IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1312

Filed: 1 March 2016

New Hanover County, Nos. 12 CRS 61266; 13 CRS 2018-19, 50425-27

STATE OF NORTH CAROLINA

v.

HAROLD LAMONT FLETCHER

Appeal by defendant from judgments entered 23 May 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 20 May 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Laura E. Crumpler, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

CALABRIA, Judge.

Harold Lamont Fletcher ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of one count of first degree sexual exploitation of a minor ("sexual exploitation"), one count of attempted statutory sexual offense with a 13, 14, or 15 year old ("attempted statutory sex offense"), eighteen counts of secret peeping, and six counts of indecent liberties with a child ("indecent liberties"). Defendant contends (1) the trial court abused its discretion by allowing the State—

over objection—to misstate the law regarding an essential element of sexual exploitation in its closing argument; and (2) the trial court erred by denying his request for an instruction that the "oral intercourse" element of sexual exploitation required "penetration, however slight." We find no error.

I. Background

Defendant and his wife Tricia ("Mrs. Fletcher") were married in 2002 while defendant was serving in the military. Before and during their marriage, the couple lived with Matt and Diane[1] (collectively, "the children"), Mrs. Fletcher's two children from a previous relationship. The children called defendant "Dad." In 2005, defendant and family moved into a three-bedroom house in Wilmington, North Carolina. In 2007, when defendant retired from active duty, he served in the Coast Guard Reserve, and as a deputy sheriff with the New Hanover Sheriff's Department.

When Diane was in the third or fourth grade, she began to notice defendant entering her bedroom at night while she was sleeping. Diane would wake up to defendant standing over her while she lay in her bed. One night she felt defendant's hand on her chest. Another night, defendant entered Diane's room and stuck his finger in her mouth while she slept, claiming he was picking a piece of lint out of her mouth. Subsequently, Diane noticed a small red light in her bedroom window. A few weeks later, Diane saw a camera outside her bedroom window and told her mother

[1] Pseudonyms are used to protect the minors' identities.

about the red light and about the camera. Both times defendant was outside the residence. After the second incident, Diane switched bedrooms with her brother, because his room faced the backyard instead of the street.

Mrs. Fletcher was aware of defendant's addiction to pornography, since defendant attended counseling that focused primarily on addressing his addiction to viewing pornography. Mrs. Fletcher also attended counseling for families of sex addicts. After Diane spoke with a counselor, the New Hanover Department of Social Services ("DSS"), the New Hanover County Sheriff's Department ("NHSD"), and the State Bureau of Investigation ("SBI") became involved.

After the SBI spoke with defendant about the allegations and obtained consent to search his computer, it discovered several images depicting Diane in various states of undress, including pictures of her in the bathroom and her bedroom. When the SBI interviewed defendant a second time, he admitted to taking the images of Diane but denied inappropriately touching her.

Subsequently, the SBI searched the Fletcher residence and discovered four particularly disturbing images on a digital external hard drive. All four showed defendant holding his penis in his hand up against Diane's partially opened mouth—as she slept—unaware of defendant's actions. Defendant was arrested and charged with sexual exploitation and statutory sex offense, as well as multiple counts of indecent liberties with a child and secret peeping.

At trial, defendant admitted to the charges of secret peeping and indecent liberties with a child. However, defendant did not admit to statutory sex offense nor sexual exploitation, claiming that he had digitally manipulated the images of his penis on or near Diane's mouth by using computer software. Testimony from defendant's expert witness, a digital forensics expert, was the only evidence defendant presented to support his defense. The expert testified that it appeared defendant was proficient at using Photoshop, graphics editing software, and that it was "highly likely" that one of the images had been manipulated using Photoshop to part Diane's lips to a farther degree. However, he explained that because the images contained no "computer forensic . . . data and [there was no] no source image[,]" he "cannot determine whether or not [a single image] was edited without obvious signs of photo manipulation."

On cross-examination, the expert conceded that his conclusion that one of the images depicted defendant holding his penis "an eighth of an inch away from [Diane's] lips" was merely "an educated guess," which derived from the expert using Photoshop to zoom the image. In addition, when the State asked if the expert could form an opinion as to whether any of the challenged images had been digitally manipulated, the expert conceded that he "cannot form an opinion" because there were not two images so similar that would provide "a before and an after type of effect[.]" Defendant did not testify.

