NO. COA14-814
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Onslow County
Nos. 12 CRS 56333-36, 56338-39,
13 CRS 52796-804, 13 CRS 52807

WILLIE ABNER BROWN,
Defendant.

Appeal by defendant from judgment entered 14 March 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 17 November 2014.

Roy Cooper, Attorney General, by David Elliott, Assistant Attorney General, and Daniel P. O'Brien, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Paul M. Green, Assistant Appellate Defender, for defendant-appellant.

BELL, Judge.

Willie Abner Brown ("Defendant") appeals from his convictions for four counts of first-degree rape, two counts of second-degree rape, one count of attempted second-degree rape, five counts of first-degree sexual offense, four counts of first-degree burglary, two counts of common law robbery, two

counts of second-degree kidnapping, four counts of robbery with a dangerous weapon, two counts of assault with a deadly weapon inflicting serious injury, four counts of obtaining property by false pretenses, one count of financial transaction card theft, one count of felonious entering a building, and one count of possession of stolen goods. Defendant's sole argument on appeal is that the trial court erred in denying Defendant's motion to dismiss two of his first-degree sexual offense charges for insufficient evidence. After careful review, we find no error in the denial of his motion to dismiss the first-degree sexual offense charged in file number 13 CRS 52803 but vacate his conviction of first-degree sexual offense charged in file number 13 CRS 52804 and remand for resentencing.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 1 July 2011 at approximately 2:33 a.m., M.H. ("Martha")[1] was confronted in her home by Defendant. He was dressed in all black, wearing gloves and a black ski mask. He forced her arms behind her back and threatened to harm her baby. Defendant vaginally raped her twice. Afterward, he made her take a shower and drive him to an ATM to withdraw money. When

[1] Pseudonyms are used throughout this opinion to protect the privacy of individuals and for ease of reading.

they returned to Martha's house, Defendant forced her into her son's room and left with the comforter from her bed and her cell phone.

On 17 May 2012, at approximately 12:30 a.m., C.J. ("Carla") was home alone while her husband was deployed in Afghanistan. When Carla went to adjust the thermostat in her home, Defendant grabbed her hair from behind and held a knife to her neck. He forced her into the bedroom and told her to remove her clothes. She later testified at trial that she "bent over, and he felt up [her] bottom and [her] vagina area" and that she could tell he was wearing gloves because she felt the fabric against her skin. Defendant forced her to perform oral sex on him and vaginally and anally raped her twice. He then made her take a shower. After the shower, Defendant found Carla's vibrator and held it up to her vagina. He used the handle of his knife to penetrate her vaginally and anally. He also vaginally penetrated her with the bottom part of a lotion bottle while he raped her anally and vaginally raped her again. Next, Defendant made Carla drive to her storage unit to retrieve her husband's gun. After forcing her to go to the storage unit, they returned to her home and he vaginally raped her again. He made her shower once more, and

Carla stayed in the shower until she heard the front door close, indicating Defendant had left her house.

Early in the morning on 11 September 2012, B.M. ("Bridget") was asleep in her bed when she felt someone shaking her awake. She sat up and was hit in the face by something hard and heavy. Assuming it was her boyfriend, she asked "What are you doing?" Defendant responded, "This is not a f—ing joke, I'm serious." Upon realizing the man was not her boyfriend, she ran out of the bedroom, down the stairs, and outside to a neighbor's house to call the police. The police arrived at the scene and took a statement from Bridget. She was taken to the hospital, where she received eighteen stitches for the injury to her head. After the attack, she discovered her wallet was missing and fraudulent charges had been made with her credit cards.

Also on the morning of 11 September 2012, S.S. ("Sheila"), who was eight months pregnant at the time, heard her husband leave for work around 5:00 or 5:30 a.m. Soon after, she was dozing in and out of sleep when Defendant turned on her bedroom light and peered around the bedroom door. He walked into her bedroom with a gun pointed at her and asked her if there were any weapons in the house, where her husband was, and if she had any money. Defendant raped her twice. When Defendant said he

was going to kill her, she grabbed the gun and tried to get it out of his hands. Defendant began punching her in the face and hitting her with the gun. After he left, she drove to a gas station and called 911.

Defendant was arrested on 14 September 2012 and subsequently indicted on the following charges in connection with the events taking place on 1 July 2011, 17 May 2012, and 11 September 2012: (1) seven counts of first-degree rape; (2) one count of attempted first-degree rape; (3) six counts of first-degree sexual offense; (4) four counts of first-degree burglary; (5) two counts of second-degree kidnapping; (6) six counts of robbery with a dangerous weapon; (7) two counts of assault with a deadly weapon inflicting serious injury; (8) one count of felony breaking and entering; (9) four counts of financial card theft; (10) four counts of obtaining property by false pretenses; and (11) one count of possession of stolen property.

