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NO. COA10-477

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 08 CRS 52044-45;
08 CRS 53363

ANTHONY TOWNSEND

Appeal by defendant from judgments entered 18 December 2009 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 14 October 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anita LeVeaux, for the State.

Geoffrey W. Hosford, for defendant-appellant.

JACKSON, Judge.

Anthony Townsend ("defendant") appeals his 18 December 2009 convictions of one count of attempted first-degree sexual offense, three counts of indecent liberties with a child, and one count of first-degree statutory rape. For the reasons stated herein, we hold no error.

Defendant was born on 16 January 1965. On 17 April 1999, defendant married Benita Townsend ("Townsend"). Townsend has two

daughters, J.B. and A.V.,¹ but neither girl is defendant's biological daughter. A.V. was born in 1987 and J.B. in 1992.

J.B. has known defendant since she was three years old. She testified that, initially, he had been a father figure to her. However, in May 2001, defendant called J.B. into his and Townsend's bedroom to show her a Disney website in preparation for their upcoming family vacation. J.B. testified that she saw a "porn web site" on the computer screen. J.B. left the room, but defendant called her back. Then defendant pulled J.B.'s shirt off, eventually removed all of her clothes, and told her that her mother had said it was okay. A pornographic movie was on the television. Defendant looked at the movie and told J.B. that they could be doing that. According to J.B., defendant then removed his clothes. Approximately five minutes later, Townsend arrived home. Defendant told J.B. to move behind the bed and put her clothes back on. Before Townsend came into the room, she yelled that she could see defendant in the bedroom because the door was smaller than the door frame.

With respect to the May 2001 incident, Townsend testified that she knocked on the locked bedroom door and was unable to open it because defendant was holding the door closed. Townsend retrieved a butter knife and pried the door partially open. Once Townsend was able to enter the room, she testified that J.B. was clothed; however, Townsend noticed that an "adult movie" still was on the

¹ Although both J.B. and A.V. are adults, they were minors when the alleged sexual assaults occurred. Therefore, we use their initials rather than their full names.

television. As defendant continued to put on his shorts, Townsend told J.B. to get into the car with her brother, Lyndon.² Once in the car, J.B. told Townsend about the incident with defendant; they did not return home until later that night.

Another incident occurred one year later, in the spring of 2002. According to J.B., while she and defendant were in his bedroom, defendant told her that it was time for her to "become a woman." Defendant told J.B. to remove her clothes, and he also removed his clothes. Defendant, wearing a condom, leaned over the side of the bed and put his penis into her vagina. Then, defendant pulled his penis out and allowed the ejaculate to fall onto the floor. J.B. never told him to stop, but she did tell him that it hurt, hoping that he would stop. Townsend was at work when this occurred; J.B. never told her mother because she was afraid that she would not believe her.

J.B. testified that another incident occurred "a couple of months" later. J.B. was in her room talking with one of her friends on the phone when defendant hung up her phone and made J.B. "play with him or jerk him off." Defendant ejaculated onto the floor, leaving J.B. to clean it up.

According to J.B., shortly thereafter, defendant approached her again. Defendant called J.B. into his bedroom and attempted to have anal sex with her, but she would not let him. Defendant then put his penis into her vagina and ejaculated onto her stomach.

² Lyndon is the biological son of defendant and Townsend.

On another occasion, while defendant was watching pornography, he called for J.B. to come into the room. At that point, he put his penis into her mouth and moved her head until he ejaculated.

J.B. testified that, during this same time period, defendant entered her bedroom one night wearing nothing but a towel. Defendant took off J.B.'s clothes and, without a condom, put his penis into her vagina, later ejaculated onto her sheets, and walked out of the room. According to J.B., she acted as if she were asleep during this incident and still did not tell her mother.

