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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1021

Filed 18 June 2024

Cumberland County, No. 22 CRS 50202

STATE OF NORTH CAROLINA

v.

DANIEL LEMAR MOSELEY

Appeal by Defendant from judgment entered 26 June 2023 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 17 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Alesia Balshakova, for the State.

Coy E. Brewer, Jr., for the Defendant.

WOOD, Judge.

Daniel Moseley (“Defendant”) appeals his jury conviction of taking indecent liberties with a child. On appeal, Defendant argues the trial court erred in denying his motions to dismiss. After careful review of the record, we conclude Defendant received a fair trial, free from error.

I. Factual and Procedural History

Defendant and Jamie Moseley (“Jamie”) married in 2007, separated in 2013, and divorced in 2014. Jamie moved out of the marital home in 2013 because a DSS “caseworker suggested that [she] either leave [Defendant] or lose [her] child” due to allegations that Defendant was abusing their daughter, Molly,¹ who was born in October 2009. In 2016, Jamie moved back in with Defendant, and she gave birth to their second child, Molly’s younger brother, in 2018.

On 28 October 2021, Jamie received a call from Molly’s school informing her that Molly had told a teacher she wanted to kill herself and had formed a plan of how to do so. Jamie took Molly to Cape Fear Valley Medical Center (the “hospital”). At the hospital, Molly told doctors that her father, Defendant, made her engage in sexual activity with him, and they notified the Department of Social Services of the allegations.²

¹ A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

² DSS had received two prior reports regarding Molly. In January 2013, Fayetteville Police Department investigator Norman Wells (“Wells”) investigated a report regarding Defendant spanking Molly too hard when she was approximately three years old, causing bruises on her lower backside and buttocks. Wells testified Defendant admitted to spanking Molly too hard. Wells did not go to trial concerning this report, was unaware of the results of the court proceedings related to the report and is unaware of the conclusion of the report. In 2021, DSS commenced an investigation regarding a report of Defendant improperly physically disciplining Molly. DSS social worker and investigator Adrian McLawhorn (“McLawhorn”) testified DSS received this report in July 2021. Molly told McLawhorn that any time she did something wrong, Defendant hit her, pulled her hair, and threatened to kill her. McLawhorn testified that when he spoke with Defendant regarding the allegations, Defendant apologized and stated he would not engage in such conduct again. McLawhorn implemented a plan with the family by which the parents agreed to use age-appropriate discipline and to stay in contact with McLawhorn regarding future threats or harm to Molly or her brother.

According to Molly, Defendant lay on his bed naked, told her to take all her clothes off and to get on top of him so that she was “sitting up” and facing him, at which point he engaged in vaginal and anal intercourse with her. The sexual activity “hurt” and continued for approximately an hour. Defendant would make her perform oral sex before and after intercourse. Defendant began engaging in such activity with Molly when she was approximately eight or nine years old and continued to do so once or twice per week until October 2021.

There was no physical evidence of sexual abuse. At trial, Dr. Judith Borger (“Dr. Borger”) was admitted as an expert in pediatric emergency medicine. On 28 October 2021, Dr. Borger treated Molly in the pediatric emergency room due to her initial complaint of suicidal ideation. She testified that because one to two weeks had elapsed since the last incident of abuse, “we would not expect to see any physical evidence of abuse at that point because so much time had passed.”

Molly testified that Defendant would make her take her clothes off to clean the kitchen and wash dishes while naked. Both Molly and Defendant informed Jamie of this incident when she returned home from work. Defendant explained to Jamie that making Molly clean the kitchen naked was an “experiment” and that he was “just trying it out” as a form of discipline. Molly testified that her parents got into “a big argument” over it.

According to Jamie, if Defendant felt Molly was showering for too long, “he would just walk in on her and pull the shower curtain back and tell her that she

needed to get out.” Concerned about Defendant’s behavior, Jamie spoke with him about it on numerous occasions, but he consistently told her “not to tell him how to discipline his child.”