The cases were joined and a jury trial was held in Onslow County Superior Court on 3 March 2014. At the close of the State's evidence, the following charges were dismissed: (1) two counts of financial transaction card theft; (2) two counts of first-degree rape; (3) one count of attempted first-degree rape; (4) two counts of robbery with a dangerous weapon; (5) one count

of first-degree kidnapping; and (6) one count of first-degree sexual offense. The trial court denied Defendant's motion to dismiss for insufficient evidence as to the remaining charges. On 14 March 2014, the jury returned verdicts finding Defendant guilty of the remaining charges. Judgment was arrested on the lesser charge of possession of stolen property. Defendant pled guilty to attaining habitual felon status and the trial court sentenced him to a minimum total of 4,922 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citations omitted). "Substantial evidence is relevant evidence that a reasonable mind would find adequate to support a conclusion. We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from

the evidence." *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010) (citations omitted).

13 CRS 52803, Count III

Defendant first argues that the trial court erred in denying his motion to dismiss file number 13 CRS 52803, Count III. Specifically, Defendant contends that the State failed to present sufficient evidence of the sexual act described in the indictment. We disagree.

File number 13 CRS 52803 charged Defendant with first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(2), which makes it a Class B1 felony for a person to "engage[] in a sexual act . . . [w]ith another person by force and against the will of the other person." N.C. Gen. Stat. § 14-27.4(a)(2) (2013). N.C. Gen. Stat. § 14-27.1 defines "sexual act" as "the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1 (2013). While the State must prove a sexual act occurred in order to convict a defendant under N.C. Gen. Stat. § 14-27.4, the State is not required to specify the nature of the sexual act in the indictment in order to charge the crime of first-degree sexual offense. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (citation omitted).

However, should the State specify the nature of the sexual act in the indictment, it must provide substantial evidence that the sexual act in the indictment occurred. *State v. Treadway*, 208 N.C. App. 286, 297-98, 703 S.E.2d 335, 345 (2010) (citation omitted). *See State v. Loudner*, 77 N.C. App. 453, 454, 335 S.E.2d 78, 79 (1985) (holding that "[w]hile the State [is] not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations" (internal citation omitted)).

In the case before us, file number 13 CRS 52803 alleged each essential element of first-degree sexual offense, and added that "[t]he sex offense consisted of digital penetration of the victim's vagina." Further, the jury instructions for this charge specified that it pertained to "alleged acts committed before [Carla's] first shower." "The Due Process Clause . . . requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Lark*, 198 N.C. App. 82, 86, 678 S.E.2d 693, 697 (2009) (alteration in original)(citation and quotation marks omitted).

Defendant argues that the State did not present any evidence of digital vaginal penetration before Carla's first

shower. We are not persuaded by this argument. At trial, Carla testified that she "bent over, and [Defendant] felt up my bottom and my vagina area." She also testified that she could tell Defendant was wearing gloves because of "the feeling of fabric against my skin." She stated that these events occurred before Defendant made her take a shower. We conclude that Carla's testimony — and the reasonable inferences that may be drawn from it — was sufficient evidence that a reasonable juror could conclude that Defendant had committed the sexual act charged in the indictment. Accordingly, we hold that the trial court properly denied Defendant's motion to dismiss as it pertains to file number 13 CRS 52803, Count III.

13 CRS 52804

Similarly, Defendant argues that the trial court erred in denying his motion to dismiss Count III of file number 13 CRS 52804 because the State failed to present evidence of the nature of the sexual act specified in the indictment. Count III of file number 13 CRS 52804 also charged Defendant with first-degree sexual offense against Carla, describing the nature of the sexual act as "digital penetration of the victim's vagina."

Here, the trial court instructed the jury that file number 13 CRS 52804 pertained to "alleged acts committed after her

first shower" and that in order to convict Defendant on this count of first-degree sexual offense, the jury must find that "this sexual act was separate and distinct from the act alleged in 13 CRS 52803, Count Three." The evidence presented at trial indicated that Defendant vaginally and anally raped Carla after she took her first shower. However, the State did not present any evidence that Defendant digitally penetrated Carla's vagina after her first shower. Therefore, even taken in the light most favorable to the State, we conclude that the State failed to present sufficient evidence tending to show that Defendant committed the sexual act of digital vaginal penetration after Carla's first shower, as alleged in file number 13 CRS 52804, Count III. As such, we vacate Defendant's conviction of first-degree sexual offense arising from this indictment and remand for resentencing.

Conclusion

For the reasons stated above, we find no error in the trial court's denial of Defendant's motion to dismiss the count of first-degree sexual offense charged in file number 13 CRS 52803. However, because the State failed to present sufficient evidence regarding the specific sexual act alleged in file number 13 CRS

52804, we vacate Defendant's conviction of first-degree sexual offense charged in this indictment and remand for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

Report per Rule 30(e).