NO. COA01-499

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 00 CRS 52513

ROBERT LEE BILLUPS

Appeal by defendant from judgment entered 9 November 2000 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Thomas S. Hicks, PLLC, for defendant-appellant.

EAGLES, Chief Judge.

On 9 November 2000, a jury found defendant guilty of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1. The Honorable Ernest B. Fullwood sentenced defendant to 21 to 26 months incarceration. Defendant appeals.

On 24 March 2000, Woodrow L. (Woodrow) and his eight year old daughter (M.L.), took Woodrow's father to the doctor's office for a checkup. After checking in at the reception desk, the three were directed to wait in the waiting room. While waiting, M.L. played at the play center that was located in the waiting room. M.L. also

played "hangman" with several other patients who were waiting. After approximately one hour and fifteen minutes, Woodrow and his father were called to see the doctor. Woodrow left M.L. to play in the waiting room.

As M.L. was playing, she noticed defendant standing at the reception desk. She approached defendant and said "[h]i." Defendant also said "[h]i." Defendant then asked M.L. how old she was and then the two talked about a carved apple that was sitting on the reception desk. Defendant told M.L. that she was pretty. M.L. then went back to play at the play center.

After defendant sat down in the waiting room, M.L. sat down next to him with a pencil and paper. She asked defendant his name and then she told defendant her name. Defendant replied, "[t]hat is a nice name." M.L. then started to ask if defendant wanted to play "hangman" but defendant interrupted and asked M.L. if she liked boys. Before she could answer, defendant said, "[c]ome on, tell the truth." M.L. replied that she did. M.L. then explained to defendant that she was with her father and grandfather who were in the back with the doctor. She then got up from her seat to get a magazine. When M.L. returned to her seat, defendant rubbed his unexposed "private part" on the outside of his clothes and asked M.L., "[d]o you like that? Do you like to see me rubbing?" M.L. got up and walked away because she perceived defendant was doing something wrong. She went to the reception desk to tell the receptionist what had happened but because the receptionist was on

the telephone, M.L. chose not to interrupt and instead, went into another waiting room.

Shortly thereafter, Woodrow decided to check on M.L. He found her in the other waiting room. Woodrow told M.L. that she was not where she was supposed to be. M.L. replied, "Dad, there is a strange man here. I need to talk to you in private." Woodrow took M.L. back to the examining room. He inquired about M.L.'s "strange man" comment. M.L. then told her father that she was sitting with defendant and that defendant had put his hands on his private parts, started rubbing, and then said, "[d]o you like watching me do this?" After hearing this, Woodrow told Nurse Naomi Kilpatrick what had occurred. M.L. retold her story to Nurse Kilpatrick. After hearing M.L.'s story, Nurse Kilpatrick called the manager, Sheila Hollowell. After informing Ms. Hollowell about what had happened, Woodrow called the police.

Officer Royce Testa of the Wilmington Police Department responded. Upon arrival, he first talked to M.L. and Woodrow. M.L. explained that while she was sitting next to defendant, defendant started touching his private area. At this point, a nurse informed Officer Testa that defendant was about to leave the office. Officer Testa went into the waiting area and saw defendant standing up. Defendant fit M.L.'s description. Officer Testa approached defendant and asked defendant to come back into an examining room. The nurses directed defendant and Officer Testa into a doctor's office. After entering the office, defendant asked Officer Testa why Officer Testa needed to talk. Officer Testa

asked defendant to sit down and then asked, "[w]ere you sitting next to a young lady out in the waiting area?" Defendant's reply indicated that he was. Officer Testa then asked defendant what the two were talking about. Defendant said that the two talked about an apple on the reception desk and that they merely had a general conversation. Officer Testa then asked defendant if the two discussed anything else. After a pause defendant asked, "[w]hat do you mean, something sexual?"

After asking defendant these few questions, Officer Testa asked M.L. to come to the door to the office. Officer Testa asked M.L., "[t]his man behind me, he is not the man that touched you, is he?" M.L. looked confused after hearing Officer Testa's question but replied, "[y]es, that's the man that was sitting next to me." Defendant then asked if he was under arrest. Officer Testa responded, "[y]es, sir, you are under arrest." Officer Testa then handcuffed defendant and told defendant that he did not have to answer any further questions.

On appeal, defendant contends: (1) the trial court erred by denying defendant's motion to dismiss the charge of taking indecent liberties with a minor at the end of the State's evidence and at the end of all of the evidence and (2) the trial court committed plain error by failing to exclude from evidence defendant's statements made while in the custody of a law enforcement officer without having been read his Miranda rights. For the following reasons, we disagree and find no error.

Defendant first contends that the trial court erred by failing to dismiss the indecent liberties charge. Defendant argues that the State presented insufficient evidence to show that defendant's activity amounted to taking indecent liberties with a child.

