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NO. COA02-239

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Alleghany County
No. 99 CRS 759

MICHAEL PIERCE CONKLIN

Appeal by defendant from judgment entered 9 October 2001 by Judge Ronald E. Spivey in Alleghany County Superior Court. Heard in the Court of Appeals 31 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for the State.

Hall & Hall, Attorneys at Law, P.C., by Susan P. Hall, for defendant-appellant.

WALKER, Judge.

On 9 October 2001, defendant was convicted of taking indecent liberties with a child. The trial court found defendant had one prior felony Class H or I conviction and seven prior Class A1 or 1 misdemeanor convictions. As a result, defendant was classified as a Level IV felon and sentenced within the presumptive range to a minimum of 24 months and a maximum of 29 months in prison.

Through the victim's testimony, the State's evidence tended to show: The victim, whose date of birth is 12 November 1988, was living with her father on 17 July 1999, the date of the incident. On that evening, the victim, her brother, defendant and two other

men were sitting on the victim's front porch. Defendant sat next to the victim and began to rub her legs and genital area. The victim's uncle was present and told defendant to stop. The victim then traded places with her brother so that he was between her and defendant. However, defendant reached around the victim's brother and continued touching the victim's genital area. Defendant stopped fondling the victim only when he was threatened by one of the other men present. Subsequently, defendant passed out in the victim's father's yard.

The victim's testimony was corroborated by her brother. Additionally, the responding police officer, Sergeant Ricky Royall, and Dr. Jack Chan, an expert in family medicine specializing in child abuse, testified the victim's prior accounts of the incident were consistent with her testimony.

First, defendant contends the trial court erred in barring evidence that the victim subsequently made similar allegations against another person. Specifically, he asserts the victim alleged in December 2000 that her uncle attempted to sexually abuse her. Detective Wayne Crouse, who investigated the charge against the victim's uncle, testified on *voir dire* that he did not believe the victim made false accusations even though she was unable to remember many of the details concerning the incident when she testified in that case.

The trial court ruled this evidence was inadmissible under Rule 412. See N.C. Gen. Stat. § 8C-1, Rule 412 (2001). Rule 412 excludes evidence of a victim's past sexual behavior but does not

apply to false accusations or inconsistent statements. § 8C-1, Rule 412; see *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982); *State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834 (2000).

The cases cited by defendant in support of his argument that the victim's allegations against her uncle are admissible are inapplicable. They involve conduct where the alleged victim either made inconsistent statements, *Younger*, 306 N.C. at 697, 295 S.E.2d at 456, or withdrew her allegations, *State v. Ginyard*, 122 N.C. App. 25, 34, 468 S.E.2d 525, 531 (1996). Here, although according to Detective Crouse the victim could not remember all of the details concerning the alleged incident with her uncle, there is no evidence that the victim made inconsistent statements or withdrew her allegations. Rather, the present case is more analogous to *State v. Anthony*, 89 N.C. App. 93, 365 S.E.2d 195 (1988), where this Court affirmed the trial court's exclusion of evidence of the victim's previous accusations of sexual abuse against her father and stepfather. Although the charges were dismissed in that case, this Court reasoned that the dismissal of the charges did not show that the victim's allegations were false. *Id.* at 97, 365 S.E.2d at 197. Just as there was no evidence of false allegations in *Anthony*, here, there is no evidence that the victim's allegations were false. Therefore, the trial court did not err in excluding evidence of the victim's prior allegation of sexual abuse.

Next, defendant contends the State could not prove he acted willfully because he was so highly intoxicated at the time of the alleged acts that he was not conscious.

Defendant did not request an instruction on intent or involuntary intoxication. A defendant must object in order to preserve errors relating to jury instructions or the failure to give requested instructions. *State v. Connell*, 127 N.C. App. 685, 691, 493 S.E.2d 292, 296 (1997). Here, defendant did not request an instruction regarding diminished capacity, but now asserts plain error in failing to so instruct. To show plain error, the defendant must establish that, but for the error, the jury would likely have reached a different conclusion. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

During defendant's evidence, he was asked on direct examination if he had been drinking. He stated, "I'd been drinking a good bit, but the thing about it is, you know, when you're alcoholic like me, it takes a lot go [sic] get you drunk, you know, you can set [sic] there and drink all day, and you won't get drunk, you'd just still be sober...." Defendant also admitted on cross-examination that he was not so drunk that he didn't recall the events leading up to his arrest and that he was not so impaired that he "lost [his] sense of what was right and wrong...." As the burden was on the defendant to establish the defense of lack of intent or diminished capacity by reason of intoxication, we find the trial court did not commit plain error in failing to instruct the jury on intent and voluntary intoxication.

Defendant also contends the trial court erred in denying his motion to dismiss because the State did not prove that he acted for the purpose of gratifying a sexual desire, an essential element to the charge. See N.C. Gen. Stat. § 14-202.1 (2001). Although the State bears the burden of proving every element of the crime charged, "in ruling on the motion to dismiss, the trial court must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997). Furthermore, a defendant's purpose in committing indecent liberties is "seldom provable by direct evidence and must ordinarily be proven by inference." *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988), quoting *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981).

Taking the evidence presented in the record in the light most favorable to the State, defendant repeatedly touched the victim in her genital area and changed positions so that he could reach around the victim's brother to continue touching her. He stopped touching her only when threatened. From this evidence, the jury could have reasonably inferred that defendant's repeated touching of the victim in her genital area was for the purpose of gratifying his sexual desires.

We find defendant's remaining assignments of error to be without merit; therefore, they are overruled.

No error.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).