NO. COA09-1573

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Haywood County
Nos. 07 CRS 3971, 3972, 3974, 3977 & 54963

CODY JAMES MARLER,

Defendant.

Appeal by defendant from judgments entered 18 September 2008 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 7 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

David L. Neal for defendant.

ELMORE, Judge.

Cody Marler (defendant) was found guilty of first degree sex offense and indecent liberties with a child - specifically, four counts of committing indecent liberties (07 CRS 3971, 07 CRS 3972, 07 CRS 3974, & 07 CRS 54963) and one count of committing a statutory sex offense (07 CRS 3977). Defendant appeals from the judgments entered upon the verdicts and from the trial court's denial of his motion to suppress certain evidence. We find no error.

I.

Defendant was indicted on 10 December 2007 for six counts of indecent liberties (07 CRS 3971-75 & 54963) and two counts of statutory sex offense (07 CRS 3976-77). Following a jury trial, defendant was found guilty of taking indecent liberties with a child for conduct occurring on 1 September 2006 by (1) rubbing his penis in or between the victim's legs (07 CRS 3971), (2) exposing his genitals to the victim (07 CRS 3972), and (3) pulling down the victim's underpants (07 CRS 3974); and (4) rubbing his penis on the victim's buttocks (07 CRS 54963). Defendant was also found guilty of statutory sex offense of a minor under age thirteen for conduct occurring on 1 November 2006 by anal penetration (07 CRS 3977).

Judge Payne sentenced defendant to a term of 240 to 297 months' imprisonment for the statutory sex offense (07 CRS 3977) and a consecutive term of 15 to 18 months for one count of indecent liberties (07 CRS 3971). A suspended sentence of fifteen to eighteen months was imposed for each of the other counts of indecent liberties (07 CRS 3972, 3974, & 54963), to be served consecutively if activated.

Defendant gave notice of appeal of his conviction as to file numbers 07 CRS 3971 and 3977 to this Court on 25 September 2008. By order of this Court on 13 August 2009, writ of certiorari was granted to review defendant's related convictions in file numbers 07 CRS 3972, 3974, and 54963 are also deemed properly appealed.

II.

The charges stem from five to seven separate incidents that occurred between defendant and the victim over the course of

several months beginning in September 2006 and ending in January 2007. The incidents all took place at the Marler household, where defendant's mother babysat the victim while the victim's parents worked. For much of the relevant time period, the victim was four years old and defendant was sixteen years old. Defendant turned sixteen years old on 5 September 2006, during the first month in which incidents occurred. Therefore, defendant *may* have been fifteen years old when taking indecent liberties with the victim. However, by rendering a guilty verdict, the jury determined that defendant was sixteen years old when taking indecent liberties with the victim. The offense dates for three indecent liberties convictions (07 CRS 3971, 3972, and 3974) are "1 September 2006."

During the first of two interviews, on 6 December 2007, defendant agreed to go to the sheriff's office for questions, was driven there by his brother, and was advised that he was there under his own free will and could leave at any time. Before making any admissions, defendant denied any misconduct and revealed to Detective VanDine of the Haywood County Sheriff's Office that he was sexually abused by a relative as a child. Detective VanDine then said:

> I understand why [you] would be afraid to tell the truth, but lying [won't] get [you] out of it . . . . [Your] cooperation [is] the only thing that would encourage me to go to bat for [you] at all . . . . [T]his [is] the only time I am interested in hearing [your] side of the story.

Also during the first interview, Detective VanDine promised defendant that he would not be charged with rape; defendant wrote

apology letters to the victim and the victim's parents, stating that he had been living a lie for two years; and Detective VanDine informed defendant that he had admitted to serious allegations and felony charges would likely result.

The following day, 7 December 2007, defendant was arrested by Detective VanDine and transported to the sheriff's office, where his brother and father waited in the lobby. Defendant agreed to make a second statement and, after being Mirandized, defendant made another statement to Detective VanDine regarding the incidents between himself and the victim that led to the charges. During this recorded custodial interview, defendant was asked in what school year sexual contact with the victim first begin, and the only intelligible part of defendant's response was "I believe . . . " Next, Detective VanDine said, "The beginning of last school year. What we seem to be looking at is September of 2006?" to which defendant responded "yes."

Neither defendant nor the victim could say with any accuracy when the conduct stopped. However, the victim was certain that it stopped before she reached five years of age. Defendant also confirmed that all of the misconduct occurred while the victim was four years old and defendant was fifteen and/or sixteen years old.

III.

