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NO. COA01-57

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

DANIEL CLIFTON

Forsyth County
Nos. 99 CRS 37247
99 CRS 37251
99 CRS 37252

Appeal by defendant from judgment entered 14 August 2000 by Judge Richard Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 11 February 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.*

*Sowers & James, P.A., by Paul M. James, III, for defendant appellant.*

McCULLOUGH, Judge.

Defendant Daniel Ray Clifton was tried before a jury at the 7 August 2000 Criminal Session of Forsyth County Superior Court. Defendant was indicted on 3 January 2000 with one count (99 CRS 37247) of first degree statutory rape of a child under 13 years of age in violation of N.C. Gen. Stat. § 14-27.2(a)(1) (2001), and two counts (99 CRS 37251, 37252) of first degree sexual offense of a child under 13 years of age in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (2001). The indictment for first degree statutory rape alleged the date of offense to be "01/01 - 03/25/99." The

indictment for one count of first degree sexual offense, 99 CRS 37251, alleged the date of offense to be "01/01 - 01/31/99." The indictment for the other sexual offense count, 99 CRS 37252, alleged the date of offense to be "02/01 - 3/25/99."

Defendant was born 16 September 1974. He was 24 years old at the time of the alleged acts. The victim in this case was born 9 June 1991. She was 7 years old and in the second grade at the relevant time.

It was at her school that the victim first spoke of the alleged misconduct. At a school function on 25 March 1999, the victim informed her teacher, Kimberly Gregg, and school counselor, Ashley Byrd, that someone was having sexual intercourse with her and sexually abusing her. It was initially believed that the victim was referring to her younger brother. However, after some investigation by the Forsyth County Department of Social Services (DSS), defendant, the victim's twenty-four-year-old stepbrother, was identified as the perpetrator. Both the victim and her younger brother were removed from their home by DSS on 9 April 1999.

The victim testified at trial as to defendant's depravity. According to her, defendant had been inserting his finger into her vagina for over a year. She said that it had happened "a lot . . . [t]hirty times," and it had happened "everyday" from when she was six until seven and one-half years old. Defendant also placed his penis in her mouth and ejaculated on more than two occasions. The victim testified that defendant had sexual intercourse with her "probably two times." The victim testified that the intercourse

and fellatio had occurred around the time she told her teachers about what was happening to her. She also testified that she was six or seven when all this occurred.

The victim's brother testified that he witnessed one of the fellatio incidents. He also testified that he saw defendant touch her "in spots he wasn't supposed to." The victim's brother testified that he was nine when all this was happening to the victim, and that she was eight at the time.

Dr. Shelley Kreiter, who works for North Carolina Baptist Hospital, testified for the State. Dr. Kreiter performed a physical examination of the victim and discovered a notch in the child's hymen. According to her testimony, this finding is consistent with vaginal penetration by foreign objects such as a penis or finger. It was Dr. Kreiter's opinion that the victim had been sexually abused. The doctor also testified that the victim tested negative for sexually transmitted diseases.

Defendant testified in his own defense denying the victim's allegations. Defendant testified that he never inappropriately touched the victim at any time during 1998 and 1999. According to him and his wife, they both had the venereal diseases chlamydia and genital warts. This fact was noted by defendant in light of the fact that the victim tested negative for these conditions. He also testified that he had hernia surgery on 3 March 1999. The hernia was visible pre-surgery according to defendant, noting that the victim testified that she did not remember seeing a bump on defendant's stomach. The surgery caused him a lot of pain which

kept him out of work for a month.

The jury found defendant guilty on all three counts on 14 August 2000. Defendant was found to have a prior record level of II, and was sentenced to a minimum of 254 months and a maximum of 314 months.

Defendant makes the following assignments of error: (1) It was plain error for the trial court to allow trial on the indictments in 99 CRS 37247, 37251, and 37252, as each indictment failed to specify the charge sufficiently to prevent the defendant from being subjected to double jeopardy. (2) It was error for the trial court to deny defendant's motion to dismiss at the close of all the evidence in 99 CRS 37251. (3) It was plain error for the trial court to allow the case to go to the jury at the close of all the evidence in 99 CRS 37247 and 99 CRS 37252 as there was insufficient evidence to support a conviction. (4) It was error for the trial court to refuse to set aside the verdicts upon defendant's oral motion as being contrary to the greater weight of the evidence.