On 7 January 2022, a warrant was issued for Defendant’s arrest for the charges of incest in violation of N.C. Gen. Stat. § 14-178(b)(1)(a) and taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(2). On 11 April 2022, a grand jury indicted Defendant on the charges. Defendant was also indicted on charges of statutory rape of a child by an adult and two counts of statutory sex offense with a child by an adult.³

Defendant’s trial was held 13-16 June 2023. Defendant moved to dismiss all charges at the close of the State’s evidence and again at the close of all evidence. The trial court denied both motions to dismiss.

The jury convicted Defendant of taking indecent liberties with a child but did not reach a unanimous verdict as to any of the other charges. On 26 June 2023, the trial court sentenced Defendant to 16-29 months of imprisonment suspended for 60 months of supervised probation for the offense of taking indecent liberties with a child. As special conditions of probation, the trial court prohibited Defendant from having contact with Molly for the remainder of her natural life and ordered him to register as a sex offender.

³ These charges do not appear in the arrest warrant or indictment. We note, however, the trial court instructed the jury on them at trial.

On 3 July 2023, Defendant filed written notice of appeal.

II. Analysis

Defendant argues the trial court erred in denying his motions to dismiss because the evidence was insufficient to prove the charged crime of taking indecent liberties with a child. Specifically, Defendant argues the evidence was insufficient to prove that he made Molly clean the kitchen and/or wash dishes while naked for the purpose of arousing or gratifying sexual desire. He further argues there was no evidence demonstrating he was physically present on that particular occasion.

“We consider a trial court’s ruling on a motion to dismiss de novo.” *State v. McDaniel*, 372 N.C. 594, 603, 831 S.E.2d 283, 289 (2019). Our Supreme Court has set forth the standard of review on a motion to dismiss:

When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state’s favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Barnett, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

N.C. Gen. Stat. § 14-202.1(a)(2) defines taking indecent liberties with a child:

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 . . . [w]illfully 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.

This Court has enumerated the elements of taking indecent liberties with a child as follows:

(1) the defendant was at least 16 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 16 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. Davison, 201 N.C. App. 354, 362–63, 689 S.E.2d 510, 516 (2009). The element requiring the act to be for the purpose of arousing or gratifying sexual desire “may be inferred from the evidence of the defendant’s actions.” *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993).

We note that element (5) as enumerated in *Davison* refers to N.C. Gen. Stat. § 14-202.1(a)(1) (willfully taking or attempting to take any immoral, improper, or indecent liberties with any child under sixteen years old) as opposed to the charged crime of N.C. Gen. Stat. § 14-202.1(a)(2) (willfully committing or attempting to commit any lewd or lascivious act *upon or with the body or any part or member of the body* of any child under sixteen years old). This is relevant to Defendant’s arguments on appeal because he argues there was insufficient evidence to prove that he made Molly do chores while naked *for the purpose of arousing or gratifying sexual desire*. However, Defendant was neither charged nor indicted pursuant to N.C. Gen. Stat. §

14-202.1(a)(1), which requires the indecent liberty to be for the purpose of arousing or gratifying sexual desire. Further, the jury was not required to limit its consideration to evidence regarding the particular incident in which Defendant made Molly do chores naked.

At the close of the State's evidence, defense counsel made a motion to dismiss all charges. Regarding the charge of taking indecent liberties with a child, he argued:

To the extent that or, you know, *if this is based upon the vaginal, anal or oral sexual activity, then clearly the state – I'm not going to argue that the state does not have evidence of that.* But if it -- the basis of this is the evidence of [Molly] being required to do dishes nude, I would contend that there is not any evidence that this was done for sexual gratification. There is no evidence that she was touched in connection with this. There was no evidence that this was part of lewd and lascivious conduct, and that while this might be an inappropriate form of discipline, that it does not have the sexual component necessary to constitute this offense. So specifically as to the charge of taking indecent liberties with a minor, the defendant makes a motion to dismiss based upon the insufficiency of the state's evidence and variance.

The State argued, however, "It is not just naked cleaning. It is not just naked dish washing. It's not just making her strip naked and get beat. It is also engaging in making her perform oral sex, anal sex and vaginal intercourse and walking in on her in the shower naked." The trial court denied the motion to dismiss. Defense counsel renewed the motion to dismiss at the close of all evidence and renewed the same argument regarding taking indecent liberties with a child.