At trial, the State was required to prove:

> (a) 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.G.S. § 14-202.1. The term "indecent liberties" has been defined as "'such liberties as the common sense of society would regard as indecent and improper.'" *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993) (citation omitted).

"We note first that it is not necessary that defendant touch his victim to commit an immoral, improper, or indecent liberty within the meaning of the statute." *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987). In his brief, defendant concedes that actually touching the victim is not required for commission of taking indecent liberties and that masturbation in the presence of a child could constitute a crime under the statute. *See State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981). Defendant argues, however, that the alleged "rubbing" in this case did not constitute masturbation and that the act was so brief and

insubstantial that it could not rise to the level of taking indecent liberties.

Whether defendant's action constituted masturbation is not dispositive as to the issue of whether defendant took indecent liberties with M.L. In *Ethridge*, our Supreme Court stated:

> [A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. Indeed, the legislature enacted section 14-202.1 to encompass more types of deviant behavior, giving children broader protection than available under other statutes proscribing sexual acts.

Etheridge, 319 N.C. at 49, 352 S.E.2d at 682.

Here, the State's evidence showed that after defendant learned that M.L. was unsupervised, defendant rubbed his crotch with his hand and, while doing so, asked M.L., "[d]o you like that? Do you like to watch me rubbing?" From this evidence, we conclude that defendant's conduct was sufficient to permit the jury to find that defendant took indecent liberties with M.L. for the purpose of arousing or gratifying sexual desire.

Defendant also argues that the State failed to present evidence indicating that defendant acted with the requisite intent. In *State v. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756 (1998), this Court stated:

> The crime of taking indecent liberties with a minor is a specific intent crime. *State v. Craven*, 312 N.C. 580, 584, 324 S.E.2d 599, 602 (1985). A specific intent crime requires the State to prove that defendant "acted willfully or with purpose in committing the offense." *State v. Eastman*, 113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994). However, a defendant's purpose in committing the act in

> an indecent liberties case is "'seldom provable by direct evidence and must ordinarily be proven by inference.'" *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988) (quoting *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981)).

State v. Creech, 128 N.C. App. 592, 598-99, 495 S.E.2d 752, 756 (1998).

Here, there was sufficient evidence from which the jury could find that defendant rubbed his genital area while sitting next to M.L. for the purpose of arousing or gratifying sexual desire. Defendant's intent can be inferred from defendant's actions, his comments, and the context in which the actions and comments occurred. After careful review of the record, transcript, and contentions of the parties, we hold that the State presented sufficient evidence of defendant's specific intent to survive defendant's motion to dismiss.

As defendant's remaining assignment of error, defendant contends that the trial court committed plain error by admitting into evidence statements that defendant made to Officer Testa during Officer Testa's investigation at the doctor's office.

At trial, Officer Testa testified in pertinent part about his investigation:

> [TESTA]: I went out in the waiting area. I saw Mr. Billups standing up . . . . I asked Mr. Billups to come back into the examining room with me . . . . The nurses directed us to, I believe it was Doctor Myer's office . . . .
> [PROSECUTOR]: And when you asked the defendant to come back in that area with you, was he in custody at that time?
> [TESTA]: No, ma'am. He was cooperative. He went back with me.

> [PROSECUTOR]: Okay. And then what happened when you went with him into Doctor Myer's office.
> [TESTA]: Mr. Billups wanted to know why I wanted to talk to him. I asked him to have a seat and I said, "Were you sitting next to a young lady out in the waiting area?" He told me that he was, and I asked him what they were talking about. He said that a little girl came and sat beside him, they were talking about an apple on the reception desk . . . . I asked him if he said--if they talked about anything else. At that point, there was a little pause and [defendant] said, he asked me, "What do you mean, something sexual?" and he sort of spread his hands (demonstrating).

"In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). "The plain error doctrine applies only in truly exceptional cases, placing a much heavier burden on the defendant than the burden imposed by N.C.G.S. § 15A-1443, which applies to defendants who have preserved their rights by timely objection." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 495 (2000). To prevail under the plain error doctrine, a defendant must convince this Court, "with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict." *Id.*, 541 S.E.2d at 496.

Even assuming error, on this record, defendant cannot show that a different result would have probably been reached by the

jury if defendant's statements had been omitted from evidence by the trial judge. The State adduced compelling evidence of defendant's sexual intent. M.L.'s testimony about defendant's conduct was clear and detailed. In addition, M.L.'s testimony was corroborated by four adult witnesses who spoke with M.L. immediately following the incident. When viewed in the context of the trial, the admission of the statements made by defendant during Officer Testa's investigation was not so prejudicial as to satisfy the plain error standard. Accordingly, this assignment of error also fails.

For the foregoing reasons, we conclude that defendant's trial was free from error.

No error.

Judges McGEE and TYSON concur.

Report per Rule 30(e).