IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-144

Filed: 15 January 2019

Haywood County, Nos. 16 CRS 480, 16 CRS 482, 16 CRS 51082

STATE OF NORTH CAROLINA

v.

LUIS ANTONIO GOMEZ, Defendant.

Appeal by Defendant from judgments entered 11 August 2017 by Judge Marvin P. Pope, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Richard Croutharmel, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Luis Antonio Gomez ("Defendant") appeals following jury verdicts finding him guilty of second-degree forcible rape and sexual activity by a custodian by engaging in vaginal intercourse against A.M.[1], and second-degree forcible rape, second-degree

[1] Initials have been used throughout the opinion to protect the identity of the victims.

forcible sexual offense, sexual activity by a custodian by engaging in vaginal intercourse, and sexual activity by a custodian by engaging in a sexual act against R.S. On appeal, Defendant argues the trial court erred by denying his motions to dismiss the charges of second-degree forcible rape and sexual activity by a custodian by engaging in vaginal intercourse against R.S. We find no error.

I. Factual and Procedural Background

On 9 May 2016, a Haywood County Grand Jury indicted Defendant for two counts of second-degree forcible rape, two counts of second-degree forcible sexual offense, two counts of sexual activity by a custodian by engaging in vaginal intercourse, and two counts of sexual activity by a custodian by engaging in a sexual act.

The court called the case for trial on 7 August 2017. The State's evidence tended to show the following. In 2016, A.M., age fifty-three, lived at the Brian Center, a nursing home facility located in Waynesville, North Carolina. A.M. suffered from chronic obstructive pulmonary disease and had difficulty breathing, walking, and talking. Defendant worked as a certified nursing assistant at the Brian Center and provided care for A.M. Sometime between the end of January and through February 2016, Defendant gave A.M. some cologne and kissed her while she was in bed. A.M. attempted to push Defendant away, but "he wouldn't go away."

On 25 February 2016 at approximately 7:00 p.m., Defendant entered A.M.'s room and told her she should use the bathroom. Once Defendant and A.M. entered the bathroom, A.M. lifted her nightgown. Defendant pulled A.M.'s underwear down, spread her legs apart, and propped her left leg onto the toilet. Defendant then "put the tip of his penis into [A.M.'s] vagina." A.M. "shoved [Defendant] away with [her] butt" and sat down on the toilet. She told Defendant he "ha[d] to leave or somebody is going to come." The next day, A.M. informed the nurse supervisor Defendant wanted to have sexual intercourse with her and "stuck it in." A.M. asked the nurse supervisor to notify the Brian Center's director of nursing and its administrator.

On 27 February 2016, Krista Shalda, a registered nurse and Defendant's supervisor at the Brian Center, visited A.M. in her room. A.M. cried and told Shalda that two days earlier, Defendant helped her into the bathroom, put her against the wall, and "put his penis in her vagina and that she had pulled away from him, and then he kissed her without her wanting him to." Shalda asked A.M. if she wanted to report this to anyone else, and A.M. informed Shalda she had already told the nurse supervisor. Shalda called the police.

Sergeant Daleene Parton, of the Waynesville Police Department, responded to a call from the Brian Center about a "possible rape that had previously occurred." Sergeant Parton spoke with A.M. A.M. was "upset and very emotional and crying." A.M. told Sergeant Parton that two nights earlier, after Defendant escorted her to

the restroom, he "maneuvered [her] over the toilet" and "tried to put his penis in her. And she made the comment that it wasn't where he wanted it, and so, therefore, he took his hand from her shoulder, grabbed his penis and, quote, put it where he wanted it, unquote." A.M. then moved and Defendant's "penis came out; and she sat down on the toilet and cried. And she said she was scared to leave."

Detective Paige Shell, of the Waynesville Police Department, interviewed A.M. at Haywood Regional Medical Center. A.M. appeared to be very upset and cried. A.M. informed Detective Shell that two days earlier, Defendant went into a bathroom with her and locked the door. He pushed her forward toward the toilet and "inserted his penis into her vagina." A.M. was able to sit down on the toilet, and Defendant's "penis came out of her vagina." Defendant opened the door of the bathroom, looked to see if anybody was in the room, and exited the bathroom. A.M. also told Detective Shell that over the past month, Defendant flirted with her, grabbed her breast, and kissed her. Detective Shell interviewed A.M. a couple of weeks later and A.M.'s account of the incident was "very consistent each time that we have spoken with her."

In early 2016, R.S., age sixty-three, also lived at the Brian Center. R.S. could feed and dress herself, but had difficulty breathing, due to chronic obstructive pulmonary disease, and had difficulty walking without assistance. R.S. also previously suffered a fall that broke her neck and back. As a certified nursing assistant at the Brian Center, Defendant provided care for R.S. For several months

prior to February 2016, Defendant came into her room and would "feel [her] breasts and [her] pelvic area and rub [her]. And [she] couldn't fight him off. [She]'d push his hands away, but his hands would come right back." Defendant would tell her, "I want some of that."

In February 2016, R.S. used the restroom and had to call for help. Defendant came to assist her and helped her stand up. He got behind R.S., pushed her forward onto her wheelchair, pulled his pants down, and "started trying to -- trying to put his penis in [her vagina.]" Defendant "reached down and started probing" R.S.'s vagina with his fingers. He put his fingers into her vagina and "started trying again to -- to get his penis in [her]." Although Defendant's penis "wouldn't go in much . . . it did go in a little[.]" Defendant then "started pumping" his penis between R.S.'s thighs "really hard until he ejaculated between [her] legs." Defendant went to get washcloths and told R.S. "to wash really good and get everything off so [she] wouldn't smell. And then he washed himself."

