NO. COA06-30

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v. Caldwell County
No. 02 CRS 7842

BOBBY JOE HODGES

Appeal by Defendant from judgments entered 30 June 2005 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 14 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Daniel F. Read for Defendant-Appellant.

STEPHENS, Judge.

Bobby Joe Hodges ("Defendant") appeals from judgments entered upon his conviction by a jury of first-degree rape and taking indecent liberties with a child. In support of his appeal, he brings forward eight assignments of error. For the reasons stated herein, we hold that Defendant received a fair trial, free of error, and thus, we uphold his conviction.

At trial during the 28 June 2005 criminal session of Catawba County Superior Court, the State's evidence tended to show that on 23 September 2002, the victim, G.H., who was eight years old at the time, was at her paternal grandparents' house "sitting around just watching TV and stuff." That afternoon, G.H. went to a shed on her grandparents' property. Defendant, G.H.'s grandfather, who was sixty-two, was working in the shed. G.H. sat on a small table.

Defendant told G.H. that he would not let her off the table until she pulled down her pants and panties. G.H. said "no," but Defendant held her down. After G.H. complied with his command, Defendant placed his finger, and then, his penis in her vagina. G.H. testified that these acts hurt her, but she did not say anything to Defendant. Defendant continued his actions until G.H.'s cousin, Felecia, walked into the shed. Defendant immediately zipped up his pants while G.H. put her clothes back on and ran to the house to her grandmother. G.H. told her grandmother, Shirley, what had happened. Shirley took G.H. to the bathroom and checked her "private areas" to make sure that G.H. was not bleeding. G.H. testified that Shirley told her not to tell anyone else what had happened and to tell others that she had inserted a tampon, even though G.H. had not yet started her period.

Felecia testified that she did not see Defendant zipping up his pants as she entered the shed when she got home from school that afternoon. However, she acknowledged that she saw G.H. on the table with her pants and panties down. Upon seeing G.H. on the table, Felecia went back to the house and told Shirley what she saw. Felecia, who was almost sixteen at the time, is also Defendant's and Shirley's granddaughter. She was living with her grandparents then, and Defendant was in the process of helping her to pick out a car for herself.

Shirley Hodges testified that G.H. told her she had her pants down because she had to "pee." Shirley denied that G.H. told her Defendant had sexually assaulted her in any manner. Nevertheless,

Shirley admitted that she checked G.H.'s private areas for blood "because she said she had to go to the bathroom[,]" and "the child was up there. I was concerned enough to want to know [] [w]hat was going on[.]"

On 25 September 2002, Felecia told Jill Duffy, a school social worker, that she had walked in on Defendant and G.H. while G.H. had her pants and panties down, and that she saw Defendant zipping up his pants. Felecia reported further that she had overheard G.H. telling Shirley that Defendant put his "pee-pee" in her. Felecia said that Shirley told her and G.H. not to tell anyone about what happened, and that they would get help for Defendant.

April Sisk and Karen Noblitt were investigators at the Caldwell County Department of Social Services at the time of the incident. Ms. Sisk testified that Felecia told her and Ms. Noblitt that she had walked in on Defendant and G.H., and that Defendant had quickly zipped up his pants. Felecia also told Ms. Sisk that immediately after the incident, she informed Shirley about it, who seemed "shocked" at first, and then acted like it was "no big deal." Ms. Sisk testified further that she observed Felecia, G.H. and Sandra Mask, Felecia's aunt, at the Sheriff's Department later that afternoon. Felecia urged G.H. to tell Ms. Sisk what had happened. G.H., who was sitting on Felecia's lap, then told Ms. Sisk: "'He took it out and put it in me.'" Ms. Sisk testified that Sandra, Felecia and G.H. were crying and hugging each other.

