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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1050

Filed 19 September 2023

Pitt County, Nos. 20CRS50522, 20CRS85

STATE OF NORTH CAROLINA

v.

TERRY LYNN BEST, Defendant.

Appeal by defendant from judgments entered on or about 27 August 2021 by Judge Jeffery B. Foster in Superior Court, Pitt County. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Locke Milholland, IV, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals from judgments, entered following a jury trial, for (1) attempted second-degree forcible sex offense and (2) second-degree forcible sex offense. Defendant's argument on appeal concerns only the completed offense, not the attempted offense, so we do not discuss the attempted second-degree forcible sex offense further. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a

party's brief are deemed abandoned."). Because the State provided sufficient evidence of a sexual act, the trial court properly denied Defendant's motion to dismiss, and we find no error.

I. Background

The State's evidence tended to show in January 2020, Defendant and T.S.¹, the victim of the sex offense at issue on appeal, got to know each other by talking when they rode the same bus. During these conversations, Defendant told T.S. he had a house where his friends would come over to play cards and invited T.S. to join them. On the night of 19 January 2020, after T.S.'s girlfriend kicked him out of her house, T.S. called Defendant and asked to go to his house. Expecting a crowd, T.S. was surprised to find only Defendant in the house. As Defendant and T.S. played cards and talked, Defendant gave T.S. some food and ginger ale. After eating, T.S. began to feel "very sleepy." The last thing T.S. remembered was Defendant's "expression on his face was like he was waiting for me to go to sleep."

When T.S. awoke the next day, he was in a bed in the same house and "still had all [his] clothes on" but his "pants were way down like under [his] behind[.]" which was "unusual[.]" "Confused[.]" T.S. searched for but could not find Defendant in the house. T.S. called Defendant, who told him a friend had picked Defendant up, so T.S. left and went to another friend's house to shower. When going to shower, T.S.

¹ We use the victim's initials to protect his identity.

noted his underwear and butt were unusually “wet.”

Later that day, T.S. went to his daily check-in with his probation officer. The probation officer asked T.S. about Defendant because the officer had tracked T.S. to Defendant’s house using a GPS-based probation monitor. During this conversation, T.S. told the probation officer “he felt like he was sexually assaulted.” The probation officer told T.S. “if he felt that a crime had occurred that he needed to report it” and “he should go get some sort of evaluation, some testing done if he felt like a crime had occurred.”

After speaking with his probation officer, T.S. reported to the police that he “may have been a victim of a sexual assault.” T.S. told the responding police officer what had happened and who he thought had assaulted him. The police officer then took T.S. to the hospital for an examination with a sexual assault evidence kit. The examination included rectal, oral, and underwear swabs. The rectal and underwear swabs provided DNA evidence that implicated Defendant. For example, the DNA found on the rectal swabs was “at least 170 octillion times more likely if it originated from [Defendant] than . . . from an unknown, unrelated individual.” Defendant was arrested a few days later.

On or about 27 January 2020, Defendant was indicted on a charge of second-degree forcible sex offense. The trial began on 25 August 2021. At trial, T.S. testified consistent with the facts presented above. T.S.’s probation officer and two police officers also testified about T.S. reporting a sexual assault and the examination with

a sexual assault kit at the hospital. Finally, the State had an expert witness in forensic DNA analysis from the State Crime Lab testify about analyzing the sexual assault kit and finding Defendant's DNA on T.S.'s rectal swab and underwear. As part of the DNA expert's testimony, the State introduced into evidence the expert's lab report on the rectal swab and underwear.

At the close of the State's evidence, Defendant made a motion to dismiss the case, arguing the State failed to present sufficient evidence to prove the sexual act element of a second-degree forcible sex offense. Specifically, Defendant's attorney argued there was no evidence of anal penetration as necessary to prove a sexual act. The State responded T.S.'s underwear and the rectal swab with Defendant's DNA were sufficient to survive a motion to dismiss. The trial judge denied Defendant's motion to dismiss, finding the rectal swab with Defendant's DNA was sufficient to survive the motion.

Defendant testified in his own defense. Defendant did not present any other evidence. After the State presented rebuttal evidence, Defendant renewed his motion to dismiss, and the trial court again denied it.

The jury found Defendant guilty. On or about 27 August 2021, the trial court entered judgment on the second-degree forcible sex offense charge and sentenced Defendant to 83 to 160 months imprisonment consecutive to his sentence for the other crime not at issue on appeal. Defendant gave oral notice of appeal in open court.

II. Analysis

In his sole argument on appeal, Defendant contends the trial court erred in denying his motion to dismiss the second-degree forcible sex offense charge for insufficient evidence. After discussing the standard of review, we address the required elements of a second-degree sex offense and the specific element for which Defendant alleges there was insufficient evidence.

