IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-317

Filed: 17 November 2015

Mecklenburg County, No. 12 CRS 235434, 235435, 235436

STATE OF NORTH CAROLINA

v.

MICHAEL BRIAN WISE

Appeal by defendant from Judgment entered 20 March 2014 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Paul M. Green for defendant.

ELMORE, Judge.

Michael Brian Wise (defendant) was found guilty of one count of statutory rape against a victim 13, 14, or 15 years old, and two counts of statutory sexual offense against a victim 13, 14, or 15 years old. After careful consideration, we find no error.

I. Background

The State's evidence tended to show the following: Q.J.[1] (the victim) and defendant initially became acquainted when the victim was attempting to call an ex-boyfriend but inadvertently reached defendant instead. A few weeks after this initial phone call, defendant and the victim again spoke on the phone. Defendant asked the victim how old she was, and she responded that she was eighteen years old. When defendant stated that he knew the victim's ex-boyfriend was thirteen or fourteen years old, the victim stated she was sixteen years old. The victim and defendant continued to speak on the phone, send text messages, and communicate through Facebook messaging. Their conversations tended to be personal and sexual, and the victim stated that she loved defendant and wanted to be in a relationship with him. The victim was fourteen years old and defendant was forty-three years old.

On 10 August 2012, defendant and the victim decided to meet in person at a park near the victim's home. Sometime between 7:00 and 9:00 p.m., the victim got into defendant's van, and defendant drove to a laundromat where they stayed for a few hours. When they arrived at the laundromat, they engaged in oral sex and sexual intercourse. Defendant then drove back to the park to drop the victim off around midnight. Officer Christopher Drew King of the Cornelius Police Department was on patrol near the park and approached the van. He thought it was suspicious because the park was closed and the van was turned off but not in a parking space. When

[1] We employ this pseudonym to protect the confidentiality of the minor in this case.

asked why he was in the park while it was closed, defendant stated, "We're just talking." Officer King testified,

> And it was at that time that I looked past him, and I observed [the victim] covering her face as I was trying to locate her. . . . And I said, ["]How old is she?["] And they both stated at about the same time that she was 18. I didn't feel comfortable with that answer. And I asked [the victim] to step out of the vehicle. And as she was stepping outside of the vehicle, the defendant—he kind of just nudged and said, ["]She told me she was 18.["]
>
> I thought this was a red flag in my book, and I called for an additional unit because I wanted to separate the parties to get their stories. And as she came around, I learned that she was 14 years old.

Officer King also saw two unused condoms in the van.

When Sergeant William Christopher Roper arrived at the scene, he spoke with defendant to find out why he was at the park. Sergeant Roper testified, "[Defendant] starts telling me he thought she was 18. He hands me his phone. He says, ['']Here. Look at these text messages that I have.['] " Sergeant Roper asked defendant if he would be willing to speak to a detective at the police station, and defendant agreed. Around 2:45 a.m., Detective Daniel Waltman spoke with defendant at the police station about what happened in the van. Around 4:00 a.m., Detective Waltman spoke with the victim. Detective Waltman testified that during the victim's interview, "she stated that they both got into the back of the van, started kissing. She performed oral sex on him. They had sex. And then she performed oral sex on him again."

Defendant was arrested on 11 August 2012 and was indicted on 20 August 2012 on two counts of statutory sexual offense of a person 13, 14, or 15 years old and one count of statutory rape of a person 13, 14, or 15 years old. During pretrial motions on 17 March 2014, the State moved to close the courtroom during the victim's testimony. The trial court asked the State whether the moving party is required under law to afford the press notice of the motion. The State responded, "The cases don't speak to [that]. . . . The cases are basically guiding us about how to balance the defendant's Sixth Amendment rights to a public [trial.]" The trial court asked defendant for a response, and he stated, "I don't wish to be heard." The trial court stated it would take the matter under advisement and address it later. At this point, defendant stated the following:

> [Defendant]: So may I just go ahead and comment? It hadn't occurred to me. It's been so long since I've done a trial where the press was interested, Your Honor. And that would prompt me—of course, I want this to be as quiet as possible. So I actually in some way didn't object at all to the closure of the courtroom. But I do have fears about the press being notified so I'd better state that.
>
> The Court: You have fears that the press is not notified of what?
>
> [Defendant]: Well, if they are notified, all of a sudden the case will become an interest and so on. That's all. So I guess I would object to the motion, even though I don't really object to the court being closed for that person to testify.