Ms. Noblitt testified that when she and Ms. Sisk first interviewed G.H. at her elementary school, she appeared "very

nervous" and "very uncomfortable." During questioning, G.H.'s face turned "very red" and "she did not make direct eye contact" with the investigators. On 25 September 2002, Ms. Noblitt also interviewed Shirley, who reported that Felecia had told her she saw G.H. in the shed with her pants and panties down, and Defendant zipping up his zipper. Shirley told Ms. Noblitt that she had confronted Defendant, and he said G.H. came in front of him with her panties down and "asked him to do something to her."

Dr. Andrea Kunkle, G.H.'s regular physician at the time of the incident, performed a child medical examination on G.H. on 30 September 2002. At the outset of the examination, Dr. Kunkle asked G.H. whether she knew why she was at the doctor's office, and G.H. replied "'[b]ecause of what pawpaw did'" to her. She then told Dr. Kunkle that she went into the shed to help Defendant, sat up on a table, and Defendant would not let her down until she took her pants and panties off. G.H. further told Dr. Kunkle that Defendant put both his finger and his penis inside of her.

Upon examining G.H.'s vaginal area, Dr. Kunkle saw a "little area where the hymen [opening for the vagina] kind of fell away on either side of a little mound." In the same area, on either side, she saw a "cleft," or break in the tissue. Dr. Kunkle testified that the presence of a little mound "can mean that something happened in that area[,]" and the presence of a cleft "can mean there was some sort of trauma." In addition, Dr. Kunkle found lesions that "looked like" herpes in the labia minora of the hymen. Dr. Kunkle then touched the lesion inside G.H., asked her if

Defendant went that far inside her, and G.H. said he went at least that far.

Dr. Kunkle performed a herpes culture and a bacterial culture in an attempt to define the lesions, but both tests came back negative. Based on her experience, however, and the fact that the lesions had already progressed to the ulcerative stage, Dr. Kunkle continued to believe the lesions represented herpes. She explained that three out of ten herpetic lesions will test negative in the ulcerative stage versus the blister stage, which comes earlier. In addition, when Dr. Kunkle reexamined G.H. a week later, the lesions had only slightly improved, but had not healed, "consistent with herpes [which] doesn't heal very quickly[.]"

Without objection, Dr. Kunkle opined that G.H.'s injuries were consistent with sexual assault and that based on the physical examination findings, G.H. "had sustained some sexual abuse."

Defendant also offered evidence, which tended to show the following: On 23 September 2002, Defendant was working in his garage workshop when G.H. came into the building to ride an exercise bike. Defendant testified it was a hot day and all of the doors and windows of the building were open. He said he was looking for an address book and a telephone book for his wife, Shirley, when G.H. came in. He eventually located the books and as he was retrieving them out of a box, Felecia walked in, at which time he heard G.H.'s feet hit the floor, and the two of them ran out of the building. He said he never saw G.H. with her pants down and claimed to Shirley that he did not do anything to G.H. He

further testified that he has trouble achieving an erection and the use of Viagra did not help him.

Sandra Stewart, a family friend, testified that, in the summer of 2003, G.H. told her Defendant did not rape her. Ms. Stewart further testified that before G.H. made such a revelation to her, she told G.H. she did not like her and nobody liked her due to G.H.'s allegations against Defendant. Ms. Stewart said "everybody" in the family was "mad" at G.H. because of her allegation. Defendant also presented the testimony of several relatives who said G.H. told them that Defendant did not rape her, and who conceded that the family was "mad" or "angry" at G.H.

After the defense rested, the State offered rebuttal testimony from Danny Barlowe, a detective with the Sheriff's Department at the time of the incident. Detective Barlowe was present during portions of Defendant's interview with Detective Jim Bryant. During the interview, Defendant told Detective Bryant that G.H. was in the shed on a table with her pants and panties down, although he denied "do[ing] anything" to her.

Ms. Noblitt and Ms. Sisk were also called to rebut Defendant's evidence. Ms. Noblitt was present while Mr. Barlowe interviewed Shirley Hodges. She testified that Shirley stated Defendant told her that G.H. "had appeared with her pants down." According to Shirley, Defendant also told her that G.H. "asked [Defendant] to do something to her."

