DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0558
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOSEPH DOUGLAS WHALEY,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0797

The Honorable Rick A. Williams, Judge

REVERSED AND REMANDED

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J O H N S E N, Judge

¶1 Joseph Douglas Whaley appeals his child molestation conviction. He argues the superior court erred in refusing to

instruct the jury on attempt to commit the charged crime of sexual conduct with a minor. For the reasons that follow, we reverse the conviction and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 Whaley lived with his wife and her four children. He was indicted on charges of sexual conduct with a minor in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405 (2010) and two counts of kidnapping in violation of A.R.S. § 13-1304 (2010), all in connection with events that occurred early one morning at his home.[1] The State alleged Whaley committed sexual conduct with a minor by raping his nine-year-old stepdaughter and that in the same incident he committed kidnapping by restraining the girl with the intent to inflict physical injury or commit a sexual offense. The second kidnapping charge alleged he restrained his wife after she discovered him attacking her daughter.

¶3 At trial, the child testified Whaley approached her when she was getting ready for bed and said he wanted to talk to her in his bedroom. The child testified that once in the bedroom, Whaley told her "this won't hurt," then bent her face-down over the bed, lifted up her nightclothes and pulled down her panties. She testified Whaley then spit on his hand and

[1] Absent material revisions after the date of the alleged offense, we cite a statute's current version.

wiped the spit “on [her] butt.” He then “hurt [her] . . . [o]n [her] butt” with his private part pushing “back and forth” a couple of times. She testified that “[a] few seconds later,” her mother came into the room and pulled Whaley off her.

¶4 Whaley’s wife testified she ran into the master bedroom after hearing her daughter say, “Ouch, that hurts. Ouch that hurts.” She testified she saw Whaley standing behind her daughter with the daughter bent over on the bed, and her daughter’s nightgown was lifted up around her waist. According to his wife, Whaley was holding the girl down by her hair and the back of her neck and was “humping her.” She testified she pushed Whaley off her daughter and grabbed his erect penis. She testified that she believed that his penis had been inside the girl’s “butt” because it was wet and because it felt like it was coming out when she grabbed it. She testified that about an inch and a half of his penis was inside her daughter when she pulled it out, but that the shaft was wet so she assumed that his entire penis had penetrated her.

¶5 Whaley’s wife further testified that after she pushed him off her daughter, “he came after me and started choking me and covering my mouth so I couldn’t scream.” She testified he threw her into a shelf next to the bed, then hit, slapped and punched her.

¶6 Whaley's wife testified her daughter had blood in her stool later that day. The forensic nurses who examined the girl shortly after the incident found no injuries to her anus or vaginal area, but found some redness "in the outer vaginal area" that could have had other causes than rubbing.

¶7 The jury heard several recorded confrontation calls in which Whaley repeatedly told his wife that he could not explain what had happened. At one point he said, "I know what I did was wrong. I don't know why I did it but I know I did it." At trial, Whaley testified he had not raped the child, removed or manipulated her clothing, exposed his genitals to her, or done anything to physically harm her. He testified that he walked out on his wife that night after they argued over other matters. He testified that the next day he was so confused by what his wife and the police told him that he thought he might have engaged in some sexual misconduct when he was blacked out from drinking twenty beers, "[g]ive or take," and "a few shots" of liquor and taking four Vicodin, but after he thought about it, he realized nothing had happened.

¶8 The jury acquitted Whaley of both charged kidnappings and the charge of sexual conduct with a minor. It convicted him, however, of the lesser-included offense of child molestation. The court sentenced Whaley to the presumptive term of 17 years in prison.

¶9 Whaley filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

DISCUSSION

¶10 Whaley argues the superior court erred by refusing to instruct the jury on attempted sexual conduct with a minor as a lesser-included offense of the charged crime of sexual conduct with a minor. Over Whaley's objection, the court instead granted the State's request for an instruction on child molestation as a lesser-included offense of the charged crime. We review a superior court's decision to refuse a jury instruction on a lesser-included offense for an abuse of discretion. *State v. Wall,* 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006).

¶11 As relevant to the facts here, a person commits sexual conduct with a minor "by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age." A.R.S. § 13-1405(A). If the person is under fifteen years of age, the crime is a Class 2 felony. A.R.S. § 13-1405(B). Sexual intercourse is defined in pertinent part as "penetration into the . . . vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(3) (2010).

¶12 A person commits the offense of "attempt" in pertinent part "if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally does or omits to do anything which . . . is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(2) (2010). Attempted sexual conduct with a minor, a Class 3 felony, is a lesser-included offense of sexual conduct with a minor. A.R.S. § 13-1001(C)(2); *see State v. Lammie,* 164 Ariz. 377, 381, 793 P.2d 134, 138 (App. 1990) ("Both case and statutory law have recognized that an attempt to commit an offense is a lesser-included offense within the completed offense, be it a sexual offense or otherwise."), *disagreed with on other grounds by State v. Peek*, 219 Ariz. 182, 184-85, ¶¶ 16-17, 195 P.3d 641, 643-44 (2008); *cf. State v. Morgan*, 204 Ariz. 166, 170, ¶¶ 11-13, 61 P.3d 460, 464 (App. 2002) (no error in refusing to instruct on attempted sexual conduct with a minor, as lesser-included offense of sexual conduct with a minor, in light of defendant's admission that he had committed act that constituted sexual conduct with a minor).

