IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-413

Filed 7 November 2023

Anson County, No. 19-CRS-51024

STATE OF NORTH CAROLINA

v.

MARLON MAURICE SMITH

Appeal by defendant from judgment entered 4 May 2022 by Judge Claire V. Hill in Anson County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Narendra K. Ghosh, for defendant-appellant.

THOMPSON, Judge.

Defendant appeals his convictions on two counts of second-degree forcible sexual offense upon a single contention: that the trial court erred by failing to instruct the jury on the lesser-included offense of attempted second-degree sexual offense. After careful consideration of defendant's argument, we disagree and therefore find no error in defendant's trial.

I. Factual Background and Procedural History

Defendant was charged with two counts of second-degree forcible sexual offense—the first count alleging anal intercourse and the second count alleging penetration with an object, more specifically, by defendant placing his fingers in the vagina of complaining witness Jane Doe.[1] The matter came on for trial at the 2 May 2022 Criminal Session of the Superior Court, Anson County, where the evidence tended to show the following:

On 8 September 2019, defendant visited Doe at her residence. While taking a walk outside the home, defendant took Doe to a shady area nearby and assaulted Doe. Doe testified that defendant "held me down and pulled my pants down and stuck his penis into my anal [sic] and used his fingers to finger my vagina and held me down on my left side so I couldn't push him away."[2] Doe further testified that she "was standing up, and so he was behind me and he had grabbed my right – my left side and held me and then put his right arm inside my boobs to start massaging it." Although Doe told defendant to stop and to leave her alone, she stated that the assault continued until "he finished."

Doe went to a hospital after the attack where the medical staff collected DNA evidence. The nurse who examined Doe found no signs of rectal bruising or tearing and did not observe any bleeding; however, a rectal swab collected revealed that DNA

[1] A pseudonym is being used to protect the identity of the victim.

[2] At the age of four years old, Jane Doe suffered a stroke which paralyzed her right arm and resulted in a permanent limp.

matching defendant was found to be present. Defendant was interviewed by a Wadesboro Police Department detective the next day and "denied any sexual contact with [Doe]." The interview was recorded and played for the jury at trial. The trial court gave a limiting instruction to the jury regarding the recorded interview, stating that prior statements made by a witness could not be considered "as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial," but could be considered in evaluating the witness's credibility.

At the charge conference, defendant requested that the trial court instruct the jury on the lesser-included charge of *attempted* sexual offense regarding the charge based on defendant having sexually penetrated Doe with his finger. Defendant's request was denied, and the trial court instructed the jury on only the two counts of forcible sexual offense. Defendant was found guilty of both charges, was sentenced to a consolidated term of 73 to 148 months of active imprisonment, and gave notice of appeal in open court.

II. Analysis

On appeal, defendant argues that, because the evidence of penetration on the second count of second-degree forcible sexual offense (involving defendant's fingers) was ambiguous, the jury might have reasonably concluded that penetration did not occur, and defendant was therefore entitled to an instruction on the lesser-included charge of attempted sexual offense. We disagree.

This Court reviews arguments of error regarding a trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

Specific to the issue presented by this appeal, while "[t]he mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require . . . [an instruction on] a lesser offense," *State v. Lampkins*, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909 (1976), the trial court *must* instruct on a lesser-included sexual offense "when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 S.E.2d 502, 505 (1981). *See also State v. Matsoake*, 243 N.C. App. 651, 658, 777 S.E.2d 810, 815 (2015) (" 'Instructions pertaining to attempted first-degree rape as a lesser-included offense of first-degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences.' " (quoting *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986)), *disc. rev. denied*, 368 N.C. 685,

781 S.E.2d 485 (2016). Likewise, a defendant is entitled to an instruction on attempted sexual offense as a lesser-included offense of first- or second-degree sexual offense when the jury may draw conflicting inferences regarding the element of penetration. *State v. Person*, 187 N.C. App. 512, 523, 653 S.E.2d 560, 567 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

A second-degree forcible sexual offense occurs when someone engages in a "sexual act" with another person. N.C. Gen. Stat. § 14-27.27 (2021). In turn, a "sexual act" is defined, in relevant part, as "the penetration, however slight, by any object into the genital . . . opening of another person's body." N.C. Gen. Stat. § 14-27.20 (2021). Further, "penetration does not require that the vagina be entered . . . . The entering of the vulva or labia is sufficient." *State v. Thomas*, 187 N.C. App. 140, 146, 651 S.E.2d 924, 928 (2007) (quoting *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988)); *see also State v. Bellamy*, 172 N.C. App. 649, 657–58, 617 S.E.2d 81, 88 (2005) (holding that spreading the labia established penetration for purposes of a charge of first-degree sexual offense), *appeal dismissed and disc. rev. denied*, 360 N.C. 290, 628 S.E.2d 384 (2006). In addition, "a prosecuting witness is not required to use any particular form of words to indicate that penetration occurred. . . . [Rather,] appellate courts permit a wide range of testimony to indicate penetration." *State v. Kitchengs*, 183 N.C. App. 369, 375–76, 645 S.E.2d 166, 171 (citations omitted), *disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 370 (2007). Moreover, a lesser-included instruction is only appropriate if there was evidence establishing "some doubt or

conflict concerning the crucial element of penetration." *Wright*, 304 N.C. at 353, 283 S.E.2d at 505 (holding instruction on lesser-included offense was not warranted where evidence "compelled a single rational conclusion [that penetration occurred]").

Defendant here argues that he was entitled to an instruction on the attempted offense because, he contends, the evidence failed to "clarif[y] whether 'finger my vagina' meant that [defendant] placed his fingers *on* [Doe's] vagina or *in* her vagina." (Emphasis in original). This argument is misplaced in light of the evidence introduced at trial. Here, Doe's testimony was that defendant "used his fingers to finger my vagina." As noted by the State, the phrase "to finger" is defined, as pertinent to sexual touching, as to "extend into or penetrate in the shape of a finger," "touch or feel with the fingers," and "touch or handle something." *Finger*, *Webster.com*, https://www.merriam-webster.com/dictionary/finger (last visited Oct. 8, 2023). The State further emphasizes that because the vagina is an internal body part, *see Vagina*, *Webster.com*, https://www.merriam-webster.com/dictionary/vagina (defining vagina as "a canal that leads from the uterus *to the outside opening of the female sex organs*") (emphasis added) (last visited Oct. 8, 2023), even merely touching Doe's vagina would require "penetration, however slight, . . . into the genital . . . opening of another person's body." N.C. Gen. Stat. § 14-27.20; *see also Thomas*, 187 N.C. App. at 146, 651 S.E.2d at 928 (holding that entering the labia or vulva constitutes penetration).

We therefore hold that Doe's testimony here that defendant "finger[ed her] vagina" meant that defendant penetrated her genital opening in order to touch her vagina, and that, in light of this evidence, the jury could either have believed Doe—thus convicting defendant of second-degree forcible sex offense—or found Doe's testimony not credible—and thus acquitted defendant of that offense. However, neither Doe's testimony nor any other evidence would permit a reasonable inference by the jury that defendant somehow touched Doe's vagina without penetrating her labia and / or vulva. *See Thomas*, 187 N.C. App. at 146, 651 S.E.2d at 928; *Wright*, 304 N.C. at 353, 283 S.E.2d at 505.

For these reasons, we find no error in the denial of defendant's request for an instruction on attempted second-degree sexual offense.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).