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NO. COA08-160

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

DWAYNE SMITH

Wake County  
Nos. 05 CRS 009374-75  
05 CRS 59140-41

# Court of Appeals

Appeal by defendant from judgments entered 20 August 2007 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 October 2008.

# Slip Opinion

*Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway-Nirham, for the State.*

*Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant-appellant.*

BRYANT, Judge.

Dwayne Smith (defendant) appeals from judgments entered upon jury verdicts finding him guilty of two counts of statutory sexual offense against Adam<sup>1</sup>, and one count of statutory sexual offense and one count of second-degree forcible sexual offense against Barry. For the following reasons, we find no error.

## *Facts*

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<sup>1</sup> Psuedonyms have been used to protect the identity of the victims.

The State's evidence tended to show the following: Defendant was Barry's maternal uncle. During his childhood, Barry's mother would ask defendant to punish Barry because defendant was the only male figure in Barry's life at the time. Defendant was "like a father figure" to Barry. On 16 February 2003, defendant attended Barry's fifteenth birthday get-together at Barry's mother's townhouse where Barry and his siblings resided. During the party, defendant came into Barry's bedroom, ordered others to leave, and told Barry to shut and lock the door. Barry complied. Defendant lectured to Barry about getting older, which was something defendant had done frequently in the past. Defendant then walked to the closet, got on his knees inside the closet with his back to the wall and called Barry over to him. Defendant warned Barry that if he told anyone what defendant was about to do, defendant would hurt "them." Defendant told Barry to pull down his pants and he did so. Defendant then pulled down Barry's boxers and proceeded to perform fellatio on Barry. After defendant finished, defendant again warned Barry that if he told anyone, defendant would hurt "them." Barry then took a shower because he "just felt dirty and stuff[.]"

Later that same day, while the two were alone in the townhouse, defendant told Barry that he seemed nervous earlier and that defendant did not want Barry to be nervous. Shortly thereafter, Barry returned to his bedroom. Defendant followed Barry. Defendant then told Barry to get on the bed, pulled down

Barry's pants and boxers, and performed fellatio on him again until he heard Barry's mother arrive.

In October of 2004, when Barry was sixteen years old, D.J., defendant's son, invited Barry to defendant's residence. D.J. subsequently went to work, leaving Barry, Barry's younger brother, and Barry's younger cousin with defendant. Defendant came into D.J.'s bedroom where Barry was on the computer and asked if they could do the "same thing" they did on his fifteenth birthday. Barry shook his head and said, "No." Later, defendant called Barry into defendant's bedroom. Defendant told Barry that if he told anyone defendant would hurt "them," and Barry believed defendant. Defendant then performed fellatio on Barry and told Barry to "suck" defendant's nipples.

At trial, Scott Snider (Snider), a clinical social worker at the Center for Child and Family Health in Durham, testified as an expert in the field of child diagnostic interviewing. Snider interviewed Barry in April 2005. During the interview, Barry informed Snider that defendant had performed fellatio on him on three occasions - twice on his fifteenth birthday and again on a later date. Barry stated that defendant had asked Barry to "suck on his nipples" on the third occasion. Barry told Snider that defendant threatened him and his mother if he did not comply; that when the second incident occurred, defendant warned Barry, "I don't have to repeat myself, you know what will happen[;]" and on the third occasion, defendant threatened Barry with the use of a gun.

Barry also told his mother about the incidents with Defendant. Barry told her that defendant threatened him by "acting" like he had a gun and telling him that he would do something to them if Barry did not comply. At trial, Barry's mother testified that in the past she called on defendant to discipline Barry until he reached the seventh or eighth grade.

At the age of about nine, Adam came to live with defendant and his wife after Adam's mother fell ill. Adam and his brother were treated just like defendant's children and were disciplined by defendant. Adam lived in defendant's residence for approximately nine months before returning to his mother's care; however, Adam eventually ended up in foster care because of his mother's declining health. After several placements, Adam began DSS-sanctioned visits with Defendant, who by then, was estranged from his wife. Adam considered defendant a "big influence" in his life and called him "Dad". Defendant began taking classes to become a licensed foster parent with the commitment of adopting Adam. Adam did not know his natural father and wanted defendant to be his father.

Adam was fourteen when the visits with defendant began. The visits were initially every other weekend and then increased to every weekend. During those visits, Adam would either sleep on the couch, in defendant's bed alone, or in defendant's bed with defendant. More often than not when he slept in defendant's bed with defendant, defendant locked the bedroom door. While Adam was still fourteen, defendant began performing oral sex on Adam, and

also "making" Adam insert Adam's penis into defendant's rectum. Each time after anal intercourse, defendant would "make" him lick defendant's nipples. Defendant told Adam not to tell anyone and that he had friends in the Mafia.

