IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-35

Filed 17 October 2023

Swain County, Nos. 19 CRS 50187, 20 CRS 29-30

STATE OF NORTH CAROLINA

v.

ROBERT WAYNE SIMPSON, Defendant.

Appeal by Defendant from judgments entered 18 March 2022 by Judge Peter B. Knight in Swain County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State.

William D. Spence for Defendant.

GRIFFIN, Judge.

Defendant Robert Wayne Simpson appeals from the trial court's judgment entered on a jury verdict finding him guilty of six crimes stemming from two separate instances of sexual acts with a child age fifteen or less. Defendant argues (1) the trial court erred in denying his motion to dismiss two charges of statutory sexual offense stemming from events on 2 to 3 March 2019 because there was insufficient evidence

to support those charges, and (2) the trial court erred in declining to intervene sua sponte in the State's closing argument. We hold the trial court did not commit error.

I. Factual and Procedural Background

This case arises from sexual acts committed by Defendant, a then-thirty-year-old man, against Hazel, a then-thirteen-year-old child, over a period of two consecutive weekends: 23 to 25 February 2019, and one week later, 2 to 3 March 2019.

Earlier in 2019, Hazel[1] was spending the weekend at her friend, Teagan's, house, where she first met Defendant, Teagan's uncle. Defendant began messaging Hazel on the day they first met, and his messages to her "would get progressively sexual."

During the weekend of 23 to 25 February 2019, Defendant was once again present while Hazel spent the weekend at Teagan's house. While Hazel was in the living room, Defendant approached her on the couch, "place[d] his hand on [her] thigh and said perverted things to [her]." Defendant proceeded to kiss Hazel, placed his hands down her pants, and inserted his fingers into her vagina. Hazel attempted to "move[] over to the other couch to get away from him," but Defendant followed her, "pulled down [her] pants, and he stuck his penis inside of [her]." Defendant then heard someone coming, pushed Hazel off, and told her to move back to the other couch.

[1] We use pseudonyms for all juveniles throughout the opinion for ease of reading and to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

The next weekend, 2 to 3 March 2019, Hazel spent the night at Teagan's house again while Defendant was present. Hazel and Defendant exchanged texts on Facebook Messenger while both parties were in Teagan's living room. Defendant sent explicit messages and asserted that "later on [he] will f[---] that tight little p[----]" and "told her that he was going to hurt her again." Teagan went to take a shower and Hazel went out onto the back porch. Defendant followed her and "started touching up on" her. Later that night, Hazel was sitting on a couch while Teagan slept beside her. Defendant approached Hazel, moved her to the other couch "like last time," got on top of her, and "stuck his penis in [her] vagina."

On 10 April 2019, Hazel reported the incidents to the Swain County Sheriff's Office after her father discovered the Facebook Messenger texts between Hazel and Defendant and a pregnancy test that Hazel hid in her bathroom. Hazel met with Deputy Robinson, who downloaded the messages, obtained a verbal and written statement, and referred her for a medical examination. Hazel's written statement was later introduced into evidence as State's Exhibit 1, which reads as follows:

> I was on the porch and [Defendant] came out where I was and . . . started getting touchy[.] . . . I was talking to my friend[s] . . . and [Defendant] came over and started kissing me and stuck his hand in my pants and started to finger me and I told him to stop it[.] . . . I got up and moved and turned on the TV the[n] he came over there and pulled my pants down and start started [sic] to mess with me and . . . he pulled out his dick and put it in me and I was trying not to make a sound then he start [sic] to choke me and I didn't know what to do but I sat there because I was scared of him and then told me to turn over so I did and he put his dick

in my ass after he f[-----] my p[----.]

On 12 April 2019, Hazel was forensically examined by Barbara Williams, a physician assistant at Mission Children's Hospital in Asheville. The examination revealed a healed transection of Hazel's hymen, which was "consistent with a penetrating trauma of some kind." The exam further exhibited a "normal anal tone" with no scars. Williams testified that she would not expect to see signs of trauma if there had been anal penetration because "the anal area is a big muscle" and human stool can be larger than a penis. Williams composed a written report of her findings during the examination, and it provided:

> Information from [Hazel] during her interview today April 12, 2019:
>
> [Hazel] discloses oral-vaginal contact, finger-vaginal contact, penile-vaginal contact the first time and it hurt and the second time there was finger-vaginal contact, oral-breast contact, penile vaginal contact and hurt but not as bad as the first time. There was also penile-anal contact the second time and it "hurted really bad."

