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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-13

Filed: 5 July 2017

Halifax County, No. 14 CRS 52477

STATE OF NORTH CAROLINA

v.

WILLIAM RAY MEINSEN

Appeal by defendant from judgment entered 24 August 2016 by Judge J. Carlton Cole in Halifax County Superior Court. Heard in the Court of Appeals 5 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

TYSON, Judge.

William Ray Meinsen (“Defendant”) appeals from judgment entered imposing active imprisonment upon a jury’s conviction of indecent liberties with a child. We find no prejudicial error.

I. Background

A.C. was fifteen years and a ninth grade student. She lived with her father and stepmother and next door to Defendant. Defendant was forty-six years old and lived with his wife and daughter, who was a few years older than A.C.

Defendant served as a pastor at A.C.'s church and as her physical education teacher at school. A.C. had known Defendant for about seven years from participating in church, school, and athletic activities. A.C. and Defendant's daughter played together on a church basketball team. A.C. occasionally visited Defendant's home, sometimes rode to church with him, and had spent time helping Defendant's wife when she injured her arm and shoulder.

In mid-January 2014, A.C.'s stepmother telephoned Defendant and informed him A.C. might have "a crush" on Defendant. Defendant thanked A.C.'s stepmother for making him aware of the matter, and stated "he had a situation like that before" and would "watch out."

A.C. went to Defendant's home on 29 January 2014. A.C., Defendant, and Defendant's wife were watching a televised soccer game in the living room. Defendant and A.C. sat on opposite ends of the couch. Defendant's wife went to bed sometime before 10:00 p.m. A.C. testified Defendant "inched closer" to her on the couch and grabbed her hand. Defendant's wife returned to the living room and asked Defendant to take the dog outside. Defendant snatched his hand away from A.C.'s hand when his wife came into the room.

Around 10:00 p.m., A.C.'s stepmother sent a text message to Defendant that A.C. needed to return home. Defendant did not initially tell A.C. that her stepmother sent a message for her to come home. Five or ten minutes later, A.C.'s stepmother sent a second text to Defendant. Defendant told A.C. that her stepmother was calling her to come home. When A.C. stood to leave, Defendant pulled her onto his lap. A.C. testified he kissed her neck, from her collarbone to her ear. She testified Defendant's actions were "wet" and "gross," and it felt like Defendant used his tongue.

A.C. was "shocked" by Defendant's actions. She put on her shoes and went home. When A.C. arrived home, her father observed "something was wrong on her face when I looked at her."

Shortly after the incident, Defendant and his wife left town for a vacation. Upon return home, Defendant went to A.C.'s house and gave her a t-shirt from the Bahamas. He stated he needed to talk to her about her grades and instructed A.C. to get into his car. As Defendant drove, he told A.C. that "him and his wife hadn't had sex in five months or nine months," "he was going to turn himself in," and "that he was this close to feeling [A.C.] up that night." A.C. begged Defendant not to turn himself in until she had an opportunity to tell her parents.

Defendant also told A.C. to tell her parents, if they found out, that Defendant gave her a "dog lick" or a "zerbert," which A.C. understood to mean a "weird noise"

that “you do on a baby’s stomach,” and to say that Defendant had done it to “gross [her] out.”

A.C. told her aunt and cousin about the incident. When A.C.’s mother learned of the incident, she contacted A.C.’s father and stepmother and the police. As word of the allegations spread through the community, Defendant told Robert Harris, a church deacon, that he had grabbed A.C.’s arm, pulled her onto the couch, tickled her, “blew whoopies on her neck,” and licked her face.

Around 20 February 2014, Defendant told A.C.’s father and stepmother that he and A.C. had “wrestled” on 29 January and “things got carried away.” He stated he had “made a like a zerbert” on A.C.’s neck, and understood how A.C. had interpreted the encounter as a “boyfriend/girlfriend thing.” When A.C.’s father questioned her about the incident, A.C. initially told him “it was a playing around, wrestling-type thing.”

The following day, Defendant told A.C.’s stepmother, through text messages, to “use the word zerbert” if asked by A.C.’s mother about the encounter, and to make sure A.C. and her father also use the word “zerbert.” He further advised A.C.’s stepmother that he was deleting their text message exchanges. A.C.’s stepmother did not delete the text messages because she “had suspicion that something actually took place.”

Halifax County Sheriff's Lieutenant Joseph Sealy interviewed A.C. in March 2014. A.C. told him "it was a zerbert and a dog lick." Mary Curry, who is employed with Tedi Bear Children's Advocacy Center, received a referral in April 2014 from the Halifax County Sheriff's Office to conduct a forensic interview with A.C.