Adam's visits with defendant continued until Adam was hospitalized at John Umstead Hospital, where he told a psychiatrist about what defendant did to him. Scott Snider interviewed Adam on 27 May 2005. Adam told Snider that his placement with defendant did not work out because defendant had been charged with molesting Barry, and that he knew the charges were true because defendant "did it to [him]." Adam, who referred to defendant as his "foster father" during the interview, told Snider that defendant began molesting him when he was fourteen. Adam told Snider that defendant would put Adam's penis in defendant's mouth or in defendant's hand and "masturbate[] [him]." Adam stated that he inserted his penis into defendant's rectum.

After the trial court denied his motion to dismiss, defendant testified on his own behalf. Defendant denied having any sexual contact with Barry or Adam. He testified that the allegations came as a shock when he was arrested in February of 2005. According to defendant, he treated Adam and his brother "much like" they were his own children and that Adam and his brother lied constantly. Defendant testified that his own sister, Barry's mother, was lying during her testimony, and that Barry lied during his testimony. Defendant's son, D.J., denied that his father was ever alone with Barry in his bedroom on the birthday in question. D.J. admitted

that in August 2004, Barry told him that defendant had molested him and that defendant had threatened Barry and his family.

Defendant was indicted for three counts of statutory sexual offense and one count of second-degree forcible sexual offense. On 20 August 2007, a jury found defendant guilty of three counts of statutory sexual offense and one count of second-degree forcible sexual offense. Defendant appeals.

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On appeal, defendant argues the trial court erred by: (I) failing to grant defendant's motion to sever the cases for trial; and (II) denying defendant's motion to dismiss the charge of second-degree forcible sexual offense.

I

Defendant first contends the trial court erred by denying his motion to sever the charges involving Barry from the charges involving Adam. In requesting a severance, defendant argued to the trial court that the testimony from the two separate victims would confuse the jury and be prejudicial to him. We disagree.

We note that defendant failed to renew his motion for severance "before or at the close of all the evidence" pursuant to N.C. Gen. Stat. § 15A-927(a)(2) (2007). "[F]ailure to renew a motion to sever as required by G.S. 15A-927(a)(2) waives any right to severance." *State v. McDonald*, 163 N.C. App. 458, 463-64, 593 S.E.2d 793, 797, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). "[O]n appeal the Court is limited to reviewing whether the trial court abused its discretion in ordering joinder at the time

of the trial court's decision to join." *Id.* The joinder of criminal charges for trial requires only that there be "some sort of 'transactional connection' between" them. *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981) (quoting *State v. Powell*, 297 N.C. 419, 255 S.E.2d 154 (1979)).

Here, the offenses involving Barry occurred in February of 2003 and October of 2004, and the offenses involving Adam occurred between May of 2004 and February of 2005; thus, some of the offenses occurred during the same time period. Both victims were teenage males - fourteen and fifteen years of age - who regarded defendant as a father figure. Defendant performed fellatio on both victims, had anal sex with Adam, and requested each victim to "lick" his nipples. These common factors are sufficient to justify joinder for trial. Defendant has failed to show any prejudice or abuse of discretion in the trial court's allowing joinder and denying defendant's motion to sever. Therefore, this assignment of error is overruled.

## II

Defendant also contends the trial court erred by denying his motion to dismiss the charge of second-degree forcible sexual offense based on insufficiency of the evidence relating to the offense occurring in October of 2004. We disagree.

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814

(1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

In order for defendant to be convicted of second-degree forcible sexual offense, the State has to prove that defendant engaged in a sexual act with Barry, and that the act was done by force and against Barry's will. Fellatio is a sexual act. See N.C. Gen. Stat. § 14-27.5(a)(1) (2007). Our Courts have repeatedly held that the element of force may be established by a showing of either "actual, physical force or by constructive force in the form of fear, fright, or coercion." *State v. Corbett*, 154 N.C. App. 713, 716, 573 S.E.2d 210, 213 (2002) (quoting *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987)). Constructive force may be shown by "proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Id.* (quoting *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680). The threats used by the defendant "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.* (quoting *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680). Defendant argues that the State failed to produce any evidence of force, threats of violence, or emphatic demands towards Barry in October of 2004.

Viewed in the light most favorable to the State, the evidence tended to show that defendant, an adult male, used constructive force to compel Barry, a teenaged boy, to engage in sexual acts with him in October of 2004. Barry testified that he viewed defendant as someone in a position of authority in his life and that defendant had been given the responsibility of disciplining him when he was younger. Barry also testified that when defendant asked if they could do the "same thing" they did on Barry's fifteenth birthday, Barry initially refused defendant by shaking his head and saying, "No." Defendant persisted, later calling Barry into his bedroom and stating if Barry told anyone, defendant would "hurt them." Only after threatening Barry did Barry allow defendant to perform sexual acts on him. Further, the State also presented the testimony of two witnesses who corroborated Barry's statements that defendant had threatened him during the incident in October of 2004.

From the circumstances surrounding the incident in October of 2004, we hold there is sufficient evidence from which a reasonable jury could conclude that defendant used constructive force to compel Barry to engage in sexual acts. The trial court properly denied defendant's motion to dismiss the charge of second-degree forcible sexual offense against Barry. Defendant's assignment of error is overruled.

No error.

Judges WYNN and ARROWOOD concur.

Report per Rule 30(e).