IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-49

No. COA20-756

Filed 18 January 2022

Lenoir County, No. 16 CRS 052315

STATE OF NORTH CAROLINA

v.

ADEL MUSAED HUGAYES, Defendant.

Appeal by Defendant from judgment entered 4 October 2019 by Judge Frank Jones in Lenoir County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

MURPHY, Judge.

¶ 1 When a defendant specifically requests a jury instruction, he may not later complain the requested instruction amounted to plain error. Here, where the trial court instructed the jury on two counts of indecent liberties in exact accordance with Defendant's requests, Defendant invited any double jeopardy concerns arising from a jury's potential to use the same act as the basis for both counts.

BACKGROUND

¶ 2 This appeal arises out of a verdict finding Defendant Adel Musaed Hugayes guilty of one count of a statutory sex offense with a child under fifteen pursuant to N.C.G.S. § 14-27.30(a) and two counts of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1(a). The charges at issue stem from Defendant's actions occurring on 16 October 2016 involving Emily,[1] at the time thirteen years old. The State presented evidence at trial tending to show the following events occurred:

¶ 3 Shortly after midnight on 16 October 2016, Emily visited Defendant and his girlfriend at their home, where the couple resided along with five children. After arriving, Emily began playing a video game with some of the younger children in Defendant's bedroom. Though both Defendant and his girlfriend were initially present in the bedroom, both left the room as Defendant's girlfriend went to wash her daughter's hair, leaving Emily and the other child alone in the bedroom with Emily on the bed. Shortly thereafter, Defendant, who had been drinking, reentered the room wearing boxers and a tank top—attire Emily indicated he typically wore around the house at night—and turned off the lights.

¶ 4 Without saying anything, Defendant grabbed the back of Emily's head and, despite her efforts to pull away, began kissing her on the lips, then pushed her head

[1] Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

down to his waist and put his penis in her mouth until it became erect. He then turned Emily over, placed his arm over her legs to prevent her from running, pulled her pants and underwear down, and attempted to anally penetrate her.

¶ 5 During this attempt, however, Defendant's girlfriend reentered the room and demanded to know what was happening. Defendant denied doing anything; Emily answered that Defendant tried to rape her. Defendant's girlfriend then attempted to drive away from the residence with Emily and, when Defendant followed them to the car, returned to the house with Emily and locked Defendant outside while she and Emily stayed the night. The following morning, Emily returned to her immediate family's home and told them what had happened, prompting Emily's mother to call the police. Defendant was forty-six years old at the time of the incident.

¶ 6 Defendant presented no evidence at trial and did not testify. At the close of all evidence, Defendant filed a *Motion to Adopt Jury Instructions* requesting the trial court read, *inter alia*, two pattern jury instructions for indecent liberties with a child. The first of these two requested instructions, "Taking an Indecent Liberty with a Child," read as follows:

> [D]efendant has been charged with taking an indecent liberty with a child.
>
> For you to find [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that [D]efendant willfully took (or attempted to take)

> an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent touching or act by [D]efendant upon the child.
>
> Second, that the child had not reached her sixteenth birthday at the time in question.
>
> And [t]hird, that [D]efendant 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 [D]efendant willfully took (or attempted to take) an indecent liberty with a child for the purpose of arousing or gratifying sexual desire, and that at that time [D]efendant 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 would 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.

(Marks omitted). Defendant also requested a second instruction on indecent liberties he entitled "Lewd & Lascivious Act," differing from the first instruction only with respect to the first element of the offense:

> First, that [D]efendant willfully committed (or attempted to commit) a lewd or lascivious act upon a child.
>
> . . . .
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date [D]efendant willfully committed (or attempted to commit) a lewd or lascivious act upon the child, and that at that time [D]efendant 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 would 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.

Both requested instructions closely followed the North Carolina Pattern Jury Instruction for indecent liberties.[2] *See* N.C.P.I.—Crim. 226.85 (2019).

¶ 7 During its closing argument, the State remarked that three acts could each serve as the basis for the first element of Defendant's first indecent liberties charge:

> This is the second charge you're going to consider, indecent liberties. And, again, there are two different indecent liberties. One being indecent liberty. The second one being a lewd or a lascivious act.
>
> So, there are three elements here. [D]efendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying a sexual desire.
>
> Let's think about what the testimony is here. He took this

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[2] The language of the pattern jury instruction for indecent liberties is based on N.C.G.S. § 14-202.1(a), which reads as follows:

> 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.

N.C.G.S. § 14-202.1(a) (2019).

> young lady's head and pushed it down onto his penis until it became erect. That's an indecent liberty.
>
> He also kissed her. That can be an indecent liberty as well. He also then tried to put his erect penis into her butt. That could be an indecent liberty as well.

The State then remarked that the same three acts could each satisfy the first element of the second indecent liberties charge:

> The last indecent liberty, which is also referred to as a lewd or a lascivious act. Defendant willfully committed a lewd or a lascivious act upon a child.
>
> Again, the oral sex, the attempted anal sex or the kissing and this whole manner in which he was kissing her and also trying to get his penis to be erect, all of that evidence of State's—of the first element.

¶ 8 After closing arguments, the trial court instructed the jury in substantial conformity with Defendant's requested instructions. The language on the verdict sheet accompanying the first indecent liberties charge—"[g]uilty of indecent liberties with a child by immoral, improper, or indecent touching or act"—and the second—"[g]uilty of indecent liberties with a child by lewd or lascivious act"—reflected the instructions on the respective charges. Defendant did not object to either the State's closing argument regarding the acts capable of constituting indecent liberties or the jury charge at trial; and, when the jury asked for clarification on the first element of an indecent liberties charge midway through deliberations, Defendant remarked that "probably the safest way to go about it would be to . . . read that pattern jury

instruction to [the jury] and leave it at that."

