An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-421

No. COA20-363

Filed 3 August 2021

Brunswick County, No. 18CRS51737

STATE OF NORTH CAROLINA

v.

CURTIS STEVEN PRYOR

Appeal by defendant from judgment entered 21 November 2019 by Judge James Bell in Brunswick County Superior Court. Heard in the Court of Appeals 9 March 2021.

Joshua H. Stein, Attorney General, by Juliane Bradshaw, Assistant Attorney General, for the State-Appellee.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Defendant-Appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 On 21 November 2019, a jury found Defendant Curtis Steven Pryor ("Defendant") guilty on all counts charged: four counts of indecent liberties with a

minor, first-degree sexual offense, rape of a child, and two counts of first-degree exploitation of a minor, as well as the presence of two aggravating factors. The trial court sentenced Defendant to life without the possibility of parole. Defendant gave notice of appeal in open court on 21 November 2019.

¶ 2 In early 2018, Robert hacked into seventeen-year-old Nicole's[1] Facebook Messenger account. Robert was Nicole's boyfriend, and Nicole is the victim. Nicole's Facebook Messenger account contained messages between Nicole and a "Steve Pryor" account, where "Steve Pryor" discussed committing the charged acts against Nicole, and Nicole and "Steve Pryor" separately sent explicit photos of themselves to one another. Robert used a phone to video record himself scrolling through the messages and photos on Nicole's account on another phone. Robert then sent the video to the "Steve Pryor" account, demanding "Steve Pryor" pay him, or Robert would send the video to Nicole's mother. Sergeant Marc Derr ("Sergeant Derr") of the Brunswick County Sheriff's Office used a video camera to record the video as it played from Nicole's mother's phone.

¶ 3 Evidence presented by the State included the recording made by Sergeant Derr of the video sent by Robert to Nicole's mother ("Exhibit 8"), as well as a video "airdropped" from Nicole's sister's phone to an Officer Mylod at the Concord Police

[1] "Nicole" is a pseudonym used to protect the child's privacy.

Department ("Exhibit 11"). Officer Mylod testified that "as far as what's in the messages, it's the exact same video" in reference to the comparison of Exhibits 8 and 11. Officer Derr testified at trial explaining the process he undertook in recording the Exhibit 8 video. The State also presented evidence of screen shots of Facebook messages between Nicole's account and the "Steve Pryor" account ("Exhibits 1-7"). Exhibits 1-7, 8, and 11 were all admitted at trial over Defendant's objections.

¶ 4 At trial, Nicole testified Defendant "used to touch me and make me touch him, and he tried to put his penis inside of me, but it couldn't fit." She further testified Defendant "rubbed" his fingers "right above the hole," but "not inside." The rest of the evidence came from the content of the Facebook messages, where "Steve Pryor" described criminal acts being committed against Nicole.

II. Jurisdiction

¶ 5 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat § 15A-1444(a) (2019).

III. Issues

¶ 6 The issues on appeal are (1) whether the trial court erred when it allowed the video of the Facebook messages between the "Steve Pryor" account and Nicole into evidence because the messages were not properly authenticated; (2) whether the trial court erred when it denied Defendant's motion to dismiss the charges of rape of a

child, sex offense with a child, and attempted sex offense with a child where there was insufficient evidence for such charges; and (3) whether the trial court committed plain error when it instructed the jury on the charge of sexual offense with a child.

IV. Analysis

A. Authentication

¶ 7 Defendant argues the trial court erred when it allowed the video of the Facebook messages between Defendant and Nicole into evidence because the messages were not properly authenticated. Defendant contends there was both: (1) a lack of proof the "Steve Pryor" account belonged to Defendant and (2) a lack of testimony authenticating the original video recording. "A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 819 S.E.2d. 632, 637 (2011).

1. *Lack of Proof the "Steve Pryor" Account Belonged to Defendant*

¶ 8 Defendant contends there was "little" on the account to "ensure that the account was that of [Defendant] and not a copy-cat account." After careful consideration of the record, we disagree.

¶ 9 This court has determined that "[w]hile tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case . . . where strong

circumstantial evidence exists that this webpage and its unique content belong to defendant." *State v. Ford*, 245 N.C. App. 510, 521, 782 S.E.2d 98, 106 (2016).