During the charge conference, defendant's attorney requested a limiting instruction for defining the "oral intercourse" element of sexual exploitation as different from "fellatio" in that "oral intercourse" required "penetration, however slight." The trial court denied defendant's request and informed the parties he would instruct the jury that, for first degree sex offense, fellatio is a touching, and that for sexual exploitation, the sexual activity was oral intercourse, without any other instruction defining the phrase. The trial court allowed both parties to argue the definitions of oral intercourse and fellatio.

During closing argument, the prosecutor argued that the minor never actually had to be involved in the sexual act itself in order to sustain a conviction under first degree sexual exploitation:

> [It d]oes not matter if the image was altered. If I take a picture of a child from the newspaper at a tennis match and I go back to my house and I take a picture of myself unclothed and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography.

Defendant immediately objected to this definition of the law. However, the court overruled the objection. Defendant's attorney argued that the images did not depict an actual event that took place, but rather that the photos were digitally manipulated so as to only simulate an actual event. Defense counsel further asserted that the images did not actually depict defendant's penis touching Diane's lips or mouth. The trial court instructed the jury on the elements of sexual exploitation.

The jury returned verdicts finding defendant guilty of one count of first degree sexual exploitation of a minor, six counts of indecent liberties with a child, eighteen counts of secret peeping, and one count of attempted statutory sex offense. The trial court arrested judgment on the secret peeping offenses and sentenced defendant to 157-198 months for attempted statutory sex offense, 73-97 months for first degree sexual exploitation of a minor, and 16-20 months for each of the six indecent liberties offenses. Defendant's sentences were to be served consecutively in the custody of the North Carolina Division of Adult Correction. The court also ordered defendant to register as a sex offender for a thirty-year period. Defendant appeals.

II. Analysis

A. Closing Argument

Defendant contends the trial court abused its discretion by allowing the State during closing argument to misstate the law to the jury regarding an essential element of sexual exploitation. Defendant specifically challenges the prosecutor's statements that "[it] does not matter if the image was altered" and that "[t]he child . . . never [had] to actually be involved in the sexual act itself[,]" and contends the jury relied on this material misstatement of an essential element of sexual exploitation when they found defendant guilty of the offense. Defendant contends the trial court abused its discretion in overruling defendant's objection to these statements. We disagree.

"On appeal, '[t]he standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection.' " *State v. Brown*, 182 N.C. App. 277, 283, 641 S.E.2d 850, 854 (2007) (quoting *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citation omitted)). "Under this test, we reverse a trial court only upon a showing that its ruling could not have been the result of a reasoned decision." *State v. Augustine*, 359 N.C. 709, 734, 616 S.E.2d 515, 533 (2005) (citation and quotation marks omitted). "When applying this standard to closing arguments, this Court first determines if the remarks were improper. Improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence." *Id.* (ellipses and brackets omitted). In addition, "[i]ncorrect statements of law in closing arguments are improper[.]" *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995) (citation omitted). Second, this Court must "determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Augustine,* 359 N.C. at 734, 616 S.E.2d at 533 (citation omitted).

"Generally, 'prosecutors are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *State v. Goss,* 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation and quotation marks omitted), *cert. denied,* 555 U.S. 835, 172 L. Ed. 2d 58

(2008). However, prejudice requiring a new trial may be found "where the defendant can show the prosecutor's comments . . . so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Nance,* 157 N.C. App. 434, 440, 579 S.E.2d 456, 460-61 (2003) (citation and internal quotation marks omitted). Nonetheless, the trial court's proper instruction on the law may cure any potential prejudice to the defendant which may have resulted from an alleged misstatement of law in the prosecutor's closing argument. *See State v. Phillips*, 365 N.C. 103, 140, 711 S.E.2d 122, 148 (2011) (concluding "[a]ny impropriety in the [prosecutor's] argument was cured by the court's correct jury instructions on [the issue]"); *State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 469 (1988) (concluding trial court's proper instruction cured any potential prejudice to the defendant that may have been caused by prosecutor's misstatement of law) (citations omitted); *State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91 (1986) (same).

In the instant case, defendant was charged with first degree sexual exploitation of a minor pursuant to N.C. Gen. Stat. § 14-190.16, which provides that a person commits the offense

> if, knowing the character or content of the materials or performance, he:
>
> (1) Uses . . . a minor to engage in . . . sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16(a)(1) (2013). "Visual representation" is not statutorily defined; however, defendant points to this Court's decision in *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 566, 351 S.E.2d 305, 319 (1986), *aff'd*, 320 N.C. 485, 491, 358 S.E.2d 383, 385 (1987), as authoritatively construing the phrase to mean "[t]he 'visual representation' must be tied to the actual exposure of the minor to sexual activity." On this basis, defendant challenges the prosecutor's remark that the jury could find defendant guilty of sexual exploitation "even if it determined that the images were created or manipulated so that it only *appeared* as though [defendant] engaged in oral intercourse" with Diane.

