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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-454

Filed 5 March 2024

Union County, No. 20CRS52472

STATE OF NORTH CAROLINA

v.

LUIS FERNANDO OSPINA, Defendant.

Appeal by defendant from judgment entered 6 October 2022 by Judge David T. Lambeth Jr. in Union County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant.

FLOOD, Judge.

Luis Fernando Ospina (“Defendant”) appeals his conviction for Indecent Liberties with a Child, arguing the trial court erred when it denied his motion to dismiss for insufficient evidence that he acted for the purpose of arousing or

gratifying sexual desire. In viewing the evidence in the light most favorable to the State, we hold the trial court did not err in dismissing Defendant's motion because Defendant's actions of isolating the child, tickling, and reaching underneath the child's waistband and touching her mid-buttock are substantial evidence from which a jury may conclude Defendant's actions were done for the purpose of arousing or gratifying sexual desire.

I. Facts and Procedural Background

Sometime around 2014, Defendant moved from New Jersey to North Carolina. Defendant, while looking for a house in North Carolina, moved in with the Maingon family, having been a friend of the father. Among the Maingon family, there was a young daughter named Carrie.¹

Carrie's testimony tends to show the following: During the month Defendant lived with the Maingons, Defendant would call Carrie over into a private corner of the house, but she declined each invitation, feeling uncomfortable. Once during that month, Defendant and Carrie were sitting on a couch together when Defendant placed a blanket over their lower bodies and touched his foot to Carrie's ankle, moving up to her inner thigh. Although another family member was also in the room with them, Carrie felt uncomfortable and moved out of the room. After that month of living with the Maingon family, Defendant found a house and relocated a few blocks away

¹ A pseudonym is used to protect the identity of the minor child in keeping with N.C.R. App. P. 42.

from the Maingon family home.

On or around 16 August 2017, when Carrie was eleven years old, she accompanied her father and her six-year-old nephew to an appointment at a car dealership. The appointment at the dealership was taking a long time, so Carrie's father called Defendant and asked if he would come pick up the children and take them to get food. Defendant picked up Carrie and her nephew and drove to the parking lot of a Chick-fil-A.

According to Carrie, after parking facing away from the Chick-fil-A, Carrie's nephew exited the car, and before Carrie had a chance to exit, Defendant entered the backseat with just Carrie and closed the door. The first thing Carrie felt after Defendant entered the backseat with her was Defendant's hand touching her back, then going down to her mid-buttock, underneath her clothing. Defendant told Carrie that he was just "tickling" her, and this lasted for approximately thirty seconds to one minute. Meanwhile, Carrie's nephew stood outside the car, attempting to open the door to no avail. Carrie fought Defendant to get him off, grabbing him so hard by the neck that it left marks. Carrie and Defendant then exited the car and went inside to eat. Years went by, and Carrie told no one about the event.

In May 2020, however, upon Carrie's older sister confiding in Carrie about an abusive relationship she experienced, Carrie shared with her sister about her experience with Defendant in the parking lot years prior. Carrie's sister told their

parents soon thereafter, and their parents contacted the authorities on 23 May 2020, explaining what happened. Defendant was charged on 17 June 2020 with Indecent Liberties with a Child.

Defendant was indicted on 2 November 2020. This case came for trial on 3 October 2022. At the close of the State's evidence, Defendant moved to dismiss for insufficient evidence, and the trial court denied his motion. Defendant did not testify or present any evidence and again moved to dismiss the case for insufficient evidence. The trial court again denied his motion.

On 6 October 2022, a jury found Defendant guilty of Indecent Liberties with a Child, and Defendant was sentenced to a minimum term of twenty months and maximum term of thirty-three months' imprisonment. This sentence was suspended, and Defendant was instead ordered to complete thirty-six months of supervised probation and serve an active term of ninety days in the Union County jail. Defendant consented to a permanent no-contact order with Carrie and was ordered to register as a sex offender for thirty years.

