IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1280

Filed: 5 November 2019

Mecklenburg County, No. 17CRS202116

STATE OF NORTH CAROLINA

v.

DWANE WALTON

Appeal by defendant from judgment entered 30 April 2018 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Marilyn Fuller, for the State.

W. Terry Sherrill for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction of sexual battery. Because the evidence supports an inference of the purpose of sexual arousal or gratification from defendant's fondling of his sleeping daughter's breast, the trial court did not err by denying defendant's motion to dismiss.

I. Background

The State's evidence showed that in the early morning hours of 18 January 2017, Debbie's[1] father, defendant, went into her bedroom where she was sleeping, wearing only his underwear, and grabbed her breast. At the time of the incident Debbie was age 27. Defendant had been her stepfather since she was 3 or 4 years old and later became her adoptive father. Debbie described the incident as "an intentional touching of my breast in a fondling manner" and that defendant's hand was wrapped around her breast "cupping it." Debbie's blanket had been pulled down and her shirt had been pulled up exposing her breast. Debbie screamed and defendant said, "I'm sorry, I'm sorry. There's no excuse." Defendant was tried by a jury and found guilty of sexual battery. The trial court entered judgment and placed defendant on supervised probation for 24 months. Defendant appeals.

II. Motion to Dismiss

Defendant's only argument on appeal is that his motions to dismiss should have been allowed because there was insufficient evidence that defendant touched and fondled his daughter's breast for the purpose of sexual arousal or sexual gratification.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

[1] A pseudonym will be used.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citation omitted).

North Carolina General Statute § 14-27.33 provides in relevant part,

> (a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:
> (1) By force and against the will of the other person[.]

N.C. Gen. Stat. § 14-27.33(a)(1) (2017).[2]

> The essential elements of sexual battery are: (1) sexual contact with another person; (2) by force and against the will of the other person; and (3) for the purpose of sexual arousal, gratification or abuse. Sexual battery requires that the act be for the purpose of sexual arousal, gratification or abuse[.]

State v. Kelso, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007).[3] Defendant contests only the sufficiency of the evidence for the third element – "for the purpose of sexual arousal, gratification or abuse." *Id.* "In criminal cases involving adult defendants, the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself." *Matter of S.A.A.*, ___ N.C. App. __, ___, 795 S.E.2d 602, 605 (2016) (citation, quotation marks, and brackets omitted).

Defendant contends we should analyze factual situations like that in *State v.*

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[2] N.C. Gen. Stat. § 14-27.33 has since been amended. *See* N.C. Gen. Stat. § 14-27.33 (2018).

[3] *State v. Kelso* cites to North Carolina General Statute § 14–27.5A for the elements of sexual battery, *Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31, which was recodified in 2015 as North Carolina General Statute § 14–27.33. *See* N.C. Gen. Stat. § 14-27.33 (Editor's Note) (2017).

State v. Stanford, 169 N.C. App. 214, 609 S.E.2d 468 (2005), and *State v. Brown*, 162 N.C. App. 333, 590 S.E.2d 433 (2004). Defendant considers both *Stanford* and *Brown* controlling because this Court determined there was insufficient evidence of the purpose of sexual arousal or gratification for a conviction of indecent liberties with a minor. *See Stanford*, 169 N.C. App. at 218, 609 S.E.2d at 470-71; *Brown,* 162 N.C. App. at 338, 590 S.E.2d at 436-37. But the defendants' actions in *Stanford* and *Brown* are distinguishable from this case. *See Stanford*, 169 N.C. App. 214, 609 S.E.2d 468; *Brown*, 162 N.C. App. 333, 590 S.E.2d 433. In *Stanford*, the defendant "brushed" against his niece's breast, *see Stanford*, 169 N.C. App. at 217-18, 609 S.E.2d at 470-71, and in *Brown*, the defendant had inappropriate conversations with a minor. *See Brown*, 162 N.C. App. at 338, 590 S.E.2d at 436-37. Here, the circumstances are very different. *Contrast with Stanford*, 169 N.C. App. at 217-18, 609 S.E.2d at 470-71; *Brown*, 162 N.C. App. at 338, 590 S.E.2d at 436-37. We can easily infer a purpose of sexual arousal or gratification "from the very act itself" where defendant entered his daughter's bedroom in the middle of the night in only his underwear, pulled down the covers over his sleeping daughter, pulled up her shirt, fondled and cupped her breast, and then when she awoke and screamed, said, "I'm sorry, I'm sorry. There's no excuse." *S.A.A.*, ___ N.C. App. at___, 795 S.E.2d at 605. This argument is overruled. The trial court did not err in denying defendant's motions to dismiss.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).