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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-214

Filed: 6 November 2018

Wake County, No. 12CRS219520

STATE OF NORTH CAROLINA

v.

KENNETH JAMES KEWISH, Defendant.

Appeal by Defendant from judgment entered 02 May 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 03 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashish K. Sharda, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for the Defendant.

DILLON, Judge.

Kenneth James Kewish ("Defendant") appeals from a judgment convicting him of first degree sexual offense and ordering lifetime sex offender registration and satellite-based monitoring ("SBM"). After careful review, we remand in part and affirm in part.

I. Background

Defendant was indicted for first degree sexual offense with a child, a Class B1 felony, pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) (2012)[1], stemming from an alleged sexual encounter he had with his thirteen (13) year-old daughter.

Defendant was found guilty by a jury of a different Class B1 felony, namely, sexual offense with a child *by an adult*, pursuant to N.C. Gen. Stat. § 14-27.4A(a)(2012)[2]. The trial court entered judgment based on the jury verdict and sentenced Defendant to a minimum of three-hundred (300) months in prison, as required by N.C. Gen. Stat. § 14-27A(b)(2012)[3].

The trial court further ordered Defendant to register as a sex offender for life and to enroll in SBM for life. Defendant orally appealed at the announcement of the judgment. Defendant also filed a petition for writ of *certiorari* for review of the trial court's civil order regarding lifetime registration and monitoring.

II. Analysis

Defendant makes three arguments on appeal concerning the criminal judgment and the civil order. We hereby grant Defendant's petition for writ of *certiorari*, and thereby address each of his arguments in turn.

A. Jury Instruction

[1] This statute was recodified in 2015 as N.C. Gen. Stat. § 14-27.26.
[2] This statute was recodified in 2015 as N.C. Gen. Stat. § 14-27.28(a).
[3] This statute was recodified in 2015 as N.C. Gen. Stat. § 14-27.28(b).

Defendant's first issue on appeal is whether the trial court erred in instructing the jury on an offense for which the Defendant was not indicted. Specifically, Defendant contends that the trial court erroneously instructed the jury on the crime of sex offense with a child *by an adult*, rather than the crime Defendant was indicted for, first degree sexual offense. Defendant contends that this error is significant because, though both crimes are Class B1 felonies, the crime for which he was convicted carries a mandatory three-hundred (300) month minimum prison term, whereas the crime for which he was indicted does not. The State concedes the error and the remedy sought by Defendant, namely that the judgment be vacated and the matter be remanded for entry of judgment based on the crime for which Defendant was indicted and for resentencing. For the reason stated below, we agree.

Both crimes require proof that the victim was under thirteen (13) years of age. The only difference between the crimes is that the crime for which Defendant was indicted requires proof that Defendant was at least twelve (12) years old and at least four years older than the victim, whereas the crime for which Defendant was convicted requires proof that Defendant was at least eighteen (18) years of age. We conclude that the jury's verdict sustains a conviction for which Defendant was indicted. In convicting Defendant of sex offense with a child by an adult, the jury found that Defendant was over eighteen (18) years old. In so finding, the jury

necessarily determined that Defendant was more than four years older than the pre-teen victim. *See State v. Perry*, 291 N.C. 586, 591-92, 231 S.E.2d 262, 266 (1977).

Therefore, we vacate the judgment and remand the case to the trial court for an entry of judgment of conviction and sentencing for first degree sexual offense, in violation of N.C. Gen. Stat. § 14-27.4(a)(1). *See State v. Harris*, 243 N.C. App 728, 734-36, 778 S.E.2d 875, 879-80 (2015); *see also State v. Hicks*, 239 N.C. App. 396, 768 S.E.2d 373 (2015).

B. Trial Court's Expression of an Opinion

Defendant next takes issue with the trial court defining the term "Lolita" in the presence of the jury on the grounds that it constituted an opinion as to a contested issue of fact. We find this argument to be without merit.

Section 15A-1222 of our General Statutes prohibits a judge, during any stage of the trial, from expressing any opinion in the presence of the jury on any question of fact to be decided by the jury. N.C. Gen. Stat. § 15A-1222 (2016). We review the trial court's statement, despite Defendant's failure to object at trial to the court's remarks, using a totality of the circumstances test. *State v. Bryant*, 189 N.C. 112, 115, 126 S.E. 107, 109 (1925); *State v. Blackstone*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950).

During its case in chief, an expert in computer forensics testified about his examination of Defendant's computers. The expert's testimony provided, in part, that he discovered items on Defendant's computers that he considered to be child pornography. Defendant argues that the below comment by the trial court, during the expert's testimony, amounts to an opinion of fact for the jury to decide:

STATE:	[D]id you find any concerning searches that might be indicative of child pornography?
. . .	
WITNESS:	Yes.
STATE:	And what were those terms?
WITNESS:	I believe "Lolita" was one.
STATE:	In your experience as a computer examiner looking for images of child pornography, what [does] the term Lolita describe?
DEFENDANT:	Objection. I don't think it's a term that probably any of us have heard in this courtroom. It is expert opinion about what that means. It coming as experience from a computer professional, and we don't know what it means.
COURT:	Overruled. I believe it is generally underaged females engaged in sexual activity.

