IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1291

Filed: 2 August 2016

Alamance County, No. 14 CRS 053365-66

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ROGER COLE, JR., Defendant.

Appeal by defendant from judgment entered 15 April 2015 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Public Defender Jennifer Harjo and Assistant Public Defender Brendan O'Donnell for defendant.

ELMORE, Judge.

A jury found defendant guilty of taking indecent liberties with a child and sexual offense with a child by an adult. On appeal, defendant argues that the trial court committed plain error by failing to instruct the jury on attempted sexual offense with a child because the evidence of penetration was ambiguous. We conclude that defendant received a trial free from error.

I. Background

On 18 June 2014, Christopher R. Cole, Jr. (defendant) confessed to the Burlington Police that he had inappropriately touched a ten-year-old girl, Kelly.[1] Defendant told Detectives Kology and Petty that the most recent incident occurred earlier in June, when he was babysitting Kelly and her other siblings. While Kelly was watching television in her parents' bedroom, defendant sat down behind her, slid his hand under her clothes, and touched her vaginal area.

Defendant initially denied that there was any penetration, stating that he only touched Kelly "on the outside of her vagina." When asked again whether there was penetration, defendant responded, "I'm 95 percent sure that I didn't go in." The detectives later clarified that "penetration" did not necessarily mean penetration of the vaginal canal, which lead to the following exchange:

> Defendant: I didn't like, you can test her, and she'll still be a virgin. If that is what you're—I never went in.
>
> Kology: Okay. Well in understanding that penetration doesn't have to be—that she's not a virgin anymore—even if it's a slight penetration, that's still penetration. Okay, so as far as the definition of penetration.
>
> Defendant: No I just rubbed the, the outside. I don't think it went in.
>
> Kology: Okay. You don't think it did.
>
> Defendant: Right, I am not sure, I was, I don't think, like I

[1] We use this pseudonym to protect the identity of the minor child.

> said, I wasn't thinking of anything. I don't think it went in in any type of way.
>
> Petty: Just so we get a clear understanding—and it's kind of like the elephant in the room with you talking about penetration—um, you are obviously familiar with the female body parts?
>
> Defendant: Correct.
>
> Petty: And how females are built. Um, you've got the labia which is the outside of—
>
> Defendant: You talking about actual penetration of the canal?
>
> Petty: Well, not the actual canal, you've got the labia . . . and then the clitoris and then actually into the vaginal canal. Did you maybe penetrate to the point of the clitoris and not actually enter the vaginal canal, type thing? Is that what you are hung up on?
>
> Defendant: Yeah, because I never went in the vaginal—I think just more like the—
>
> Petty: —between the labia and the clitoris—
>
> Defendant: —the clitoris, which is right there [motioning]. I was confused as to what you're talking about, penetration, that makes it a lot better.

At trial, Kelly testified that defendant touched her vagina on at least five different occasions—the latest occurring in June 2014. She described how defendant touched her during the incident in June, stating that "his hand went around the hole,

you know that hole in the vagina." When asked for more detail, Kelly gave a demonstration to the jury and testified as follows:

> A: Okay. So, um, I don't know what they're called but my vagina, he would take his pointer finger and his ring finger and open it a little bit and then just feel around there. He wouldn't like go in there, in the hole, but just feel around there and it was not painful. It just felt uncomfortable. He would just feel around there.
>
> Q: Okay. So for the record, you are saying he used three fingers to rub around and two outside fingers you said to open up?
>
> A: Yes.
>
> Q: And then middle finger would do what?
>
> A: Touch around the opening.
>
> Q: Okay. And when you said would it be—well, let me ask you. Do you know the difference between the outside and the inside?
>
> A: Yes.
>
> Q: Of your private parts?
>
> A: Yes.
>
> Q: Okay. And I'll just ask you, did it go further than just being outside of your private parts?
>
> A: Um, yes, but not that—not that far.
>
> . . . .
>
> Q: Now, I just need to be clear about that was the last time that you just gave us a description of[,] is that right?

A: Right.

Q: Okay. And you told us that it happened on different times. About six, I believe you testified to. About six different times. Is that what you said?

A: Five.

Q: Five. Okay. Thank you. Now, do you remember if there was any difference between what he would do what you just now described the last time, the other times would he do something different or was it the same or what would he do?

A: Different.

Q: It was different. Okay. And could you tell us what you mean by he would do something different?

A: Yes. He would just rub the outside.

Q: Okay. And so was there any inside previously than June? I want to make sure I'm clear with you. You described you know the difference between inside and outside, right?

A: Right.

Q: Okay. And you just said that on other occasions he used to rub the outside?

A: Right.

Q: Okay. Did he ever go inside on other occasions?

A: Yes, but not too far. Like, just rubbing the outside of it, not, like, going inside.

Q: Okay. Are you talking about as far as he did in June?

A: Yes.

Q: Okay. But not further?

A: Right.

At the conclusion of trial, the jury found defendant guilty on two counts of taking indecent liberties with a child and one count of sexual offense with a child by an adult. The trial court sentenced defendant to 300 to 372 months of imprisonment. He gave notice of appeal in open court.

II. Discussion

Defendant argues that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of attempted sexual offense with a child because when viewed in the light most favorable to defendant, the evidence of penetration was "ambiguous, equivocal, and conflicting." Accordingly, a rational jury could, and would, have acquitted defendant of the substantive offense and convicted him of the lesser offense of attempt. In response, the State maintains that a lesser-included instruction was not necessary in this case because "there was clear, positive, unambiguous, unequivocal, and non-conflicting evidence" of penetration.

