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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1097

Filed: 5 July 2017

Davie County, Nos. 15 CRS 50048-50

STATE OF NORTH CAROLINA

v.

DAVID LEE KLUTTZ

Appeal by defendant from judgments entered 3 March 2016 by Judge Kevin M. Bridges in Davie County Superior Court. Heard in the Court of Appeals 4 April 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.*

*Crumpler Freedman Parker & Witt, by David B. Freedman, for defendant-appellant.*

DAVIS, Judge.

David Lee Kluttz (“Defendant”) appeals from his convictions of first-degree sexual offense with a child and two counts of indecent liberties with a child. On appeal, he argues that the trial court erred by denying (1) his motion *in limine* to suppress incriminating statements he made to a detective; and (2) his motion to

dismiss the charges against him based on insufficiency of the evidence. After careful review, we conclude that Defendant received a fair trial free from error.

### **Factual and Procedural Background**

The State presented evidence at trial tending to establish the following facts: In 2000, Defendant began a romantic relationship with a woman named “Betty.”<sup>1</sup> The couple moved into a house in Mocksville, North Carolina, along with Betty’s son and young daughter, “C.A.” When C.A. was nine years old, Defendant forced her to perform oral sex on him and inappropriately touched her on multiple occasions.

When C.A. was seventeen, she told her mother about these incidents from her childhood. On 19 August 2014, Betty and C.A. met with Detective Patrick Reagan of the Mocksville Police Department. C.A. told Detective Reagan that when “she was approximately nine years old and in the fourth grade” she “was forced to have oral sex on approximately five separate occasions.”

Upon learning of these alleged acts of sexual abuse, Detective Reagan reached out to Defendant and arranged three interviews with him. Prior to each of these three interviews, Detective Reagan informed Defendant that he was free to leave at any time. On 28 September 2014, Detective Reagan conducted his first interview with Defendant in an interview room at the Mocksville Police Department but did not inform Defendant of the allegations against him. On 30 November 2014,

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<sup>1</sup> Pseudonyms and initials are used throughout this opinion to protect the privacy of the minor child.

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Detective Reagan conducted a second interview at the Mocksville Police Department during which he told Defendant about the allegations C.A. had made against him.

On 31 December 2014, Detective Reagan met with Defendant in the parking lot of the Mocksville Police Department and “offered to either escort him or have him follow me to” an interview room at the Davie County Sheriff’s Office. Defendant accepted a ride from Detective Reagan in an unmarked SUV. Defendant was unrestrained during the ride.

When they arrived at the Sheriff’s Office, Detective Reagan and Defendant walked to an interview room where Special Agent Marc Sharp was waiting to administer a polygraph examination. Defendant agreed to submit to the examination, and Detective Reagan left the room. When the polygraph examination concluded approximately two and a half hours later, Detective Reagan returned to the room and Special Agent Sharp left the room. The interview room door remained open.

At this point, Detective Reagan “asked [Defendant] if he had any new information to provide to [him].” At trial, Detective Reagan testified that Defendant stated the following:

At that time he admitted to me while he was living on Hardison Street [C.A.] had entered his bedroom. She asked him for ice cream. He stated he would give her ice cream later. He then admitted [C.A.] performed oral sex on him. He stated he brushed her away and said, “Don’t tell your mother about this.”

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After Defendant made this statement, Detective Reagan asked him “if he would be comfortable . . . filling out a voluntary written statement that would essentially be in his own handwriting, tell [sic] what he wanted to say about those incidents.” Defendant agreed to write a statement containing his version of the events. Detective Reagan then asked Defendant “if he would rather go to the conference room . . . which is a much larger room. It’s open with windows and daylight.” Defendant agreed to go to the conference room. Detective Reagan asked Defendant “if he wanted a restroom break or some water . . . because of the hour . . . and he declined lunch and the restroom break but wanted the water.” Detective Reagan “gave him [a bottle of] water from the Sheriff’s Department.”

Detective Reagan handed Defendant a “Voluntary Statement Form” and told him to read it and sign his initials so as to “indicate that he had read that and accepted that[.]” Defendant initialed the form. Detective Reagan then “explained to him that this was whatever he wanted to put on the form in whatever narrative he chose to put in there. I was not going to dictate how he put it in there. I said it might be more comfortable for you if I step out of the room and give you the time you need.” At that point, Detective Reagan stood up and “went to the hallway” while Defendant wrote his statement on the form.

Defendant took “[a]pproximately 30 minutes” to write his statement. The conference room door continued to remain open during this time. Detective Reagan

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stayed in the hallway or “in the doorway” and testified that he remained close by so that “[i]f [Defendant] had an immediate question, I was there.” When Defendant was “about halfway through the statement on the page[,]” Detective Reagan asked him if he wanted “to take a break or . . . more water.” Defendant told him that “he had enough water[,]” and Detective Reagan “stepped back out of the room into the hallway.” After approximately thirty minutes, Detective Reagan “observed from the hallway that [Defendant] had stopped writing[,]” so he returned to the room. At this point, Defendant put his pen down and stated that “he was finished with his statement.”

Detective Reagan “read over the statement silently” and “asked him if this was his statement and that he was freely writing[,]” to which Defendant responded in the affirmative. Detective Reagan then “completed the time and date stamp at the bottom of the form[,]” and he and Defendant both signed the written statement. Detective Reagan drove Defendant back to his car at the Mocksville Police Department and informed him that he “would make contact with him as more information became available.”

On 7 January 2015, Defendant was charged with one count of first-degree sexual offense with a child and two counts of indecent liberties with a child. He was arrested on 16 January 2015. On 23 February 2015, a grand jury returned bills of

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indictment charging Defendant with first-degree sexual offense with a child and two counts of indecent liberties with a child.

A jury trial began on 1 March 2016. That morning, Defendant's counsel filed a "Motion *In Limine* to Suppress Statement of Defendant," requesting that the trial court suppress his incriminating oral and written statements because they "were not voluntarily made by the Defendant, and were made while effectively in custody without any advisory warning to the Defendant of his Constitutionally protected rights against self-incrimination and to counsel . . . ."

On 2 March 2016, the following exchange occurred between defense counsel and the trial court:

[DEFENDANT'S COUNSEL]: My objection would be to any reference to my client's statements to Detective Reagan following the polygraph on December 31st of 2014, for the reasons that were stated on the record yesterday, in particular, that it would be our position that it was a custodial interrogation and he was not properly Mirandized before those statements were made.

THE COURT: That objection is duly noted and preserved. It is overruled and I am giving you a continuing objection throughout the course of this trial.

That same day, the trial court entered an order denying Defendant's motion *in limine* and concluding that Defendant "was never in formal custody, nor was he deprived of his freedom or restrained in any way so as to trigger warnings pursuant to Miranda." At trial, the State presented testimony from C.A., Betty, Detective

Reagan, and two other witnesses. During the direct examination of Detective Reagan, the State introduced evidence of Defendant's written statement, and Detective Reagan testified about the verbal statements Defendant had made to him. During the presentation of this evidence, Defendant's counsel made no objection.

At the close of the State's evidence, Defendant's counsel moved to dismiss the charges against him based on insufficiency of the evidence, and the trial court denied his motion. Defendant did not testify, and his counsel renewed his motion to dismiss at the close of all the evidence, which the trial court also denied.

On 3 March 2016, the jury returned its verdict, finding Defendant guilty of first-degree sexual offense with a child under the age of 13 and two counts of taking indecent liberties with a minor child. That same day, the trial court sentenced Defendant to 288 to 355 months imprisonment for the first-degree sexual offense conviction and consecutive sentences of 19 to 23 months imprisonment for each of the indecent liberties convictions. On 9 March 2016, Defendant filed a notice of appeal.

### **Analysis**

On appeal, Defendant argues that the trial court erred by (1) denying his motion *in limine* to suppress the incriminating statements he made to Detective Reagan; and (2) denying his motion to dismiss for insufficiency of the evidence. We address each argument in turn.

#### **I. Denial of Motion *In Limine***

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As an initial matter, we must determine whether this issue is properly before us. “To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence.” *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (citation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

When a motion *in limine* has been denied and when the contested evidence is then offered at trial, the party opposing admission of the evidence must renew his objection at trial to preserve the issue for appellate review. Even if the trial court allows the party a standing objection, the party is not relieved of his obligation to make a contemporaneous objection.

*State v. Mays*, 158 N.C. App. 563, 578, 582 S.E.2d 360, 370 (citation omitted), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 379 (2003).