The prosecutor's argument (emphasis added) provided in pertinent part:

> The . . . charge is sexual exploitation of a minor. That's a very fancy way for saying manufacturing or producing child pornography. You have to know the content of the material, using a minor for the purposes of producing material that contains a visual representation depicting sexual activity. *Does not matter if the image was altered*. If I take a picture of a child from the newspaper at a tennis match and I go back to my house and I take a picture of myself unclothed and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography. *The child does* [sic] *never have to actually be involved in the sexual act itself.*

According to defendant, this was a material misstatement of the law, because *Cinema I Video* stands for the proposition that "any 'visual representation' giving rise to a charge of first degree sexual exploitation must 'involve live performance or

photographic or other visual representation of live performances' " of minors actually exposed to sexual activity. *Cinema I Video*, 83 N.C. App. at 566, 351 S.E.2d at 319 (quoting *New York v. Ferber*, 458 U.S. 747, 765, 73 L. Ed. 2d 1113, 1127 (1982)). We disagree.

In *Cinema I Video*, sellers and renters of sexually explicit videotapes filed an action for a declaratory judgment regarding the recently legislated amendments to North Carolina's obscenity and child pornography statutes alleging that they were unconstitutional. *Id.* at 549-50, 351 S.E.2d at 309. Regarding the criminal offenses of sexual exploitation of minors, this Court addressed whether the State could prosecute a charge when the material depicting minors engaged in sexual activity did not require the use of a live minor. The plaintiffs argued the statutory definition of "material," which included "drawings . . . or representations" was overly broad in that neither a drawing nor a representation would be produced by the exploitation of real children as required under *Ferber*. *See Ferber*, 458 U.S. at 764-65, 73 L. Ed. 2d at 1127 (permitting states to proscribe the distribution of child pornography which involved "live performance or photographic or other visual reproduction of live performances" of minors engaging in sexual activity).

This Court acknowledged and agreed with the plaintiffs that "the [*Ferber*] Court . . . noted that 'depictions of sexual conduct otherwise not obscene, which do not involve live performance or photographic or other visual reproduction of live

performances, retains First Amendment protection.' " *Cinema I Video*, 83 N.C. App. at 566, 351 S.E.2d at 319. Accordingly, this Court interpreted the provisions of N.C. Gen. Stat. §§ 14-190.16 and .17 that "refer to a visual representation of a minor" to be "referring to a representation of a live person under 18 years of age" and held that those provisions "require[d] the exploitation of a *live* minor to sustain convictions thereunder." *Id.* However, *Cinema I Video*'s interpretation of the phrases "visual representation of a minor" and "visual representation depicting a minor," pursuant to N.C. Gen. Stat. §§ 14-190.16 and .17, respectively, carries no authoritative construction of the phrase at issue in this case: "live representation depicting [sexual] activity" pursuant to N.C. Gen. Stat. § 14-190.16. Therefore, we cannot conclude that the prosecutor misstated the law in light of *Cinema I Video*.

In the instant case, it is necessary to determine whether the prosecutor's remarks were reasonable inferences of the law. *See* N.C. Gen. Stat. § 15A–1230(a) (2015) ("An attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue."); *Alston*, 341 N.C. at 239, 461 S.E.2d at 709-10 ("Counsel may . . . argue to the jury the law . . . and all reasonable inferences drawn therefrom.") (citation omitted). We conclude that they were. The prosecutor's challenged remarks served to rebut defendant's "simulated sexual activity" defense by arguing reasonable inferences that derived from the statutory language of N.C. Gen. Stat. § 14-190.16, which had not previously been

defined. The prosecutor's statements that it "[did] not matter if the image was altered" and that "the child . . . never [had] to actually be involved in the sexual act itself" were neither correct statements of the law that had been authoritatively confirmed, nor were they misstatements of the law. It was reasonable for the prosecutor to construct inferences from the language of the statute and its purpose. Specifically, by prohibiting the production of child pornography that contains a "visual representation" depicting a minor engaged in sexual activity, this would include digitally manipulated photos that had been produced without a minor being *actually engaged* in sexual activity, provided that the image depicted an *actual minor* engaged in sexual activity. This was a permissible inference of law properly left for counsel to argue and the jury to determine until our legislature or our appellate courts conclude otherwise by legislating or interpreting in due course.

