IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-12

Filed: 2 October 2018

Union County, Nos. 15 CRS 51369-70

STATE OF NORTH CAROLINA

v.

BOBBY DEWAYNE HELMS

Appeal by defendant from judgments entered 4 May 2017 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 21 August 2018.

Attorney General Joshua H. Stein, by Associate Attorney Erin E. Gibbs and Assistant Attorney General Alexandra Gruber, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

ARROWOOD, Judge.

Bobby Dewayne Helms ("defendant") appeals from judgments entered on his convictions of first degree sex offense with a child under the age of thirteen years. For the reasons stated herein, we find no error.

I. Background

A Union County grand jury indicted defendant on 6 July 2015 for two counts of engaging in a sex offense with a child under the age of thirteen years. On 24 April 2017, those indictments were joined for trial with two other indictments for indecent liberties with a child.

The matter came on for trial on 24 April 2017, the Honorable Christopher W. Bragg presiding.

The State's evidence tended to show that L.F.[1] was born on 23 April 2011. She lived with her mother, B.F., in Indian Trail. Her father, A.B., lived with his wife, S.B., in La Grange.

B.F. met defendant through his cousin in 2012. For B.F. and defendant's first date, defendant took B.F. and L.F. to a restaurant. L.F. was an infant at the time. Afterwards, B.F. performed oral sex on defendant in the car, while L.F. was asleep in her car seat, facing the back of the truck. After this first date, defendant and B.F. exchanged hundreds of Facebook messages to each other between 2012 and 2014.

In the messages, defendant and B.F. referred to each other as husband and wife, discussed getting married and having children, and expressed love for one another. The messages were often sexually graphic, and included messages from defendant about engaging in sex acts with his and B.F.'s future offspring. In reference to L.F., the messages contain requests from defendant that L.F. watch him

[1] Initials are used throughout this opinion to protect the identity of the juvenile and for ease of reading.

and B.F. perform sex acts, that B.F. send him photographs of L.F., and that L.F. participate in sex acts. During this time, B.F. would see defendant "[e]very once in a while[.]"

Sometime between October and December 2014, defendant took B.F. and L.F. to his parents' residence. Defendant, B.F., and L.F. went into a treehouse next to the parents' house. The treehouse had a room with a bed and a television in it. B.F. and L.F. sat on the bed and watched a television show for a while. Defendant sat on the other end of the bed. Then, at defendant's direction, B.F. took off her and L.F.'s clothes. Defendant removed his clothes, except for his boxers. Defendant then told B.F. to touch L.F.'s clitoris, and she complied, while defendant masturbated. Defendant asked B.F. to move L.F. closer to him, and she did. Defendant then asked B.F. what she would think if L.F. put her mouth on his penis. L.F. put her mouth on his penis, and defendant placed his hands on her head. L.F. said she wanted to leave. Defendant took L.F. and B.F. back to B.F's house.

On 5 January 2015, S.B. retrieved L.F. from B.F.'s residence to take her to visit La Grange. During the visit, L.F. complained to S.B. that her mother had hurt her, indicating she was hurting in her private area. L.F. told S.B. that her mother had put her finger in L.F.'s vagina. S.B. asked L.F. if anyone else was with her mother when her mother hurt her, and L.F. answered that her mother's boyfriend, Dewayne,

had been there. L.F. said Dewayne did not hurt her, and that she had touched him in his private area.

S.B. contacted law enforcement and the Department of Social Services. Law enforcement arranged a forensic interview and medical examination of L.F., which took place on 3 February 2015. S.B. also logged into B.F.'s Facebook account. Based on the contents of the account, she believed B.F.'s boyfriend Dewayne to be defendant.

On 2 April 2015, Lieutenant David Linton of the Union County Sheriff's Department interviewed defendant. Defendant was not under arrest at the time of the interview, and Lieutenant Linton told him that he was free to leave at any time. During the interview, defendant admitted that he had a relationship with B.F., that he exchanged Facebook messages with her, and that he took part in sexual acts committed against L.F. He also specifically admitted that he asked B.F. to digitally penetrate L.F. in the treehouse, and that his penis went inside L.F.'s mouth.

The jury found defendant guilty of all four charges and found that the State had proven two aggravating circumstances: (1) that defendant took advantage of a position of trust and confidence, including a domestic relationship, to commit the offense, and (2) that the victim was very young. The trial court arrested judgment on the two convictions for taking indecent liberties.