The indecent liberties judgments in case file numbers 07 CRS 3971, 3972, and 3974 list offense dates of 1 September 2006. Defendant argues that the judgments are invalid on their face because each bears an offense date at which time defendant would

have been fifteen years old and thus not subject to the indecent liberties statute. N.C. Gen. Stat. § 14-202.1 (2009). Defendant's argument has no merit.

The elements of the crime of indecent liberties with a child are:

> (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. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005); N.C. Gen. Stat. § 14-202.1 (2009). The judgments entered in the case at hand listed an "offense date" of "1 September 2006." Each judgment also indicated defendant's date of birth as "5 September 1990." At the outset, we note that there is no requirement that the judgments list offense dates.

Defendant's first argument – that the judgments should be vacated because they were not first tried in district court – fails because they were felony offenses and therefore not in the original, exclusive jurisdiction of the district court. *State v. Felmet*, 302 N.C. 173, 174, 273 S.E.2d 708, 710-11 (1981).

> When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed.

Id. at 176, 273 S.E.2d at 711 (citations omitted).

Defendant's reliance on the *Felmet* case on this point is misplaced. The defendant in *Felmet* was charged with trespass, a misdemeanor over which the district court had original, exclusive jurisdiction, and an appeal from the district court to the superior court was not included in the record. *Id.* at 175-76, 273 S.E.2d at 710-11. Therefore, the superior court in *Felmet* never had proper jurisdiction over the case because the record did not show that the case first began in district court.

However, defendant in the case at bar was charged with felony offenses for which age is an element and convicted by a jury of those offenses. Defendant's unlawful conduct was determined by a jury – via their guilty verdicts – to have occurred on or after 5 September 2006 when defendant was sixteen, and thus within the proper jurisdiction of the Superior Court.

Defendant is correct that age is an essential element of indecent liberties – specifically, that the offender be "16 years of age or more." N.C. Gen. Stat. § 14-202.1 (2009). However, by characterizing the unlawful conduct as "beginning 1 September 2006," defendant has incorrectly quoted the indecent liberties indictments in 07 CRS 3971, 3972, and 3974. The indictments actually state the conduct as beginning "on or about 9-1-2006." Further, it was for the jury to determine whether defendant was sixteen years old when the conduct occurred, and it clearly determined that he was; the jury was well aware of the importance of the age element, having received clarification from the judge on

the point, and it found defendant guilty beyond a reasonable doubt for the indecent liberties charges in 07 CRS 3971, 3972, and 3974.

Because the trial court had original jurisdiction and the indictment offense dates were "on or about 9-1-2006," we do not vacate the judgment as facially invalid.

Defendant also argues that the trial court never acquired proper jurisdiction because defendant's misconduct was part of a single scheme or plan beginning when defendant was fifteen years old and thus a juvenile, and therefore remained under the exclusive original jurisdiction of the district court. We disagree.

This Court considered a similar argument in *State v. Reber*, 182 N.C. App. 250, 641 S.E.2d 742 (2007). There, the defendant, who was indicted for first degree sexual offense and taking indecent liberties with a child, argued that he was fifteen years old at the time of the offenses and made the same jurisdictional arguments that defendant makes here. *Id.* at 252-54, 641 S.E.2d at 743-45. Based on jury instructions almost identical to those in the case at bar, this Court rejected the defendant's argument that a jurisdictional issue existed because "the trial court instructed the jury that it must find, beyond a reasonable doubt, that defendant committed the acts, if at all, when he was at least sixteen-years-old." *Id.* at 254-55, 641 S.E.2d at 746. Here, evidence presented at trial, including defendant's confession, showed that the incidents occurred after defendant turned sixteen years old on 5 September 2006. The indictments listed that the offense started "on or about 1 September 2006." The great majority

of the evidence shows that the offenses occurred when defendant was at least sixteen years old, and no evidence was introduced at trial that defendant was fifteen when the conduct began. Defendant admitted that the offenses beginning in September 2006 occurred once per month until 2007. Therefore, defendant would have certainly been sixteen during part of the offense if, as he suggests, this Court views the acts as a whole under a theory of a common scheme or plan.

Defendant correctly states that, once the juvenile court has exclusive, original jurisdiction, it keeps that jurisdiction until the case is transferred to superior court. *State v. Dellinger*, 343 N.C. 93, 96, 468 S.E.2d 218, 220 (1996). However, this principle is inapplicable here. In *Dellinger*, where a sixteen-year-old defendant was indicted in superior court because of his age, there was evidence that he was twelve or thirteen years old when he committed the offense, and therefore a minor. *Id.* at 94, 468 S.E.2d at 219. Thus, the district court in *Dellinger* had exclusive, original jurisdiction because the defendant was a minor at the time of the offense and the superior court could have only obtained jurisdiction by transfer from the district court. *Id.* at 96, 468 S.E.2d at 220. However, the case at bar differs dramatically as there was no evidence showing that defendant was fifteen (and thus a minor) at the time the offenses were committed.