Ms. Sisk interviewed Defendant, who reported that G.H. was sitting on the table with her pants down when she asked Defendant

to give her a hug. Defendant reported that he did not know why G.H. had her pants down, but continued to work and "thought nothing of it."

At the close of the State's evidence and at the close of all the evidence, Defendant moved to dismiss both charges for insufficiency of the evidence. The motions were denied. After deliberations, the jury returned verdicts of guilty of first-degree rape and taking indecent liberties with a child. Defendant was then sentenced to 193 to 241 months in prison for the rape conviction and thirteen to sixteen months for the indecent liberties conviction, to run concurrently. Defendant appeals.

Defendant first argues that the trial court committed plain error by allowing Dr. Kunkle to testify that G.H. had evidence of herpetic lesions, even though the tests for herpes were negative and there was no evidence that Defendant had herpes or could have transmitted such disease to G.H. He further argues that it was plain error for the trial court to allow Dr. Kunkle to testify that G.H. was in fact sexually abused. We disagree.

Plain error in the trial of a criminal case is an error which is so fundamental, it amounts to a miscarriage of justice or probably caused the jury to reach a different verdict than it otherwise would have reached but for the error. *State v. Lawson*, 159 N.C. App. 534, 583 S.E.2d 354 (2003). Defendant contends that because there was no evidence to connect the herpetic lesions to Defendant or any evidence as to how the lesions could have been

caused, "[t]he jury was thus prejudicially left to assume that the herpetic lesions must have come from [Defendant]." Further, because the existence of the lesions formed part of the basis for Dr. Kunkle's opinion that G.H. had been sexually abused, Defendant argues that the "practical effect" of this evidence was to vouch for G.H.'s credibility.

In support of his position, Defendant cites *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002); *State v. Hammett*, ___ N.C. App. ___, 625 S.E.2d 168 (2006); and *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005). Defendant's reliance on these cases is misplaced because in each of them, this Court and our Supreme Court held that *absent physical findings* supporting a diagnosis of sexual abuse, testimony opining that sexual abuse in fact occurred is inadmissible. By contrast, in the present case, Dr. Kunkle testified in detail about the abnormal physical findings she made of G.H.'s genitalia, including stretching in the area of G.H.'s hymen, which Dr. Kunkle stated could have resulted from penetration by a penis, and lesions consistent with herpes. Dr. Kunkle described her findings to the jury with the aid of a drawing illustrating the abnormalities, and she based her opinion that G.H. had sustained injuries consistent with sexual assault and had suffered sexual abuse *solely* on the physical findings.

In *State v. Goforth*, 170 N.C. App. 584, 589, 614 S.E.2d 313, 316, *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005) (citation omitted), we held that "'[a]n expert medical witness may render an

opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e., physical evidence consistent with sexual abuse[,]'" and allowed the doctor's testimony there that the children in question had been sexually abused. In the present case, Dr. Kunkle's testimony was based on uncontradicted physical findings consistent with sexual abuse, and thus, was admissible pursuant to Rule 702 of the North Carolina Rules of Evidence.

Defendant also argues, however, that since no evidence was offered to connect the herpetic lesions to him, evidence of the existence of those lesions could not be considered to support Dr. Kunkle's diagnosis of sexual abuse. Defendant's argument has no merit. First, Dr. Kunkle acknowledged that she had no information that Defendant had herpes. Nevertheless, she found lesions on G.H.'s genital area which, based on their advanced stage of development and Dr. Kunkle's experience and expertise, she concluded were herpetic in nature. As a properly qualified medical expert, Dr. Kunkle was competent to testify to the findings she made on physical examination of G.H. *See State v. Shepherd*, 156 N.C. App. 69, 575 S.E.2d 776 (2003). The mere fact that she could not say the lesions came from Defendant because she had no information that he had herpes does not prevent her from describing the physical examination findings she made.

