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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-11

Filed 20 February 2024

Randolph County, No. 20CRS53445

STATE OF NORTH CAROLINA

v.

CHRISTOPHER DALE TATE, Defendant.

Appeal by defendant from judgment entered 7 April 2022 by Judge Gale M. Adams in Randolph County Superior Court. Heard in the Court of Appeals 22 August 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the state-appellee.*

*Randolph and Fischer, by J. Clark Fischer, for the defendant-appellant.*

STADING, Judge.

Christopher Dale Tate (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of indecent liberties with a child and statutory rape of a child less than fifteen years of age. For the reasons below, we hold no error.

**I. Background**

On 14 September 2020, the State indicted defendant for second-degree forcible rape, indecent liberties with a child, and statutory rape of a child less than fifteen years of age. The indictments alleged that defendant, who was over thirty years old, committed these offenses against thirteen-year-old J.A..<sup>1</sup> A jury trial was held on 4 April 2022 in Randolph County Superior Court.

At trial, J.A. testified that defendant, who is the brother of her mother's boyfriend, lived near her family. On 5 August 2020, J.A. and her younger brother rode with defendant on his side-by-side off-road vehicle ("side-by-side"). The three rode around until they reached a fallen tree, blocking a bridge over a creek. J.A. testified that after her brother got out of the side-by-side to move the tree, defendant "grabbed [her] thigh and tried to make [her] touch his thigh." J.A. stated she pulled away from defendant, her brother returned, and the ride continued.

After this, defendant allowed J.A.'s brother to drive the side-by-side on his own. J.A. testified that, while her brother was driving the side-by-side, defendant pushed her into a tree, pulled down her shorts and underwear, and "put his penis inside of [her] vagina and started having sex with [her]." She testified she told him to stop,

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<sup>1</sup> To protect the identity of the victim, she will be referred to by her initials pursuant to N.C. R. App. P. 42.

said no, and tried to push him away, but defendant continued to assault her. When her brother returned, defendant told him to “go back down [the hill] and finish riding,” and her brother went out of view. Defendant continued the assault, and when her brother returned a second time, defendant removed his penis and J.A. put her shorts back on. Then, defendant drove J.A. and her brother to his cousin’s house for a bonfire before they returned home. Initially, J.A. did not tell anyone about the assault, but she later confided in her friend and mother. When J.A.’s father found out about the assault, he threatened defendant with a gun. After law enforcement was contacted, a criminal investigation ensued.

At trial, the State introduced evidence from a physical examination of J.A., revealing that she tested positive for gonorrhea. Additionally, defendant’s girlfriend testified that after learning about the accusations, she was tested for sexually transmitted diseases which showed she was positive for gonorrhea. The jury returned a guilty verdict for indecent liberties and statutory rape, but not guilty for second-degree forcible rape. The trial court sentenced defendant to imprisonment for 240–348 months. Defendant entered his notice of appeal on 7 April 2022.

## **II. Jurisdiction**

As a final judgment, this Court has appellate jurisdiction to hear defendant’s appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

### **III. Analysis**

Defendant raises two issues on appeal: (1) whether the trial court violated his right to be free from double jeopardy by submitting the charges of second-degree forcible rape and statutory rape to the jury, and (2) whether the trial court erred by submitting the charge of indecent liberties to the jury.

#### **A. Double Jeopardy**

First, defendant argues the submission of both statutory rape and second-degree forcible rape to the jury violated his right to be free from double jeopardy because both charges stemmed from a single act. Defense counsel raised this issue at trial by arguing “[p]rosecution and punishment of defendant for second degree rape and statutory rape . . . based upon the same act violates the Fifth Amendment of the Federal Constitution and Section 19 of the N.C. Constitution.” Defendant properly preserved this issue for appellate review. N.C. R. App. P. 10(a)(1).

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). “The Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution prohibit double jeopardy.” *State v. Sparks*, 182 N.C. App. 45, 47, 641 S.E.2d 339, 341 (2007), *aff’d*, 362 N.C. 181, 657 S.E.2d 655 (2008) (internal citations and quotation marks omitted). “The Double

Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and (3) multiple punishments for the same offense.” *State v. Strohauer*, 84 N.C. App. 68, 72, 351 S.E.2d 823, 826 (1987). “[W]here the prosecution is for the same offense in a single trial . . . [d]efendant’s only interest is that he not be subjected to more punishment than the legislature intended.” *Id.* at 72, 351 S.E.2d at 827.

Here, the constitutional prohibitions against double jeopardy were not violated since defendant was found not guilty of second-degree forcible rape. The concerns enumerated in *State v. Strohauer* are not implicated. 84 N.C. App. at 72, 351 S.E.2d at 826. As in *Williams v. Warden*, “[s]uch an extension would not comport with the primary purpose of the Double Jeopardy Clause.” 422 F.3d 1006, 1010 (9th Cir. 2005). Thus, our review leads us to conclude that defendant’s constitutional protection against double jeopardy was not violated.