J.B.'s half-sister, A.V., is five years older than J.B. For some time, A.V. also lived with defendant, Townsend, J.B., and Lyndon. A.V. testified that, in January 1998, she was playing a video game in Townsend and defendant's bedroom when defendant entered the room and sat down behind her on the bed. This made A.V. "really, really uncomfortable." A.V. began to leave the room, but defendant said, "Let me show you something." He then kissed her on the mouth. A.V. told her grandmother - and eventually, Townsend - what had happened. According to A.V., Townsend confronted defendant, but he denied the incident. A.V. did not report the incident to the police because Townsend believed defendant instead of her.

Approximately one year later, A.V. and J.B. were in the backyard chasing one another around their pool. A.V. testified that, as she ran past defendant, he grabbed her leg, causing her to trip and fall. As defendant helped her up, he grabbed and touched A.V.'s vaginal area on the outside of her swimsuit.

Later that same year, defendant, A.V., J.B., and Lyndon were lying on a pallet watching a movie. A.V. went to the kitchen for some food, and when she returned, her brother was asleep and had been moved to the other side of defendant. A.V. testified that, after she lay back down, defendant began to fondle her vaginal area and kiss her breasts. He then pulled her pants down and attempted to penetrate A.V.'s anal area. A.V. testified that, at first, she could not tell if defendant's penis was against her skin or simply against her clothes, but later, when defendant attempted to penetrate her anal area, she knew that it was touching her skin. A.V. was in pain, but she never told defendant to stop. Finally, when the pain became significant, she stood up and went to her room. Defendant told A.V. that her mother was aware of what he was doing and that if A.V. told anyone, he would hurt Townsend.

According to A.V., on her fifteenth birthday, she and a neighbor had a "cake fight." As A.V. was cleaning up the cake, defendant walked into the kitchen and said, "I want that flower[,]'" ostensibly referring to the rose made from icing which decorated the birthday cake. A.V. told him, "[Y]ou can't have my flower." Defendant responded, "I don't mean that flower. I mean I want to deflower you." A.V. then called Townsend into the kitchen and asked what "deflower" meant. Townsend told her that it meant to take one's virginity. A.V. told Townsend that defendant had used that term with her. According to A.V., Townsend responded by grabbing a knife, walking down the hallway toward defendant's room, and calling defendant's name. Townsend, with the knife behind her

back, confronted defendant in the hallway, but she eventually handed the knife to A.V., who returned it to the kitchen. Townsend and defendant then continued to argue in their bedroom. Defendant testified that he merely wanted to eat the icing rose off the cake.

Townsend testified that she was aware of A.V.'s allegations against defendant, but she thought that they were prompted by A.V.'s desire to move back home and by her wish for Townsend and A.V.'s father to reunite. Townsend also was aware of A.V.'s allegations that defendant had kissed A.V. on the lips. Townsend acknowledged that she did not go to the police. Townsend told police that defendant did not "get along" with either J.B. or A.V.

In February 2007, Townsend told A.V. that she would support her daughter if she wanted to report defendant's activities to the police. Subsequently, A.V. told police that, several years earlier, defendant had touched her inappropriately. A.V. was attending college at the time.

J.B. and Townsend had had some conflicts arising out of Townsend's concern about J.B.'s sexual activity. On 17 December 2007, during one of their arguments about this issue, J.B. told Townsend that defendant had sexually assaulted her. Townsend testified that J.B. said, "[M]om, I don't want you to think that I'm messing around with a lot of guys . . . I need to talk to you about something" Townsend testified that she spoke with investigators at the child advocacy center when J.B. told her that defendant was "messing with" her. J.B. told Townsend of the times that defendant had sexually assaulted her while Townsend was at

work. Townsend testified that J.B. told her that defendant had called her into the room and told her to take her clothes off, bent her over the bed, and had vaginal intercourse with her.

On the same day that J.B. told her mother about the incidents, Townsend called the police to report defendant's alleged conduct. When Townsend obtained a restraining order against defendant in December 2007, defendant moved out of the residence he shared with her. However, in October 2008, defendant moved back in with Townsend.