I.

Defendant's first assignment of error deals with the defendant's theory that the case of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) is applicable to the case at bar.

Defendant contends that the *Apprendi* case stands for the proposition that the requirements that all charging documents used to try a defendant must set forth each element of the offense and

further that each element must then be found by the unanimous decision of twelve jurors beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 477, 147 L. Ed. 2d at 447.

Defendant further contends that these principles are violated by the three indictments used at his trial. Defendant objects to these indictments on the grounds that the broad range included in the date of offense does not adequately apprize defendant of the specific factual charge in order to adequately prepare a defense; the broad date range, in light of the multiple acts related in the evidence does not adequately protect defendant from being twice tried for the same offense; and the charges as specified allow for the likely outcome that defendant was convicted by a less than unanimous decision of the jury in violation of the fundamental principles reaffirmed in the *Apprendi* decision.

Defendant did not contest the indictments at trial. A defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*

The *Apprendi* case is indeed an important case. However, it has no specific bearing on the outcome of the case *sub judice*. The *Apprendi* case dealt with matters that increased a defendant's sentence and whether they were presented to a jury and proven

beyond a reasonable doubt. That case held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455. Our Supreme Court has applied the *Apprendi* decision in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001) to North Carolina's sentencing scheme. The Supreme Court has also reviewed the short-form indictments, authorized by N.C. Gen. Stat. § 15-144 (2001), in light of *Apprendi*. *See State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001), *cert. denied*, ___ U.S.___, 151 L. Ed. 2d 1002 (2002); *State v. Holmon*, 353 N.C. 174, 540 S.E.2d 18 (2000), *cert. denied*, ___ U.S.___, 151 L. Ed. 2d 181 (2001). All these cases uphold the short-form indictment for murder under N.C. Gen. Stat. § 15-144 (2001). This Court has previously addressed this matter as it pertained to N.C. Gen. Stat. § 144.1 (2001) for rape and N.C. Gen. Stat. § 144.2 (2001) for sexual offense and upheld the short form, although *Apprendi* was not taken into account. *See State v. Harris*, 140 N.C. App. 208, 535 S.E.2d 614, *appeal dismissed, disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000); *State v. Ackerman*, 144 N.C. App. 452, 551 S.E.2d 139, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001); *State v. Graham*, 145 N.C. App. 483, 549 S.E.2d 908 (2001); *see also State v. Lowe*, 295 N.C. 596, 247 S.E.2d 878 (1978). In light of the case law by our Supreme Court upholding the short-form indictments for murder from

attacks based on *Apprendi*, and our own previous cases, we find nothing in *Apprendi* or defendant's arguments that persuade us that short-form indictments for rape and sexual offenses are invalid or unconstitutional. Nor do we find, as defendant contends, that *Apprendi* has overruled any of our current case law pertaining to indictments. *E.g., Harris*, 140 N.C. App. 208, 535 S.E.2d 614; *State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000), *appeal dismissed, disc. review denied*, ___ N.C. ___, 547 S.E.2d 430 (2001).

Defendant essentially makes the argument that the indictments in his case were impermissibly vague. Defendant properly concedes that he did not make an objection to the indictments below. Appellate courts will not consider constitutional questions that were not raised and decided at trial. *See State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (1998), *aff'd as modified*, 351 N.C. 413, 527 S.E.2d 644 (2000). Nevertheless, we will address defendant's arguments and review for plain error pursuant to the discretionary authority accorded us by N.C.R. App. P. 2.