¶13 A defendant is entitled to a lesser-included offense instruction if the jury is "able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall,* 212 Ariz. at 4, ¶ 18, 126 P.3d at 151; *see*

also Ariz. R. Crim. P. 23.3 ("Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense.").

¶14 The State does not dispute that Whaley's acquittal on the charge of sexual conduct with a minor establishes the first *Wall* requirement, which is that a jury must be able to find the State failed to prove each element of the greater offense. The issue is whether the second *Wall* element is established, namely, whether the evidence was sufficient to support a conviction on the charge of attempted sexual conduct with a minor.

¶15 Our review of the record persuades us that the evidence was sufficient to support a conviction on the lesser charge. The jury plainly disbelieved Whaley's wife's account of events the morning in question, and could have accepted the testimony of a forensic nurse, who testified that a child victim sometimes is not able to accurately distinguish one form of touching from another and observed that given Whaley's height and the height of the bed, he would not have been able to commit the assault in the manner the child and Whaley's wife described. Based on that evidence and the absence of evidence of physical injury to the child, the jury could have convicted Whaley of attempted sexual conduct with a minor based on the child's

testimony that Whaley pulled down her panties and held her down on the bed. *See State v. Carlisle*, 198 Ariz. 203, 207, ¶¶ 14-15, 8 P.3d 391, 395 (App. 2000) (evidence that defendant propositioned someone he thought was a 14-year-old boy for sex was sufficient to support conviction of attempted sexual conduct with a minor).

¶16 The State argues the court correctly refused the attempt instruction because Whaley's only defense was that he did not engage in any sexual misconduct whatsoever with the child. As a practical matter, when a defendant asserts an all-or-nothing defense, "there will usually be little evidence on the record to support an instruction on the lesser included offenses." *Wall*, 212 Ariz. at 6, ¶ 29, 126 P.3d at 153 (quoting *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984)). That is not always the case, however. *See Wall*, 212 Ariz. at 6, ¶ 30, 126 P.3d at 153. To the contrary, a defendant's all-or-nothing defense does not preclude a lesser-included offense instruction when the record contains evidence warranting the instruction. *Id.* at ¶ 31. Because, as we have concluded, the evidence could have supported a conviction for attempted sexual conduct with a minor, the jury should have been instructed on the crime.

¶17 The State argues, however, that the superior court need not have instructed the jury on attempted sexual conduct

with a minor because that crime is a lesser-included offense of child molestation, the crime the jury found Whaley committed. The State argues that on the evidence, the jury could not have found Whaley guilty of attempted sexual conduct with a minor without also finding him guilty of child molestation.

¶18 Child molestation is defined as "intentionally or knowingly engaging in or causing a person to engage in sexual contact . . . with a child under fifteen years of age." A.R.S. § 13-1410(A) (2010); *see* A.R.S. § 13-1401(2) (defining sexual contact as including touching of any part of the genitals or anus by any part of the body or causing a person to engage in such contact). The State argues "it is impossible to intend to commit sexual conduct with a minor and take 'any step in a course of conduct planned to culminate' in the commission of sexual conduct with a minor (penetration into the penis, vulva, or anus or masturbatory contact with the penis or vulva) without *also* attempting to commit child molestation (touching of penis, vulva, or anus)."

¶19 We do not agree that attempted sexual conduct with a minor is a lesser-included offense of child molestation. Instead, attempted sexual conduct with a minor and child molestation both are lesser-included offenses of sexual conduct with a minor. *See Lammie,* 164 Ariz. at 381, 793 P.2d at 138;

State v. Ortega, 220 Ariz. 320, 328, ¶ 25, 206 P.3d 769, 777 (App. 2008).

¶20 Moreover, although the State contends Whaley was not entitled to the attempt instruction because the evidence supported a conviction on child molestation, a defendant is entitled to an instruction on all offenses necessarily included in the offense charged. *See Wall,* 212 Ariz. at 3, ¶ 13, 4, ¶ 18, 126 P.3d at 150, 151; Ariz. R. Crim. P. 23.3 cmt. Implicit in the State's argument is the assertion that because the jury convicted Whaley of child molestation, it would not have convicted him of attempted sexual conduct with a minor. But our supreme court has held that "[t]he rule requiring instruction on lesser-included offenses is designed to prevent a jury from convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime." *Wall*, 212 Ariz. at 4, ¶ 16, 126 P.3d at 151. The law requires lesser-included instructions to mitigate the risk that a jury will convict a defendant of a crime, even though the evidence "remains in doubt," simply because he "is plainly guilty of *some* offense." *Id.* (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

¶21 Moreover, contrary to the State's contention, given the evidence recounted in ¶ 13, *supra*, the jury could have convicted Whaley of attempted sexual conduct with a minor

without also finding him guilty of child molestation. The jury could have found that Whaley attempted to penetrate the child's vulva or anus with his penis or attempted to engage in masturbatory contact, but perhaps because he was interrupted, he fell so short of completing the act that he did not "engage in sexual contact" with her, within the meaning of A.R.S. §§ 13-1410(A) and -1401(2).

¶22 Accordingly, we conclude the court abused its discretion by denying Whaley's request to instruct the jury on attempted sexual conduct with a minor. Because we vacate the conviction on this basis, we need not address Whaley's argument that the court created a risk of a non-unanimous verdict by refusing to instruct the jury on multiple acts.

CONCLUSION

¶23 For the foregoing reasons, we reverse Whaley's conviction and remand for proceedings consistent with this decision.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge