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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-515

No. COA20-557

Filed 21 September 2021

Cumberland County, No. 16 CRS 58298

STATE OF NORTH CAROLINA

v.

CALVIN GENE McNEILL.

Appeal by Defendant from judgment entered 4 October 2018 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Calvin Gene McNeill ("Defendant") appeals from a judgment entered on a jury verdict finding him guilty of first-degree statutory rape of a child, three counts of first-degree sexual offense with a child, and indecent liberties with a child. Defendant argues that the trial court erred (1) by denying his motion to dismiss one of the charges of first-degree sex offense because there was not substantial evidence of

digital penetration and (2) by admitting testimony regarding a similar incident in a different county to demonstrate Defendant's bad character. After careful review, we conclude Defendant has failed to demonstrate reversible error.

I. FACTS & PROCEDURAL BACKGROUND

¶ 2 Evidence presented at trial tends to establish the following:

¶ 3 Defendant first sexually assaulted D.M., a minor, when she was approximately five years old. Defendant was D.M.'s aunt's boyfriend; he and D.M.'s aunt lived together in a house next door to D.M.'s family home. Defendant sexually assaulted D.M. on multiple occasions between 1 December 2005 and 30 June 2011.

¶ 4 The first time Defendant assaulted D.M., D.M.'s mother had left D.M. at her aunt's house for the weekend and Defendant was the only person home at the time. Once D.M.'s mother left, Defendant put D.M. on the kitchen counter while he cooked. He proceeded to touch her breasts, remove her pajama pants, push her underwear aside, and feel her vagina with his hand. Defendant eventually let D.M. down from the counter and gave her peanut M&Ms.

¶ 5 Defendant next sexually assaulted D.M. when she was six. D.M. was again left alone at her aunt's house with Defendant. As D.M. watched television in the living room, Defendant touched her breasts and vagina. He then went to his bedroom and called D.M. there. Defendant was sitting on the futon with his shorts down when D.M. came into the bedroom. Defendant pushed D.M. to her knees and forced his

penis into her mouth. Defendant held D.M.'s head with his hand and moved her mouth up and down over his penis. After, Defendant bribed her with money and peanut M&Ms.

¶ 6 The same thing happened when D.M. was eight. Home alone with D.M., Defendant called D.M. into his bedroom. He took off her clothes and touched her breasts. As before, he pushed her down to her knees, removed his pants, and put his penis in her mouth, forcing her to perform fellatio on him. He then pushed her onto her back on the floor and licked her vagina. Defendant rubbed his penis on D.M.'s vagina and attempted to insert his penis into her vagina. He only stopped when D.M. gasped and pulled away. Defendant gave D.M. peanut M&Ms after he finished.

¶ 7 Defendant sexually assaulted D.M. at her aunt's house again when D.M. was ten years old. Defendant made D.M. come into his bedroom, where he touched her breasts under her clothes, removed her clothing along with his own, and made her get on the floor. Defendant rubbed her vagina, inserted his penis into her vagina, and raped her. After a few minutes, he pulled away when she started bleeding and crying. Defendant again placated her with $5 and peanut M&Ms.

¶ 8 Defendant sexually assaulted D.M. for the last time just after her twelfth birthday on 8 June 2011. D.M.'s mother dropped her off with Defendant because he had offered to take her to a water park and buy her a phone and other presents for her birthday. Instead, he took D.M. to a Relax Inn in Harnett County. There was a

camcorder on a tri-pod facing one of the beds and alcohol in the hotel room. Defendant told D.M. this was "going to be the best sex of [her] life" and proposed that she marry him and have his child. D.M. refused his advances. Defendant rubbed D.M.'s back and open-mouthed kissed her, at which point D.M. laid down on the bed and cried. Defendant got upset, telling D.M. "he could pay someone to have sex with him." He told D.M. to have someone come to pick her up and then left the room. D.M. called her mother, who immediately reported the incident to police.

¶ 9 Defendant's case came on for trial on 24 September 2018 after two previous mistrials.[1] At trial, in addition to D.M.'s testimony, D.M.'s sister and mother both testified to being sexually assaulted by Defendant as children. Several police officers, including one who responded to the call from the Relax Inn in Harnett County, corroborated D.M.'s testimony. At the close of the State's evidence, and on a renewed motion after the close of all evidence, defense counsel moved to dismiss all charges. The trial court denied both motions.