A.C. told Ms. Curry that Defendant "pulled her on his lap, nibbled on her ear, and licked her neck." A.C. stated Defendant's conduct made her feel "very uncomfortable." Lieutenant Sealy interviewed A.C. again in July 2014, after A.C.'s interview with Ms. Curry. A.C. told him that "she had gotten up to leave and that he grabbed her hand, pulled her back onto his lap and had kissed her on her neck from about her collarbone up to her earlobe." After she spoke with Ms. Curry and Lieutenant Sealy, A.C. told her father that Defendant had kissed her neck.

A.C. testified about additional prior encounters with Defendant. In the summer of 2013, when A.C. was fourteen years old, Defendant drove her and her cousin to church and asked A.C. what kind of underwear she was wearing, and the color of it. Defendant also asked A.C. if she knew what "commando" meant. When A.C. answered she did not know, Defendant told her it meant not wearing any underwear.

In the fall of 2013, while A.C. was in Defendant's physical education class, she commented that the chair seat was cold. Defendant stated, "maybe if you weren't wearing thongs, your butt wouldn't be cold." Also in the fall of 2013, A.C. was riding

in the car with Defendant and his wife to take their daughter to college. When Defendant's wife fell asleep on the way home, Defendant reached behind his seat and held A.C.'s hand.

Defendant was indicted on one charge of taking indecent liberties with a child. After a jury convicted him of this offense, Defendant was sentenced to an active prison term of thirteen to twenty-five months. He was also ordered upon release, to register as a sex offender for thirty years. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2015).

III. Jury Instructions on Theory of "Lewd and Lascivious" Act

Defendant argues: (1) the trial court's jury instructions permitted the jury to convict Defendant on a theory, which was not alleged in the indictment; (2) the record fails to indicate which theory the jury relied upon; and, (3) Defendant suffered prejudice. We disagree.

A. Standard of Review

"Where the defendant preserves his challenge to jury instructions by objecting at trial, we review 'the trial court's decisions regarding jury instructions . . . *de novo*[']" *State v. Hope*, 223 N.C. App. 468, 471-72, 737 S.E.2d 108, 111 (2012) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)). Under *de novo*

review, the appellate court considers the matter anew and is free to substitute its judgment for that of the trial court. *State v. Williams*, 362 N.C. 628. 632-33, 669 S.E.2d 290, 294 (2008).

B. Analysis

Defendant was charged and convicted of one count of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1 (2015), which provides:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is punishable as a Class F felony.

Defendant's indictment alleges:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did commit and attempt to take immoral, improper and indecent liberties with [A.C.], who was under the age of 16 years at the time, *for the purpose of arousing and gratifying sexual desire*. At the time, the defendant was over 16 years of age and at least five years older than

that child. *In violation of G.S. 14-202.1(a)(2)*. (emphasis supplied).

At trial, defense counsel objected to the trial court's instruction on the "lewd and lascivious" theory set forth in N.C. Gen. Stat. § 14-202.1(a)(2), because the text of the statute was not specifically alleged in the indictment, although a citation to that subsection was included. After the trial court overruled Defendant's objection, both defense counsel and the prosecutor submitted agreed-upon language to include in the instructions to define "lewd and lascivious" conduct.

The trial court instructed the jury:

The defendant has been charged with taking an indecent liberty with a child. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

First, that the defendant willfully:

A, took an indecent liberties [sic] with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper, or indecent touching by the defendant upon a child or inducement by the defendant of an immoral or indecent touching of the child.

B, committed or attempted to commit a lewd and lascivious act upon the child. Lewd has been defined to mean inciting sexual desire or imagination, while lascivious means tending to arouse sexual desire.

Second, that the child had not reached her sixteenth birthday at the time in question.

And, third, that the defendant was at least five years older than the child and had reached his sixteenth birthday at that time.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire, committed a lewd or lascivious act upon the child, and that at that time the defendant was at least five years older than the child and had reached his sixteenth birthday but the child had not reached her sixteenth birthday, it will be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues the trial court erred by permitting the jury to convict Defendant on the “lewd and lascivious” theory, where it was not alleged in the indecent liberties indictment. We disagree.

In ruling on the sufficiency of an indictment, our courts have held:

An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction. Furthermore, *a defendant who feels that he may be taken by surprise at trial may ask for a bill of particulars to obtain information in addition to that contained in the indictment which will clarify the charge against him.*

State v. Lowe, 295 N.C. 596, 603-04, 247 S.E.2d 878, 883 (1978) (internal citations omitted) (emphasis supplied).