Later, the trial court revisited the State's motion to close the courtroom and

asked defendant if he wished to be heard. Defendant replied, "No, sir." The court then entered its order into the record. The court made findings of fact and concluded as a matter of law the following:

> [T]here is an overriding interest that would be harmed by allowing the courtroom to remain open. . . .
>
> [T]here are no reasonable alternatives to closing the proceedings. . . .
>
> [T]he closure allowed is no broader than necessary to protect the aforesaid overriding interest . . . .
>
> [T]hat closing the courtroom for this limited period of time during the trial will protect the minor child from embarrassment and undue hardship satisfied under [sic] the relevant legal factors outlined in the law.

The court entered the following order:

> [T]he State's motion to close the courtroom during the victim's testimony is allowed, and that all individuals present in the courtroom other than the officers of the court, court personnel, the defendant, the lead detective, and the attorneys will be excluded and excused from the court during the testimony of the minor victim. . . .
>
> [U]pon completion of her testimony, the courtroom will be reopened. No other business will be transacted by the Court during the time when the courtroom is closed to public and nonessential witnesses and bystanders and citizens and the media.

Upon entering the order, the court again asked if either party would like to be heard on the matter, and defendant again responded, "No, sir."

On 20 March 2014, the jury found defendant guilty of all three charges. The trial court sentenced defendant to three consecutive sentences of 192 to 291 months' imprisonment. The trial court also ordered defendant to register as a sex offender upon his release for a period of thirty years. Defendant now appeals.

II. Analysis

A. Courtroom Closure

Defendant argues that the trial court erred in granting the State's motion to close the courtroom while the then-fifteen-year-old victim testified, violating his constitutional right to a public trial. The State claims that defendant failed to preserve this issue for appeal because he did not object to the partial courtroom closure and he stated that he wished to keep the proceedings "as quiet as possible."

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2009). "It is well settled that constitutional issues cannot be raised for the first time on appeal." *State v. Wright*, 200 N.C. App. 578, 584, 685 S.E.2d 109, 114 (2009) (citing *State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001)). Because defendant stated that he did not object to the court being closed for the victim to testify but only objected to notifying the press of the State's motion, the issue is not preserved for appeal.

Assuming *arguendo* that the issue is preserved, defendant's argument is without merit. Defendant claims (1) the trial court "failed to make a case-by-case determination that the well-being of this minor victim necessitated closure of the courtroom, and it ordered closure of the courtroom erroneously and upon inadequate findings[;]" (2) the State had no overriding interest that was likely to be prejudiced if the courtroom was not closed; and (3) the *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984), test was not met.

"In the trial of cases for rape or sex offense . . . , the trial judge may, during the . . . testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case." N.C. Gen. Stat. § 15-166 (2013). In *Waller v. Georgia*, the Supreme Court of the United States held that "any closure of a suppression hearing over the objections of the accused" must meet the following test: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 47–48, 81 L. Ed. 2d at 39. Subsequently, this Court held that "where defendant consents to the closure, the trial court is not required to make specific findings of fact." *State v. Starner*, 152 N.C. App. 150, 154, 566 S.E.2d 814, 817 (2002) (citing *Waller*, 467 U.S. at 47–48, 81 L. Ed. 2d at 39 as

"requiring the trial court, where it ordered closure *over objection of the defendant*, to make closure no broader than necessary, consider other alternatives, and to make findings of fact in order to protect Sixth Amendment public-trial guarantee").