¶ 10 The jury found Defendant guilty on all counts. The trial court sentenced Defendant to consecutive active prison sentences of 288 to 355 months for each count

[1] During the first trial on 29 May 2018, the trial court found substantial and irreparable prejudice to the State's case and, in the second trial on 5 June 2018, the jury could not reach a unanimous verdict.

of first-degree sex offense and first-degree statutory rape and 19 to 23 months on the indecent liberties conviction. Defendant gave notice of appeal in open court.

II. ANALYSIS

1. Sufficiency of Evidence for First-Degree Sex Offense by Digital Penetration

¶ 11 Defendant argues there was insufficient evidence he digitally penetrated D.M. on count two of his first-degree sexual offense conviction. We disagree.

¶ 12 We review a trial court's denial of a motion to dismiss *de novo*. *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (2016). A motion to dismiss should be denied if there is substantial evidence of each element of a crime and of the defendant being the perpetrator. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). Substantial evidence is "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citations omitted). In conducting our review, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Benson*, 331 N.C. at 544, 417 S.E.2d at 761 (citation omitted).

¶ 13 A defendant is guilty of a sexual offense with a child if (1) the defendant is at least 18 years of age and (2) the defendant engaged in a sexual act with a victim who is under the age of 13 years. N.C. Gen. Stat. § 14-27.4A(a) (2013) (recodified as § 14-

27.28(a) by Sess. L. 2015-181, § 10(a), effective 1 December 2015, and applicable to offenses committed on or after that date). A sexual act is defined, in relevant part, as cunnilingus, fellatio, or "penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.1(4) (recodified as § 14-27.20(4) by Sess. L. 2015-181, § 2, effective 1 December 2015, and applicable to offenses committed on or after that date). For a sexual act by penetration, "any object" encompasses human body parts, including fingers. *State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981).

¶ 14 There is no dispute as to Defendant's or D.M.'s age at the time of the offenses; only the sexual act element, namely whether Defendant digitally penetrated D.M.'s vagina, is at issue. Defendant was charged with three counts of first-degree sex offense with a child. None of the counts specified the sexual act committed and each alleged a sexual act between 1 December 2005 and 30 June 2011. On count two, the jury indicated Defendant was guilty of a sex offense with a child based on "digital penetration." The other two counts were by cunnilingus and/or fellatio. According to D.M.'s testimony, count two corresponds to the first time Defendant sexually assaulted her when she was a five-year-old.

¶ 15 Defendant relies on *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961), and *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), to argue there was insufficient evidence of penetration. We conclude those cases are inapposite. In *Whittemore*, one

of the victims testified that the defendant made her pull off her pants and underwear and then he "put his hand on my privates" and "kept it there." 255 N.C. at 586, 122 S.E.2d at 398. Our Supreme Court held the victim's testimony was "insufficient to establish the 'penetration' necessary for a conviction" of intercourse against nature and carnal knowledge of a female child. *Id.* D.M.'s testimony in this case, that Defendant "touch[ed]," "rubb[ed]," felt, and "mess[ed] with" her vagina, certainly indicates something more than the defendant's passive touching of the victim's vagina in *Whittemore*.

¶ 16 In *Hicks*, our Supreme Court held a victim's ambiguous testimony that the defendant "put his penis in the back of me," without other corroborative evidence, was insufficient evidence of penetration for a conviction of first-degree sexual offense. 319 N.C. at 90, 352 S.E.2d at 427. Unlike in *Hicks*, D.M.'s testimony was unambiguous about how Defendant touched her when she was five and it was further corroborated by the testimony of officers and a medical expert.

¶ 17 Defendant also ignores more recent and specific precedent from this Court announcing that evidence of penetration of the labia of the vagina constitutes evidence of penetration as a sexual act. In *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81 (2005), this Court explicitly held that "evidence that the defendant entered the labia is sufficient to prove the element of penetration" for purposes of sexual offenses. 172 N.C. App. at 657-58, 617 S.E.2d at 88 (citing *State v. Johnson,* 317 N.C.

417, 434, 347 S.E.2d 7, 17 (1986), *superseded by statute as stated in State v. Moore,* 335 N.C. 567, 440 S.E.2d 797 (1994)). The defendant in that case forced the victim to remove her pants and underwear and then ordered her to spread her labia apart so he could touch and separate it further with the barrel of his gun. *Id.* at 654, 617 S.E.2d at 86. We upheld the defendant's conviction for first-degree sexual offense based on the victim's testimony. *Id.* at 658, 617 S.E.2d at 88; s*ee also State v. Corbett*, 264 N.C. App. 93, 96-99, 824 S.E.2d 875, 878-79 (2019) (applying *Bellamy* and holding testimony that the defendant touched "between" the victim's labia was sufficient evidence for reasonable jurors to conclude the defendant penetrated her vagina pursuant to N.C. Gen. Stat. § 14-27.7A).