Defendant sent a *pro se* written notice of appeal from the jail on 11 October 2022; however, Defendant failed to satisfy all the requirements for providing notice of an appeal, and thus failed to preserve his appeal. Defendant was appointed an appellate defender who filed a petition for writ of certiorari with this Court.

II. Jurisdiction

As an initial matter, we consider Defendant’s petition for writ of certiorari in which he asks this Court to consider the trial court’s denial of Defendant’s motion to dismiss for insufficient evidence, despite his *pro se* failure to properly appeal to this Court. Defendant contends the trial court erred by denying Defendant’s motion to dismiss for insufficient evidence that he committed Indecent Liberties with a Child. Specifically, Defendant argues there was insufficient evidence that his actions were done for the purpose of arousing or gratifying sexual desire as required.

“A written notice of appeal in a criminal proceeding must be filed with ‘the clerk of superior court and serv[ed] . . . upon all adverse parties within fourteen days after entry of the judgment or order[.]’” *State v. Thorne*, 279 N.C. App. 655, 658, 865 S.E.2d 768, 771 (2021) (quoting N.C. R. App. P. 4(a)(2) (2021)). This Court has previously granted such petitions where a *pro se* defendant has failed to properly serve the State in a criminal appeal. *See id.* at 659, 865 S.E.2d at 771; *see also State v. Baungartner*, 273 N.C. App. 580, 583, 850 S.E.2d 549, 551 (2020). Given Defendant’s *pro se* status upon filing his notice of appeal, in spite of its jurisdictional defects, this Court elects to exercise its discretion by granting the writ of certiorari and proceeding to the merits of Defendant’s appeal.

III. Analysis

On appeal, Defendant contends the trial court erred by denying his motion to dismiss for insufficient evidence that he committed Indecent Liberties with a Child.

Specifically, Defendant argues the State failed to present substantial evidence that Defendant's actions were "for the purpose of arousing or gratifying sexual desire."

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

"Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

"Upon defendant's motion for dismissal, the question for the [trial c]ourt 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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted)). Substantial evidence is "such relevant evidence as 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) (citation omitted).

"When considering defendant's motion to dismiss, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citation and internal quotation marks omitted). With these

principles in mind, we consider the merits of the case.

A defendant is guilty of Indecent Liberties with a Child if, the defendant being sixteen years or older 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 [sixteen] 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 [sixteen] years.

N.C. Gen. Stat. § 14-202.1 (2023).

To withstand a motion to dismiss, the State must present substantial evidence of each of the following elements:

(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. Every, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (citation omitted).

On appeal, Defendant claims there was insufficient evidence of the last element only.

Whether an action’s purpose was for arousal or gratifying sexual desire “may be inferred from the evidence of the defendant’s actions.” *State v. Rhodes*, 321 N.C.

102, 105, 361 S.E.2d 578, 580 (1987). We explained in *State v. Campbell*, that “[a] defendant’s purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference.” 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). “[A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor.” *Every*, 157 N.C. App. at 206, 578 S.E.2d at 648 (quoting *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987)). Moreover, “the variety of acts included under the statute demonstrate that the scope of the statute’s protection is to encompass *more* types of deviant behavior and provide children with broader protection than that available under statutes proscribing other sexual acts.” *State v. McClary*, 198 N.C. App. 169, 173–74, 679 S.E.2d 414, 418 (2009) (emphasis added) (citation omitted). If the evidence is “sufficient only to raise a suspicion or conjecture” of the crime, the motion to dismiss must be granted. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983); *see also State v. Brown*, 162 N.C. App. 333, 338, 590 S.E.2d 433, 437 (2004).

Because the standard for what constitutes action for the purpose of arousing or satisfying sexual desire is subjective, we turn to caselaw to further our analysis. In *State v. Slone*, the defendant led his victim away during a game of hide-and-go-seek, to a dark and isolated dog shed. 76 N.C. App. 628, 631, 334 S.E.2d 78, 80 (1985). While hiding there, the defendant “put his arm around the victim, placed his hand between her legs and underneath her softball shorts[.]” *Id.* at 631, 334 S.E.2d at 80.