In 2008, J.B. met with Dr. Laura Gutman for a sexual assault examination. J.B. admitted at trial, but not to Dr. Gutman, that she had had sexual intercourse with her boyfriend subsequent to the alleged assault by defendant but before Dr. Gutman examined her. Based upon the medical examination, Dr. Gutman concluded that there was "very strong support for the conclusion that J.B. had been sexually assaulted."

On 14 December 2009, defendant was charged with one count of attempted first-degree sexual offense, three counts of indecent liberties with a child, and one count of first-degree statutory rape. At trial, defendant attempted to elicit information from Townsend as to J.B.'s personal profiles on the social websites MySpace and Facebook. According to defendant, the content of the profiles was admissible to show that J.B. "hadn't been honest and forthright with [Townsend] and that it has a bearing on [J.B.]'s credibility with her own mother." The profiles included numerous photographs of young men "throwing up signs that appear to be gang

signs[,]” at least one photograph of J.B. making a gang sign with her hands, and other photographs of J.B. wearing a bathing suit. Townsend had seen these photographs because she had installed a program to track computer activities. Following the State’s objection and a subsequent *voir dire*, the trial court held:

The Court has considered the defendant’s offer of proof and the nature of the testimony he is attempting to elicit from this witness and the Court has considered the definition of relevant evidence under Rule 401 which is defined as evidence, having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence, and the Court concludes that this testimony is not relevant within the definition of that rule. Even if the testimony is probative, the Court concludes under Rule 403 that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice or confusion of the issues or of misleading the jury or by considerations of undue delay and waste of time. Accordingly, the [S]tate’s objection is sustained.

On 18 December 2009, a unanimous jury returned a guilty verdict against defendant as to each of the five counts. The trial court sentenced defendant to consecutive sentences of 240 to 297 months and 125 to 159 months. Upon release from prison, defendant is required to register as a lifetime sex offender. Defendant appeals.

Defendant first contends that the trial court erred by denying his motion to dismiss the charges because there exists no credible or substantial evidence that he committed the offenses. We disagree.

We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). In order to survive a motion to dismiss, the State must have presented substantial evidence as to each essential element of the offense charged and as to defendant's identity as the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

Our Supreme Court has set forth the standards governing our review of motions to dismiss:

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant['s] being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (internal citations and quotation marks omitted). In addition, a "substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight." *State v. Marshall*, 188 N.C. App. 744, 753, 656 S.E.2d 709, 715-16 (quoting *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), cert.

denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)), *disc. rev. denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). “‘Evidentiary contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.’” *Id.* at 753, 656 S.E.2d at 716 (quoting *State v. Garcia*, 358 N.C. 382, 413, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)). Thus, “[i]f there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the [trial] court’s duty to submit the case to the jury.” *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citations omitted).

To prove first-degree statutory rape, pursuant to North Carolina General Statutes, section 14-27.2(a)(1), the State must show that (1) defendant had vaginal intercourse with the victim, (2) the victim was under thirteen years of age, (3) defendant was at least twelve years of age, and (4) defendant was at least four years older than the victim. N.C. Gen. Stat. § 14-27.2(a)(1) (2001). “The unsupported testimony of the [accuser] in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury.” *State v. Bailey*, 36 N.C. App. 728, 730, 245 S.E.2d 97, 99 (1978) (citations omitted). “It is equally well-settled that the testimony of a single witness is adequate to withstand a motion to dismiss when that witness has testified as to all the required elements of the crimes at issue.” *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 914 (2006) (citations omitted).

In the case *sub judice*, J.B. testified as to her birth date, which is in 1992. Defendant was born on 16 January 1965. J.B. also testified that, during the period of 1 March through 30 April 2002, when she was ten years of age, defendant had vaginal intercourse with her. J.B. testified that, while she was in defendant's bedroom, he told her that it was time for her to "become a woman." Defendant told J.B. to take off her clothes and when she did, defendant, wearing a condom, leaned J.B. over the bed and put his penis into her vagina. Because J.B. testified as to all the required elements of the crime at issue, and because it is a jury's duty to weigh a witness's credibility, the trial court properly denied defendant's motion to dismiss the charge of statutory rape.