During closing arguments, defense counsel argued that Defendant “made it clear to you that he did not engage in any sexually oriented behavior with [Molly]. Made it clear that there was never any vaginal penetration, anal penetration, oral sex or any other type of indecent liberties or sexually related activity.” The State, in turn, argued in its closing argument that the jury could consider all of the testimony regarding oral sex and anal and vaginal intercourse as evidence of taking indecent liberties with a child, in addition to Defendant’s making Molly do chores while naked. The trial court instructed the jury regarding the charge of taking indecent liberties with a child as follows:

The defendant has been charged with taking an indecent liberty with a child. For you to find the defendant guilty of this offense, the state must prove three things beyond a reasonable doubt. First, that the defendant willfully committed or attempted to commit a *lewd or lascivious act upon a child*. Second, that the child, [S.M], had not reached her 16th birthday at the time in question. And, third, that the defendant was at least five years older than the child and had reached his 16th birthday at the time.

(Emphasis added). The trial court properly instructed the jury on the charged crime pursuant to N.C. Gen. Stat. § 14-202.1(a)(2), which does not specifically require the lewd or lascivious act upon the body to be for the purpose of arousing or gratifying sexual desire, because that is assumed when a sexual act is committed *upon the body*.

Defense counsel’s arguments on the motions to dismiss and during closing argument demonstrate an understanding that making Molly clean the kitchen while undressed was not the only possible basis for a conviction of taking indecent liberties

with a child. Indeed, defense counsel admitted that if such a conviction were based on the alleged sexual acts Defendant engaged in with Molly, *then there was sufficient evidence*. Instead, defense counsel argued upon his motions to dismiss that to the extent a potential conviction were based on making Molly clean the kitchen while undressed, there was insufficient evidence regarding the “sexual component” of that incident.

The State explicitly argued in response to defense counsel’s motion to dismiss, as well as in its own closing argument, that the jury could base a conviction for taking indecent liberties with a child on any one of the alleged sexual acts in which Defendant engaged with Molly. The trial court, in its instruction to the jury on the charge of taking indecent liberties with a minor, did not specify which evidence the jury was required to consider in order to reach a conviction on the charge. Rather, the trial court instructed the jury pursuant to N.C. Gen. Stat. § 14-202.1(a)(2), which pertains to committing or attempting to commit “any lewd or lascivious act *upon or with the body*” of a child, which is distinguishable from N.C. Gen. Stat. § 14-202.1(a)(1), pertaining to taking or attempting to take “any immoral, improper, or indecent liberties” with a child for the purpose of arousing or gratifying sexual desire.

Defendant was charged pursuant to N.C. Gen. Stat. § 14-202.1(a)(2). When viewed in light of the trial court’s jury charge, it is reasonable to conclude that the jury convicted Defendant on the charge of taking indecent liberties with a child based on his engaging or attempting to engage in an explicit sexual act with Molly. The

acts of vaginal, anal, and oral sex that Molly testified Defendant engaged in with her certainly could be included in the jury's consideration. Because these acts are by their very nature explicitly sexual, the jury was entitled to infer "from the evidence of [Defendant's] actions" that his purpose for engaging in such sexual acts was for the purpose of arousing or gratifying sexual desire. *Quarg*, 334 N.C. at 100, 431 S.E.2d at 5.

For the same reasons, Defendant's argument that there was no evidence of him having been physically present also fails. Molly's testimony that Defendant engaged in sexual acts with her necessarily required that he be physically present.

Because the evidence was sufficient for the jury to infer the sexual component of the acts to which Molly testified Defendant engaged in or attempted to engage in with her, and because the sexual acts necessarily required Defendant to be physically present, the trial court did not err in denying Defendant's motions to dismiss.

III. Conclusion

For the foregoing reasons, the jury was not required to base Defendant's conviction for taking indecent liberties with a child on the incident in which he made Molly do chores while naked. Molly testified Defendant engaged in various sexual acts with her, and the jury could reasonably infer Defendant did so or attempted to do so for the purpose of arousing or gratifying sexual desire. The evidence presented at trial was sufficient to allow the charge to proceed to the jury. Accordingly, the trial court did not err in denying Defendant's motions to dismiss.

STATE V. MOSELEY

Opinion of the Court

NO ERROR.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).