In *Starner*, the State moved to exclude bystanders from the courtroom during the minor victim's testimony, and the defendant did not object. 152 N.C. App. at 153–54, 566 S.E.2d at 816–17. The trial court, therefore, did not make any findings to support the closure. *Id*. The defendant later appealed, and this Court found no error, holding that because the defendant consented to the closure, the trial court was not required to make specific findings of fact. *Id*. (citing *Waller*, 467 U.S. at 48, 81 L.Ed.2d at 39); s*ee also State v. Smith*, 180 N.C. App. 86, 98, 636 S.E.2d 267, 275 (2006) (holding that the trial court did not err in closing the courtroom without holding a hearing or making findings of fact because the defendant did not object to the closure).

Here, as in *Starner*, defendant did not object to the courtroom closure. Instead, defendant stated,

> So may I just go ahead and comment? It hadn't occurred to me. It's been so long since I've done a trial where the press was interested, Your Honor. And that would prompt me—of course, I want this to be as quiet as possible. So I actually in some way didn't object at all to the closure of the courtroom. But I do have fears about the press being notified so I'd better state that.

Moreover, the trial court asked defendant both before and after entering its order if

he wished to be heard, and defendant replied, "No, sir." Because defendant supported closing the courtroom so it would "be as quiet as possible," the trial court was not required to make findings adequate to support the closure. *See Starner*, 152 N.C. App. at 154, 556 S.E.2d at 817.

B. Sufficiency of the Evidence

Defendant next argues that the trial court erred in denying his motion to dismiss one of the two charges of statutory sexual offense against a victim 13, 14, or 15 years old because the State's evidence was insufficient to establish more than one act of fellatio. The State claims that defendant has not preserved this issue for appeal because he did not state the specific grounds for his motion to dismiss.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2009).

Defendant argues that this Court's decision in *State v. Person*, 187 N.C. App. 512, 653 S.E.2d 560 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008), is controlling. In *Person*, the "defendant moved to dismiss all the charges at the close of the State's evidence and at the close of all the evidence." *Id.* at 518, 653 S.E.2d at 564. We stated, "Although defendant provided no specific reasoning to support the motion to dismiss, he was not required to do so, since it was apparent

from the context that he was moving to dismiss all the charges based on the insufficiency of the evidence." *Id.* at 519, 653 S.E.2d at 565 (citing N.C.R. App. P. 10).

Here, at the close of the State's evidence, defendant stated, "Your Honor, I'll make a motion to dismiss. And I don't wish to be heard." Defendant put on evidence and at the close of all the evidence again moved to dismiss, stating, "Your Honor, I just move to dismiss. I'm at a loss for an argument on this. I don't wish to be heard." The trial court responded, "I believe there's enough evidence. It's a jury determination as to who to believe and what to believe. I think that's up to the jury. So I will deny that motion. But I will note your exception[.]" Although defendant was "at a loss" for why he was moving to dismiss, it was seemingly apparent to the trial court. Thus, we will review this issue despite defendant's failure to state the specific grounds for the ruling he desired.

"On appeal, the standard of review for the denial of a motion to dismiss is to determine whether the evidence, when taken in the light most favorable to the State, would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt." *State v. Mueller*, 184 N.C. App. 553, 560, 647 S.E.2d 440, 446 (2007) (citing *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987)). "The state is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the

commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Baker*, 338 N.C. 526, 558, 451 S.E.2d 574, 593 (1994) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)) (quotation marks omitted).

Defendant contends that the State presented insufficient evidence of two counts of statutory sexual offense under N.C. Gen. Stat. § 14-27.7A(a).