A. Standard of Review

This Court has held:

The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Lopez, 274 N.C. App. 439, 446, 852 S.E.2d 658, 662 (2020) (citation and quotation marks omitted). “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.” *Id.* (quoting *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009)). “We review the denial of a motion to dismiss *de novo*.” *State v. Williams*, 207 N.C. App. 136, 138, 698 S.E.2d 542, 544 (2010).

Further, our Supreme Court has explained both direct and circumstantial

evidence can withstand a motion to dismiss:

The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only permit a reasonable inference of the defendant's guilt of the crime charged in order for that charge to be properly submitted to the jury. Once the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, 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. Taylor, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994) (citations and quotation marks omitted).

B. Sufficiency of the Evidence

With that standard of review in mind, we now turn to the question of whether the State presented sufficient evidence Defendant committed a second-degree forcible sex offense. North Carolina General Statute § 14-27.27(a) defines a second-degree forcible sexual offense as follows:

A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:

- (1) By force and against the will of the other person; or
- (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.27(a) (2019). As relevant here, a second-degree forcible sex

offense based on disability or incapacitation has three elements: “(1) engag[ing] in a sexual act; (2) with a person who” has a mental disability, is mentally incapacitated, or is physically helpless; and (3) when the defendant “knew or should reasonably have known” about the other person’s disability or incapacitation. *See Williams*, 207 N.C. App. at 138, 698 S.E.2d at 544 (citing N.C. Gen. Stat. § 14-27.5(a)(2) (2009)) (defining elements based on previous version of statute with slightly different language referencing a person with a mental disability); *see also* N.C. Gen. Stat. § 14-27.27(a) (current version of statute that includes updated language); N.C. Gen. Stat. § 14-27.27, Editor’s Note (indicating § 14-27.27 was “[f]ormerly cited as § 14-27.5”). On appeal, Defendant only contests the sufficiency of evidence to prove the sexual act element.

As relevant to the facts here, a sexual act includes “the penetration, however slight, by any object into the genital or anal opening of another person’s body.” N.C. Gen. Stat. § 14-27.20(4) (2019). The term “any object” includes the human body. *See State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981) (interpreting the definition of sexual act when it was codified under North Carolina General Statute § 14-27.1(4)); *compare* N.C. Gen. Stat. § 14-27.20(4) *with Lucas*, 302 N.C. at 346, 275 S.E.2d at 436 (indicating no change in the substantive portions of the definition of sexual act between modern § 14-27.20(4) and old § 14-27.1(4) as quoted in *Lucas*).

“[W]hen a victim fails to testify that penetration occurred, the State must present additional corroborative evidence of actual penetration.” *See Matter of J.D.*,

376 N.C. 148, 154-55, 157, 852 S.E.2d 36, 42, 44 (2020) (reviewing motion to dismiss juvenile petition because of insufficient evidence of sexual act element of first-degree forcible sexual offense). To meet the State’s burden of presenting additional corroborative evidence, our Courts have previously held DNA from a defendant found on a rectal swab is sufficient evidence of penetration to deny a motion to dismiss. *See State v. Sloan*, 316 N.C. 714, 726, 343 S.E.2d 527, 535 (1986) (holding “the State produced substantial evidence of the element of rectal penetration” when the “material . . . detected on [a] rectal slide” was “spermatozoa”); *see also State v. Person*, 187 N.C. App. 512, 525, 653 S.E.2d 560, 568 (2007) (explaining, in the context of whether there was conflicting evidence of penetration for purposes of whether the defendant was entitled to an attempted sexual offense jury instruction, “the State presented DNA evidence[,]” specifically sperm, from an “anal swab[,]” which was “unequivocal evidence of penetration”), *rev’d in part on other grounds* 362 N.C. 340, 663 S.E.2d 311 (2008) (per curiam).

Here, the State presented sufficient evidence of penetration via its forensic DNA expert. Similar to *Sloan* and *Person*, the State’s expert testified the DNA found on the rectal swab from T.S. was “at least 170 octillion times more likely if it originated from [Defendant]” than an unrelated individual. *See Sloan*, 316 N.C. at 726, 343 S.E.2d at 535; *Person*, 187 N.C. App. at 525, 653 S.E.2d at 568. The DNA evidence from the rectal swab is “substantial” and “unequivocal evidence of penetration[.]” *See Sloan*, 316 N.C. at 726, 343 S.E.2d at 535 (indicating DNA

evidence is “substantial evidence of the element of rectal penetration”); *Person*, 187 N.C. App. at 525, 653 S.E.2d at 568 (indicating “DNA evidence . . . found on [an] anal swab” is “unequivocal evidence of penetration”). Because the State presented sufficient evidence of penetration, it presented sufficient evidence of a sexual act. *See* N.C. Gen. Stat. § 14-27.20(4) (defining sexual act to include penetration of the anus). Therefore, the trial court did not err in denying Defendant’s motion to dismiss.