At the sentencing hearing, the trial court found four mitigating factors: (1) defendant voluntarily acknowledged wrongdoing in connection with this offense to a

law enforcement officer prior to arrest, (2) defendant supports his family, (3) defendant has a support system in the community, and (4) defendant has a positive employment history and was gainfully employed. The trial court determined that the aggravating factors outweighed the mitigating factors, and that an aggravated sentence was justified. The trial court sentenced defendant to imprisonment for 300 to 420 months for each charge, to run consecutively.

Defendant appeals.

II. Discussion

The sole issue on appeal is whether there was sufficient evidence to support the submission of the aggravating circumstance found in N.C. Gen. Stat. § 15A-1340.16(d)(15), that defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offenses[,]" to the jury.

> In order to be valid, an aggravating factor must be supported by sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence. The trial court should be permitted wide latitude, however, in arriving at the truth as to the existence of aggravating and mitigating factors, for it alone observes the demeanor of the witnesses and hears the testimony.

State v. Hayes, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991) (citations omitted).

N.C. Gen. Stat. § 15A-1340.16(d)(15) (2017) provides for the imposition of an aggravated sentence during the sentencing phase of a trial if it is found that "defendant took advantage of a position of trust or confidence, including a domestic

relationship, to commit the offense." *Id.* To apply the enhancement, a jury must find that both: (1) "a position of trust existed," and (2) the "defendant abused the position of trust in order to commit the assault." *State v. Nicholson,* 169 N.C. App. 390, 396, 610 S.E.2d 433, 437 (2005).

A finding of this aggravating factor does "not require that the victim consciously regard the defendant as one in whom she placed her trust or confidence." *State v. Mann*, 355 N.C. 294, 318-19, 560 S.E.2d 776, 791 (2002) (citation omitted). Instead, the "finding depends . . . upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Daniel,* 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987).

Defendant argues that the evidence at trial was insufficient to establish this aggravating factor because it failed to show that the relationship between defendant and L.F. was conducive to her reliance on him, and only showed that L.F. trusted defendant in the same way she might trust any adult acquaintance.

Defendant supports his argument with *State v. Blakeman*, 202 N.C. App. 259, 688 S.E.2d 525, *disc. review denied,* 364 N.C. 242, 698 S.E.2d 656 (2010). In *Blakeman*, our Court held there was insufficient evidence of the "trust or confidence" aggravating factor between a 13-year-old girl and her friend's stepfather where:

> [t]he evidence was undisputed that [the victim] required her mother's permission to spend the night [at her friend's house], and had spent the night there no more than ten times. There was no evidence that [the victim's] mother

> had arranged for Defendant to care for [the victim] on a regular basis, or that Defendant had any role in [the victim's] life other than being her friend's stepfather. There was no evidence suggesting that [the victim], who was thirteen-years-old and lived nearby, would have relied on Defendant for help in an emergency, rather than simply going home. There was no evidence of a familial relationship between [the victim] and Defendant, and no evidence that [the victim] and Defendant had a close personal relationship or that [the victim] depended or relied on Defendant for any physical or emotional care. The evidence showed only that [the alleged victim] trusted Defendant in the same way she might trust any adult parent of a friend.

Id. at 270-71, 688 S.E.2d at 532 (quotation marks omitted).

Here, however, L.F.'s mother testified that she had been in a relationship with defendant for over two years. She referred to him as her husband, and even discussed having children with him. L.F. knew about her mother's close relationship with defendant, as she specifically referred to him as her mother's "boyfriend" when she reported defendant's crimes against her. Unlike in *Blakeman*, where the victim was 13 years old, L.F. was only 3 years old when defendant committed the offenses at issue against her. Because the victim was significantly younger than the victim in *Blakeman*, she was more dependent on her mother, who was her primary caregiver, and in a relationship with defendant.

Viewing this evidence in the light most favorable to the State, there is a permissible inference that because of L.F.'s extreme reliance on her mother, L.F. would trust and rely on her mother's boyfriend of more than two years, even though

L.F. only interacted with defendant in person on two occasions. This evidence, in conjunction with the manner in which the crime was carried out, establishes the aggravating factor of abuse of "a position of trust or confidence" by a preponderance of evidence, as defendant used his relationship with L.F.'s mother to create a relationship with L.F., and, ultimately, as a reason to bring L.F. to his parents' home to sexually assault her.