Furthermore, to the extent that the prosecutor's argument could be construed as a misstatement of law, it was remedied by the trial court's multiple reiterations that it will instruct on the law and its instructing was in accordance with the pattern jury instructions. "We presume that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (1993) (citation and quotation marks omitted). Prior to closing arguments, the trial court instructed the jury: "It is now time for the final

arguments of the lawyers. *At the conclusion of these arguments I will instruct you on the law in this case*[.]" In addition, the prosecutor reiterated during her closing argument that the trial court is the final authority on the law:

> [Prosecutor]: Really quickly, [defense counsel] touched on this and the Judge is going to talk to you a lot more. She's going to give you the instructions but I just want to kind of give you a quick preview of the statutes that you're going to encounter. And it's up to you, of course, but I urge you not to take too many notes because, like I said, the Judge is going to read you the instructions again.

After closing arguments, the trial judge ordered a recess and then explained to the jury: "[W]hen you come back *I will give you the instructions on the law*[.]" After returning from recess, the trial judge explained: "It is now your duty to decide from this evidence what the facts are. *You must then apply the law which I'm about to give to you* to those facts. *It is absolutely necessary that you understand and apply the law as I give it to you* and not as you think it is or as you might like it to be."

During the jury charge, when the trial judge instructed on "first degree sexual exploitation of a minor," he followed the pattern jury instructions, *see* N.C.P.I.—Crim. 238.21, virtually verbatim:

> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant used, induced, coerced, encouraged or facilitated a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity. Oral intercourse is sexual activity.

> Second, that that person was a minor.
>
> And third, that the defendant knew the character of the material.
>
> If you find from the evidence beyond a reasonable doubt that . . . the defendant used, induced, coerced, encouraged or facilitated a minor to engage in sexual activity for the purpose of producing material that contains a visual representation depicting sexual activity and that the defendant knew the character of the material, it would be your duty to return a verdict of guilty.

The trial judge then provided the jury with a copy of his instructions to bring into the jury room. Significantly, after the jury charge, the trial judge asked if either counsel had "[a]ny additions or corrections or comments regarding the instructions," to which defendant replied: "No."

We conclude the trial judge's instructions stated in accordance with the pattern jury instructions, which followed the prosecutor's challenged statements and were prefaced on multiple occasions with a direction to apply only the law given by the court, cured any alleged misstatement of law during the prosecutor's closing argument. *See State v. Phillips*, 365 N.C. 103, 140, 711 S.E.2d 122, 148 (2011) (citation omitted); *see also State v. Penland*, 343 N.C. 634, 658, 472 S.E.2d 734, 747 (1996) (citation omitted). In addition, the prosecutor during closing argument reminded the jury that the judge will instruct on the law, and the judge provided defendant with the opportunity to address any concern he may have had after the

jury charge, but defendant failed to do so. For these reasons, defendant has failed to show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Therefore, we conclude the trial court did not abuse its discretion in failing to sustain defendant's objection. We overrule defendant's challenge.

As a secondary matter, whether an identifiable minor must be actually exposed to sexual activity, or whether an identifiable minor may be merely a virtual victim of digital imaging technology (*e.g.*, by "compositing" or "morphing" images, as discussed below), in order to sustain a conviction of first degree sexual exploitation appears to be an issue of first impression in North Carolina. However, this issue is not squarely before us, since the disposition of defendant's challenge to the prosecutor's statements does not require us to address this issue, and since defendant has not argued insufficiency of the evidence on appeal. Nonetheless, we note that the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 152 L. Ed. 2d 403 (2002) struck down as unconstitutionally overbroad two provisions of the federal Child Pornography Prevention Act of 1996, which effectively proscribed "child pornography that does not depict an *actual* child[,]" such as "virtual child pornography," which is produced by using computer imaging technology to "create realistic images of children who do not exist[,]" as well as pornography "created by using adults who look like minors[.]" *Id.* at 238, 152 L. Ed. 2d at 414. The High Court

acknowledged the potential issues raised by "computer morphing," what the Court defined as the "alter[ing of] innocent pictures of real children so that the children appear to be engaged in sexual activity," but failed to address whether such images were entitled to First Amendment protection. *Id.* at 242, 152 L. Ed. 2d at 416.

