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NO. COA09-301

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 04CRS053491

JAMES DANIEL GARRETT,
Defendant.

Appeal by defendant from judgment entered on or about 21 August 2008 by Judge James W. Morgan in Superior Court, Cleveland County. Heard in the Court of Appeals 26 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David Gordon, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

James Daniel Garrett ("defendant") appeals from judgment entered upon his conviction for first degree statutory rape. Defendant contends the trial court erred in denying his motion to dismiss for lack of sufficient evidence. We find no error.

On 7 June 2004, defendant was indicted for first degree statutory rape. The charged offense involved defendant's niece, E.W., ("Emily")¹ and is alleged to have occurred between 1 November 2003 and 30 April 2004. Although the record does not reveal a

¹ We will refer to the minor child E.W. by the pseudonym Emily to protect the child's identity and for ease of reading.

reason for any delay, the matter did not come on for trial until 14 August 2008. The State presented the following evidence: Minor child Emily was born in December, 1997, making her ten years old at the time of trial. When she was in kindergarten, she lived with her grandparents, her mother, her sister J.B., ("Jane")² and her uncle, who is the defendant in this case. Emily, Jane, their mother, and defendant all shared a bedroom. When Emily's mother was away at work, Emily's grandparents and sometimes defendant would look after her. Sometimes, defendant would lay down with Emily and he would play with her and tickle her. It was uncomfortable when he touched her private part, which Emily called her "hoo hah." Emily identified her "hoo hah" as being close to where she peed out of, and at trial she indicated its location by pointing to the front of her pants. She said when he touched her there, it "hurt bad." When this happened, her sister Jane was in the room with her. She told a social worker what happened, and once her mother knew, she talked to her mother about it, as well as a doctor. Although she sometimes had fun with defendant, she did not like it when he touched her, which happened more than once. When asked what part of defendant's body touched her, she did not know what to call it.

Her sister, Jane, testified that she was born in 1999 and was nine years old at trial. When her sister Emily was in kindergarten, they lived with her grandparents, her mother, and her

² We will refer to the minor child J.B. by the pseudonym Jane to protect the child's identity and for ease of reading.

uncle Danny, the defendant in this case. When her mother was at work, her grandparents and defendant took care of her. She shared a bedroom with Emily, her mother, and defendant. Sometimes defendant would take a nap with her and her sister, and she would go to sleep sometimes. She stated that she had known for a long time that defendant had touched her sister, but she also indicated that she had a hard time remembering what happened.

The girls' mother, Crystal B., testified that she and the girls lived with her mother and stepfather for about two years. Crystal's brother Danny, the defendant, also lived there. When Crystal and the girls started living there, defendant was just under sixteen years old, and they lived there until right after he turned eighteen. In the fall of 2003, Emily was five years old and she entered kindergarten. Defendant was in high school at that time. Crystal started working at Denny's. She and her daughters shared a bedroom with defendant; she and her daughters slept together on a futon and defendant slept either on a pallet on the floor or on the top bunk of the bed. Sometimes she slept on the couch in the living room. She used drugs at the time and was a heavy sleeper. After a social worker came to the house to discuss the allegation, Crystal asked Emily what happened, and Emily told her in front of everyone that she had been touched and that her Uncle Danny had done it. After that, Crystal took the girls to the doctor to be examined. She said the family referred to private parts between the legs as "hoo hah." Finally, Crystal acknowledged

an incident when her mentally challenged son, D.J., ("David")³ touched Emily's "hoo hah" one summer when the children were outside in the front yard playing in their bathing suits. David was seven, eight, or nine years old at the time, and Emily was about four and a half years younger than David. She did not remember if the touching was under the bathing suit.

Lindsey Gantt ("Lindsey"), defendant's former girlfriend, testified that she met defendant on the Internet in August of 2003, when she was fourteen years old and defendant was seventeen years old. Lindsey stated that she and defendant communicated daily by phone and email until around April 2004. She reported that during phone conversations defendant told her he was having sex with his nieces, whom she knew were five and six years old at the time. She said that she "heard [defendant's nieces] on the phone when he said that he was having sex with them." On one occasion in early December 2003, Lindsey stated that "[defendant] referred to it as sticking it to them," and this was followed by the sound of a small child whimpering. In late 2003, Lindsey's parent's no longer allowed her to talk to defendant. Lindsey testified that she asked her friend Amanda Cozart to call defendant and set up a three-way phone conversation for her with defendant.

Amanda Cozart ("Amanda") testified that during one such conversation in December 2003, after making the phone connection between defendant and Lindsey, she told them that she was putting

³ We will refer to the minor child D.J. by the pseudonym David to protect the child's identity and for ease of reading.

the phone down and not listening anymore but had actually pressed the mute button so that she could continue to listen to their conversation. Amanda testified that she heard defendant tell Lindsey he was babysitting his nieces and was "about to stick my dick in their ass." This statement was followed by the sound of a little girl crying.

Anna White, a former social worker with the Cleveland County Department of Social Services, testified that on 26 April 2004, the agency received a report alleging that Jane and Emily were being sexually abused by defendant. She went to Emily's school to interview her. Emily was six years old at that time. They discussed good touches and bad touches, and that a bad touch was when someone touches your private parts. Emily indicated she knew what private parts meant by pointing to her vaginal area, and which she called a "hoo hah." She told Ms. White that her uncle Danny had touched her on her private parts and again pointed to her vagina. She said it happened in the bed, and that it also happened to Jane. She further told Ms. White that he would get behind her and "put something in my back," and she indicated her buttocks. She said it was not his hand, but it was part of his body, and she did not know what to call it. She told Ms. White that it happened since they'd been living together, and that she wanted it to stop because "it hurts." After the interview with Emily, Ms. White went to the family's residence and spoke to Crystal, who was upset and in shock upon hearing the allegations. She asked Jane whether Emily was telling the truth or a lie, and Jane responded that it

wasn't a lie, it was the truth. Ms. White scheduled a medical exam that occurred on 20 May 2004, and she accompanied the family to that appointment.