Defendant attempts to distinguish this case from *Sloan* and *Person* by noting the State Crime Lab expert did not testify that the DNA evidence contained sperm cells. But, while both cases involved sperm as the specific type of DNA found, neither *Sloan* nor *Person* indicated their reasoning was limited to sperm; instead, both cases apply to DNA evidence more broadly. *See Sloan*, 316 N.C. at 726, 343 S.E.2d at 535 (discussing whether the “material” on a rectal swab, which happened to be sperm, came from inside or outside the “rectal opening”); *Person*, 187 N.C. App. at 525, 653 S.E.2d at 568 (initially introducing the sperm as “DNA evidence” and then stating “the DNA evidence” combined with the victim’s testimony meant the trial court did not err). The sufficiency of DNA alone, without confirmation it is sperm, also aligns with the language of the statute that defines sexual act to include penetration “*by any object[.]*” N.C. Gen. Stat. § 14-27.20(4) (emphasis added). Only a penis emits sperm, but many other objects can transfer general DNA; if the Legislature intended to limit penetration to only an object that could transfer sperm, it could have included a more limited definition of sexual act. *See Lucas*, 302 N.C. at 346, 275 S.E.2d at 436

STATE V. BEST

Opinion of the Court

(“The Legislature must have intended ‘sexual act’ as defined in G.S. 14-27.1(4)[²] to encompass every penetration other than vaginal intercourse. We therefore conclude that the Legislature used the words ‘any object’ to embrace parts of the human body as well as inanimate or foreign objects. If the lawmaking body had a different intent, it could have easily expressed it.”); *see also, e.g., State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (“The intent of the Legislature controls the interpretation of a statute.” (citation and quotation marks omitted)). Finally, in a case about a different sex crime where penetration is an element, this Court held “emission of semen need not be shown to prove the offense[.]” *See State v. Lancaster*, 137 N.C. App. 37, 43, 527 S.E.2d 61, 66 (2000) (quoting *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985)) (stating as part of rejecting the defendant’s motion to dismiss a rape charge for insufficient evidence). Therefore, we reject Defendant’s contention the *Sloan* and *Person* cases are inapplicable.

In his other argument challenging the DNA evidence,³ Defendant contends the

² As discussed above, Section 14-27.1(4) has since been recodified, without substantive changes, into North Carolina General Statute § 14-27.20(4). *Compare* N.C. Gen. Stat. § 14-27.20(4) *with Lucas*, 302 N.C. at 346, 275 S.E.2d at 436 (indicating no change in the substantive portions of the definition of sexual act between modern § 14-27.20(4) and old § 14-27.1(4) as quoted in *Lucas*).

³ Defendant also compares his case to two others where the evidence of penetration was insufficient, *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987) and *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961). Both cases are inapposite to this case because in both cases the only evidence was “ambiguous testimony” by the alleged victim. *See Hicks*, 319 N.C. at 90, 352 S.E.2d at 427 (finding insufficient evidence of a sexual act when “[t]he only evidence introduced” was “ambiguous testimony” by the alleged victim); *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398 (finding testimony of alleged victim was insufficient to survive motion to dismiss because it did not establish penetration and

trial judge erroneously relied on the DNA expert witness because the “DNA lab analyst did not testify that the DNA sample he examined came from inside the anus.” As an initial matter, Defendant fails to recognize T.S. testified at trial that the swabs were taken “[f]rom [his] behind.” Furthermore, our Supreme Court already rejected a similar argument in *Sloan*. See *Sloan*, 316 N.C. at 726, 343 S.E.2d at 535. In that case, the defendant argued “the State failed to produce evidence that rectal penetration occurred” because a doctor testified the DNA “found on the rectal swab could have been collected from deposits at the rectal opening, rather than from inside the rectum[.]” *Id.* The Supreme Court rejected that argument and found the State had presented sufficient evidence because the material came “from within one centimeter length of the rectum” and because “[o]n a motion to dismiss, the evidence must be taken in the light most favorable to the State, and the State must be given the benefit of every reasonable inference deducible therefrom.” *Id.* Similarly, here, the State’s DNA expert testified the normal procedure would be to swab inside the anus and “[i]f it’s done any other way . . . that generally will be noted[.]” There was no note indicating a deviation from the normal procedure of swabbing inside the anus, so taking the facts in a light most favorable to the State, the evidence permits a reasonable inference the anal swab collected matter from inside the anus. See *Sloan*,

instead only discussed “rubbing”). By contrast, here the primary evidence of penetration is the DNA evidence rather than testimony.

316 N.C. at 726, 343 S.E.2d at 535.

III. Conclusion

After our *de novo* review, taking the evidence in the light most favorable to the State, we conclude the State presented sufficient evidence of penetration to satisfy the sexual act element of the charge of second-degree sexual offense. Therefore, the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).