We also note that, in the instant case, it appears that defendant's theory of how he produced the challenged images by manipulating photos using Photoshop might fall under what has been described as "compositing" and "morphing" images. Specifically, as to defendant's theory the challenged image was created by taking a photo of himself holding his penis and superimposing it upon the photo of Diane sleeping in her bedroom, this might be more accurately characterized as "compositing" an image. As to defendant's theory of altering the photo of Diane sleeping by using a Photoshop tool to part Diane's lips to a greater degree, this might be more accurately defined as "morphing" an image. *See United States v. Rearden*, 349 F.3d 608, 613 (9th Cir. 2003) (distinguishing images that had been "composited (which involves the altering of images by, for example, transferring the head of one person to the body of another) or morphed (which . . . involves the creation of an intermediate image from two other images)").

Furthermore, we note that the Supreme Court in *United States v. Williams*, 553 U.S. 285, 170 L. Ed. 2d 650 (2008) recognized that "[t]he emergence of new technology and the repeated retransmission of picture files over the Internet could

make it nearly impossible to prove that a particular image was produced using real children[,]" and upheld a federal statute proscribing "a visual depiction of an *actual minor* engaging in sexually explicit conduct," where "sexually explicit conduct" could be "actual or *simulated*[.]" *Id.* at 290, 170 L. Ed. 2d at 661 (citing 18 U.S.C. § 2252A(a)(3)(B)(ii) (2000 ed., Supp. V) and § 2256(2)(A)) (emphasis added). The Court interpreted "simulated" sexually explicit conduct not as sexually explicit conduct that is "merely suggested, but rather . . . that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id.* at 297, 170 L. Ed. 2d at 665. In upholding these provisions, the Court explained:

> Critically, unlike in *Free Speech Coalition*, § 2252A(a)(3)(B)(ii)'s requirement of a "visual depiction of an *actual minor*" makes clear that, although the sexual intercourse may be simulated, it must involve actual children[.] This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse."

Id. (emphasis added).

B. Jury Instructions

Defendant next argues that the trial court erred in instructing the jury as to the sexual activity element of sexual exploitation. Defendant asserts that the trial court erred by denying his request to instruct the jury that "oral intercourse" is

different from "fellatio," in that "oral intercourse" requires a finding by the jury of "penetration, however slight." We disagree.

On appeal, this Court reviews a trial court's ruling regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "[T]he trial court is not required to give the exact instructions requested by a defendant. Instead, requested instructions need only be given in substance if correct in law and supported by the evidence." *State v. Bivens*, 204 N.C. App. 350, 352, 693 S.E.2d 378, 380 (2010) (citation and quotation marks omitted). Our Supreme Court has recently explained that "in giving jury instructions, 'the court is not required to follow any particular form,' as long as the instruction adequately explains 'each essential element of the offense.' " *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (quoting *State v. Avery,* 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985) (citation and quotation marks omitted)). In addition, although pattern instructions have "neither the force nor the effect of law," *State v. Warren,* 348 N.C. 80, 119, 499 S.E.2d 431, 453, *cert. denied,* 525 U.S. 915, 142 L. Ed. 2d 216 (1998), North Carolina courts frequently "approve[] of jury instructions that are consistent with the pattern instructions[.]" *Walston*, 367 N.C. at 731, 766 S.E.2d at 319 (citations omitted). "[C]hoice of 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 (2002) (citation omitted).

In this case, first degree sexual exploitation of a minor required the State to prove that (1) the defendant "use[d], employe[d], induce[d], coerce[d], encourage[d], or facilitate[d] a [person] to engage in sexual activity for a live performance or for the purpose of producing material that contain[ed] a visual representation depicting this activity;" (2) the person was a minor; and (3) the defendant knew the character or content of the performance or material. N.C. Gen. Stat. § 14-190.16(a)(1) (2013). "Sexual activity" includes "[v]aginal, anal, or oral intercourse[.]" N.C. Gen. Stat. § 14-190.13(5)(b). Defendant correctly points out that "oral intercourse" is not statutorily defined, nor has it been defined by our case law, whereas "fellatio" has been defined by our courts to mean "any touching of the male sexual organ by the lips, tongue, or mouth of another person." *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564 (1992) (citations omitted).

Defendant contends that because our courts have interpreted "vaginal intercourse" and "anal intercourse" to require penetration, *see State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984) (interpreting "vaginal intercourse" to mean the "*slightest* penetration of the female sex organ by the male sex organ"); *see also State v. Atkins*, 311 N.C. 272, 275, 316 S.E.2d 306, 308 (1984) (interpreting "anal intercourse" as requiring penetration of the anus), the trial judge should have instructed the jury that "oral intercourse" required some evidence that the defendant's male sex organ penetrated Diane's mouth. We disagree.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (quoting *Burgess v. Your House of Raleigh, Inc.,* 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)).