Second, and more importantly, Defendant's argument ignores the uncontested fact of the additional trauma Dr. Kunkle noted to G.H.'s hymenal tissue, that is, the stretching of the hymen, which

Dr. Kunkle opined could have resulted from penetration by a penis. We hold that the doctor properly was permitted to describe all the physical findings she made that supported a diagnosis of sexual abuse. It was then the function of the jury, based on all the other evidence, to determine if the sexual abuse diagnosed by Dr. Kunkle was caused by Defendant. Defendant's assignments of error relating to the admission of Dr. Kunkle's opinion testimony have no merit and are overruled.

By his next assignment of error, Defendant argues that the trial court erred by allowing Ms. Duffy, the school social worker, to testify to statements which Felecia allegedly made to her describing G.H.'s comments about the incident. Defendant contends such testimony was hearsay unsupported by a proper foundation. Again, we disagree.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). Hearsay evidence is inadmissible at trial unless an exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2005). However, impeachment of a witness through prior inconsistent statements is proper as long as the testimony is for the purpose of impeachment only. *State v. Stokes*, 357 N.C. 220, 581 S.E.2d 51 (2003) (holding that when a witness is confronted with prior statements that are inconsistent with the witness's testimony and the inconsistencies are material to the

issue at hand in the trial, the witness's testimony may be contradicted by other testimony).

Here, the State called Felecia, who testified that she did not see Defendant zipping up his pants as she entered the shed. She also denied telling anyone that G.H. said Defendant "'stuck his thing inside of [her].'" The State then offered testimony from Ms. Duffy that Felecia had told her she saw G.H. on the table in the shed with her pants and panties down and Defendant zipping up his pants. Ms. Duffy also testified that Felecia said she overheard G.H. telling Shirley "something about [Defendant] putting his pee-pee in her." Defendant contends that this evidence was hearsay and no foundation to support admission of a prior inconsistent statement of Felecia was laid, making this evidence inadmissible.

In *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984) (citation omitted), our Supreme Court held that "[w]hen the witness's prior statement relates to material facts in the witness's testimony, extrinsic evidence may be used to prove the prior inconsistent statement without calling the inconsistencies to the attention of the witness. Material facts involve those matters which are pertinent and material to the pending inquiry." It cannot be seriously disputed that the statements in question here relate to material facts in Felecia's testimony. Therefore, it was not error for the trial court to allow the testimony of Ms. Duffy. In addition, the trial judge specifically instructed the jury as follows:

> Members of the jury, in regards to the testimony you're hearing at this point, you

> may consider this testimony for the purpose of the value it may have in regard to impeaching or corroborating the testimony of the prior witness Felecia. You may not consider it for any other purpose other than that.

This instruction appropriately limited the jury's consideration of the challenged testimony to its sole purpose of impeaching Felecia's testimony. *See State v. Miller*, 330 N.C. 56, 408 S.E.2d 846 (1991). Accordingly, we likewise overrule this assignment of error.

Defendant next argues that the trial court erred by sustaining the State's objections to certain testimony of Felecia when she was recalled to the witness stand to testify on behalf of Defendant. Specifically, Defendant challenges the trial court's determination that the evidence being elicited by the defense was cumulative when defense counsel asked Felecia whether Defendant was zipping up his pants when she walked into the shed.

Decisions regarding the admission of evidence are addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of discretion is clearly shown. *State v. Fowler*, 159 N.C. App. 504, 583 S.E.2d 637, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 355 (2003). To prove an abuse of discretion, Defendant must show that the trial court's decision was "so arbitrary that it could not have been the result of a reasoned decision[.]" *State v. Nolen*, 144 N.C. App. 172, 550 S.E.2d 783, *appeal dismissed and cert. denied*, 354 N.C. 368, 557 S.E.2d 531 (2001). Defendant has failed to make such a showing here.