The indictment for first degree statutory rape alleged the date of offense to be "01/01 - 03/25/99." Defendant points out that testimony from the victim was that defendant put his private part into my private part "not very often . . . probably twice" and it happened when she was six. However, she was not six during the time of the date of offense alleged in the statutory rape indictment, as she presumably turned seven on 9 June 1998. Defendant feels this entitles him to relief. It is apparent from

the record that the victim had a difficult time with temporal aspects of events. However, she did testify that the alleged events took place near the time when she told her teacher and counselor at her school, which was around the 24th and 25th of March 1999. She was seven years old at this time, which falls within the period of the date of offense in the indictments. Further testimony exemplifies the young child's seemingly inability to pinpoint times:

> Q. Okay. On March 25th, 1999 how old were you, J_____?
>
> A. Nine.
>
> Q. Last year, March, you were nine?
>
> A. Uh-uh.
>
> Q. How old were you?
>
> A. Six.
>
> Q. In 1999, last year, you were six?
>
> A. No. I was eight.

The indictments for first degree sexual offense alleged the dates of offenses to be "01/01 - 01/31/99," and "02/01 - 3/25/99" respectively. The testimony at trial revealed how the victim had been digitally penetrated and how defendant had committed the act of fellatio with the victim. There were no dates as to when these acts occurred, nor how many times the acts were committed.

Defendant essentially contends that there was a fatal variance between the dates in the indictment and the evidence at trial and that the indictment failed to apprize him so that he may reasonably

prepare his defense. He claims that he "may as well have been told that sometime in the last two to three years he is accused of having had one or more acts of carnal knowledge with [the victim] and further he is accused of sometime in the last two years having committed two, or perhaps many more sex acts with [the victim], which could be any acts on a statutory list containing at least five separate and distinct acts."

"An indictment is 'constitutionally sufficient if it apprizes the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.'" *State v. Hutchings*, 139 N.C. App. 184, 188, 533 S.E.2d 258, 260 (quoting *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)), *disc. review denied*, 353 N.C. 273, 546 S.E.2d 381 (2000). *See* N.C. Gen. Stat. *§* 15A-924(a)(4) (2001).

> Generally, an indictment must include a designated date or period within which the offense occurred. N.C.G.S. § 15A-924(a)(4) (1990). However, the statute expressly provides that "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Also, "[n]o judgment upon any indictment . . . shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly." N.C.G.S. § 15-155 (1990).
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> In cases of sexual assaults on children, temporal specificity requisites diminish.
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> We have stated repeatedly that in

> the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

> *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs. *See State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987); *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984). "[I]t is sufficient for conviction that the jury is satisfied *upon the whole evidence* that each element of the crime has been proved beyond a reasonable doubt." *State v. May*, 292 N.C. 644, 655, 235 S.E.2d 178, 185 (emphasis added), *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977).

*State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991).

In *State v. McKinney*, this Court upheld an indictment that alleged the date of offense as "July, 1985 thru July, 1987." *State v. McKinney*, 110 N.C. App. 365, 367, 430 S.E.2d 300, 301, *appeal dismissed, disc. review and cert. denied*, 334 N.C. 437, 433 S.E.2d 182 (1993). That case stated, as did *Everett*, that, "[i]f time is not of the essence of the offense charged, the failure to state the time at which the offense was committed, or stating the time imperfectly, is not grounds for dismissal of the indictment." *Mc*Kinney, 110 N.C. App. at 370-71, 430 S.E.2d at 303. The *McKinney*

Court held that, "[b]ecause time does not constitute an element of first-degree rape, *see* N.C.G.S. § 14-27.2 (1986), time is not of the essence of the crime. . . . Accordingly, because in the instant case the failure of the indictments to allege *any* date on which the offenses occurred would not be grounds for dismissal of the charges, the designation of a two-year period is not grounds for dismissal." *Id.* at 371, 430 S.E.2d at 303-04.

The above principles were reaffirmed recently by this Court in *State v. Johnson*, 145 N.C. App. 51, 549 S.E.2d 574 (2001). In *Johnson*, the defendant was appealing his motion to dismiss because of alleged variances between the evidence presented at trial and the State's responses to defendant's request for a bill of particulars. It is noted that defendant in the present case did not seek a bill of particulars. This Court stated:

> In *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983), the North Carolina Supreme Court rejected the contention that the defendant was denied a fair trial because the bill of particulars and the evidence presented at trial did not precisely establish the date and time of the alleged rape:
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> > [A] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.
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> *Id.* at 749, 309 S.E.2d at 207 (citing *State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962)).

