NO. COA10-485

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Cherokee County
Nos. 08 CRS 50976-79

MONT JOHNSON, JR.

Appeal by defendant from judgments entered 18 June 2009 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 28 October 2010.

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

Jarvis John Edgerton, IV, for defendant-appellant.

JACKSON, Judge.

Mont Johnson, Jr. ("defendant") appeals from judgments entered upon convictions for two counts of first-degree statutory rape and two counts of first-degree statutory sex offense. He contends that the trial court erred by failing to dismiss the charges because the State failed to present evidence of his age at the time the offenses were committed. After careful review, we disagree, and we hold no error.

On 4 August 2008, defendant was indicted for two counts of first-degree statutory rape and two counts of first-degree statutory sex offense. The matter came on for trial on 15 June

2009. The State's evidence at trial was as follows: A.M. testified that she was thirty-one years old at trial. She was born on 22 January 1978, and she turned twelve on 22 January 1990. She testified that defendant, whom she knew as "Junior," was married to her paternal grandmother, and that she had known defendant since she was born.

In 1990, when A.M. was twelve years old, she was living with her mother and stepfather in Blue Ridge, North Carolina, and her father, Alan Dockery ("Dockery"), was living with his mother and defendant in Murphy, North Carolina. A.M. spent every other weekend in 1990 with her father at defendant's house. Defendant's house had two bedrooms; Dockery slept in one bedroom, and A.M.'s grandmother and defendant slept in the other bedroom, which had two beds. When A.M. stayed at defendant's house, she slept in the extra bed in defendant's bedroom. When A.M. was scared, she slept in the same bed as defendant and her grandmother.

A.M. testified that defendant would feel her body, including her breasts, with his hands when she was in the same bed with defendant and her grandmother. When she was in the extra bed, defendant would get in bed with her after she and her grandmother fell asleep. She stated that defendant put his fingers and his penis inside of her vagina. She estimated that they had vaginal intercourse twelve to fifteen times in 1990. With regard to defendant's digital penetration of her vagina, she stated that it "happened a lot," and estimated that it occurred approximately twenty times.

A.M. related that defendant would also follow her into the bathroom and fondle her breasts and vagina. He asked her if she liked it, tried to kiss her, and wanted her to perform oral sex on him or rub his penis. He also drove her in a pickup truck to a secluded lot off a road where he fondled her and had intercourse with her. She estimated they went to the secluded lot four times in 1990. The sexual abuse began when A.M. was between eight and ten years old and lasted until she was sixteen when she had a job and a car and would be able to leave on her own.

A.M. told her brother about the abuse, and, when she was sixteen, she told her mother. In 2008, A.M., her husband, and their children needed a place to live and began living in a camper trailer on defendant's property. She told defendant not to touch her children, and he said that "he couldn't get it up and that he wasn't interested." She also told her grandmother not to leave the kids alone with defendant.

A.M. and her family lived in the camper for approximately one year. At some point, accusations were made regarding defendant abusing two of A.M.'s children. The Department of Social Services became involved, and A.M. and her husband moved off of defendant's property. Although A.M. and her husband lost custody of their children for several months, the children were returned to them before the start of the instant criminal trial.

A.M. later spoke to a law enforcement official and agreed to wear a wire and record a conversation with defendant. She met defendant in a supermarket parking lot on 7 July 2008 and told him

that police were questioning her about their relationship. A.M. described defendant as being cautious during the conversation, but he did talk about the secluded road and almost getting caught there when a car drove by.

Officer Brad Hoxit of the North Carolina Highway Patrol ("Officer Hoxit") testified that he assisted in investigating the allegations against defendant in conjunction with Lieutenant Jerry Crisp with the Cherokee County Sheriff's Department ("Lieutenant Crisp"). On 9 July 2008, Officer Hoxit interviewed defendant at the Sheriff's Department and took a statement from him. Defendant admitted to having sex with A.M. at her mother's house and at his house when she was twelve or thirteen years old. He also admitted that he digitally penetrated A.M. "two or three times." Officer Hoxit reviewed the statement with defendant, defendant signed the statement, and Lieutenant Crisp signed as a witness. Lieutenant Crisp testified that he watched the interview on closed circuit television and then joined defendant and Officer Hoxit and reviewed defendant's statement with him.

The only witness proffered for the defense was psychologist Jack Clement ("Clement"), who was tendered and admitted as an expert in forensic psychology. Clement evaluated defendant in March and May 2009. With respect to defendant's psychiatric history, Clement testified that defendant told him he had a nervous breakdown "a long time ago." Although "it was very difficult" for Clement "to establish exact dates," he stated that, "[t]he best I could tell it was between the ages of 22 and 28." Clement

explained that defendant "was incredibly vague when he talked about time[.] He would say that something happened back in the 60s or back in the 70s or a long time ago." Defendant was hospitalized for about a month and received outpatient mental health care. Clement testified that defendant scored a fifty-three on an IQ test, putting him in the lowest first percentile of the adult population. Defendant also had a severe speech impediment. Clement's opinion was that defendant's judgment was extremely limited, making him susceptible to influence of others. Based upon his evaluation of defendant, Clement believed that defendant's confession was neither knowing nor voluntary as he would not have been able to fully understand his rights.