The jury determined that the State proved beyond a reasonable doubt that defendant was at least sixteen years old when the

offenses were committed. Therefore, the trial court had proper jurisdiction. We find no error.

IV.

Defendant next argues that the trial court erred by failing to intervene *ex mero motu* to prevent the State from making grossly improper, inflammatory, and unduly prejudicial arguments in its closing argument. Specifically, defendant argues that the State's closing argument appealed to passion and prejudice and included statements of personal opinion and references to matters outside the record. Defendant contends that the State's arguments were prejudicial because of "their individual stigma" and their "general tenor . . . as a whole" and that, as a result of the lower court's failure to intervene *ex mero motu* to correct these grossly improper arguments, defendant's right to due process and fair trial was violated.

Defendant's arguments are based on several remarks made during closing arguments by Assistant District Attorney Reid Brown. Brown mentioned various individuals present in court as "entrusted," such as the judge, bailiff, jury, and prosecutor. Brown stated his duties during closing argument, while informing the jury that he was "entrusted by the [State] . . . with [the victim] to make sure that [he] presented to you a fair trial by the rules, not to crucify this boy . . . ." Brown made references to the victim's father, who "donned a uniform" as a police officer, and to the jury members' "badges," meaning they too were "entrusted." Brown, referring to the victim's father first confronting defendant about

the inappropriate contact, mentioned that the victim's father acted with restraint in not barging into the "boy's house . . . and show[ing] him what it felt like to have some hard steel thing crammed in his anus or . . . mouth." Brown referred to defendant as a "sexual predator," adding "[y]ou know how horrendous this is" and stating that defendant "sodomized" and "terrorized" the victim. During closing, Brown referenced the victim's testimony as "truth." Brown also showed a picture of the victim in an angel costume, which he stated was "not admissible . . . [and] not to [be] consider[ed] evidence," and thereafter referred to the victim as "angel." Defendant did not object to any of these statements or actions, and indeed he made no objections to the prosecution's closing arguments during trial.

> The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. "'[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.'" In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers.

State v. Trull, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (citations omitted; alteration in original); *see also State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002); *State v. Braxton*, 352 N.C. 158, 200, 531 S.E.2d 428, 452-53 (2000). To establish that the State's closing argument was grossly improper,

"defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted).

The scope of permissible prosecutorial closing arguments to the jury is limited by statute:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2009).

While defendant is correct in proclaiming those rights are conferred upon him under the Constitution, defendant is mistaken in arguing that such rights have been violated here. *See* U.S. Const. Amends. IV, V, XIV. A prosecutor has a duty to uphold the right to a fair hearing, and the court is obliged to intervene where the prosecutor's argument is "improper and not warranted by the evidence and is calculated to mislead or prejudice the jury." *State v. Dockery*, 238 N.C. 222, 226, 77 S.E.2d 664, 667 (1953) (citation omitted); *see State v. Smith*, 279 N.C. 163, 166-67, 181 S.E.2d 458, 460-61 (1971).

In *State v. Wiley*, where the prosecutor stated that the victim "'came forward and began to tell the truth and has told pretty much the truth,'" the court found no gross impropriety, noting that

"counsel possesses wide latitude to argue facts in evidence and all reasonable inferences arising from those facts." 355 N.C. 592, 620-21, 565 S.E.2d 22, 42 (2002). In the case at bar, Brown's references to the victim telling the "truth" were supported by the evidence as the victim gave consistent accounts about what happened, defendant admitted those accounts were true, and defendant admitted to sexually molesting the victim. Therefore, this characterization of the victim's testimony constitutes a fair assessment of the evidence and was not a gross impropriety.

As to the State's statements regarding the victim's father seeking revenge, our Courts have held that similar statements in similar circumstances did not constitute gross impropriety. *See, e.g.*, *State v. McCollum*, 334 N.C. 208, 225, 433 S.E.2d 144, 153 (1993) (no gross impropriety where the trial court did not intervene during remarks regarding "the impact of [the victim]'s death on her father and the fact that he wanted revenge"); *State v. King*, 299 N.C. 707, 711-12, 264 S.E.2d 40, 43-44 (1980) (no gross impropriety where the trial court did not intervene in the prosecutor's statement concerning what the dying victim was thinking and what the victim's family experienced following the victim's death).