Similarly, the State presented substantial evidence as to the three indecent liberties charges. "A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (1997).

In the instant case, A.V. testified that, at some point during the period of 1 May through 31 August 1999, she and J.B. were in defendant and Townsend's backyard by the swimming pool chasing one another. As A.V. ran past defendant, he grabbed her leg, causing her to fall. Defendant asked if she was okay, and, as he picked

her up, he grabbed and touched her vaginal area on the outside of her swimsuit. A.V. testified that she was eleven years old at the time.

J.B. testified as to a second incident in May 2001, when defendant called J.B., who was nine years old at the time, to his bedroom. J.B. testified that she saw a "porn web site" on the computer screen. As J.B. tried to leave the bedroom, defendant called her back. Defendant then pulled off J.B.'s shirt and eventually removed all of her clothes, telling J.B. that Townsend had said that it was okay. A pornographic movie was on the television, which showed "two people having sex." Defendant told J.B. that they could be doing that, and then he proceeded to undress himself. Townsend's testimony at trial corroborated J.B.'s testimony when she told Officer West in May 2001 that she unexpectedly had walked in on defendant while he was watching a pornographic movie in their bedroom with J.B. This evidence goes to the element of "[w]illfully tak[ing] or attempt[ing] to take any immoral, improper, or indecent liberties with any child" and also demonstrates defendant's "purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (1997). See *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987) (holding that an inference as to defendant's purpose may be drawn from the evidence of defendant's actions); see also *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981) (holding that no actual touching of a child is necessary to support the offense of indecent liberties with a child) (citations omitted).

According to J.B., a third incident occurred in the spring 2002, while J.B. was talking with one of her friends on the phone. Defendant hung up the phone and made J.B. "play with him or jerk him off." Defendant ejaculated and left the ejaculate on the floor for J.B. to clean up.

Giving the State the benefit of all reasonable inferences, the combined testimony from A.V., J.B., and Townsend provides substantial evidence in support of each essential element of three counts of indecent liberties with a child. In the light most favorable to the State, this evidence supported one count of taking indecent liberties with A.V. during the summer of 1999, one count of taking indecent liberties with J.B. in May 2001, and one count of taking indecent liberties with J.B. in the spring of 2002.

Finally, the State's evidence also survives a motion to dismiss as to the sexual offense charge. "The crime of first-degree sexual offense is committed when a defendant engages in a sexual act with a child under the age of 13 years and the defendant is at least 12 years old and at least four years older than the victim." *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315, *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005) (citing N.C. Gen. Stat. § 14-27.4(a)(1) (2003)). A sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (1997). "The elements of attempt are an intent to

commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (citing *State v. Robinson*, 355 N.C. 320, 338, 561 S.E.2d 245, 257, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004).

A.V. testified that, sometime between 1 May and 31 August 1999, defendant, A.V., J.B., and Lyndon were lying on a pallet watching a movie. A.V., who was eleven years old at the time, went to the kitchen for some food. When she returned, her brother was asleep and had been moved to the other side of defendant, leaving an open spot next to defendant. After she lay back down, defendant began to fondle A.V.'s breasts and vaginal area. He then pulled her pants down and attempted to penetrate her anal area. Although she was unsure at first whether or not defendant's penis was against her skin, she knew once defendant attempted to penetrate her anal area. A.V. was in great pain, but she never told defendant to stop. Finally, when it started to hurt much worse, A.V. got up and went to her room.

In the light most favorable to the State, this evidence supports the elements of first-degree sexual offense. See N.C. Gen. Stat. § 14-27.4(a)(1) (1997). Accordingly, we hold that the trial court properly denied defendant's motion to dismiss the charge of first-degree sexual offense.

