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NO. COA06-338

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Vance County
Nos. 04 CRS 52601-2

EDWARD STEWART HINES

Appeal by defendant from judgments entered 17 August 2005 by Judge Kenneth C. Titus in Vance County Superior Court. Heard in the Court of Appeals 1 November 2006.

Attorney General Roy Cooper by Assistant Attorney General Amy C. Kunstling for the State.

Brian Michael Aus for defendant appellant.

McCULLOUGH, Judge.

Defendant was charged with statutory rape of a person who is 13, 14, or 15 years old, second-degree sexual offense and indecent liberties with a child. The jury found defendant guilty on all charges and the trial court imposed a consolidated sentence of 350 to 429 months' imprisonment for the statutory rape conviction, a concurrent sentence of 107 to 138 months' imprisonment for second-degree sex offense conviction, and 20 to 24 months' imprisonment for the conviction on the charge of indecent liberties with a child to run at the expiration of the aforementioned sentence.

At defendant's trial the evidence tended to show that Edward Hines ("defendant"), a man in his forties, was M.C.'s mother's boyfriend. M.C., who was 13 years old at the time, and her mother were living with defendant in a hotel on 14 May 2004. M.C. testified that on 14 May she and defendant were alone in the hotel room where she fell asleep. When M.C. awoke, defendant came over to her bed, took her clothes off, touched her breasts and placed his penis inside of her vagina. M.C. did not tell her mother about the incident with defendant because she was afraid that her mother would not like her.

After the incident M.C.'s relatives found her mother's journal containing statements which indicated that defendant had touched M.C. inappropriately. Once they found the journal, they questioned M.C. about whether defendant was touching her, to which she admitted. M.C.'s relatives then called the police and subsequently took the child to the hospital.

Rhonda Hopkins, a forensic nurse, interviewed M.C. and performed a physical examination on 18 May 2004. During the interview, M.C. indicated through the use of anatomical drawings that defendant had touched her breasts, placed his penis inside her vagina, touched her vagina with his hand, and tried to lick her vagina. Nurse Hopkins testified that, upon physical examination of M.C., she determined that M.C.'s hymenal tissue was extensively torn and eroded and further opined that the cause was a penetrating trauma consistent with a penis entering her vagina.

Defendant made a motion to dismiss the charges for failure to present sufficient evidence at the close of the State's case which was denied by the trial judge. Defendant then rested his case without the presentation of any evidence on his behalf. The jury found defendant guilty on all charges. Defendant appeals.

We now turn to the substance of defendant's appeal. Defendant argues on appeal that the trial court erred in admitting into evidence the diary of M.C.'s mother where the statements were hearsay and admitted in violation of defendant's constitutional rights under the Confrontation Clause. However, because defendant failed to make this constitutional argument at trial, we will not consider it on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). This assignment of error is overruled.

Further, defendant contends that the trial court committed plain error in permitting the jury to hear the contents of the mother's diary where such contents were hearsay. We disagree.

The plain error rule provides that the Court may review alleged errors affecting substantial rights even though defendant failed to object to the admission of the evidence at trial. *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998), *cert. denied*, 350 N.C. 839, 539 S.E.2d 299 (1999). Our Supreme Court has chosen to review such issues when the appellant has alleged plain error in the assignments of error "and when the issue involves either errors

in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *Id.* at 314, 488 S.E.2d at 563. The rule must be applied cautiously, however, and only in exceptional cases where, "'after reviewing the entire record, it can be said the claimed error is a *'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]''*" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and emphasis omitted). Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error. *Id.* at 661, 300 S.E.2d at 378-79.