¶ 18 Here, there is no evidence that Defendant inserted his fingers into D.M.'s vaginal opening, but there is sufficient evidence that he penetrated her labia. Describing the sexual assault, D.M. testified to the following: (1) "He started touching me on my breasts and my vagina area" with his hand; (2) "[Defendant] started touching and feeling on me" inside her "underpants" on her vagina; and (3) "He started messing with my vagina." The prosecutor further clarified, "And when you say he started touching you, he started rubbing you on your breasts and vaginal area, was that over your clothing or under your clothing?" D.M. affirmed it was "under [her] clothing."

¶ 19 In addition to D.M.'s account of the assault, the State offered testimony from a medical expert in child abuse pediatrics, Doctor Danielle Thomas-Taylor ("Dr. Thomas-Taylor"). Dr. Thomas-Taylor testified that "when you push something into the genital area . . . it touches the urethra, it touches the vaginal area, and in little kids, it can touch all of them at the same time. And so, you can certainly have discomfort associated with friction, something rubbing against your genital area or penetrating the vaginal opening." The urethra Dr. Thomas-Taylor describes is located within the labia majora and labia minora of the vagina, below the clitoris and above the vaginal opening.[2]

¶ 20 Based on D.M.'s testimony about how Defendant touched her vagina and Dr. Thomas-Taylor's description of the anatomy of a child's vagina, a reasonable juror could conclude that Defendant, at a minimum, necessarily penetrated D.M.'s labia majora, providing substantial evidence of digital penetration for the first-degree sexual offense. Viewing the evidence in the light most favorable to the State and following our recent precedent, we hold the State presented substantial evidence of

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[2] The urethral opening is the "external opening of the transport tube that leads from the bladder to discharge urine outside the body." The opening "of the female urethra is below the clitoris and just above the opening of the vagina." MedicineNet, *Medical Definition of Female Urethral Opening*, https://www.medicinenet.com/female_urethral_opening/definition.htm.

digital penetration. The trial court properly denied Defendant's motion to dismiss on this charge.

2. Admissibility of Evidence about Incident in Harnett County

¶ 21 Defendant contends testimony regarding what he did in the Relax Inn hotel room in Harnett County is inadmissible to show he acted in conformity with his bad character under North Carolina Rule of Evidence 404(b).

¶ 22 Defendant has not preserved this issue for our review because he did not timely object to D.M.'s testimony about the incident in Harnett County in the presence of the jury at trial. N.C. R. App. P. 10(a)(1) (2021) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendant claimed to "renew" his objection at the close of evidence during his motion to dismiss and at another point after the trial court had already given a limiting instruction to the jurors. But throughout D.M.'s testimony about the hotel room in Harnett County, defense counsel never objected.

¶ 23 Defendant has also failed to assert plain error review on appeal. N.C. R. App. P. 10(a)(4) (2021) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal *when the judicial*

action questioned is specifically and distinctly contended to amount to plain error." (emphasis added)). Because Defendant failed to preserve the issue of admissibility of this testimony at trial, we cannot now consider it.

¶ 24 Assuming *arguendo* Defendant's argument is preserved, the trial court did not abuse its discretion by allowing the testimony about what Defendant did in Harnett County. The State offered evidence of what occurred there for a permissible purpose under Rule 404(b), specifically modus operandi, plan, or opportunity. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.") And the testimony was probative under North Carolina Rule of Evidence 403 in that it tended to further demonstrate how Defendant carried out earlier sexual assaults against D.M.—Defendant was always alone with D.M.; Defendant sexually assaulted or attempted to sexually assault D.M.; Defendant abused the same victim, D.M.; Defendant sexually abused D.M. while she was not yet a teenager, between the ages of five and twelve; and Defendant always bribed D.M.

III. CONCLUSION

¶ 25 Based on the foregoing reasons, we hold the trial court did not err in denying

Defendant's motion to dismiss count two of first-degree sexual offense with a child. Defendant has failed to preserve his second argument for our review.

NO ERROR.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).