Because defendant did not request an instruction on attempt, we review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To

> show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 14-27.28(a) (2015), formerly section 14-27.4A, "[a] person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." A "sexual act" includes "the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.20(4) (2015). Mere separation of the labia is sufficient to prove penetration. *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005).

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citations omitted). "An act must be done with specific intent to commit the underlying crime before a defendant may be convicted of an attempted crime." *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (2003) (citation omitted). "[T]he intent required for attempted statutory sexual offense is the intent to engage in a sexual act." *Id.* at 86, 579 S.E.2d at 900.

Even in the absence of a request from counsel, a trial court must instruct the jury on a lesser-included offense if the evidence, viewed in the light most favorable to the defendant, "would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986) (citation omitted); *see also State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000); *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). If, however, "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718–19 (1980) (citation omitted).

In arguing that the evidence of penetration was ambiguous, defendant first points to his statements to the detectives. According to defendant, his "reference to the clitoris merely indicated that he was agreeing to the detective's definition of penetration and not, by implication, that he was admitting to touching the clitoris." Defendant also claims that Kelly's testimony describing how defendant touched her "around the opening" could be interpreted as "touching the *outside* of the genital opening and, therefore, a lack of penetration." In addition, defendant argues that Kelly's remaining testimony casts doubt on her every use of the word "in" or "inside." Although defendant concedes that the testimonial evidence supports a finding of

digital penetration, he contends that in the light most favorable to the defense, the evidence of penetration was ambiguous such that the trial court should have included an instruction for attempted sexual offense with a child.

After reviewing the interrogation video, we are not convinced that defendant's statement to the detectives is subject to competing interpretations. It is sufficiently clear that defendant denied penetrating the vaginal canal. But once the detectives clarified that "penetration" also includes entry "to the point of the clitoris," defendant both acknowledged his confusion and admitted to penetrating the genital opening: "Yeah, cause I never went in the vaginal—I think just more like the—the clitoris."

As for Kelly's testimony, we also disagree that her statements can be reasonably interpreted in the way urged by defendant. Kelly testified unequivocally that in June, defendant used his index and ring fingers to separate her labia, and touched the opening of her vaginal canal with his middle finger. Her statement that the touching went "inside" her private parts but "not that far" cannot be reasonably interpreted to mean that defendant touched her only "above or below the genital opening." It is equally clear from the final portion of Kelly's testimony, *supra*, that defendant's finger would penetrate beyond the labia and vulva, but would not go as far as it did in June, when he "rubb[ed] the outside" of her vaginal canal. The State maintains, and we agree, that "overall, Kelly's testimony showed that defendant penetrated the labia and clitoris," which is all that is required for a "sexual act."

Assuming *arguendo* that the testimony regarding penetration is ambiguous, the evidence here does not support a conviction for attempted sexual offense with a child by an adult. Relying on unpublished opinions and rape cases, defendant asserts that "in a sexual offense case, the jury must be instructed on the lesser-included offense of attempted sexual offense when there is some doubt or conflict about the element of penetration." In each of the cases cited by defendant, however, the evidence showed that the defendant *intended* to commit the substantive offense. *E.g.*, *Johnson*, 317 N.C. at 436, 347 S.E.2d at 18 (holding that failure to instruct on attempted first-degree rape was plain error where evidence included testimony that defendant "tried to penetrate" the victim "but couldn't"); *State v. Couser*, 163 N.C. App. 727, 734, 594 S.E.2d 420, 425 (2004) (holding that instruction on attempted rape was appropriate where evidence, including victim's report that defendant "attempted to rape her," "put[ ] the fact of penetration in doubt"). Here, if we were to accept defendant's assertion that he did not complete the sexual act, the evidence of intent to commit the substantive offense is lacking. He argues that his statements to the detectives—that he tickled and poked Kelly "to see how close he could get"—amount to some evidence of intent. But if this evidence shows anything, it shows that defendant intended to "get close" to committing a sexual act, but did not intend to actually commit it.

Finally, even if the evidence of penetration was ambiguous and the attempt instruction should have been given, the error does not amount to plain error. In *State v. Carter*, 366 N.C. 496, 500–01, 739 S.E.2d 548, 552 (2013), our Supreme Court held that the trial court's failure to instruct the jury on attempted first-degree sexual offense did not constitute plain error. The Court explained that assuming there was an inconsistency in the victim's testimony regarding penetration, the defendant still failed to meet his burden under the *Lawrence* standard:

> To establish a "probable impact" in this case, defendant would have to show that the jury would have disregarded any portions of the victim's testimony stating that he put his penis "in" her anus in favor of those instances in which she said "on." Yet the Court of Appeals itself found that the evidence of penetration was sufficient to support a verdict of guilty on the completed offense. Defendant has not shown that "the jury probably would have returned a different verdict" if the trial court had provided the attempt instruction. It therefore cannot be said that defendant was prejudiced by the failure to give the instruction under the plain error standard, even if failure to give the instruction was error.

Id. at 500–01, 739 S.E.2d at 551–52. Like *Carter*, here "the evidence of penetration was sufficient to support a verdict of guilty on the completed offense." *Id.* Accordingly, defendant has failed to show the requisite prejudice to warrant a new trial.

III. Conclusion

The trial court did not err in failing to instruct the jury on the lesser-included offense of attempted sexual offense with a child by an adult. Defendant's statements during the interrogation and Kelly's testimony at trial cannot be reasonably interpreted in the way urged by defendant to create ambiguity on the issue of penetration. Even if there was error, it does not rise to the level of plain error because the evidence was still sufficient to support a conviction for the completed offense.

NO ERROR.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).