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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-246

Filed: 7 April 2020

Dare County, No. 15 CRS 282

STATE OF NORTH CAROLINA

v.

JOHNATHAN ALEXANDER BURTON

Appeal by defendant from judgments entered 25 July 2018 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

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

DIETZ, Judge.

Defendant Johnathan Alexander Burton appeals his convictions for second-degree rape and second-degree sexual offense, arguing that the State presented insufficient evidence of the "force" element for both crimes. We reject this argument. The State presented evidence that Burton used both actual force and constructive force to overcome any resistance the victim might have made and to compel her not

to resist the sexual assault. This constitutes substantial evidence of the force element of the charged offenses. We therefore find no error in the trial court's judgments.

Facts and Procedural History

Diana[1] and her boyfriend lived together in Colington, across the street from Defendant Johnathan Burton and his wife. The two couples were on friendly terms and used to socialize at each other's homes. Then, on 4 May 2015, Burton was indicted for two counts of second-degree sexual offense and for second-degree rape of Diana.

Burton's trial began on 23 July 2018, where Diana testified about an encounter with Burton on 11 January 2015. Diana's boyfriend left their house early that morning to drive his daughter to college. The pair said goodbye and Diana went back to sleep. She was lying on her stomach when she woke up and felt a pair of cold hands between her legs and on her vagina. Initially, Diana thought it was her boyfriend, back from his drive. Then, she testified, "[I f]elt my hair getting pulled, my head getting yanked. . . . I was getting forced. I had an object in my mouth. . . . Somebody's penis." She knew then it was not her boyfriend because he "was never that rough" with her.

After making her perform fellatio on him, the man ordered Diana to "flip over." She flipped over, and the man had vaginal intercourse with her. Diana testified that she did as she was told "[b]ecause I didn't want to get hurt." Diana recognized

[1] We use a pseudonym to protect the victim's identity.

Burton's voice when the man spoke and recognized Burton's profile when he walked out of the room.

At the close of the State's evidence and at the close of all the evidence, Burton moved to dismiss the charges against him. The trial court denied Burton's motion. On 25 July 2018, the jury found Burton guilty of second-degree rape and one count of second-degree sexual offense. He was sentenced to two consecutive sentences of 82 to 159 months in prison. Burton appealed.

Analysis

Burton argues that the trial court erred by denying his motion to dismiss all charges for insufficiency of the evidence. 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).

A trial court properly denies a motion to dismiss if there is substantial evidence that the defendant committed each essential element of the charged offense. *Id.* "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* When reviewing challenges to the sufficiency of the evidence, this Court "must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378–79, 526 S.E.2d 451, 455 (2000).

Here, Burton was convicted of second-degree sexual offense and second-degree rape. While the former encompasses a "sexual act" and the latter "vaginal intercourse," both crimes result in a conviction if committed (1) by force, and (2) against the will of the other person. N.C. Gen. Stat. §§ 14-27.5(a)(1), 14-27.3(a)(1).

Notably, Burton concedes there was sufficient evidence that he engaged in a sexual act and in vaginal intercourse with Diana against her will. His sole argument on appeal is that the State presented insufficient evidence that he did so by force. We disagree.

The force element of second-degree rape and second-degree sexual offense is present if the defendant "uses force sufficient to overcome any resistance the victim might make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992). Force may be established either by "actual, physical force" or by "constructive force in the form of fear, fright, or coercion." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). "Physical force" is force applied to the victim's body. *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988). "Constructive force" is demonstrated by "proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Etheridge*, 319 N.C. at 45, 52 S.E.2d at 680. "Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." *Id.*

At trial, Diana testified, "[I f]elt my hair getting pulled, my head getting yanked. . . . I was getting forced. I had an object in my mouth. . . . Somebody's penis." Then, she testified that she obeyed Burton's command to "flip over" because she "didn't want to get hurt."

Viewing this evidence in the light most favorable to the State, this testimony is substantial evidence that Burton used force on Diana. First, he used actual, physical force when he "pulled" Diana's hair, "yanked" her head and "forced" her to perform fellatio on him. These acts go beyond the physical touching inherent to the sexual act itself, and therefore meet the physical force element of second-degree sexual offense. *State v. Raines*, 72 N.C. App. 300, 303, 324 S.E.2d 279, 281 (1985). Second, under the totality of the circumstances, these acts also constituted "other actions" compelling Diana's submission to the vaginal intercourse, therefore establishing the use of constructive force for the second-degree rape charge. *Id.* at 304, 324 S.E.2d at 282. Thus, the trial court did not err in denying Burton's motion to dismiss and sending both charges to the jury.

Conclusion

The trial court properly denied Burton's motion to dismiss. We find no error.

NO ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).