IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1134

Filed: 2 July 2019

New Hanover County, No. 17 CRS 51701

STATE OF NORTH CAROLINA

v.

EDWARD HAMILTON SOUTHERLAND

Appeal by defendant from judgment entered 21 February 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Sarah Holladay for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was sufficient to show defendant attempted to engage in indecent liberties with a minor child, the trial court did not err in denying defendant's motion to dismiss.

On 21 February 2018, defendant Edward Hamilton Southerland, an elderly man, was tried by a jury and convicted in New Hanover County Superior Court before the Honorable R. Kent Harrell, Judge presiding, on the charge of taking indecent liberties with a child, eleven-year-old A.G.

The State presented evidence that A.G. and her grandmother went to University Arms Apartments to visit a relative. Defendant, who lived in the apartment across from A.G.'s relative, frequently interacted with A.G. and her grandmother, when they came to visit the relative.

On 27 February 2017, defendant gave A.G.'s grandmother a sealed envelope and directed her to deliver it to A.G. A.G.'s name was written on the front of the envelope. In the letter, defendant stated to A.G.:

> Dear [A.G.],
>
> Have you ever been offered something and not followed up on "it," only to wonder what would have happened "if" I had? That's how I have felt about the three balloons you gave me for my birthday, last year.
>
> When you moved, every day I think of you and those balloons. I miss you so much, yet the only thing I have are my memories of you. That makes me feel like the lonely old man that I am. I don't want to feel that way and the only thing that makes me feel young and alive is to wonder what "it" would be like to have sex with you. I'm within sight of being seventy years old and in good health. The only thing I need is a very pretty girl who knows me and likes me. Therefore, the only girl I could possibly like is you.

Defendant wrote at the bottom of the letter to A.G., "[p]lease do me the honor of having sex with me and help me to feel young again. Love, Mr. Ed[.]"

The next day, A.G.'s grandmother read the letter and immediately called the police. Detective Justin Ovaska of the Wilmington Police Department read the letter

and went to defendant's apartment where defendant admitted that he wrote the letter to A.G.

At the close of the State's evidence, defendant moved to dismiss arguing that the State did not present substantial evidence that he was actually or constructively in the presence of A.G. Defendant's motion was denied. Defendant took the stand and testified that he "was so tired and lonely from trying to get help [for his post-traumatic stress disorder] that [he] just sat down and wrote [A.G.] a letter." After defendant rested his case, he renewed his motion to dismiss which the trial court denied.

Defendant was found guilty of taking indecent liberties with a child. The trial court sentenced defendant in accordance with the jury verdict, and defendant was ordered to register as a sex offender for thirty years. On 22 February 2018, defendant filed his notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss the charge of indecent liberties because the State did not present substantial evidence to support that he was "with" A.G. or that he took steps beyond mere preparation to complete the act. After careful consideration, we disagree.

"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). "Under a *de novo*

review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
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> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered

State v. Bullard, 312 N.C. 129, 160, 322 S.E.2d 370, 387–88 (1984) (internal citations and quotation marks omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (internal citations and quotation marks omitted).

In the instant case, defendant was indicted for taking indecent liberties with a child in violation of section 14-202.1(a)(1) of our General Statutes. To be convicted of taking indecent liberties with a child: 1) the defendant must be at least sixteen years old, 2) the child must be under the age of sixteen, and 3) the defendant is at least five years older than the child in question. N.C. Gen. Stat. § 14-202.1(a) (2017). Additionally, a defendant is guilty of taking indecent liberties with a child under subsection (a)(1) if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" *Id.* § 14-202.1(a)(1).