> 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) (2013). " 'Sexual act' means . . . fellatio, . . . but does not include vaginal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2013). "Fellatio is . . . defined as contact between the mouth of one party and the sex organs of another." *State v. Johnson*, 105 N.C. App. 390, 392, 413 S.E.2d 562, 563 (1992) (quotations and citations omitted). "Statutory sexual offense and statutory rape are categorized as strict liability crimes[,]" meaning that consent is not a defense and "the defendant's mistake or lack of knowledge of the child's age" is irrelevant. *State v. Sines*, 158 N.C. App. 79, 84, 579 S.E.2d 895, 899 (2003) (citing *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000)).

Here, the only element that defendant is contesting is the "sexual act." He concedes that one act of fellatio occurred but argues there was insufficient evidence

of a second act primarily because his statements during his police interview were "barely audible and often unintelligible." For the reasons discussed below, the State presented sufficient evidence of two sexual acts.

At trial, the victim testified to the following:

> Q. While in the van, did the two of you engage in any other sexual conduct?
>
> A. Yes.
>
> Q. And what was that?
>
> A. It was oral sex.
>
> Q. And just as you described for us what you meant by sex, can you describe what you mean by oral sex?
>
> A. My mouth on his penis.

Additionally, Detective Waltman testified that the victim told him during her interview that "[s]he performed oral sex on him. They had sex. And then she performed oral sex on him again." This testimony was admitted as corroborative evidence during the State's case. During defendant's case, the video of the victim's interview was admitted as substantive evidence and played for the jury, and the transcript was admitted for illustrative purposes.

During defendant's interview with Detective Waltman and Sergeant Roper, defendant admitted that two acts of fellatio took place:

DW[2]: She come on to you. Hell. You're like, whoa. She started, ya know—

MW: Groping on me.

DW: —pulling at you and groping on your penis and stuff. And what happened at that point?

MW: You already know the answer to that question.

DW: I already know the answer to that question. So she started giving you a blow job.

MW: And kissing on my neck and I started kissing her, kissing.

DW: Did y'all move to the back of the van? Hmm?

MW: Yeah.

. . . .

CR: After it happened, she told you how old she was?

MW: She comes out with these ol' what if scenarios.

CR: And this is after what happened?

MW: After the fact.

CR: After what?

DW: Ya know, we can't help you out unless you tell us what happened.

MW: After, after sex.

. . . .

[2] DW stands for Detective Daniel Waltman. MW stands for Michael Wise, defendant. CR stands for Sergeant Christopher Roper.

> DW: You pulled out? Or did she, ya know, go down on you at that point or anything?
>
> MW: No, that was after that, she wasn't doing nothing, she wanted to, give me head again, give me a blow job.
>
> DW: I'm sorry, I didn't?
>
> MW: She gave me a blow job after that.
>
> DW: After having sex?
>
> MW: (crying)
>
> DW: Wow.
>
> CR: How long did this last for? About five minutes?
>
> MW: Yeah, man, ten to five, ten minutes.

At trial, Detective Waltman testified that the video and the transcript "accurately reflect the interview in its entirety[,]" which he confirmed by looking at the transcript while watching the video and "following along." The video of defendant's interview was admitted without objection at trial as substantive evidence and the transcript was admitted for illustrative purposes.

When taken in the light most favorable to the State, there was sufficient evidence to permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. *See Mueller*, 184 N.C. App. at 560, 647 S.E.2d at 446. Although defendant argues for the first time on appeal that the video recording does not confirm the transcript, the jury listened to the video at trial

and was able to consider for itself what, if anything, defendant admitted. "It is within the jury's province to assess the credibility of each witness, and to assign weight to all parts of the testimony believed." *Johnson*, 105 N.C. App. at 393, 413 S.E.2d at 564 (citing *Williford v. Jackson*, 29 N.C. App. 128, 131, 223 S.E.2d 528, 530 (1976)). Based on defendant's interview, the victim's testimony and interview, and Detective Waltman's corroborating testimony, the State presented sufficient evidence that two sexual acts occurred.

III. Conclusion

The trial court did not err by granting the State's motion to close the courtroom during the victim's testimony or by denying defendant's motion to dismiss.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).