### **B. Indecent Liberties**

Next, defendant argues the trial court erred in submitting the charge of indecent liberties to the jury because the act of touching J.A.’s thigh did not rise to the level of an indecent liberty. At trial, defense counsel moved to dismiss the indecent liberties charge, properly preserving the issue for appellate review. N.C. R. App. P. 10(a)(1). “We review the trial court’s denial of a motion to dismiss *de novo*.”

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*State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citations omitted). We must “determine whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant’s being the perpetrator of such offense.” *Id.* (citations omitted). “The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence.” *State v. Brown*, 162 N.C. App. 333, 336, 590 S.E.2d 433, 435 (2004) (citations omitted).

For a conviction of indecent liberties with a child, “the State must prove (1) the defendant was at least [sixteen] years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under [sixteen] years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.” *State v. Rhodes*, 321 N.C. 102, 104–05, 361 S.E.2d 578, 580 (1987) (citation omitted). Our Court has previously held “a person may be convicted of both rape and indecent liberties without being placed in double jeopardy since vaginal intercourse is not an element of indecent liberties, and committing the act for sexual gratification is not an element of rape.” *State v. Hewett*, 93 N.C. App. 1, 12, 376 S.E.2d 467, 474 (1989) (citing *State v. Rhodes*, 321 N.C. 102, 106–07, 361 S.E.2d 578, 581 (1987)). In *Hewett*, our Court determined the victims’ “testimony showed that defendant raped each of them . . . and this same evidence, therefore, supported

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a finding that [the defendant] had taken indecent liberties with them.” *Id.* Our Court determined, from this testimony, “a jury may infer that the defendant engaged in the conduct for the purpose of gratifying his sexual desire[.]” *Id.* at 12, 376 S.E.2d at 474.

In this case, the jury could have properly used J.A.’s testimony and other evidence supporting the statutory rape charge to find defendant guilty of taking indecent liberties with a child. While the evidence supporting statutory rape, on its own, supports the indecent liberties charge, the separate evidence of defendant touching J.A.’s thigh and forcing her to rub his thigh also supported submission of indecent liberties to the jury. Defendant relies on *State v. Shue*, to argue that the State presented insufficient evidence of indecent liberties. 163 N.C. App. 58, 592 S.E.2d 233 (2004). There, the State’s evidence showed an eight-year-old boy asked the defendant for help locking a bathroom stall; the defendant entered the stall, locked it, and attempted to grab the boy’s arm, but he jerked away, and the defendant exited the stall. *Id.* at 59, 592 S.E.2d at 235. Soon after, the defendant inappropriately touched the boy’s five-year-old brother in the same bathroom. *Id.* at 60, 592 S.E.2d at 235. The defendant was convicted of two counts of indecent liberties—one against the eight-year-old and one against the five-year-old. *Id.* On appeal, this Court reversed the conviction of indecent liberties regarding the eight-year-old because “[t]he evidence of [the] defendant’s conduct involving [the five-year-

old] does not support the conclusion that [the] defendant attempted to take indecent liberties with [the eight-year-old].” *Id.* at 62, 592 S.E.2d at 236.

The matter before us is readily distinguishable from *State v. Shue* as there were two victims in that case. 163 N.C. App. 58, 592 S.E.2d 233. Here, J.A. testified that defendant “grabbed [her] thigh and tried to make [her] touch his thigh,” then “reached over and grabbed [her] hand and pulled it.” She then testified that defendant sexually assaulted her just minutes later. Defendant made inappropriate advances toward J.A. and then escalated his behavior to sexual assault once in an isolated location. Our Supreme Court held “[d]efendant’s purpose for committing such act is the gravamen of [taking indecent liberties]; the particular act performed is immaterial.” *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). “[O]ur courts have focused on defendant’s purpose (arousing or gratifying sexual desire) in light of the particular sexual act in which defendant has engaged.” *Brown*, 162 N.C. App. at 337, 590 S.E.2d at 436 (citations omitted). “A defendant’s purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference.” *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). Here, given the short time between the touching and the sexual assault, it is reasonable to infer that defendant’s grabbing of J.A.’s thigh and trying to get her to touch his thigh was done for the purpose of arousing or gratifying his sexual desire. Thus, this evidence was sufficient to warrant the inference that defendant willfully



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took indecent liberties with J.A. for the purpose of arousing or gratifying his sexual desire.

**IV. Conclusion**

We hold that defendant's constitutional right to be free from double jeopardy was not violated since he was found not guilty of second-degree forcible rape. Additionally, we conclude that the trial court did not err in submitting the charge of indecent liberties to the jury.

NO ERROR.

Judges STROUD and FLOOD concur.

Report per Rule 30(e).