R.S. did not report Defendant, because she "felt like he was doing it to just me and everybody else was safe." She also was afraid Defendant's behavior would worsen or she would suffer retaliation. After she found out Defendant had "done stuff" to A.M., she decided to come forward. On 28 February 2016, R.S. reported Defendant's actions to Shalda and her daughter.

On 28 February 2016, Shalda visited R.S. R.S. cried and told Shalda she wanted to tell her "some things that had happened to her with [Defendant]." R.S. told Shalda that Defendant pushed her, put his fingers inside her vagina, and pushed his penis between her legs.

On 28 February 2016, Sergeant Parton went to the Brian Center and spoke with R.S. R.S. informed Sergeant Parton as she got up from the toilet, Defendant pushed her down. R.S. felt Defendant's penis between her legs, but he "couldn't get it into her vagina." Defendant ejaculated on her and handed her a washcloth.

On 29 February 2016, R.S. told her daughter the following. Defendant, an employee at the Brian Center, raped her. Defendant came into the restroom and pushed her over onto her wheelchair. Defendant "proceeded to try to penetrate" R.S., but "wasn't able to get it in, and so he '[p]ump[ed] until he come.' " Defendant "[p]ump[ed]" his penis "between the lips of her vagina." On multiple occasions, Defendant came into her room and touched her vagina and breasts. On one occasion, R.S. woke up to find Defendant sticking his tongue in her mouth.

Also on 29 February 2016, Lieutenant Chris Chandler, of the Waynesville Police Department, interviewed R.S. R.S. told him the following. Two to three weeks earlier, she woke up, and Defendant had his tongue in her mouth. Defendant came into the bathroom, pushed her from behind, and put his penis between her legs.[2]

[2] R.S. did not tell Lieutenant Chandler the date this incident occurred.

Defendant "stuck his fingers" in her vagina "trying to make his penis go in." The head of Defendant's penis "had penetrated her vagina but that it just wouldn't all go in, but that he just kept pumping" until he ejaculated.

At the close of the State's evidence, the State voluntarily dismissed one count of second-degree forcible sexual offense and one count of sexual activity by a custodian by engaging in a sexual act. Defendant moved to dismiss the remaining charges, and the trial court denied his motion. At the close of all the evidence, Defendant renewed his motion to dismiss. The trial court denied his motion.

The jury found Defendant guilty of second-degree forcible rape and sexual activity by a custodian by engaging in vaginal intercourse against A.M. The jury also found Defendant guilty of second-degree forcible sexual offense, sexual activity by a custodian by sexual act, second-degree forcible rape, and sexual activity by a custodian by engaging in vaginal intercourse against R.S. The trial court sentenced Defendant to three consecutive terms of 92 to 171 months imprisonment. The trial court also ordered, that upon his release from imprisonment, Defendant register as a sex offender and enroll in satellite-based monitoring. Defendant gave oral notice of appeal.

II. Standard of Review

"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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom." *State v. Hardison*, 243 N.C. App. 723, 726, 779 S.E.2d 505, 507 (2015) (citation omitted), *disc. review denied*, 368 N.C. 685, 781 S.E.2d 609 (2016). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). We review a denial of a motion to dismiss *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

III. Analysis

Defendant argues the trial court erred in denying his motions to dismiss the charges of second-degree forcible rape and sexual activity by a custodian by engaging in vaginal intercourse against R.S. Specifically, Defendant contends the State presented insufficient evidence he engaged in vaginal intercourse with R.S. We disagree.

A person is guilty of second-degree forcible rape if the person:

> engages in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is

> mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physical helpless.

N.C. Gen. Stat. § 14-27.22(a)(1)-(2) (2017). A person is guilty of sexual activity by a custodian if a person "having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim[.]" N.C. Gen. Stat. § 14-27.31(b) (2017). Both of these offenses require evidence Defendant engaged in vaginal intercourse with R.S.

"The slightest penetration of the sexual organ of the female by the sexual organ of the male is all that is required to prove vaginal intercourse." *State v. Stanley*, 310 N.C. 353, 366, 312 S.E.2d 482, 490 (1984) (citations omitted). "Generally, a jury may find a defendant guilty of an offense based solely on the testimony of one witness." *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586, *disc. review denied*, 366 N.C. 596, 743 S.E.2d 220 (2013) (citations omitted).

We conclude the State presented substantial evidence Defendant penetrated R.S.'s vagina. When asked whether Defendant's penis penetrated her vagina, R.S. testified although "it wouldn't go in much . . . it did go in a little[.]" Additionally, R.S.'s statements to her daughter and Lieutenant Chandler corroborate her testimony at trial. R.S.'s daughter testified R.S. told her Defendant "[p]ump[ed]" his

penis "between the lips of her vagina." Lieutenant Chandler testified R.S. "explained that the head of [Defendant's] penis had penetrated her vagina but that it just wouldn't all go in[.]" Viewing the evidence in the light most favorable to the State and resolving all contradictions in favor of the State, we conclude the trial court did not err in denying Defendant's motions to dismiss.

IV. Conclusion

For the foregoing reasons, we find no error in the judgments.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).