Defendant's argument that the State's comparison between the victim's father's role and the jurors' roles was grossly improper is also without merit. In *State v. Oliver*, our Supreme Court held that "[m]ercy is not a consideration, just as prejudice, pity for the victim, or fear may be an inappropriate basis for a jury

decision as to guilt or innocence. Arguments which emphasize these factors are properly deemed prejudicial." 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983) (citation omitted). However, unlike in *Oliver*, in the case at hand, Brown did not emphasize the comparison throughout his closing remarks to evoke pity for the victim and make it a central basis for the jury's decision. As such, the statements regarding the victim's father were not so grossly improper as to require the court to intervene *ex mero motu*.

Defendant also argues that the following remarks by Brown were grossly improper: "crucifixion" and "lynch [mob] mentality," the jury's "entrusted" role, a reference to defendant as a "sexual predator," the statement "[y]ou know how horrendous this is," and the description of defendant's having "sodomized" and "terrorized" the victim. When viewed in context, these arguments are not grossly improper. "[A] prosecutor's statements during closing argument should not be viewed in isolation but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Augustine*, 359 N.C. 709, 726, 616 S.E.2d 515, 528 (2005) (quotations and citations omitted).

In *State v. Graves*, the defendant was convicted of rape and sentenced to death. 252 N.C. 779, 114 S.E.2d 770 (1960). On appeal, the Supreme Court reversed and remanded for new trial, finding that the trial court committed prejudicial error in allowing the prosecutor to make closing arguments to the jury that, if they did not impose the death sentence, the community might take

matters into its own hands the next time someone was accused of rape. *Id.* at 780, 114 S.E.2d at 771. The Supreme Court found that the remarks were not supported by the evidence, and were, therefore, error. *Id.* at 781, 114 S.E.2d at 772.

However, defendant's reliance on *Graves* is misplaced. Here, defendant is arguing that the trial court failed in intervening *ex mero motu* as he neither objected to the remarks made during closing arguments nor moved for a mistrial at the trial court level; in *Graves*, the defendant objected and indeed moved for a mistrial. Further, the Court in *Graves* specifically based its ruling on this principle, quoted from the now-repealed N.C. Gen. Stat. § 84-14:

> "Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so, it is the right and duty of the court to correct the argument at the time or in the charge to the jury."

Id. at 781, 114 S.E.2d at 771. Defendant's argument in this case has no such basis.

Furthermore, counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom . . . so as to present his side of the case." *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988) (quotations and citation omitted). Defendant's arguments that such statements led the jury to be more apt to believe any improper arguments therefrom because of this obligation of the prosecutor is invalid. *See State v. Smith*, 279 N.C. 163, 166-67, 181 S.E.2d 458, 460-61 (1971).

Finally, we note that, even assuming *arguendo* that these statements by Brown were improper, in light of the evidence on record, it is unlikely that the closing argument denied defendant due process. In *McCollum*, the prosecutor repeatedly asked jurors to "imagine that the victim was their child[,]" and our Supreme Court assumed *arguendo* that the remarks were improper. 334 N.C. at 224, 433 S.E.2d at 152. The Court found that no due process violation had occurred, however, both due to the weight of the evidence presented at trial and because of what the closing statements did *not* do – specifically, they "did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* Here, defendant confessed to anally and orally penetrating the victim and rubbing his penis on her body. Additional evidence consistent with defendant's admissions included testimony by the victim, the victim's parents, law enforcement officer, nurse, and counselor. And, as in *McCollum*, the State's closing argument did not implicate any other specific rights.

Defendant has not shown that Brown's remarks during closing arguments were so extreme and calculated as to prejudice the jury. *See State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 819 (2008). There is nothing in the transcript regarding Brown's comments that would entitle defendant to a new trial based upon any failure by the lower court to intervene *ex mero motu*. *Id.*

Therefore, because no gross impropriety exists, we find no error on this point.

V.

Defendant next argues that the trial court erred by admitting defendant's statements to law enforcement into evidence. Defendant further argues that evidence of his guilt of the felony statutory sex offense rested heavily on his own confessions and that those confessions should have been suppressed by the lower court because they were involuntary. This argument is irrelevant because there was evidence from the victim, the victim's parents, law enforcement officers, and other expert witnesses from which the jury could have made inferences.

"The trial court's findings of fact are binding if supported by competent evidence in the record. The conclusion of voluntariness, however, is a legal question which is fully reviewable." *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citation omitted).