A review of the record reveals that the trial court's definition of "Lolita" did not amount to an opinion on any question of fact, or a statement that went to the "heart of the case." *State v. Bearthes*, 329 N.C. 149, 160-61, 405 S.E.2d 170, 176 (1991). The

trial court's statement was not a statement of guilt or innocence of the Defendant; in fact, Defendant was not on trial for any crime pertaining to child pornography, this evidence solely sought to prove motive or intent for the underlying crimes at issue. Further, we note that the trial court gave an accurate definition of "Lolita," which is defined by Merriam-Webster's as "a precociously seductive girl." "Lolita." *Merriam-Webster Online Dictionary*. 2018. http://www.merriam-webster.com (18 Oct. 2018). In any event, the State later asked the expert whether he found any internet searches consistent with child pornography, to which he replied, "I found the term 'Lolitas.' " Defendant made no objection to this statement, nor the implication that in the special agent's opinion the term "Lolita" is indicative of child pornography. Thus, even assuming *arguendo* that the trial court erroneously opined, it is not prejudicial as the State put on evidence tending to show that the term "Lolitas" refers to child pornography. Defendant's second issue on appeal is denied.

C. Sex Offender Registration and Satellite-Based Monitoring Order

Defendant's final issue on appeal regards the trial court's order that Defendant register as a sex offender and submit to SBM for the remainder of his natural life. As such order has been deemed civil in nature, a party must file a written notice of appeal to preserve any objection to the order. N.C. R. App. P. 3(a); *see State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010).

In the present case, the Defendant only gave an oral notice of appeal. Such notice is insufficient to preserve an objection to the trial court's order. *Id.* Nevertheless, Defendant petitioned this Court for writ of *certiorari* on this issue, which we hereby grant.

Defendant argues that the trial court wrongfully ordered lifetime sex offender registration and SBM based on its finding that Defendant was convicted of sexual offense with a child by an adult. The State concedes the error. We have carefully reviewed Defendant's arguments; and, for the reasons stated below, we too agree and, therefore, reverse and remand the order requiring lifetime sex offender registration and SBM.

Section 14-208.23 of our General Statutes requires lifetime registration for those who are convicted of an aggravated sexual offense. N.C. Gen. Stat. § 14-208.23 (2016).

"Aggravated offense" is defined as an offense which involves a sexual act involving penetration *either* by force or threat of serious violence *or* with a victim who is less than twelve (12) years of age. N.C. Gen. Stat. § 14-208.6 (2012). The determination of whether an offense is aggravated is to be based solely on the elements of the crime, not based on the actual facts or evidence offered at trial. *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009).

Here, two common elements of the crime for which Defendant was indicted and the crime for which Defendant was convicted include: (1) a sexual act, and (2) a victim who is a child that is under the age of thirteen (13) years. There is no requirement that the sexual act involve penetration. *State v. Warren*, 309 N.C. 224, 231, 306 S.E.2d 446, 451 (1983) (noting that the sexual act of fellatio does not necessarily have to involve penetration). Further, there is no requirement that the victim be under the age of twelve (12), but rather just proof that the victim is under the age of thirteen (13). Therefore, since the elements of Defendant's crime do not "fit" into the statutory definition of "aggravated offense," we must conclude that Defendant has not been convicted of an aggravating offense as a matter of law. *State v. Singleton*, 201 N.C. App. 620, 630, 689 S.E.2d 562, 569 (2010). The order for lifetime sex offender registration is reversed and remanded.

The order also required Defendant to submit to SBM for the rest of his life. Defendant argues that this order was entered in violation of *Grady v. North Carolina*, which mandates that the trial court make a determination on the reasonableness of SBM search(es) based on the totality of the circumstances. *Grady v. North Carolina*, ___ U.S. ___, ___, 135 S. Ct. 1368, 1371 (2015). No such determination was made by the trial court regarding the reasonableness of the SBM order. The State concedes this error and we agree. The order for lifetime SBM is reversed and remanded for the reasonableness determination mandated by *Grady*. *Id.*

III. Conclusion

We vacate the judgment and remand the case to the trial court for an entry of judgment of conviction and sentencing for first degree sexual offense, in violation of N.C. Gen. Stat. § 14-27.4(a)(1). We find no prejudicial error in the trial court's statement regarding the term "Lolita" at trial. We vacate the order requiring Defendant to register as a sex offender for life and to subject himself to SBM for life and remand to the trial court for a proper order and *Grady* hearing.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges STROUD and BERGER concur.

Report per Rule 30(e).