Here, Defendant filed a motion *in limine* to suppress his statements to Detective Reagan. Although the trial court denied the motion, it granted him “a continuing objection throughout the course of this trial.” At trial, the prosecutor introduced as an exhibit Defendant’s written statement and questioned Detective Reagan regarding the oral statements Defendant made to him on 31 December 2014. Although the trial court stated that the exhibit was “received into evidence over objection[,]” Defendant did not actually object to any of the evidence of his pre-trial statements to Detective Reagan. Accordingly, Defendant has failed to properly preserve this issue for appellate review. *See Mays*, 158 N.C. App. at 578, 582 S.E.2d

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at 370 (where defendant did not lodge contemporaneous objections and instead simply relied upon a standing objection, issue was not preserved for review).

Even assuming *arguendo* that Defendant had properly preserved his objection to the admission of these statements, however, his argument would still fail. The warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), “appl[y] only in the situation where a defendant is subject to custodial interrogation.” *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). “[T]he appropriate inquiry in determining whether a defendant is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (quotation marks omitted). “Circumstances supporting an objective showing that one is ‘in custody’ might include a police officer standing guard at the door, locked doors or application of handcuffs.” *Id.* “However, no single factor controls the determination of whether an individual is ‘in custody’ for purposes of *Miranda*.” *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004) (citation omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

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Here, the trial court found as fact<sup>2</sup> that “Detective Reagan met with the defendant in the parking lot of the Mocksville Police Department and drove him to the Davie County Sheriff’s Office” in an unmarked car with no physical restraints “because [Defendant] was unsure of the location” of the Sheriff’s Office. After Defendant agreed to take a polygraph examination and the examination was completed, Detective Reagan began speaking to Defendant in a small interview room. Although Detective Reagan sat in front of the doorway, the door to the room remained open during the entire interview. He stated to Defendant that “there were some things that he needed to hear from . . . [D]efendant” and “did not ask . . . [D]efendant any specific questions, but he did ask him to elaborate and gave some prompts to keep him talking.”

When Defendant began making incriminating statements, Detective Reagan asked him if he would be willing to write these statements down in his own handwriting, and Defendant agreed to do so. Detective Reagan then brought Defendant to a more spacious conference room. While Defendant was writing his statement, Detective Reagan “moved away from the defendant.” The door to the conference room remained open, and Detective Reagan “stood near the open doorway.”

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<sup>2</sup> Because Defendant does not challenge the trial court’s findings of fact in its order denying his motion *in limine*, these findings are binding on appeal. *State v. Eldridge*, \_\_ N.C. App. \_\_, \_\_, 790 S.E.2d 740, 742 (2016) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”)

The trial court found that Defendant's conversation with Detective Reagan "lasted twenty to thirty minutes" and that Defendant was told he was "free to leave at any time." Detective Reagan offered Defendant opportunities for breaks, including "a bathroom break, a water break, and lunch to be provided for him at no cost[,] but Defendant "declined everything except the water which was provided to him."

Moreover, the trial court found that Defendant "was never physically restrained in any way." He never asked to stop talking, never requested an attorney, and was made no promises in exchange for his statements. At the close of the interview, Detective Reagan did not arrest Defendant, and he never suggested to Defendant that formal charges would be filed against him. He provided Defendant with transportation back to the parking lot of the Mocksville Police Department during which time the only restraint on Defendant was his seatbelt.

Our Supreme Court has rejected similar arguments in analogous circumstances. *See, e.g., State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010) (defendant voluntarily agreed to accompany detectives to police station, told detectives "he was anxious to talk with them and answer their questions[,] was never restrained, was given several bathroom breaks, and was frequently left alone in interview room with door unlocked and no guard posted (quotation marks omitted)), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011); *Garcia*, 358 N.C. at 397, 597 S.E.2d at 737 (defendant was twice informed he was not under arrest, was free to move about

unescorted to get a drink from the water fountain, and was interviewed by plain-clothed, unarmed officer with the interview room door closed); *Barden*, 356 N.C. at 337, 572 S.E.2d at 124 (defendant voluntarily drove his car to meet police for questioning, was repeatedly informed that he was not under arrest and was free to leave at any time, was never restrained or confined, and at the conclusion of the interview was allowed to leave).

Based on the totality of these circumstances, we conclude that the trial court's findings of fact support its conclusion of law that Defendant was not in custody at the time he made his oral and written incriminating statements to Detective Reagan. *See Garcia*, 358 N.C. at 400, 597 S.E.2d at 739 (where defendant was not in custody when he made incriminating statements, his motion to suppress the statements was properly denied). Accordingly, this argument is overruled.

