffrey W. Hosford, for defendant-appellant.

CALABRIA, Judge.

Victor Owen Pore ("defendant") appeals judgments entered upon jury verdicts finding him guilty of statutory sexual offense, crime against nature, and indecent liberties with a child. We find no error.

The State's evidence tended to show that the victim was fourteen years old on 18 October 2006. The victim was involved in a county program called Moore Buddies, which provided mentoring and counseling to at-risk youth. On 18 October 2006, Moore Buddies sponsored a celebration lunch at Outback Steakhouse. The victim and defendant were both in attendance. The plan was for defendant

to become the victim's new mentor. This was the first time the two had met.

The victim's mother came to pick him up from the restaurant during her lunch break. She needed to get back to work, but the victim was having a good time at the event and did not want to leave. Defendant agreed to take the victim home. The party ended and the victim left with defendant. They stopped to pick up defendant's son from school, and dropped the son off with a babysitter. Defendant then drove the victim to his home in Southern Pines.

Once at defendant's home, the victim stayed outside to smoke a cigarette. After smoking his cigarette, the victim entered the home and sat on a couch immediately inside the door. The victim did not see defendant when he entered the home. At some point, defendant returned and began massaging the victim's shoulders and upper back. Defendant then got on his knees and massaged the victim's buttocks and legs. The victim asked defendant, "What are you doing?", but defendant did not reply. Defendant placed the victim's legs up onto the couch, so that the victim was on his back. Defendant sat on the victim's legs, and pulled down the victim's jeans and boxers. At this point, the victim again asked defendant what he was doing and began to fight back. Defendant held the victim's arms together above his head against the couch. Defendant put the victim's penis in his mouth and began sucking it. The victim protested, saying "Get off me!" and "What are you doing?" Eventually, defendant stopped and while the victim pulled

up his clothes, defendant said, "This is between you and me." Thereafter, defendant allowed the victim to use his computer. The victim tried to send a message via the website Myspace to his girlfriend to call his mother, but he got a "failure to send" message from the website.

Defendant was in another room while the victim was using the computer. Defendant returned wearing different clothes and the two left. Defendant dropped the victim off at the victim's aunt's house. Later, his mother picked him from the aunt's house. The victim did not tell anyone what happened.

At school the next day, the victim told his cousin what happened. She encouraged him to tell someone. The victim told the school counselor what defendant had done. The school counselor reported it to the school resource officer, who reported it to the Southern Pines Police Department.

Officer Marvin Wright ("Officer Wright"), an investigator with the Southern Pines Police Department, responded to the report at the school. The victim's mother also arrived at the school. The victim told Officer Wright and his mother what defendant did to him.

Officer Wright obtained a DNA sample from the victim on 23 October 2006. A DNA sample was also obtained from defendant. Officer Wright submitted the DNA samples, along with other physical evidence, including the clothing worn by the victim on 18 October 2006, to the SBI laboratory. The victim's shirt and jeans did not reveal the presence of any saliva, however, his underwear did. The

predominant profile of the DNA found on the underwear matched the DNA sample provided by defendant.

Defendant was arrested, indicted, and subsequently tried in Moore County Superior Court for the offenses of statutory sexual offense, second degree sexual offense by force, crime against nature, and indecent liberties with a child. At trial, defendant testified on his own behalf. He denied giving the victim a massage and denied that he performed oral sex on the victim.

At the close of the State's evidence, defendant made a motion to dismiss all charges. The trial court dismissed the charge of second degree forcible sexual offense but denied the motion as to the remaining charges. At the close of all the evidence, defendant again made a motion to dismiss that was denied by the trial court. A jury found defendant guilty of the three remaining charges. Defendant was sentenced to a minimum of 144 months to a maximum of 182 months imprisonment for statutory sexual offense, a concurrent term of a minimum of 16 months to a maximum of 20 months for indecent liberties with a child, and a term of a minimum of six months to a maximum of eight months, suspended for thirty-six months, for crime against nature. All sentences were to be served in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that the trial court erred in denying defendant's motions to dismiss the charges of statutory sexual offense and indecent liberties with a child. We disagree.

In reviewing the denial of a motion to dismiss, this Court must determine "whether there is substantial evidence -- either

direct, circumstantial, or both -- to support a finding that the crime charged has been committed and that defendant was the perpetrator." *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). We assess the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *Clark*, 325 N.C. at 682, 386 S.E.2d at 194. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Defendant first argues that the State did not prove all of the elements of statutory sexual offense.

A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or 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) (2006). In the instant case, defendant contends that the State failed to prove that he and the victim were not married. However, defendant concedes that this Court rejected the "marriage defense" in *State v. Ewell*, 168 N.C. App. 98, 106-107, 606 S.E.2d 914, 920 (2005). In *Ewell*, the defendant argued that the trial court erred in denying his motion to dismiss the charge of statutory rape because the State failed to prove that he and the victim were not married during the relevant

time period. This Court stated that the marriage defense applies only where the defendant and victim are lawfully married, and since under N.C. Gen. Stat. § 51-2(b1), the defendant and the victim could not be lawfully married, the marriage defense could not apply. *Id.*

In the instant case, as in *Ewell*, the victim and defendant could not be lawfully married. Defendant and the victim are both male. "Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina." N.C. Gen. Stat. § 51-1.2 (2007). Accordingly, the marriage defense cannot be available to defendant. This assignment of error is overruled.

Defendant also argues that the State failed to prove that he committed the offense of indecent liberties with a child for the purpose of gratifying his sexual desire.

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully 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). Taking indecent liberties with a child is a specific intent crime. *State v. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756 (1998). However, defendant's

purpose for committing the act of indecent liberties with a child is seldom proven by direct evidence, and often must be proven by inference. *Id.* "[T]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987).

In the instant case, the State's evidence established that defendant massaged the victim's shoulders, upper back, legs, and buttocks. Defendant pulled down the victim's pants and underwear, and put the victim's penis in his mouth and sucked it. This evidence was sufficient to permit the jury to infer that defendant's purpose was to arouse himself or to gratify his sexual desire. This assignment of error is overruled.

No error.

Judges WYNN and STROUD concur.

Report per Rule 30(e)