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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-250

No. COA20-912

Filed 5 April 2022

New Hanover County, No. 18 CRS 57159, 57120

STATE OF NORTH CAROLINA

v.

KELTON BUCK LEWIS, Defendant.

Appeal by Defendant from judgments entered 9 March 2020 by Judge Richard Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 16 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine R. Laney, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

¶ 1 Defendant was convicted of several crimes arising from his sexual assault of Joe[1], a nine-year-old boy, whom he was babysitting. We find no error.

I. Background

¶ 2 Defendant was a friend of Joe's family. One day while Joe's father was at work,

[1] In cases involving juveniles, the parties are required to use initials or pseudonyms.

Defendant was babysitting Joe. When Joe's father arrived home during his lunch break unannounced, he found Defendant on the couch with Joe. Joe was lying down, wearing just his underwear, and half-covered by a blanket. Defendant explained he was trying to wake Joe up. Though a little suspicious, Joe's father returned to work.

¶ 3 After Joe's father left, Defendant bought Joe a video game and told him not to tell his father what he had been doing to him.

¶ 4 That evening, after returning from work, Joe's father asked Joe what had happened earlier in the day. Joe told his father that Defendant had sexually assaulted him, describing various acts.

¶ 5 Joe's father took him to a hospital that night to report the assault. There, Joe relayed similar facts of sexual abuse to a nurse and a police officer. Defendant's DNA was found on swabs taken from Joe's anus, penis, and underwear (front and back).

¶ 6 Defendant was indicted on several charges. The jury convicted Defendant on five charges: specifically, one count of sex offense with a child by analingus, one count of attempted sex offense with a child by anal intercourse, and three counts of taking indecent liberties.

¶ 7 Defendant was sentenced to 300 to 420 months for one count of sex offense with a child by analingus and two counts of taking indecent liberties with a child. He was sentenced to 144 to 233 months for one count of attempted sex offense with a child by anal intercourse and one count of taking indecent liberties with a child. He was also

required to register as a sex offender upon release from prison. Defendant timely appealed his conviction.

II. Analysis

¶ 8 On appeal, Defendant argues that the trial court should have dismissed various charges against him and that his sentences violated the Eighth Amendment. We address each argument in turn.

A. Motion to Dismiss

¶ 9 Defendant contends that the trial court should have dismissed three of the charges for which he was convicted. We disagree.

¶ 10 Our standard of review for a trial court's denial of a motion to dismiss is *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). On appeal, we must look at the evidence in the light most favorable to the State while determining evidentiary sufficiency. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

¶ 11 First, Defendant challenges the sufficiency of the State's evidence that he committed a sexual offense with a child by analingus.

¶ 12 "A person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2018). Analingus is one of the various sexual acts listed under N.C. Gen. Stat. § 14-27.20, and it has been

defined by this Court as the "stimulation of the anal opening by the tongue or lips." *State v. White*, 101 N.C. App. 593, 606, 401 S.E.2d 106, 113 (1991).

¶ 13 Defendant notes certain evidence, including a statement Joe allegedly made during one of his interviews which suggests that Defendant had specifically engaged in analingus. However, we conclude that the evidence, when viewed in the light most favorable to the State, was sufficient as to this charge. For instance, two of the witnesses testified that Joe had described how Defendant "licked his butt," without any objection or request for limited instruction from Defendant. Therefore, the jury was free to consider Joe's statement as substantive evidence. Along with the witness testimony, Defendant's DNA was found on the swab taken from Joe's anus. It is true that it was not determined whether the DNA was from Defendant's saliva. Notwithstanding, based on the evidence as a whole when viewed in the light most favorable to the State, "a reasonable inference of defendant's guilt [of analingus] may be drawn from the circumstances[.]" *See State v. Fritsch,* 351 N.C. 373, 379, 526 S.E.2d 452, 455 (2000).

¶ 14 The other two charges challenged by Defendant are for taking indecent liberties with a child. Defendant was convicted on three counts: one for analingus, one for fellatio, and one for attempted anal intercourse.

> 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 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.

N.C. Gen. Stat. § 14-202.1.

¶ 15 Defendant contends that the charge for taking indecent liberties by analingus must be set aside because there was insufficient evidence to show that analingus occurred. We disagree for the reasons stated in the prior section of this opinion. *See, e.g., State v. Swann*, 322 N.C. 666, 677-78, 370 S.E.2d 533, 539-40 (1988) (holding that the same act could be used to convict a defendant of both a sexual offense charge and an indecent liberty charge where the other elements of each charge are also proven).

¶ 16 Defendant also contends that the indecent liberties verdict based on fellatio must be set aside because the jury found him not guilty of committing a sexual offense with a child by fellatio. We disagree as it has long been held that "a jury is not required to be consistent and mere inconsistency will not invalidate a verdict." *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939). In fact, our own Court has held that indecent liberties with a child and a first-degree statutory sexual offense were

not "mutually exclusive because guilt of one did not necessarily exclude guilt of the others." *State v. Alonzo*, 261 N.C. App. 51, 56, 819 S.E.2d 584, 588 (2018) (internal marks omitted), *aff'd as modified on other grounds*, 373 N.C. 437 (2020). We have reviewed the cases cited by Defendant and conclude that they are distinguishable.

B. Eighth Amendment

¶ 17 Defendant argues that his mandatory minimum sentence of 300 months for a sexual offense violates the Eighth Amendment prohibition of cruel and unusual punishments (made applicable to the States through the Fourteenth Amendment). In *State v. Thomsen*, we held that a 300-month sentence imposed on a defendant found guilty of rape of a child and sexual offense with a child did not violate the Eighth Amendment. 242 N.C. App. 475, 488, 776 S.E.2d 41, 50 (2015). Likewise, we have held that a life sentence for a first-degree sexual offense conviction did not violate the Eighth Amendment. *State v. Stallings*, 107 N.C. App. 241, 251, 419 S.E.2d 586, 592 (1992).

III. Conclusion

¶ 18 We conclude that the Defendant received a fair trial, free from reversible error, and that his sentence did not violate the Eighth Amendment.

NO ERROR.

Judges MURPHY and GORE concur.

Report per Rule 30(e).