Dr. Patricia Pitcher-Grinton was tendered as an expert in the field of pediatrics and sexual abuse. She testified that she interviewed and then examined Emily on 20 May 2004. In the interview, Dr. Pitcher-Grinton explained that she was going to do a physical exam, and she described what that would entail. She asked some questions in order to make Emily more comfortable, then she asked if anyone ever laid down with Emily. Emily replied that her uncle Danny laid down with her. When asked what happened when they were laying down together, Emily said that he touched her "hoo hah," and she pointed to her vaginal area. She said he touched it with his private area, which she identified on an anatomically correct male doll as the penis. Emily stated that it happened "lots of days," and when asked if anyone else had touched her, she answered, "No." The physical examination revealed an absence of posterior hymenal tissue and a small scar from the vaginal opening toward the anus. Dr. Pitcher-Grinton opined that the injury which caused the scar occurred at least a month prior, but she could not be certain when it had occurred. In her opinion, it would have taken an object an inch or greater in diameter to cause the damage, that children do not usually self-mutilate and it was unlikely that Emily had done this damage to herself, the damage would have caused a lot of pain, and that a young boy's penis was not capable of causing the damage observed on Emily. Dr. Pitcher-Grinton

testified that the physical damage was consistent with penetration of the vagina and sexual abuse.

Defendant did not testify or call any witnesses in his defense. He submitted a videotape, which was viewed by the jury, of an interview of Emily by a police officer. At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the charge for lack of sufficient evidence of penetration. The trial court denied the motions.

After deliberations, the jury returned a verdict of guilty of first degree statutory rape. At sentencing, defendant presented evidence in mitigation. The trial court found the existence of three mitigating factors, determined that a mitigated sentence was appropriate, and sentenced defendant to an active term in the mitigated range of a minimum of 180 months to a maximum of 225 months imprisonment. From the judgment entered, defendant appeals.

Defendant challenges the trial court's denial of his motion to dismiss on the basis that insufficient evidence was presented to show the element of penetration. We disagree.

In determining whether to grant a motion to dismiss for insufficiency of the evidence, "the trial court must decide whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998) (citation and quotations omitted). Substantial evidence includes both direct and circumstantial evidence, and is "evidence from which a rational finder of fact could find the fact to be

proved beyond a reasonable doubt." *Id.* When considering such a motion, all evidence is viewed in the light most favorable to the State, including all reasonable inferences which may be drawn therefrom. *Id.* at 679, 505 S.E.2d at 141. "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *Id.* (citation and quotations omitted).

A person may be found guilty of first degree rape if (1) he has vaginal intercourse with a child under the age of 13 years old, (2) he is at least 12 years old, and (3) he is at least four years older than the victim. N.C. Gen. Stat. § 14-27.2(a)(1) (2003). An essential element of rape is vaginal intercourse, which is the slightest penetration of the female sex organ by the male sex organ. *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). For rape to be found, it is not necessary that complete penetration occurred. *State v. Bell*, 159 N.C. App. 151, 158, 584 S.E.2d 298, 303 (2003), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004).

Testimony by a medical expert relating statements and nonverbal conduct by a child in an interview, including use of anatomically correct dolls, is properly admitted for purposes of medical diagnosis and treatment. *State v. Bullock*, 320 N.C. 780, 782, 360 S.E.2d 689, 690 (1987); N.C. Gen. Stat. § 8C-1, Rule 803(4) (2003). Further, although a medical expert may not testify that a defendant raped a victim, a medical expert may permissibly offer an opinion whether a victim in a rape case had been

penetrated and whether injuries were caused thereby. *State v. Galloway*, 304 N.C. 485, 489, 284 S.E.2d 509, 512 (1981). Thus, testimony that evidence from a physical examination revealed injuries consistent with an alleged rape is properly admitted. See *id.* Testimony of a victim, coupled with testimony from a medical expert, may be sufficient to prove the element of penetration. See *Bell*, 159 N.C. at 158, 584 S.E.2d at 303.

Defendant contends that the evidence shows, at most, that touching occurred, not penetration. He argues that Emily's testimony was confused and ambiguous, and that none of the evidence presented showed that defendant actually had vaginal intercourse with the alleged victim. We find, however, that Emily's testimony, in conjunction with the testimony of the medical expert, when viewed in the light most favorable to the State, constitutes substantial evidence of the element of penetration.

Here, testimony from the child victim indicated that defendant touched her private part, which she identified as her vagina, and that it hurt. She told social worker Anna White that defendant touched her vagina and that it hurt. She did not know what to call the body part that defendant used to touch her, but she was able to show Dr. Pitcher-Grinton using anatomically correct dolls that defendant touched her vagina with his penis. In addition, Dr. Pitcher-Grinton testified that the physical damage she observed in Emily's genital area was consistent with penetration and sexual abuse. Additionally, defendant's former girlfriend Lindsey Gantt and her friend Amanda Cozart testified that they heard defendant in

phone conversations state that he was having sex with or performing sex acts on his nieces, and this statement was followed by the sound of a child whimpering or crying. Taking all of this evidence, together, we find that evidence was sufficient to allow the charge to be submitted to the jury, and that the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

The remaining assignments of error, not brought forth or argued on appeal, are deemed abandoned. N.C.R. App. P. 28(a).

No error.

Judge WYNN and CALABRIA concur.

Report per Rule 30(e).