We note that this holding is not based on L.F.'s age. Because the trial court found as aggravating factors both that the victim was very young and that defendant took advantage of a position of trust or confidence in order to commit the offense, so holding would erroneously permit the trial court to base two aggravating factors on the same fact—the victim's infancy—in derogation of N.C. Gen. Stat. § 15A-1340.16(d) (2017), which disallows "the same item of evidence" to "be used to prove more than one factor in aggravation." Instead, as in *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), "the aggravating factor that the defendant took advantage of a position of trust or confidence was grounded not in the youth of [the] child but more fundamentally in the child's dependence[.]" *Id.* at 311, 354 S.E.2d at 218. Here, L.F. was inherently more vulnerable and inclined to trust her mother than an older victim may be because of her extreme dependency on her mother as her caretaker, who was singularly responsible for her welfare. *See also State v. Holden,* 321 N.C. 689, 695,

365 S.E.2d 626, 629 (1988) (finding the evidence sufficient to establish a position of trust when victim was 3 months old and the daughter of the defendant).

Therefore, in the light most favorable to the State, we conclude that this evidence is sufficient to establish that defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offenses.

III. Conclusion

For the foregoing reasons, the trial court did not commit error when it submitted the aggravating factor in N.C. Gen. Stat. § 15A-1340.16(d)(15) to the jury.

NO ERROR.

Judge BRYANT concurs.

Judge HUNTER, JR. dissents in separate opinion.

Report per Rule 30(e).

No. COA18-12 – *State v. Helms*

HUNTER, JR., Robert N., Judge, dissenting in separate opinion.

I respectfully dissent. In my view, the trial court erred in submitting the aggravating factor that the defendant violated a position of trust or confidence to the jury. *See* N.C. Gen. Stat. § 15A-1340.16(d)(15) (2017). In my view, the majority's logic imputing the domestic relationship between the defendant boyfriend and the defendant mother as "sufficient" to show the defendant held a position of trust or confidence with the victim is tenuous given the State used the theory of aiding and abetting to convict the defendant of the underlying crime. *See State v. Corbett*, 154 N.C. App. 713, 717-18, 573 S.E.2d 210, 214 (2002); *State v. Beck*, 359 N.C. 611, 616, 614 S.E.2d 274, 278 (2005); *see also Apprendi v. New Jersey*, 530 U.S. 466, 498-99, 147 L. Ed. 2d 435, 459-60 (2000) (Scalia, J., concurring). In addition, the evidence, standing alone, fails to raise a triable question of fact requiring jury resolution beyond a reasonable doubt.

The majority views the State's evidence in the light most favorable to the State to determine whether the State met its burden to present the aggravating factor to the jury. However, this standard of review must be applied using the plain language of the statute. Section 15A-1340.16(a) provides the following:

> The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of

> proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C. Gen. Stat. § 15A-1340.16(a).

The majority relies on our Supreme Court's holding in *State v. Mann*, 355 N.C. 294, 560 S.E.2d 776 (2002) to emphasize finding "this aggravating factor did not require that the victim consciously regard the defendant as one in whom she placed her trust or confidence." *Id.* at 319, 560 S.E.2d at 791 (citation omitted). I agree with the majority evidence of "[s]uch a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). However, "[o]ur courts have upheld a finding of the 'trust or confidence' factor in very limited factual circumstances." *Mann*, 355 N.C. at 319, 560 S.E.2d at 791; *see e.g.*, *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984).

The majority relies on L.F.'s "extreme reliance" on her mother to transfer their relationship to the defendant. The majority cites testimony from Sergeant Matt Price with the Union County Sheriff's Office and S.B. to establish a relationship of trust or confidence between L.F. and the defendant. Sergeant Price's testimony established a close relationship existed between L.F.'s mother and the defendant based on their Facebook messages and one prior interaction with L.F. S.B.'s testimony established

a relationship of trust or confidence between L.F. and L.F.'s mother, but not with the defendant. Additionally, the State's evidence shows a relationship between L.F. and her mother, but fails to establish the same between L.F. and the defendant. In the State's case-in-chief, this evidence supported conviction on the elements of the underlying crime because the State requested and used the instruction of aiding and abetting in its case-in-chief.

The State did not meet their burden to present a jury question of a relationship of trust or confidence between L.F. and the defendant because the evidence, independent of that used to convict the defendant of the underlying crime, presented was insufficient, even in the light most favorable to the State. Although, the State had an opportunity to present additional evidence of aggravating factors after the jury convicted the defendant of the underlying crimes, but the State failed to do so.

While I realize the resentencing of the defendant may not change the term of his sentence, I would remand for resentencing without the consideration of the challenged aggravating factor under Section 15A-1340.16(d)(15).