## **II. Denial of Motion to Dismiss**

Defendant's final argument is that the trial court improperly denied his motion to dismiss<sup>3</sup> because the State's evidence was insufficient to allow the jury to convict

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<sup>3</sup> We note that in his brief Defendant refers to his motion both as a motion for directed verdict and as a motion to dismiss. "Whether termed in a criminal case as motion for directed verdict, motion of nonsuit, motion to dismiss or motion pursuant to G.S. 15A-1227," the same standard of review applies to our review of the trial court's denial of this motion. *State v. Thompson*, 43 N.C. App. 380, 380, 258 S.E.2d 800, 800 (1979) (citation omitted).

him of either the first-degree sexual offense charge or the two offenses of taking indecent liberties with a child.<sup>4</sup> We disagree.

“The trial court’s denial of a motion to dismiss is reviewed *de novo* on appeal.” *State v. Pressley*, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (2014) (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 829, 763 S.E.2d 382 (2014). “Upon defendant’s motion for dismissal, the question for the Court 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 defendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is . . . evidence . . . a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). If the

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<sup>4</sup> The first count of taking indecent liberties was for “touching breasts” and the second count was for “masturbating.”

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court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

"The pertinent definition of first-degree sexual offense is a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." *State v. Manley*, 95 N.C. App. 213, 214, 381 S.E.2d 900, 900, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 467 (1989) (citation, quotation marks, and ellipsis omitted).

A person is guilty of taking indecent liberties with children if, being sixteen years of age or more and at least five years older than the child in question, he or she either (1) willfully 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; or (2) willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

*Id.* (citation, quotation marks, and brackets omitted).

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Defendant's primary argument is that his motion to dismiss should have been granted because (1) there was an eight-year lapse in time between the dates on which the sexual abuse occurred and the date when C.A. reported the abuse; and (2) C.A. could not recall specific details about several of the incidents at issue, including the specific dates of the incidents. However, it is well established that

[i]n cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs.

*State v. Bingham*, 165 N.C. App. 355, 362, 598 S.E.2d 686, 691 (2004) (citation omitted); *see also State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990) (“[A] child's uncertainty as to when the offense was committed goes to the weight of her testimony. Where there is sufficient evidence that the defendant committed each essential act of the offense, nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed.”), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991).

Here, Defendant makes no argument that the State failed to provide evidence of any element of the offenses for which he was convicted. *See State v. Miller*, 137

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N.C. App. 450, 459, 528 S.E.2d 626, 631 (2000) (affirming denial of motion to dismiss where defendant “neither argued nor pointed us to a lack of evidence as to any element of any of the remaining offenses for which he was convicted in those cases”).

Moreover, the State offered testimony from C.A., who described at length the first and last incidents of Defendant’s sexual abuse. As to these two occasions, C.A. was able to recall in detail where the incidents took place, the specific conversations she had with Defendant that occurred prior to the incidents, the parts of her body that Defendant touched, the parts of Defendant’s body that she was forced to touch, the sexual acts that Defendant performed or attempted to perform on her, and how she felt during and after the abuse. Among other things, she testified that during the first incident, Defendant forced her to lick his penis. She testified that during the final incident Defendant (1) “started touching my breasts”; and (2) “started masturbating behind me.”

When viewed in the light most favorable to the State, this evidence was sufficient to submit this case to the jury. *See State v. Fuller*, 166 N.C. App. 548, 556-57, 603 S.E.2d 569, 575-76 (2004) (evidence withstood defendant’s motion to dismiss charges of first-degree sexual offense with a child and three counts of taking indecent liberties where victim testified that defendant “made [her] suck his private with her mouth” and “(1) lifted her shirt and kissed her breasts; (2) kissed her ‘private’ area with his lips; and (3) penetrated her vagina with his fingers” (quotation marks

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omitted)). Accordingly, we cannot say that the trial court erred in denying Defendant's motion to dismiss. *See State v. Watkins*, \_\_ N.C. App. \_\_, \_\_, 785 S.E.2d 175, 178 ("Because we are satisfied that the State's evidence was adequate to submit the case to the jury, the trial court properly denied Defendant's motions to dismiss."), *disc. review denied*, \_\_ N.C. \_\_, 792 S.E.2d 508 (2016).

**Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).