Defendant argues that the confessions were not voluntary because they were improperly induced, which would prohibit the State from introducing such confessions into evidence. This Court "looks at the totality of the circumstances of the case in determining whether the confession was voluntary." *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 246 (2004) (quotations and citation omitted). An "improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage." *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (citation omitted). The trial court entered uncontested

binding findings of fact concerning defendant's first and second interviews, concluding that defendant's "statements were voluntary," and denied defendant's motion to suppress.

Defendant also argues that the confessions were not voluntary because they resulted from promises by Detective VanDine that induced hope. This argument is rooted in the principle that, as our Courts have repeatedly held, one of the factors that makes a statement involuntary is a promise by a law enforcement officer that induces a defendant to speak out of hope. *See, e.g.*, *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (1967). Defendant's argument is incorrect.

The statements in question were made after Detective VanDine informed defendant of the victim's remarks regarding the incidents and included the following statements: that the detective would go "to bat for" defendant, that defendant could still "get in front" of the charges by explaining what happened, and that defendant would not be charged with rape. In his brief to this Court, defendant relies heavily on *Pruitt*, in which the Supreme Court held that a confession was made involuntarily after noting that an officer's statement that it would be harder on defendant if he did not cooperate certainly "would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess." *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. In *Pruitt*, the police had also "repeatedly told defendant that they knew he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool

around.'" *Id.*

In the present case, Detective VanDine did not accuse defendant of lying, but rather urged him to tell the truth and think about what would be better for him when telling him what he might be charged with. According to *Pruitt*, any inducement of hope must promise relief from the criminal charge to which the confession relates. *Pruitt* at 458, 212 S.E.2d at 102; *see also Gainey* at 84, 558 S.E.2d 463 at 471. Even when viewing Detective VanDine's statements in the circumstances surrounding defendant's confession, there is no evidence on record to imply a conclusion that an emotion of hope was aroused in defendant so as to render the confession involuntary. *See Fuqua* at 228, 152 S.E.2d at 72. The only promise that can be derived from Detective VanDine's statements to defendant is that he would not be charged with the crime of rape – and, indeed, he was not.

In light of the surrounding circumstances, as no relief was promised other than defendant not being charged with rape, and because nothing in the record shows that hope impelled the confession, it can be concluded that defendant's confession was voluntary and not improperly induced.

Defendant also argues that the confession was induced while defendant was in a vulnerable position after having revealed a secret regarding sexual abuse which he endured as a child. Again, this was a voluntary revelation by defendant in an attempt to explain why he began the inappropriate conduct.

Defendant further argues that the second confession, which was

custodial, is inadmissable under the doctrine of the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). However, the trial court's uncontested findings of fact show that defendant's statement made on 6 December 2007 during the first interview was voluntary. The trial court properly concluded that defendant was not in custody during the first interview, that defendant's statements made at that time were voluntary, and that the trial court properly denied defendant's motion to suppress concerning the first interview. Therefore, no "poisonous tree" existed on the first day and, without such, it could bear no inadmissable fruit for the second day interview.

Additionally, the trial court's uncontested findings of fact regarding defendant's second interview supported the conclusion that defendant's statement on 7 December 2007 was voluntary. The trial court properly concluded that defendant was in custody during the second interview, that defendant properly waived his Miranda rights, and that defendant's statements were voluntary. Defendant's further reliance on *Pruitt* fails here as well. When viewing the second confession in light of the entire record, nothing from Detective VanDine's remarks the previous day induced hope or improperly induced defendant's waiver of his Miranda rights, as the only promise, that defendant not to be charged with rape, was irrelevant. Therefore, the trial court properly denied defendant's motion to suppress the second interview.

Defendant further argues that State cannot prove that

admitting defendant's confession was harmless beyond a reasonable doubt - at least with regard to the felony statutory sex offense. In the confession, defendant stated that, on one occasion, his penis slipped about an inch into the victim's bottom. Defendant contends that there would have been no definite evidence of penetration to support the sex offense felony at trial without the confession. However, there was testimony from the victim and other witnesses from which an inference could be made, such as the victim's remarks that "[defendant] put his tail in her back butt," "it hurt," and the victim said to stop.

In conclusion, defendant's confessions were voluntary and not improperly induced. Therefore, defendant's statements to law enforcement were properly admitted into evidence by the trial court and we find no error.

VI.

For the foregoing reasons, we hold that defendant received a trial free from error.

No error.

Chief Judge MARTIN concurs.

Judge BRYANT concurs in result only.

Report per Rule 30(e).