Law enforcement conducted an interview with Defendant after he waived *Miranda* rights. Defendant explained that he knew Hazel and "thought she was fourteen or fifteen but [he] knew she was young." Defendant was aware that Hazel was Teagan's friend and that Teagan was between twelve and thirteen.

Defendant initially denied having anal sex and any oral-vaginal contact with Hazel. He later conceded to having anal sex, stating: "When she got off of me at one point and she got back on me and put me inside of her, and . . . I guess she stuck it in

her ass." Defendant claimed that he only had sex with Hazel on 25 February, and that "she never came back over after that." Defendant further described, "I'm not saying I didn't talk to her and I'm not saying I didn't fuck her, [inaudible] I'm just saying I didn't rape her, I did not rape that girl."

On 14 March 2022, Defendant's case came on for trial by jury in Swain County Superior Court. On 17 March 2022, the jury returned a verdict finding Defendant guilty of six different crimes: one count of statutory rape of a child fifteen or less and two counts of statutory sex offense with a child fifteen or less for the dates of 23 to 25 February 2019; as well as one count of statutory rape of a child fifteen or less and two counts of statutory sex offense with a child fifteen or less for the dates of 2 to 3 March 2019. Upon conviction, Defendant was sentenced to two consecutive terms of 248 to 310 months' imprisonment each.

II. Analysis

Defendant argues the trial court erred by (1) denying the motion to dismiss two charges of statutory sexual offense on 2 to 3 March 2019 because the State presented insufficient evidence, and (2) declining to intervene sua sponte in the State's closing argument.

A. Denying the Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss two statutory sexual offense charges occurring on 2 to 3 March 2019 because there was insufficient evidence the crimes occurred on those dates. This Court reviews a trial's

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

When considering a motion to dismiss, "the question for the [c]ourt 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 [the] defendant's being the perpetrator of such offense." *State v. Powell,* 299 N.C. 95, 98, 573 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296, S.E.2d 649, 652 (1982) (quoting *Powell*, 299 N.C. at 99, 573 S.E.2d at 117). The trial court must view the evidence presented and "all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin,* 356 N.C. 446, 473, 573, S.E.2d 870, 889 (2002).

The crime of statutory sex offense with a child fifteen or less is defined as "engag[ing] in a sexual act with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person[.]" N.C. Gen. Stat. § 14-27.30(a) (2019). The term "sexual act" includes "[c]unnilingus, fellatio, analingus, or anal intercourse . . . [and] also means the penetration, however

slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2019). This Court has held that the term "sexual act" in N.C. Gen. Stat. § 14-27.20(4) includes digital-vaginal penetration. *State v. Stokes,* 216 N.C. App. 529, 532, 718 S.E.2d 174, 177 (2011).

Defendant contends that there was no substantial evidence of digital-vaginal or penile-anal penetration that occurred on the second weekend of 2 to 3 March 2019 to support the charges of sexual offense with a child fifteen or less. We disagree. Hazel provided direct testimony during the trial, a written report to law enforcement, and explanations during the forensic exam.

This Court has held that a victim's testimony describing that the "defendant touched her 'inside' . . . *alone is sufficient* evidence of a sexual act and thereby of a sexual offense[.]" *State v. Lopez*, 274 N.C. App. 439, 449, 852 S.E.2d 658, 664 (2020) (emphasis added). Here, Hazel described that Defendant "stuck his fingers inside of [her] vagina" on the first weekend "and a weekend after." Hazel described that Defendant told her "he was going to fuck [her] and told [her] that he was going to hurt her again" on Facebook messages on 2 March 2019. Hazel further explained that Defendant used the word "again" because he placed his penis "in [her] anus and [her] vagina" the prior weekend and was expecting to do it again.

The State also admitted a written law enforcement report made when Hazel and her father went to the Sheriff's Office. Hazel explained at trial that her statements in the report concerned only the weekend of 2 to 3 March 2019 because

she didn't want to stress her father and stepmother about the events of the weekend before:

> [Defendant's attorney:] The specific encounter that you described in the statement that you made [to law enforcement], do you remember which day you say was the first time that it happened or the second time it happened?
>
> [Hazel:] Second time.

In the written law enforcement report, Hazel describes that Defendant "told [Hazel] to turn over so [she] did and he put his dick in [her] ass after he f[----- her] p[----.]" Hazel disclosed to Ms. Williams that "[t]here was also penile-anal contact the second time and it 'hurted really bad.'" In her testimony, Ms. Williams stated Hazel further explained that on the "second time" there was "finger-vaginal contact, oral-breast contact, penile-vaginal contact and it hurt, but not as bad as the first time. There was also penile-anal contact the second time, and it hurted [sic] really bad."