As defendant was convicted for indecent acts by delivery of a letter, our analysis, in this case, is controlled by *State v. McClary*, 198 N.C. App. 169, 173, 679 S.E.2d 414, 417 (2009). In *McClary*, the defendant delivered a sexually explicit letter to a fifteen-year-old requesting to have sex, and this Court considered whether the delivery of the letter with sexual language constituted a willful taking, or the attempt to take, indecent liberties with a child to withstand a motion to dismiss. This Court explained that:

> [i]ndecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper. Neither a completed sex act nor an offensive touching of the victim are required to violate the

> statute. This Court has specifically rejected the argument that the utterance of 'mere words,' no matter how reprehensible, does not constitute the taking of an indecent liberty with a child.
>
> The State is required to show that the action by the defendant was for the purpose of arousing or gratifying sexual desire. *[A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor*. Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to encompass more types of deviant behavior and *provide children with broader protection than that available under statutes proscribing other sexual acts*.

Id. at 173–74, 679 S.E.2d at 417–18 (emphasis added) (internal citations and quotation marks omitted). This Court held that the State presented substantial evidence and stated, the "[d]efendant's actions of overtly soliciting sexual acts from [the victim] through the sexually explicit language contained in the letter [fell] within the broad category of behavior that the common sense of society would regard as indecent and improper." *Id*. at 174, 679 S.E.2d at 418.

Similarly, the delivery of a letter in *McClary* —the act found to be in violation of the statute—is indistinguishable as a matter of law from the act in the instant case. Here, the State's evidence established that defendant, who was sixty-nine years old, wrote a letter to A.G., an eleven-year-old, requesting sex to make him "feel young again" and attempted to deliver the letter to A.G. through her grandmother. A.G.'s grandmother testified that the sealed envelope from defendant was addressed to A.G. and that defendant specifically asked her to give the letter to A.G. Based on the

evidence, we conclude that an attempt to carry out defendant's ultimate desired act––having sex with A.G.—was made upon delivery of the letter.

We mirror the sentiments of the *McClary* Court in finding that "the completion of defendant's ultimate desired act, [i.e.,] having sexual intercourse and oral sex [with the victim], was not required in order to allow the jury to reasonably infer that defendant's acts of writing and delivering the letter [to the victim] were for the purpose of arousing or gratifying sexual desire." *Id.* at 174, 679 S.E.2d at 418; *see also* N.C.G.S. § 14-202.1 (attempts to take as well as a completed act of taking indecent liberties with children are punishable the same by law). We recognize that had A.G.'s grandmother not opened the letter and called the police, defendant's letter would have been successfully delivered to his intended recipient, A.G., and thus as in *McClary*, the evidence was sufficient to allow the jury to reasonably infer that defendant acted beyond mere words by delivering the letter expressing his intent to gratify his sexual desire.

Defendant argues that since he "gave his letter to an adult," the act did not constitute a violation under N.C.G.S. § 14-202.1. because A.G. did not receive the letter and he never "saw, heard, touched, or communicated with A.G." However, we reject his argument: as our Supreme Court has previously stated, "the statute does not contain any language requiring . . . the State prove that a touching occurred. Rather, the State *need only* prove the taking of any of the described liberties for the

purpose of arousing or gratifying sexual desire." *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990) (emphasis added).

As our Court noted in *McClary*:

> The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions. In *State v. McClees*, this Court held that the defendant's act of secretly videotaping an undressed child was for the purpose of arousing or gratifying sexual desire even though no evidence was presented showing that the defendant ever actually viewed the video. Thus, the completion of the defendant's ultimate desired act, watching the video tape, was not required in order to allow the jury to reasonably infer that the defendant's acts of secretly setting up the video camera and arranging for the child to undress directly in front of the camera were for the purpose of arousing or gratifying sexual desire.

McClary, 198 N.C. App. at 174, 679 S.E.2d at 418 (internal citations and quotation marks omitted) (citing *State v. McClees*, 108 N.C. App. 648, 654–55, 424 S.E.2d 687, 690–91 (1993)). Therefore, we hold that defendant's actions in sending a letter with a specific request for delivery to A.G.—clearly expressing a desire to have sex with an underage child—was an attempt to take indecent liberties with a child under the statute.

Accordingly, based on the evidence presented at trial, when viewed in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss as the State presented substantial evidence to support each element of taking or attempting to take indecent liberties with a child.

NO ERROR.

Judges STROUD and COLLINS concur.