¶ 10 The case at bar is analogous to *Ford*. In *Ford*, the social media account at issue was in a username that reflected the defendant's nickname and contained pictures of the defendant. *Id.*,782 S.E.2d at 106. The "Steve Pryor" account reflected both Defendant's name, as he was known in the community, and a picture of Defendant that Nicole's mother testified was used as Defendant's Facebook profile picture. Nicole's mother was able to identify the photos sent by the "Steve Pryor" account as photos of Defendant's genitals. Nicole's mother was able to testify to Defendant's identity because Nicole's mother dated Defendant when Nicole was about eight years old, and they lived together for a short period of time. Taken together, the knowledge of peculiar details "Steve Pryor" had regarding the abuse suffered by Nicole at the time she and her mother lived with Steve Pryor, the photos of Defendant, Nicole's mother's ability to identify the photos, and the name on the account, amounted to sufficient "unique content" to establish strong circumstantial evidence the "Steve Pryor" account belonged to Defendant. *See id.* at 521, 782 S.E.2d at 106.

2. *Lack of Testimony Authenticating the Original Video Recording*

¶ 11 Defendant contends because Robert was not present at trial to provide testimony authenticating the footage of either video, the trial court erred in allowing its admission. We agree.

¶ 12 "Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8-97 (2019). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 901 (Requirement of authentication or identification), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2019). In *State v. Snead*, this Court held that evidence the recording process is reliable and evidence the video introduced at trial is the same as what was produced by the recording process is sufficient to authenticate the video. *State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016).

¶ 13 Video Exhibits 8 and 11 were admitted at trial, as well as Exhibits 1-7, which were video screen shots. This Court finds that while the screen shots (Exhibits 1-7) were properly authenticated, neither video Exhibit 8 nor Exhibit 11 admitted at trial was properly authenticated.

¶ 14 *State v. Moore* is instructive. *State v. Moore*, 254 N.C. App. 544, 565, 803 S.E.2d 196, 210 (2017). In *Moore*, this Court was presented with a case involving a cell phone video recording of a surveillance video from a gas station. The Officer who captured the cell phone video testified at trial the video was a fair and accurate representation of what he saw on the gas station surveillance video. *Id.* at 565, 803

S.E.2d at 210. The gas station clerk also testified at trial, but never confirmed the video equipment was operating properly on that night, or that the original surveillance video was an actual depiction of what occurred. *Id.*, 803 S.E.2d at 210. This Court found the Officer's recording video was inadmissible as either substantive or illustrative evidence because the clerk did not properly authenticate the original recording. *Id.*, 803 S.E.2d at 210.

¶ 15 In the case at bar, it is undisputed Robert was the creator of the original video. Because Robert was not called to testify regarding the original video, no subsequent video recording of that video, including Exhibits 8 or 11, could be properly authenticated. It was error for the trial court to allow the admission of the unauthenticated video recordings.

¶ 16 We must "next consider whether the introduction of the video was prejudicial." *See State v. Moore* at 566, 803 S.E.2d at 210 (holding that while trial court erred in admitting video footage not properly authenticated by the State, such error did not prejudice the defendant). Defendant did not object to the admission of the video on constitutional grounds.

¶ 17 Regarding prejudice from errors that do not arise under the state or federal constitution, N.C. Gen. Stat. § 15A-1443(a) states that:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the

> error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 18 Defendant argues that absent the admission of the videos, there is a reasonable possibility that the jury would not have convicted him. Considering the admission of the videos in the context of the other evidence introduced at trial, this Court concludes the admission of neither video was prejudicial.

¶ 19 The evidence, other than the videos, pertaining to the issue of whether Defendant committed the acts charged, included Nicole's trial testimony, as well as screen shots of Facebook messages between Nicole and Defendant (Exhibits 1-7). Authentication of these exhibits was achieved through Nicole's testimony regarding the exhibits. Nicole was the party originally receiving the messages in question, therefore, Nicole was a witness "with knowledge" of the messages and their content shown in the screen shots, satisfying the requirement of authentication or identification outlined in N.C. Gen. Stat. § 8C-1, Rule 901(b)(1). Nicole affirmatively testified that the messages were in fact what the State claimed them to be: messages between Nicole and Defendant, and further, that Nicole remembered the messages. Therefore, the screen shots were properly authenticated. The properly authenticated screen shots contained messages from Defendant depicting the prior commission of a

sex offense with a child. Separate from the screen shots, the State presented evidence of rape of a child through Nicole's testimony, as referenced in Section B of this analysis, "Motions to Dismiss."

¶ 20 Sufficient evidence existed, and was admitted, to convict Defendant of each crime, separate from the evidence presented in the video exhibits, such that a reasonable jury could have found Defendant guilty of each crime charged. Therefore, we conclude Defendant has failed to meet his burden of showing there was a reasonable possibility the jury would have reached a different verdict absent the video evidence, such that the admissibility of the video evidence was prejudicial to Defendant.

B. Motions to Dismiss

¶ 21 Defendant contends the trial court erred when it denied Defendant's motion to dismiss the charges of rape of a child, sex offense with a child, and attempted sex offense with a child where there was insufficient evidence for such charges.