Defendant argues that the trial judge "immediately cut defense counsel off" when he attempted to present Felecia as a defense witness. He contends that even if Felecia had given substantially the same testimony when the State called her, the trial judge's decisions sustaining the State's objections to defense counsel's direct examination of this witness showed the jury that he did not have any patience for Felecia and that she was not to be believed. This argument has no merit.

The trial court sustained the State's objections based on Rule 403 after defense counsel asked Felecia whether she saw Defendant zipping up his pants and whether Defendant was doing anything unusual when Felecia walked into the shed. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Outside the presence of the jury, defense counsel argued that he wanted to present evidence of what Defendant was doing when Felecia went into the building. The trial judge pointed out that defense counsel had "examined [Felecia] previously. She has testified that she did not see his pants unzipped, did not see him adjust his shirt, and told the District Attorney that she did not. . . . That is a summary of what previously had been testified to by this witness." In view of the fact that the trial judge correctly summarized the evidence previously elicited from Felecia,

the trial judge's decision to exclude the same evidence during Defendant's case in chief is not manifestly unsupported by reason.

We have previously held that substantially similar testimony at two different times during a trial constitutes cumulative evidence and may be properly excluded. *See State v. Burge*, 100 N.C. App. 671, 397 S.E.2d 760 (1990), *disc. review denied*, 328 N.C. 272, 400 S.E.2d 456 (1991); *see also State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994). Accordingly, we hold that it was not error for the trial judge to exclude this testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2005). This assignment of error is overruled.

In his fifth assignment of error, Defendant argues that the trial court erred by allowing the State to present rebuttal evidence which Defendant characterizes as repetitive and cumulative. After the defense rested, the State called three witnesses to contradict evidence presented by the defense. The trial court overruled defense counsel's objections to the testimony of these witnesses because the evidence was properly presented for impeachment purposes. *See, e.g., State v. Westbrooks*, 345 N.C. 43, 60, 478 S.E.2d 483, 493 (1996) ("Discrediting a witness by proving, through other evidence, that the facts were otherwise than [s]he testified, is an obvious and customary process that needs little comment"). Moreover, control of rebuttal evidence is within the discretion of the trial court. N.C. Gen. Stat. § 15A-1226 (2005). Defendant has failed to prove, and we fail to perceive, that the trial judge abused his discretion in allowing the rebuttal

witnesses. This assignment of error has no merit.

Defendant next assigns error to the trial court's denial of his motions to dismiss, arguing that the evidence was insufficient to submit either charge against him to the jury. We disagree.

It is well settled that upon a motion to dismiss, the trial court must determine whether there is substantial evidence, taken in the light most favorable to the State, of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "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). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference arising from it. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. The trial court is concerned only with the sufficiency of the evidence to go to the jury, and not the weight to be accorded the evidence. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005).

Section 14-27.2(a)(1) of the North Carolina General Statutes establishes the following elements necessary to support a charge of first-degree rape:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.2(a)(1) (2002). In the present case, the State presented substantial evidence through (1) the testimony of G.H., eight years old at the time, that Defendant, sixty-two years old at the time, engaged in intercourse by placing his penis in her vagina; (2) the testimony of Dr. Kunkle, who was told by G.H. that Defendant had placed his finger and penis inside her, causing pain; (3) the testimony of Felecia, who saw G.H. inside the shed with her pants and panties down; (4) the findings of Dr. Kunkle regarding G.H.'s physical examination, which included injuries consistent with stretching of the hymen by a penis; and (5) Dr. Kunkle's opinion testimony based on those injuries, that G.H. had been sexually abused.

This evidence plainly satisfies the elements of section 14-27.2(a)(1) necessary to support submission of the first-degree rape charge to the jury.