> In *State v. Burton*, 114 N.C. App. 610, 442 S.E.2d 384 (1994), the defendant challenged his convictions of incest, rape, and taking indecent liberties with minors on the ground that the State failed to offer sufficient evidence that the crimes occurred within the time periods noted in the indictments. This Court sustained the convictions, holding that the "'variance between allegation and proof as to time is not material where no statute of limitations is involved.'" *Id*. at 612, 442 S.E.2d at 385 (citation omitted). Indeed, "'the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.'" *Id*. at 612, 442 S.E.2d at 386 (citing *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991)).
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>> In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring years before. (citations omitted).
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> *Id*. at 613, 442 S.E.2d at 386.

*Johnson*, 145 N.C. App. at 56-57, 549 S.E.2d at 578.

However, it is possible for a defendant to be unduly prejudiced by variances between the indictment and evidence presented at a sexual child abuse trial. That is precisely what occurred in *State v. Stewart*, 353 N.C. 516, 546 S.E.2d 568 (2001).

*Stewart* provided that:

> An indictment must include a designated date or period of time within which the alleged offense occurred. However, this Court has recognized that a judgment should not be reversed when the indictment lists an incorrect date or time "'if time was not of the essence'" of the offense, and "'the error or omission did not mislead the defendant to his prejudice.'" Generally, the time listed in the indictment is not an essential element of the crime charged. This general rule, which is intended to prevent
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>> a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.

*Id.* at 517-18, 546 S.E.2d at 569 (citations omitted). *See* N.C. Gen. Stat. § 15A-924(a)(4).

In the *Stewart* case, the indictment gave the period as "7-01-1991 to 7-31-1991." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569. There defendant's evidence at trial provided an alibi for the entire period stated in the indictment, while the State put on evidence that encompassed a two-and-one-half-year period of sexual encounters. *Id.* at 519, 546 S.E.2d at 570. The Supreme Court noted in holding for the defendant that its decision was confined to the "unique facts and circumstances" of that case, and concluded "that the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him 'of an opportunity to adequately present his defense.'" *Id.* at 519, 548 S.E.2d at 570 (quoting *State v.*

*Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984)). This was so even taking into account the policy of leniency surrounding the memory of the child of specific dates in sexual abuse cases.

The variance in our case does not reach to the level present in *Stewart*. The victim's testimony may have wavered as to temporal aspects. However, defendant was on notice, at a minimum, that the testimony was from a young child and that such problems could arise. It is worth noting again that defendant did not seek a bill of particulars from the State, nor did he defend on a time-based alibi. While some of the testimony was outside of the date of offense, we hold that defendant was not prevented from mounting a meaningful defense and thus suffered no undue prejudice.

Defendant next contends that the broad date range, in light of the multiple acts related in the evidence does not adequately protect defendant from being twice tried for the same offense. He argues essentially that he is not protected now, even after being convicted, from the State indicting him on several more charges of sexual offense. This argument has been previously addressed by this Court in *Hutchings*, 139 N.C. App. at 190, 533 S.E.2d at 261. There, we said:

> In order to sustain a conviction, an indictment needs "to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offense." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534, *appeal after remand*, 23 N.C. App. 186, 208 S.E.2d 519 (1974). Each of the indictments in the present case used the language of the applicable statue to charge

> the offense. It is established law that an indictment need not allege the evidentiary basis for the charge; an indictment which charges a statutory offense by using the language of the statute is sufficient both to give a defendant adequate notice of the charge against him and to protect him from double jeopardy. *State v. Miller*, 137 N.C. App. 450, 528 S.E.2d 626 (2000).

*Hutchings*, 139 N.C. App. at 190, 533 S.E.2d at 261. This argument by defendant has no merit.

Defendant's final argument pertaining to the indictments is that the charges as specified and the jury instructions allow for the likelihood that defendant was convicted by a less than unanimous decision of the jury because it is not required that all twelve jurors agree as to which sex act they believe occurred beyond a reasonable doubt. Defendant admits that this issue has been decided previously against him by this Court. *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990); *State v. Petty*, 132 N.C. App. 453, 512 S.E.2d 428, *appeal dismissed, disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999); *Youngs*, 141 N.C. App. 220, 540 S.E.2d 794. Defendant maintains that *Apprendi* has overruled these cases. As we said above, we do not agree with defendant that *Apprendi* has had any such effect on this line of cases. This assignment of error by defendant is overruled.

II.

Defendant next argues that it was error for the trial court to deny its motion to dismiss 99 CRS 37251, which is the sex offense with the date of offense of "01/01 - 01/31/99."

The trial court must determine whether the State presented

substantial evidence on every essential element and that defendant is the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982); *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001). Evidence is to be viewed in the light most favorable to the State. *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997). All contradictions are to be resolved in favor of the State, and all reasonable inferences based upon the evidence are to be indulged in. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Lee*, 348 N.C. 474, 487, 501 S.E.2d 334, 342 (1998).

Defendant contends that "not only do you have a fairly lengthy time period, 30 days, you also have from the evidence the possibility of overlapping allegations from the other charge of first degree sex offense. Based on the evidence contained in the transcript it [is] impossible for 12 jurors to find beyond a reasonable doubt . . . that the Defendant committed a sex act as alleged in the time period and have such finding differentiated from the same alleged conduct charged in the other first degree sex offense charge."

The testimony at trial, summarized above, revealed that the State had proved the elements of the charged crimes. There were no specific dates given as to when certain acts occurred, although it was established that certain acts occurred in close proximity to when the victim revealed her turmoil to her teacher and counselor.

This Court feels that it must defer to the policy of leniency as to child testimony. *See Johnson*, 145 N.C. App. 51, 549 S.E.2d 574; *Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994); *Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652. "'The date given in the [indictment or] bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.'" *Burton*, 114 N.C. App. at 612, 442 S.E.2d at 386 (quoting *Norris*, 101 N.C. App. at 151, 398 S.E.2d at 656). Thus, defendant's attempt to distinguish his case is denied and this assignment of error is overruled.

III.

We have examined defendant's remaining assignments of error, that the statutory rape charge (99 CRS 37247) and the other sex offense charge (99 CRS 37252) should not have gone to the jury because there was insufficient evidence to convict and that it was error for the trial court to refuse to set aside the verdicts upon defendant's oral motion as being contrary to the greater weight of the evidence. We believe them to be without merit. Here again, defendant contends that *Apprendi* overrules our previous case law as it pertains to the instructions regarding statutory rape and sex offenses. *See Harris*, 140 N.C. App. at 214, 535 S.E.2d at 618-19. We review the issue here briefly for the purpose of clarification.

The trial court did not err in its instructions for sexual offense and statutory rape in that the trial court explicitly distinguished between "male sex organ" and "object." *See Harris*, 140 N.C. App. at 214, 535 S.E.2d at 618-19; *State v. Speller*, 102

N.C. App. 697, 705, 404 S.E.2d 15, 19, *appeal dismissed, disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991). The potential problem stems from the definition of "sexual act" being "any penetration, however slight, by an object into the genital opening of a person's body," and the definition of rape, which is essentially vaginal intercourse, which is penetration, however slight, of the female sex organ by the male sex organ. While "sexual act" does not include vaginal intercourse, the argument has been made that the "male sex organ" could be misunderstood by the jury to be the "object" of penetration, which could mean that defendants are convicted of both crimes by one act. While it is the better practice for trial courts to explicitly exclude the male sex organ from its "sexual act" definition, any error is harmless. The trial court in the present case, as in *Harris* and *Speller*, gave the instructions so that they "were sufficient to differentiate between the two offenses so that the jury understood it was to consider the vaginal intercourse for purposes of the rape charge and the digital penetration for purposes of the sex offense charge." *Harris*, 140 N.C. App. at 215, 535 S.E.2d at 619.

Because we hold that defendant had a trial free from prejudicial error, we find

No error.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).