This Court held the intentional isolation in a dark place was sufficient evidence to warrant an inference that the defendant's actions had been for the purpose of arousing or satisfying sexual desire. *Id.* at 631, 334 S.E.2d at 80.

In *State v. Bruce*, the defendant and victim were “just playing” when the defendant “went up and under [the victim’s] blouse” and rubbed her breast. 90 N.C. App. 547, 551, 369 S.E.2d 95, 98 (1988). The defendant locked the back screen door of the mobile home and did not stop rubbing the victim’s breast until the victim’s brother tried to enter the locked back door. *Id.* at 551, 369 S.E.2d at 98. We held this was sufficient evidence for a jury to infer that the defendant’s actions were for the purpose of arousing or satisfying sexual desire. *Id.* at 551, 369 S.E.2d at 98; *cf. State v. Stanford*, 169 N.C. App. 214, 217, 609 S.E.2d 468, 470 (2005) (holding that the defendant’s accidental grazing of his niece’s breast while the two smoked marijuana was not done for the purpose of arousing or gratifying sexual desire).

In *State v. Shue*, the defendant followed a minor into a bathroom stall and tried to grab the minor’s arm, but the minor jerked his arm away. 163 N.C. App. 58, 62, 592 S.E.2d 233, 236 (2004). The defendant then exited the stall without further action. *Id.* at 61, 592 S.E.2d at 236. This Court held this was not sufficient evidence that the defendant had acted for the purpose of arousing or satisfying sexual desire. *Id.* at 62, 592 S.E.2d at 236.

In our present case, the Record evidence shows that Defendant parked the car,

facing away from the building, and entered the backseat of his vehicle with Carrie. Defendant told Carrie he was “tickling” her and proceeded to reach under her pants and underpants to touch her upper-mid buttock. Defendant did not stop until Carrie fought back and left marks on Defendant’s neck. Like the defendant in *Sloane*, Defendant used a child’s game to isolate Carrie in a small space and physically touch Carrie in a manner that was inappropriate by reaching underneath her waistband and touching her upper-mid buttock. *See Sloane*, 76 N.C. App. at 631, 334 S.E.2d at 80. Further, similar to the defendant in *Bruce*, Defendant claimed he was just “tickling” Carrie when he tried to isolate Carrie into the backseat of the vehicle. *See Bruce*, 90 N.C. App. at 551, 369 S.E.2d at 98. Although Defendant did not lock any doors as the defendant in *Bruce* had done, Defendant used a much smaller space to isolate Carrie. *Id.* at 551, 369 S.E.2d at 98.

Unlike the defendant in *Stanford*, Defendant’s action of touching was not an “accidental grazing” as Defendant intentionally reached underneath Carrie’s waistband to touch her upper-mid buttock. *See Stanford*, 169 N.C. App. at 217, 609 S.E.2d at 470. Additionally, the present case is different from *Shue* because Defendant did not stop “tickling” Carrie after she tried to get away; instead, Defendant stopped only after Carrie grabbed his neck and left marks. *See Shue*, 163 N.C. App. at 61, 592 S.E.2d at 236.

Viewing all inferences in the light most favorable to the State, the facts that

Defendant had isolated Carrie in the backseat and that Defendant reached underneath Carrie's waistband during the guise of a child's game of tickling to touch her upper-mid buttock act as substantial evidence to infer that Defendant's actions were for the purpose of arousing or gratifying sexual desire. *See Campbell*, 51 N.C. App. at 421, 276 S.E.2d at 729. Because the evidence is sufficient, we hold the trial court did not err when it denied Defendant's motion to dismiss. *See Every*, 157 N.C. App. at 205, 578 S.E.2d at 647.

IV. Conclusion

Viewing all evidence and inferences in the light most favorable to the State, there was sufficient evidence that Defendant's actions of isolating the minor in the backseat of a vehicle and reaching underneath the minor's waistband while tickling her were for the purpose of arousing or gratifying sexual desire. We therefore hold the trial court did not err by denying Defendant's motion to dismiss for insufficient evidence.

NO ERROR.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).