¶ 9 The jury found Defendant guilty on both indecent liberties counts in addition to the statutory sex offense, and he received a consolidated active sentence of 276 to 392 months. Defendant timely appealed.

ANALYSIS

¶ 10 Defendant's sole argument on appeal is that the trial court committed plain error when it failed to instruct the jury that it could not find Defendant guilty of both indecent liberties counts on the basis of the same act. Specifically, Defendant argues the trial court's instructions permitted the jury to convict him under both counts of indecent liberties for the same act in violation of the double jeopardy clause of the Fifth Amendment. U.S. Const. amend. V; *see also State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004) ("The [Double Jeopardy] Clause protects against . . . multiple punishments for the same offense."), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

¶ 11 Defendant acknowledges he did not preserve this argument at trial and can, at best, seek our review for plain error. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (marks and citation omitted) ("For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. . . . [B]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public

reputation of judicial proceedings[.]"). However, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991) (citing *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965)). Accordingly, before evaluating whether the trial court plainly erred, we must address whether Defendant invited the alleged error. *See State v. Wilkinson,* 344 N.C. 198, 213-14, 474 S.E.2d 375, 383 (1996) (foregoing plain error review upon finding the defendant invited an alleged error and noting that we "[have] consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests").

¶ 12 Defendant specifically contends the trial court erred in failing to instruct the jury that he could not be convicted of two indecent liberties counts for the same act. However, here, Defendant invited any alleged error, and we need not further review his argument. It is well established that, with respect to indecent liberties, the two alternative formulations of the first element—"immoral, improper, or indecent liberties with any child . . . for the purpose of arousing or gratifying sexual desire" and "commit[ting] any lewd or lascivious act upon or with the body . . . of any child[,]" respectively—are not separate offenses, but "alternative elements" of a "single wrong . . . ." N.C.G.S. § 14-202.1(a) (2019); *State v. Hartness*, 326 N.C. 561, 566, 391 S.E.2d 177, 180 (1990). Moreover, the State need not show any *particular* act forms the basis of an indecent liberties charge. *See Hartness*, 326 N.C. at 565, 391 S.E.2d at 179

("Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.'") (quoting N.C.G.S. § 14-202.1 (1981)). Finally, it is undisputed that each of the three acts of which the State presented evidence—kissing, fellatio, and attempted anal penetration—could form the basis of a separate indecent liberties count. *See State v. James*, 182 N.C. App. 698, 705, 643 S.E.2d 34, 38 (2007) ("[M]ultiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties."). Having this legal background available, Defendant still chose to request indecent liberties instructions that did not factually differentiate between the two counts and were, in effect, interchangeable statements of law. To the extent an error arose from the confluence of those statements, that error was invited.

¶ 13 Defendant attempts to distinguish this case from *State v. Wilkinson*, where our Supreme Court held the defendant invited any alleged instructional error. *Wilkinson,* 344 N.C. at 214, 474 S.E.2d at 383. In *Wilkinson*, the defendant alleged the trial court erroneously instructed the jury on depravity of mind when it replaced his desired instructional phrasing—"unusually heinous, atrocious, or cruel"—with "especially heinous, atrocious, or cruel." *Id.* at 212-13, 474 S.E.2d at 382-83. However, because the trial court discussed the change with the defendant and the

defendant accepted the instruction and stated he had no objection to the change, our Supreme Court held that "any error was invited error." *Id.* at 213-14, 474 S.E.2d at 383 (quoting *McPhail*, 329 N.C. at 643-44, 406 S.E.2d at 596-97).

¶ 14 However, a more apt comparison is to *McPhail*. There, "[t]he defendant . . . specifically requested the exact language of the charge that was given." *McPhail*, 329 N.C. at 643, 406 S.E.2d at 596. Our Supreme Court, noting the trial court's adherence to the defendant's request, held that "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request. Since he asked for the exact instruction that he now contends was prejudicial, any error was invited error." *Id.* at 643-44, 406 S.E.2d at 596.

¶ 15 Additionally, Defendant did more than assent to a change, as the defendant in *Wilkinson* did; rather, like the defendant in *McPhail*, he specifically requested the trial court read the jury pattern jury instructions he now alleges were erroneous, even after submission of the case to the jury. Defendant contends he did not invite the alleged error because he did not request or assent to the *absence* of a separate instruction on double jeopardy. This characterization ignores the fact that, to the extent double jeopardy concerns arose from the trial court's instructions, they arose because *he* requested instructions on indecent liberties that did not factually differentiate between the acts alleged to have constituted the offense. Therefore, "[s]ince he asked for the exact instruction that he now contends was prejudicial, any

error was invited error." *Id.*

CONCLUSION

¶ 16 The trial court instructed the jury on two counts of indecent liberties in exact accordance with Defendant's request. Defendant invited any double jeopardy concerns arising from the jury's potential use of the same act as the basis for both counts.

NO ERROR.

Judge JACKSON concurs.

Judge DILLON concurs, writing separately.

Report per Rule 30(e).

DILLON, Judge, concurring, writing separately.

¶ 17 I concur in the majority opinion. I write separately to state my conclusion that, as an alternative ground, any error regarding the jury instructions does not rise to the level of plain error. It may be that the jury relied on the same act to support both convictions; but we do not know that to be the case, as there were three different acts that the State relied upon to support the two charges. In other words, though any error in the jury instructions might rise to the level of prejudicial error (that it is reasonably *possible* that the jury relied on the same act to support both convictions), any such error did not rise to the level of plain error (that it is reasonably *probable* that the jury relied on the same act).