“[A]n indictment which charges a statutory offense, such as taking indecent liberties with a minor in violation of G.S. § 14-202.1, by using the language of the statute is sufficient, and need not allege the evidentiary basis for the charge.” *State v. Miller*, 137 N.C. App. 450, 457, 528 S.E.2d 626, 630 (2000) (citing *State v. Blackmon*, 130 N.C. App. 692, 507 S.E.2d 42, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998)). “The indictment need not allege specifically which of defendant’s acts constituted the immoral, improper and indecent liberty.” *Id.* (citing *Blackmon*, 130 N.C. App. at 699, 507 S.E.2d at 47) (internal quotation marks omitted).

In *State v. Wilson*, 87 N.C. App. 399, 361 S.E.2d 105 (1987), *disc. review denied*, 321 N.C. 479, 364 S.E.2d 670 (1988), the indictment expressly charged the defendant with violating “N.C. Gen. Stat. § 14-202.1,” and included the “lewd and lascivious” prong of the statute. *Id.* at 400, 361 S.E.2d at 106. The indictment did not include the first prong of the statute (“[w]illfully tak[ing] or attempt[ing] to take any immoral, improper, or indecent liberties . . . for the purpose of arousing or gratifying sexual desire”). *Id.* at 399-400, 361 S.E.2d at 106. Nor did the indictment refer to the statutory subsection for that prong. As here, the trial court instructed the jury on *both* prongs of the statute. *Id.* at 400-01, 361 S.E.2d at 107.

This Court held:

On the facts of the case before us, the State could have charged defendant under G.S. 14-202.1(a)(1), but was not required to do so. The evidence presented at trial supported either theory. Therefore, we must conclude that

the trial judge's inclusion in the charge of language involving "the purpose of arousing or gratifying sexual desires" did not constitute a fatal variance between the indictment and the charge. The language of the indictment together with the bill of particulars gave defendant fair notice both of the events giving rise to the charge and of the crime with which he was accused, taking indecent liberties with a child.

Id. at 402-03, 361 S.E.2d at 108.

Also, as here, the defendant in *Wilson* was alleged to have committed physical acts upon the victim on one occasion. The defendant denied he committed the acts.

Id. at 403, 361 S.E.2d at 108. In *Wilson* and here, the victim's testimony was the only direct evidence tending to show the defendant had committed the offense. This Court explained:

If the jurors believed the victim's testimony, they correctly found that he committed a lewd or lascivious act upon the body of the child pursuant to G.S. 14-202.1(a)(2) and consistent with the indictment. There is nothing in the record to indicate that the additional language in the trial judge's charge to the jury caused the jury to reach its verdict.

Id. at 403-04, 361 S.E.2d at 108.

If the jury believed the victim's testimony in this case, they necessarily determined Defendant "willfully t[ook] or attempt[ed] to take an[] immoral, improper, or indecent libert[y]" with A.C. "for the purpose of arousing or gratifying sexual desire" under N.C. Gen. Stat. § 14-202.1(a)(1), which was alleged in the indictment. As was true in *Wilson*, "[t]here is nothing in the record to indicate the additional [lewd

and lascivious] language in the trial judge's charge to the jury caused the jury to reach its verdict." *Id.* at 404, 361 S.E.2d at 108.

Here, the indictment clearly set forth: (1) the specific date of the offense; (2) the name of the victim; (3) the indecent liberties statute number; (4) the language of the first prong of the offense under subsection (a)(1) of the statute; and, (5) an explicit reference to the second "lewd and lascivious" prong of the statute under subsection (a)(2). If Defendant felt he needed more specific information or details to assert his defense, as the Defendant also did in *Wilson*, he was free to request a bill of particulars. *See id.* at 400, 361 S.E.2d at 106; N.C. Gen. Stat. § 15A-925 (2015).

The indictment alleged sufficient statutory elements to enable Defendant to prepare his defense and to protect him from double jeopardy. *See Lowe*, 295 N.C. at 603-04, 247 S.E.2d at 883.

IV. Conclusion

Defendant has failed to show the trial court's inclusion of the "lewd and lascivious" theory set forth in N.C. Gen. Stat. § 14-202.1(a)(2), constituted prejudicial error, where the indictment did not include the specific language of that subsection. Defendant has failed to show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2015).

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Opinion of the Court

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no prejudicial error in the jury's conviction or in the judgment entered thereon. *It is so ordered.*

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).