The elements necessary to support the charge of taking indecent liberties with a child are found in section 14-202.1, as follows:

> (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. Gen. Stat. § 14-202.1 (2002). Here, the State's evidence established through the testimony of G.H. and Dr. Kunkle that Defendant touched G.H.'s genital area with his hand and placed at least one finger inside G.H.'s vagina. This was sufficient for the trial court to properly deny Defendant's motion to dismiss the charge of taking indecent liberties with a child. We hold that the trial court did not err in denying Defendant's motions to dismiss as to both charges.

By his seventh assignment of error, Defendant argues that the trial court erred by including in its jury instructions the pattern instruction on false and contradictory statements made by Defendant. We find no merit in this argument.

The choice of jury instructions is a "matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (citations omitted). Here, the trial judge instructed the jury from North Carolina Pattern Jury Instruction 105.21 as follows:

> Members of the jury, the State contends and the defense denies that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or to exculpate himself, and you should consider that evidence along with all of the other believable evidence in this case.

> However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt.

Our Supreme Court has noted that this instruction is proper not only where the defendant's own statements contradict each other, but also where the defendant's statements flatly contradict other relevant evidence. *State v. Walker*, 332 N.C. 520, 538, 422 S.E.2d 716, 726 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993). The probative force of such evidence is that it tends to show consciousness of guilt. *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983). Here, the instruction was proper because Defendant's testimony that he never saw G.H. with her pants down on 23 September 2002 conflicts with statements from Shirley Hodges that Defendant told her G.H. suddenly appeared in front of him with her pants down. It further conflicted with testimony from other witnesses that Defendant told them G.H. had her pants and panties down because she needed to use the bathroom and that she had her panties down and asked him to give her a hug. We agree with the State that these contradictory statements go to the heart of what happened in the outbuilding on the day that G.H. alleged Defendant raped her. The contradictions between Defendant's testimony and the prior statements he made to his wife, law enforcement personnel and social workers were probative not only on the issue of Defendant's credibility, but also because they tended to show consciousness of guilt, thus warranting the challenged instruction. *See, e.g., State v. Scercy*, 159 N.C. App. 344, 583 S.E.2d 339,

disc. review denied, 357 N.C. 581, 589 S.E.2d 363 (2003). For this reason, Defendant has failed to show that the trial court abused its discretion in giving this instruction. Accordingly, this assignment of error is overruled.

Lastly, Defendant argues that the trial court erred in trying and sentencing him on two separate criminal counts when the evidence tended to show at most only one act. This assignment of error likewise has no merit.

Defendant was tried, found guilty and sentenced on charges of first-degree rape and taking indecent liberties with a child. It is settled that the charge of taking indecent liberties is not a lesser-included offense of first-degree rape. *State v. Swann*, 322 N.C. 666, 678, 370 S.E.2d 533, 540 (1988). The elements of the two offenses are not the same because first-degree rape requires vaginal intercourse and taking indecent liberties does not. In addition, committing an act for the purpose of arousing or gratifying sexual desire is not an element of first-degree rape as it is in taking indecent liberties. Further, in *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988), our Supreme Court determined that it was not double jeopardy to punish the defendant for convictions of rape, incest and taking indecent liberties with a minor when all of the convictions were based on one incident.

In the present case, the evidence was sufficient for the jury to determine that Defendant committed separate and distinct criminal acts when he (1) touched G.H.'s genital area with his hand

and placed at least one finger inside G.H., thereby taking indecent liberties; and (2) placed his penis inside her vagina, thus committing first-degree rape. Therefore, Defendant was not placed in double jeopardy by being convicted of both crimes. *See also State v. Rhodes*, 321 N.C. 102, 106-07, 361 S.E.2d 578, 581 (1987) (citation omitted) ("A person is not subject to double jeopardy by being prosecuted for two separate crimes based on the same transaction provided each offense for which he is tried requires proof of a fact which the other offense does not"). We thus overrule this assignment of error.

For the foregoing reasons, we hold that Defendant received a fair trial, free of any error.

No error.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).