At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges. The trial court denied both motions. After deliberating, the jury returned verdicts of guilty of all four offenses. The trial court consolidated the offenses into two judgments, and imposed consecutive life sentences. From the judgments entered, defendant appeals.

Defendant argues that the trial court erred by denying defendant's motions to dismiss when the State failed to present substantial evidence of his age. He contends that no direct evidence was presented as to his age, nor was there any evidence to indicate defendant's relative age compared with the victim, particularly since defendant was not a blood relative, rendering familial relationships unhelpful. Defendant asserts that, based

upon the trial court's error, his convictions should be vacated. 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) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). 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.* (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). "However, when it is consistent with the State's evidence, the defendant's evidence 'may be used to explain or clarify that offered by the State.'" *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *Jones*, 280 N.C. at 66, 184 S.E.2d at 866).

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) (2009); *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). First-degree sexual offense involves a "person engag[ing] in a sexual act: (1) [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4 (2009).

Thus, for both statutory rape and statutory sex offense, the age of defendant is an essential element which must be proven by the State. At the time the offenses were alleged to have occurred in 1990, A.M. was twelve years old. There is no dispute regarding A.M.'s age at the time the offenses at issue were committed. Therefore, the State was required to produce evidence that defendant was at least four years older than A.M., or at least sixteen years old.

This Court has stated that "our evidentiary rule does not allow a jury to determine the age of a criminal defendant beyond a reasonable doubt merely by observing him in the courtroom without having the benefit of other evidence, whether circumstantial or direct." *In re Jones*, 135 N.C. App. 400, 405, 520 S.E.2d 787, 789-92 (1999) (reversing the trial court's denial of the juvenile's motions to dismiss for first-degree sexual offense and first-degree

rape after surveying North Carolina cases in which the jury's observation of defendant's age was at issue on appeal). However, if sufficient circumstantial evidence is presented regarding a defendant's age, the jury's ability to observe the defendant in the courtroom may be considered in determining whether the State presented substantial evidence of the defendant's age where age is an element of an offense. *See State v. Ackerman*, 144 N.C. App. 452, 461-62, 551 S.E.2d 139, 145-46 (holding no error after acknowledging that the State presented circumstantial evidence of the defendant's age such that the jury properly could use its own observations of the defendant in determining his age with respect to his charge for assault on a female, a charge which requires a defendant to be at least eighteen years old), *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001).

Our analysis in *Ackerman* is instructive in our consideration of the case *sub judice*. In *Ackerman*, we noted that the State presented circumstantial evidence of the defendant's age in that he had been involved in a romantic relationship with a woman who was forty-three years old, that he was a "regular" at a bar and had purchased and consumed alcoholic beverages at the bar on the night in question, and that one must be at least twenty-one years old to purchase or consume alcohol pursuant to North Carolina General Statutes, section 18B-302. *Id.*

In the case *sub judice*, the State presented the following relevant circumstantial evidence with respect to defendant's age:

(1) defendant was married to A.M.'s grandmother; and (2) defendant drove A.M. in a truck when she was twelve years old in 1990.

Although the State did not present evidence of A.M.'s grandmother's age, we are satisfied that, with the generational gap between A.M. and her grandmother, defendant's romantic involvement and marriage to A.M.'s grandmother provided sufficient circumstantial evidence of defendant's age through which the jury would be entitled to consider their observations of defendant in determining defendant's age. *See id.* (favorably observing the defendant's romantic involvement with a forty-three year old woman as circumstantial evidence of the defendant's age). Furthermore, in *Ackerman*, we observed that the State presented evidence of the defendant's purchase and consumption of alcohol, circumstances for which the laws of the State require the defendant to be at least twenty-one years old. *See id.* Adopting parallel reasoning in the case sub *judice*, A.M. testified that defendant drove her in a Ford pickup truck to a secluded lot at least four times in 1990. Pursuant to North Carolina General Statutes, section, 20-7, a person must obtain and carry a driver's license to drive a motor vehicle on a highway, and pursuant to section 20-9(a), a person must be at least sixteen years old to obtain a driver's license. *See* N.C. Gen. Stat. §§ 20-7-9 (2009).

Accordingly, we hold that the State presented circumstantial evidence of defendant's age such that the jury could rely upon its observations of defendant to determine his age as an element of the offenses charged. Furthermore, with regard to the jury's

observation of defendant, the record reflects that defendant was born in October 1940, which means he was forty-nine or fifty years old in 1990 when the offenses were committed, and sixty-eight years old at the time of trial. Therefore, unlike *In re Jones*, 135 N.C. App. at 405-09, 520 S.E.2d at 789-92, in which case the juvenile's age on the date of the offense was at issue, in the case *sub judice*, there can be no serious dispute that the jury may have been confused about defendant's age.

Upon review, we conclude that, in the light most favorable to the State, sufficient circumstantial evidence was presented from which, in addition to its observations of defendant, the jury could conclude that defendant was at least sixteen years of age when the offenses were committed. Accordingly, the trial court did not err in denying defendant's motions to dismiss the charges for lack of substantial evidence.

No Error.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).