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). "In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *State v. Tew*, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990) (citation omitted). "Although the title of an act cannot control when the text is clear, the title is an indication of legislative intent." *Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) (citations omitted). Furthermore, "[w]hile a criminal statute must be strictly construed against the State, the courts must nevertheless construe it with regard to the evil which it is intended to suppress." *Tew*, 326 N.C. at 739, 392 S.E.2d at 607 (citation omitted).

In the instant case, defendant fails to cite any legal authority interpreting "oral intercourse" as requiring "penetration" and nothing in the statutes governing the

offenses of sexual exploitation indicates such a requirement. We recognize that the legislature has elsewhere used "fellatio" rather than "oral intercourse." *See* N.C. Gen. Stat. § 14-27.1 (2013) (defining "sexual act" as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]"). Nonetheless, we determine the title of the act to be an appropriate indicator of meaning.

On 11 July 1985, the General Assembly passed House Bill 1171, entitled: "An Act to Strengthen the Obscenity Laws of this State and The Enforcement of Those Laws, To Protect Minors From Harmful Material That Does Not Rise to The Level of Obscenity, and *To Stop the Sexual Exploitation and Prostitution of Minors*." 1985 H.B. 1171 (emphasis added). The plain language of the act makes clear that the legislature drafted the act with an intent to eliminate the sexual exploitation of minors. Furthermore, this Court has recently reiterated the evil that our sexual exploitation statutes are intended to suppress:

> [Our c]hild pornography laws . . . are designed to prevent the victimization of individual children, and to protect minors from the physiological and psychological injuries resulting from sexual exploitation and abuse. . . . [C]hild pornography poses a particular threat to the child victim because the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place.

State v. Williams, 232 N.C. App. 152, 159, 754 S.E.2d 418, 423-24 (quoting *State v.*

Howell, 169 N.C. App. 58, 63, 609 S.E.2d 417, 420-21 (2005)), *appeal dismissed*, *disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014). Given the ambiguity of the phrase and these indicators of meaning, we refuse to impose the requirement that when the State proceeds under "oral intercourse," it must prove that the victim's mouth was penetrated.

Dispositively, the trial court's challenged jury instruction mirrored the pattern jury instructions for first degree sexual exploitation of a minor. *See* N.C.P.I.—Crim. 238.21 ("First, that the defendant [used] [employed] [induced] [coerced] [encouraged] (or) [facilitated] a person to [engage in] . . . sexual activity[] for . . . [the purpose of producing material[] that contains a visual representation depicting this activity]. (*Define sexual activity,* i.e.*, masturbation*) is sexual activity."). As stated above, the trial judge instructed that "[o]ral intercourse is sexual activity[,]" and instructed on each essential element of the offense, in accordance with the pattern jury instructions. Furthermore, prior to instructing the jury, the judge heard both parties' arguments on this issue and concluded:

> And under the sexual exploitation of a minor charge, the indictment indicates that the sexual activity was oral intercourse, therefore I am going to instruct the jury that the sexual activity was oral intercourse. I'm not going to give any further definition of oral intercourse but I am going to allow counsel to argue definitions of oral intercourse and fellatio.

In summary, the trial judge was not required to incorporate defendant's request, because there is no statutory or other legal basis for the instruction, and the trial judge properly instructed on each essential element of the offense in accordance with the pattern jury instructions. Therefore, we conclude that the trial judge did not abuse his discretion in instructing the jury.

III. Conclusion

Defendant has not shown that the prosecutor's remarks during closing argument were improper. The alleged misstatements of law were reasonable inferences derived from the sexual exploitation statute and aimed to refute the defense presented that the images merely depicted "simulated" sexual activity. Furthermore, any potentially prejudicial error in the jury instructions was cured by the trial judge's proper instruction on the offense of sexual exploitation. Therefore, the trial judge did not abuse his discretion in overruling defendant's objection during the prosecutor's closing argument.

In addition, the trial court did not err by denying defendant's request to instruct that the "oral intercourse" element of sexual exploitation required penetration, where defendant has not argued any statutory or judicial authority for this interpretation. We conclude that the trial court did not abuse its discretion in denying defendant's request and instructing the jury in accordance with the pattern jury instructions.

NO ERROR.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).