Although defendant argues that his charges should have been dismissed because the State introduced only the "shaky" testimony

of his stepdaughters, we reiterate that the weight and credibility of a witness's testimony are for the jury to determine. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999), *cert. denied*, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000). The State satisfied its burden to produce substantial evidence as to each element of the five charges.

Defendant's second argument is that the trial court erred by denying defendant's request to cross-examine Townsend as to J.B.'s activities on MySpace and Facebook. Defendant contends that the specific conduct from the online activity demonstrated J.B.'s lack of veracity and credibility. We disagree.

We review the question of relevance *de novo*; however, the trial court's determination is given deference. *State v. Lawrence*, 191 N.C. App. 422, 427, 663 S.E.2d 898, 901 (2008) (citing *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992)), *aff'd*, 363 N.C. 118, 678 S.E.2d 658 (2009) (per curiam). The trial court's ruling as to whether the prejudicial effect of relevant evidence outweighs its probative value is reviewed pursuant to an abuse of discretion standard. *State v. Whaley*, 362 N.C. 156, 159-60, 655 S.E.2d 388, 390 (2008) (citations omitted). "An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* at 160, 655 S.E.2d at 390 (quoting *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

In the case *sub judice*, defendant requested that Townsend be allowed to describe J.B.'s Facebook and MySpace postings at trial. Allegedly, these postings include photographs of young men who are making gang signs, J.B. in a swimsuit, J.B. making gang signs, and J.B. dressed in revealing attire. Other pictures from J.B.'s online accounts allegedly include a boy with a mask, a boy with paper currency on his face, and a boy holding a gun. Defendant argues that these postings are relevant evidence concerning J.B.'s character, because, if J.B. concealed her friends and the fact that she may have gang ties from her mother, her credibility reasonably may be questioned.

On *voir dire*, the trial court probed this argument by inquiring of defense counsel:

THE COURT: . . . what's the relevance of this testimony?

[Defense counsel]: Well, that [Townsend] discovered this shortly after the allegations of [defendant] were made and that she was

unaware of it and that she had had conversations with [J.B.] about staying away and having boys at the house and some other things and that she hadn't been honest and forthright with her and that it has a bearing on [J.B.]'s credibility with her own mother.

THE COURT: Is it not already abundantly clear that [J.B.] and her mother, this witness, were having some difficulty and that [J.B.] wanted to move out of the house?

[Defense counsel]: Well, I -- if you're asking me, I would think, yeah, it's clear but I don't know if it's enough to be abundant and that's -- I guess when you're defense counsel, you never know when it's abundant or not.

. . . .

THE COURT: Do you concede that none of the postings whether it was a written posting or a photograph that may have been posted on the web site, pertain to the allegations made against your client or, for that matter even pertain to your client?

[Defense counsel]: I concede that. I think it applies-could apply only to [J.B.'s] veracity. That's the only thing I think it could apply to.

The trial court then ruled:

The Court has considered the defendant's offer of proof and the nature of the testimony he is attempting to elicit from this witness and the Court has considered the definition of relevant evidence under Rule 401 which is defined as evidence, having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence, and the Court concludes that this testimony is not relevant within the definition of that rule. Even if the testimony is probative, the Court concludes under Rule 403 that the probative value of the testimony is substantially outweighed by the danger of unfair prejudice or confusion of the issues or of misleading the jury or by considerations of undue delay

and waste of time. Accordingly, the [S]tate's objection is sustained.

The trial court made a thorough inquiry into this issue and concluded that the evidence was not relevant, and even if relevant, its probative value was substantially outweighed by the prejudicial effect. Considering that potential gang affiliation could produce an emotional, rather than reasoned, bias against J.B. and that her tense relationship with her mother already had been discussed and explored, we cannot say that the trial court abused its discretion in excluding this evidence.

For the foregoing reasons, we hold that the trial court did not err by denying defendant's motion to dismiss nor did it abuse its discretion in excluding the evidence of J.B.'s social networking webpages.

No error.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).