The State presented substantial evidence to support the charges of statutory sexual offense on the dates of 2 to 3 March 2019. The trial court did not err by denying Defendant's motion to dismiss and submitting the charges to the jury.

B. Declining to Intervene Sua Sponte

Defendant argues the trial court erred in failing to intervene sua sponte in the State's closing argument when the State "improperly included facts that were not in evidence." Defendant did not object to any of the State's closing argument during trial.

"Where, as here, [the] defendant failed to object to [closing] arguments at trial, [the] defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998). "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (citation omitted). When assessing statements made in closing argument, "the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court . . . should have intervened on its own accord[.]" *State v. Jones*, 355 N.C. 117, 133, 558, S.E.2d 97, 107 (2002).

These parameters include the general rule that the State is granted wide latitude in the scope of its argument and "is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). The State may not argue evidence outside the record created during trial, but may provide their own analysis of the evidence:

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. 15A-1230(a) (2021). "Statements or remarks in closing argument 'must be viewed in context and in light of the overall factual circumstances to which they refer.'" *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (citation omitted).

Defendant challenges the following statements made by the State during closing arguments. The State first recounted Hazel's testimony that Defendant had sex with her and penetrated her digitally and anally, then asserted this was "consistent with what [Defendant] says himself." The State further argued:

> [Defendant] admits to having vaginal intercourse with his penis penetrating [Hazel's] vagina. He admits in his interview to anal intercourse with Hazel.
>
> [Hazel] testified to the same.
>
> . . .
>
> Reasonable logical conclusion supported by competent admissible evidence: On those same dates at that same place that same man, this man . . . engaged in sexual acts, anal sex and digital penetration. Two separate things, two separate counts, two separate criminal offenses on two different dates.
>
> . . .
>
> Folks, the evidence is here. The law requires it. [Hazel] deserves it. And the State has proven its case beyond a reasonable doubt with the help of [D]efendant's own words.

The context that surrounds the State's closing argument involves Defendant's interview with law enforcement alongside Hazel's testimony, written statement to law enforcement, and explanations provided in her forensic examination.

Defendant contends the State's "misleading argument that [D]efendant had admitted to digital penetration and anal intercourse and that [Hazel] had testified to the same (at least as to the second weekend) was incorrect and not part of the evidence at trial." As explained in section II.A. above, the State's arguments concerning the digital-vaginal and penile-anal penetration during both weekends was corroborated by evidence at trial. Hazel's testimony, the written law enforcement report, and Hazel's explanations during the forensic exam all were sufficient to show that Defendant digitally and anally penetrated Hazel on both weekends.

The evidence also showed that Defendant admitted to at least vaginal and anal penetration of Hazel on at least one occasion. In his interview with law enforcement, "[w]hen [Hazel] got off of me at one point and she got back on me and put me inside of her, and . . . I guess she stuck it in her ass." The statements that Defendant challenges do not assert that Defendant specifically admitted to all instances of sexual offense, just that Defendant admitted to anal intercourse. Though he frames it as Hazel's choice, Defendant did admit to at least one instance of anal intercourse in his interview with law enforcement. Further, the challenged statements argue that the State made its case, as a whole, "with the help of [D]efendant's own words." The State did not argue that each offense charged was individually supported by Defendant's own admissions. We cannot say that the State's challenged statements exceeded the acceptable parameters of propriety.

Even if we were to find error in the trial court's decision not to intervene, the State's statements were not reversibly prejudicial to Defendant's case. *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592, (2001) (citation omitted) (stating prejudicial error arises only where trial court does not intervene on its own when the State's statements amount to an extreme impropriety). The State made it clear that it was going to present the State's view of the evidence, and told the jurors: "If your recollection of any of this is different than mine, you go with what you remember. This is not verbatim by any stretch of the imagination. You go by what you remember." The State urged the jurors to refer to the evidence if they believed it to be different than the closing argument. Further, the evidence at trial sufficiently showed that Defendant committed each sexual offense on each date, notwithstanding the State's assertion that he admitted to doing so. When considering the State's closing argument relative to the evidence presented as a whole, we cannot say the State's statements were so grossly improper or prejudicial such that the trial court committed error by not intervening ex mero motu.

III. Conclusion

For the reasons stated above, we find no error in the trial court's judgment.

NO ERROR.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).