An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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-519

No. COA20-596

Filed 21 September 2021

Pitt County, No. 18CRS051811, 053617-18

STATE OF NORTH CAROLINA

v.

JEFFREY TREMONT SUGGS, Defendant.

Appeal by Defendant from judgment entered 28 August 2019 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Alesia Balshakova, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

¶ 1 Defendant Jeffrey Tremont Suggs appeals from a judgment finding him guilty of statutory sex offense with a child by an adult.

I. Background

¶ 2 The evidence at trial tended to show as follows: Defendant is the stepfather of eleven-year-old "Mary" and the father of seven-year-old "Joy" and ten-year-old

"Anna."[1] The three girls have the same mother. On the weekend of 10-11 December 2016, the three children stayed with Defendant. Mary testified that as they were sleeping in the same bed, Defendant started showing her pornography on his phone, touching her buttocks with his hands, and humping her. Mary told her mother what happened after she was taken home and provided a statement to the police a few days later with additional details. Although Mary no longer had contact with Defendant, Joy and Anna continued to visit him.

¶ 3 On the weekend of 11-12 November 2017, Joy and Anna visited Defendant. Joy testified that during the visit, "our dad digged in our private part." She referred to her private part as her "poo-poo." When asked at trial what she does with her "poo-poo," she responded that "she takes a bath." Joy testified that Defendant did this action repeatedly with his hands and that it hurt. Her sister Anna testified that she walked into the room to observe Defendant "mess[ing] with [Joy's] private part." Anna told her mother what she observed.

¶ 4 When Joy and Anna returned from their visit with Defendant, Joy complained to her mother that her "poo-poo" hurt and that she could not take a shower. She pointed to her vagina to indicate the area that hurt. Her mother took her to Rex Hospital, where Joy reported that her "daddy" had hurt her. A physician assistant

[1] Pseudonyms have been used throughout the opinion to protect the identity of the juveniles and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

who examined Joy testified at trial that Joy was reluctant to undergo a physical examination. Joy's mother told him that Joy's father had sexually assaulted Joy and that Joy was complaining of "discomfort in the vaginal and anal area."

¶ 5 Joy was also examined at WakeMed children's emergency department. A pediatric emergency medicine physician who examined Joy testified that although there was no obvious trauma on the external portion of Joy's genitalia, she observed bruising on the left labia minora and right labia major. There was also swelling around the urethral opening. Another pediatric doctor testified that there was a "well-healed but linear, meaning straight, scar on the inside of her right labia" that was unusual "in a month's time after a suspected injury." The pediatric doctor testified to the opinion that Joy's "description of what happened fit with the genital trauma that was seen at WakeMed."

¶ 6 Defendant was indicted for (1) statutory sexual offense with a child (related to Joy's complaints) and (2) indecent liberties with a child and disseminating obscenity (related to Mary's complaints). Following a jury trial, Defendant was found guilty of statutory sexual offense with a child. He was found not guilty of indecent liberties with a child and the trial court dismissed the charge of disseminating obscenity. Defendant timely appealed to our Court.

II. Analysis

A. Jury Instructions on Attempted Sexual Offense

¶ 7 Defendant argues that the trial court erred in not instructing the jury on attempted sexual offense. We disagree.

¶ 8 We review *de novo* the trial court's denial of a requested jury instruction. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

¶ 9 "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). But when "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980). However, the court considers the evidence in the light most favorable to the defendant when considering whether it supports a lesser-included offense instruction. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988).

¶ 10 Defendant was charged with statutory sexual offense with a child. N.C. Gen. Stat. § 14-27.28(a) (2017) defines statutory sexual offense with a child by an adult as a "person . . . at least 18 years of age . . . engag[ing] in a sexual act with a victim who

is a child under the age of 13 years." Our General Statutes further define a "sexual act" as "the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" *Id.* § 14-27.20(4). "The elements of an *attempt* to commit a crime are (1) an intent to commit the crime, (2) an overt act done for that purpose, going beyond mere preparation, (3) but falling short of the completed offense." *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1993) (emphasis added).

¶ 11 Here, the State's evidence was clear and positive with respect to each element of statutory sexual offense with a child by an adult, and the evidence would not have permitted the jury rationally to find Defendant guilty of the lesser offense. The evidence presented at trial included: Joy's testimony detailing Defendant's insertion of his fingers into her vagina, Anna's testimony that she saw Defendant "messing" in the victim's "private part," and testimony from medical professionals explaining the victim's report, examination, and injuries including swelling around the urethral opening and a scar on the labia.