At trial, the juvenile, M.C., testified as to the actions of defendant on 14 May 2004. She testified that, while she and defendant were at the hotel where she and her mother were residing with defendant at the time, defendant pulled off her clothes, touched her breasts and inserted his penis into her vagina. M.C. further testified that she told her relatives about the incident only after they found her mother's diary and inquired about defendant and his actions. Nurse Hopkins, an expert and forensic nurse, corroborated M.C.'s testimony by showing anatomical charts filled out by M.C. indicating defendant's actions and further testified that M.C. exhibited injuries to her hymen consistent with the trauma of a penis entering her vagina.

Katina Ragland, M.C.'s aunt, testified at trial that she was called home from work by her husband's sister one day on the premise that an emergency had occurred. When she arrived at home

she learned a relative found the diary of M.C.'s mother and that in the diary the mother stated "that [M.C.] had told her that [defendant] had been touching her." Upon cross-examination of Katina Ragland, defense counsel elicited the following statements from the diary of M.C.'s mother: "'I seen what you did to my baby Sunday night[]'"; "if I caught you, you don't mess with my daughter, you can forget about me[.]"; and "my baby said that you touched her."

Here the evidence against defendant is overwhelming. The record is replete with evidence regarding defendant's sexual touching of M.C., and it cannot be said that reference to excerpts from the diary of the mother were so prejudicial as to deprive defendant of a fair trial. Moreover, even if the evidence is prejudicial, defendant may not complain of evidence elicited by him on cross-examination. *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 96, 181 S.E.2d 405, 413 (1971); *State v. Burton*, 256 N.C. 464, 464-65, 124 S.E.2d 108, 109 (1962). This assignment of error is overruled.

Additionally, defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of second-degree sexual offense where there was insufficient evidence to submit the charge to the jury. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a

reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

"A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person: (1) [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.5(a)(1) (2005). The term sexual act, as defined by statute, means "cunnilingus, fellatio, analingus, or anal intercourse[.]" N.C. Gen. Stat. § 14-27.1(4) (2005).

The testimony in the instant case tended to show that defendant "tried to go below with his tongue and I wouldn't let him[,] " "[h]e tried to lick my vagina[,] " and "he has attempted oral sex on [me.]" Defendant contends that such evidence was not sufficient to support a charge on second-degree sexual offense but rather only supported a charge of attempted second-degree sexual offense, and therefore, his conviction on the charge should be reversed.

Taking the evidence in the light most favorable to the State, the evidence is insufficient to support a conviction of second-degree sexual offense. However, the evidence is sufficient to support a conviction of the lesser-included offense of attempted second-degree sexual offense. See N.C. Gen. Stat. § 15-170 (2005) ("Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.") "When a jury finds the

facts necessary to constitute one offense, it also inescapably finds the facts necessary to constitute all lesser-included offenses of that offense." *State v. Squires*, 357 N.C. 529, 536, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). Since the evidence at trial was sufficient to prove an attempted second-degree sexual offense, the charge for second-degree sexual offense will not be vacated, but rather remanded for judgment as upon a verdict of guilty of attempted second-degree sexual offense. *State v. Vance*, 328 N.C. 613, 623, 403 S.E.2d 495, 502 (1991).

Lastly, defendant contends that the judgment and commitment for statutory rape contains a clerical error requiring remand and further requests this Court to review sealed records reviewed by the trial court for evidence which may be favorable and material to defendant. We find no merit in these contentions.

Defendant argues that a clerical error exists in the judgment and commitment for statutory rape where the offense description is listed as "STAT RAPE/SEX OFFN DEF > =6YR[.]" However, this description is merely a recitation of the title placed on the statute N.C. Gen. Stat. § 14-27.7A and therefore does not warrant a clerical error nor further discussion by this Court.

Further, defendant requests the Court to review certain sealed records reviewed by the court for information favorable and material to him. However, it appears from the record, briefs and exhibits before us that defendant failed to include or request the inclusion of such sealed records on appeal for our review. We

cannot review documents which were not made part of the record on appeal and are not before us.

Accordingly, we find no prejudicial error.

Affirmed in part and remanded in part for judgment in accordance with this opinion.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).