¶ 22 "This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (emphasis omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526

S.E.2d 451, 455 (2000) (quotations omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)).

¶ 23 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull,* 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 24 The charge of rape of a child requires the State prove (1) the defendant is at least 18 years old, (2) the victim is under the age of 13 at the time of the offense, and

(3) the defendant engaged in vaginal intercourse with the victim. N.C. Gen. Stat. § 14-27.23 (2019). It is well established that "the slightest penetration of the sexual organ of the female by the sexual organ of the male" is sufficient evidence of penetration to prove vaginal intercourse. *State v. Bell*, 159 N.C. App. 151, 158, 584 S.E.2d 298, 303 (2003) (internal quotation and citation omitted).

¶ 25 Defendant contends the State failed to proffer substantial evidence of element three. In this case, Nicole testified "he tried to put his penis inside of me, but it couldn't fit" and that "it hurt." Under the "slightest penetration" standard in *Bell*, Nicole's testimony, which alludes to some amount of force involved in the genital-to-genital contact, could lead to a reasonable inference that vaginal intercourse occurred. *See Bell*, 159 N.C. App. at 158, 584 S.E.2d at 303. The trial court therefore did not err in denying Defendant's motion to dismiss the charge of rape of a child.

¶ 26 The charge of sexual offense with a child requires the State prove (1) the defendant is at least 18 years old, (2) the victim is under the age of 13 years old, and (3) that the defendant engaged in a "sexual act" with the victim. N.C. Gen .Stat. § 14-27.28 (2019). A "sexual act" is defined as "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2019). The State's evidence contained a properly authenticated message from Defendant to Nicole reading: "i cant wai [sic]

to taste your pussy **again**." (emphasis added). The evidence presented could lead to a reasonable inference that a sexual act, such as cunnilingus, occurred. The relevant indictment reflects the sexual act was alleged to have occurred between 1 January 2008 and 31 December 2010; Nicole testified sexual acts took place while she was living with Defendant and was under the age of 13. The trial court therefore did not err in denying Defendant's motion to dismiss the charge of sexual offense with a child.

¶ 27 Defendant further contends the trial court erred in denying his motion to dismiss the charge of attempted sexual offense with a child. Defendant, however, never made a motion to dismiss the charge of attempted sexual offense with a child, presumably because he was never indicted for attempted sexual offense with a child. Defendant's argument is therefore not properly before this Court and this portion of his appeal is dismissed.

C. Jury Instruction

¶ 28 Defendant contends the jury instruction on the charge of sexual offense with a child caused prejudicial error because the word "object" was not specifically defined by the court and distinguished from "male sex organ." Because there was no objection to the instruction, this Court reviews the jury instruction for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

¶ 29 Jury instructions must be "sufficient to differentiate between . . . two offenses so that the jury under[stands] it [is] to consider . . . vaginal intercourse for purposes

of [a] rape charge and . . . digital penetration for purposes of [a] sex offense charge." *State v. Harris*, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619 (2000). When there is distinction within jury instructions between a "male sexual organ" and an "object," this Court has held "there is no reasonable possibility that a juror would incorrectly equate the two." *State v. Speller*, 102 N.C. App. 697, 705, 404 S.E.2d 15, 20 (1991).

¶ 30 In this case, the trial court instructed the jury that a sex act included "any penetration, however slight, by an object into the genital opening of a person's body." The court specifically stated in its instructions for the charge of rape of a child that commission of the crime requires that the male sex organ penetrate the female sex organ. The jury received the rape of a child and sexual offense with a child instructions back-to-back, with only the jury instructions for attempted rape of a child intervening.

¶ 31 In this case, it can be presumed the jury understood the difference between "male sex organ" and "object" given the proximity of the differing instructions. *See Harris* at 215, 535 S.E.2d at 619. Therefore, the trial court did not commit plain error in delivering its instruction to the jury on the charge of sexual offense with a child.

VI. Conclusion

¶ 32 This Court holds that while sufficient proof existed to link Defendant to the Facebook account in question, the trial court erred in admitting video footage not properly authenticated by the State. However, such error was not prejudicial error

in light of the other properly admitted evidence.

¶ 33 We further hold the trial court did not err in denying Defendant's motions to dismiss the charges of rape of a child or sex offense with a child. We dismiss the portion of Defendant's appeal wherein Defendant contends the trial court erred in denying a motion to dismiss a charge of attempted sex offense with a child. Lastly, we hold the trial court did not commit plain error in its delivery of its instruction to the jury on the charge of sexual offense with a child. *It is so ordered.*

AFFIRM.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).