¶ 12 We conclude that the trial court did not err in denying Defendant's request for a jury instruction on attempted sexual offense.

B. Jury Instructions on Sexual Offense

¶ 13 Defendant also argues that the trial court erred in instructing the jury that it could convict him of sexual offense with a child by an adult if it found that he penetrated the victim's anus. We disagree.

¶ 14 We review this argument under the same standard set out in Section II.A. above.

¶ 15 Traditionally,

> [w]here the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial.

State v. Lynch, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

¶ 16 However, our Court has stated that "the statutory definition of 'sexual act' does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *State v. Petty*, 132 N.C. App. 453, 462, 512 S.E.2d 428, 434 (1999). Our Supreme Court has also recognized that disjunctive jury instructions do not risk a defendant's right to a unanimous jury verdict in first-degree sexual offense cases. *State v. Hartness,* 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990).

¶ 17 The trial court instructed the jury that Defendant could be convicted of statutory sexual offense if it found he committed a sexual act, defined as "any penetration, however slight, by an object into the *genital or anal* opening of a person's body. A person's finger is an object." This instruction follows the statutory definition

of sexual act. *See* N.C. Gen. Stat. § 14-27.20(4). Defense counsel objected to this jury instruction, and the trial court overruled the objection.

¶ 18 Defendant argues that there was no evidence of anal penetration; therefore, one or more of the jurors could have convicted him of statutory sexual offense not supported by the evidence. Defendant relies on *State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76 (1994) for the premise that a verdict may not stand where the evidence does not support one or more of the sexual acts set out in the jury instructions. We dismiss Defendant's argument in light of our controlling caselaw and conclude that the trial court did not err in its instructions to the jury.

C. Mandatory Minimum Sentence

¶ 19 Finally, Defendant argues that the mandatory minimum sentence imposed by the trial court violated his state and federal constitutional rights. We disagree.

¶ 20 "Our review is *de novo* in cases implicating constitutional rights." *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). N.C. Gen. Stat. § 14-27.28(b) provides that the mandatory minimum sentence for statutory sexual offense with a child by an adult is 300 months. Our Court has previously found this mandatory minimum to be facially constitutional. *State v. Thomsen*, 242 N.C. App. 475, 488, 776 S.E.2d 41, 50 (2015). However, Defendant argues that the mandatory minimum sentence is unconstitutional as applied in his case because it violates the Eighth Amendment.

¶ 21 The Eighth Amendment, applied to the states by the Fourteenth Amendment, prohibits cruel and unusual punishment. U.S. Const. amend. VIII; *Robinson v. California,* 370 U.S. 660, 667 (1962). The United States Supreme Court has concluded that, in part, this means that "extreme sentences that are grossly disproportionate to the crime" are prohibited. *Harmelin v. Michigan,* 501 U.S. 957, 1001 (1991) (internal quotation marks omitted). A court must "begin by comparing the gravity of the offense and the severity of the sentence" to determine whether a sentence is grossly disproportionate to the crime. *Graham v. Florida*, 560 U.S. 48, 60 (2010). "In the rare case in which this threshold comparison leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id*. at 60 (internal quotation marks omitted).

¶ 22 Defendant received the mandatory minimum sentence for his conviction for statutory sexual offense. Defendant contends that his sentence is grossly disproportionate to the crime because if he had committed second-degree murder, for example, he could have received a lesser sentence. We rejected an almost identical argument in *Thomsen*, where we noted that the defendant's consolidated "300-month sentence [for rape of a child and sexual offense with a child] is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction." 242

N.C. App. at 488, 776 S.E.2d at 50. In that case, the defendant similarly attempted to compare his sentence to a second-degree murder conviction without success. Therefore, we reject Defendant's argument and conclude that the trial court did not violate Defendant's constitutional rights with the imposition of the mandatory minimum sentence.

III. Conclusion

¶ 23 We conclude that the trial court did not err in its choice of jury instructions. Further, Defendant's constitutional rights were not violated by the trial court's imposition of the mandatory minimum sentence for the crime for which Defendant was convicted.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).