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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-898

Filed 05 July 2023

Onslow County, Nos. 16 CRS 56184, 17 CRS 50499, 19 CRS 50295, 20 CRS 310-11

STATE OF NORTH CAROLINA

v.

DERRICK BRANDON STOKES

Appeal by defendant from judgments entered 10 November 2021 by Judge Henry L. Stevens in Onslow County Superior Court. Heard in the Court of Appeals 25 May 2023.

*Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, for the State.*

*Jason Christopher Yoder for defendant-appellant.*

ARROWOOD, Judge.

Derrick Brandon Stokes (“defendant”) appeals from judgments entered upon his convictions for disclosure of private images, disseminating obscenity, and attaining the status of habitual felon. On appeal, defendant argues: (1) the trial court erred in denying his motion to dismiss the charges; and (2) that if this Court vacates the trial judgments, we must also reverse the judgments revoking defendant’s

probation. In his brief, defendant also notes that he has filed a Motion for Appropriate Relief (“MAR”) contending that N.C. Gen. Stat. § 14-190.5A is unconstitutional. Defendant did not raise the constitutionality of the statute at trial and has therefore waived that issue on direct appeal. *See State v. Gopal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (citations omitted) (“Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, . . . not even for plain error[.]”), *aff’d per curiam*, 362 N.C. 342, 661 S.E.2d 732 (Mem) (2008).

Understanding that his oral notice of appeal, given after the trial court’s sentencing, may not have been sufficient to convey jurisdiction to this Court for the trial court judgments and the judgment revoking probation, defendant has also filed a *writ of certiorari* (“PWC”). We grant defendant’s PWC in our discretion but find no error. Defendant’s MAR is denied by separate order.

### I. Background

In 2016, B.L.<sup>1</sup> met defendant and they began dating. They communicated mainly through social media and “exchanged photos” throughout their relationship. While they were dating, defendant went by “Derrick Full Custody Stokes” on Facebook and “Emperor Stokes” on Instagram.

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<sup>1</sup> The victim in this case will be referred to by her initials. Although the record states that the victim will be referred to as B.F., for consistency with the briefs submitted, we refer to her as B.L. here.

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In March 2017, while visiting defendant out of state, B.L. agreed to let defendant “record videos” of them having sex and of her performing oral sex on him in their hotel bathroom. B.L. expressed to defendant that she was “scared” the video of her would be shared, but ultimately consented to being recorded because she was in a relationship with defendant and she “trusted that he wouldn’t share those images of [her].” B.L. was under the impression the video would remain between them, and never provided defendant permission to share the video.

In June 2017, B.L. and defendant’s relationship deteriorated, but they continued communicating for months thereafter. In October 2017, B.L. blocked defendant on social media, as her previous attempts to end communication with defendant were unsuccessful and he became “aggressive” if she did not “respond [to him] right away or if . . . the conversation wasn’t going how he wanted[.]” Thereafter, defendant began contacting B.L. through different social media accounts under various names, but she knew it was still defendant based on the context of the conversations. Some of the accounts that contacted her were under the names “Chass Tan, Derrick Full Custody Stokes, and Ericka Chanelle.” During this time, B.L. continued engaging with defendant, who had been posting explicit images of her online, “trying to see if [she] c[ould]” get him to take “the pictures down.”

On 8 June 2018, Riley Eversull (“Ms. Eversull”) was working as the public affairs officer for the Naval Medical Center (“the hospital”) in Camp Lejeune. It was her role to manage the hospital’s public Facebook page, which got anywhere from

3,000 to 40-50,000 views, but upwards of 200,000 views, per post. On that day, Ms. Eversull opened a private message sent to the hospital's Facebook page from a profile with the username "Tsu Surf[.]" The message contained what appeared to be a video link, as it was an image with a play symbol over it. The image depicted B.L.'s face and a male torso reflected in the mirror behind her. No one other than B.L. was identifiable in the image. The message that accompanied the image stated:

I think it's absurd that the Naval Hospital can have employees that also make internet porn. You all seriously need to look into disciplining [B.L.] for making internet porn for profit while being an employee for a hospital. I will report you all if she is not disciplined for this inappropriate activity.

Ms. Eversull reported the message to the hospital's law enforcement agency and saved screenshots of the message.

B.L., who worked for the hospital at this time, was contacted by the director of her department, and advised "that the [hospital's] Facebook page had received some messages . . . stating that [she] did porn" and the person who sent the message sent "some . . . images . . . as well as the link of [her]." That same day, B.L. made a report with the Onslow County Sheriff's Office Special Victim's Unit, implicating defendant.

On 19 June 2018, defendant, under the username "Emperor Stokes[.]" sent B.L. a message via Instagram. In the message, defendant stated "hypothetically" if B.L. did "call the police" and they attempted to speak with him about the situation or he caught "wind that [B.L.] actually went the police route instead" of just talking with

defendant, he would “actually go the route of coming through with the burner and forcing” her to have a conversation with him. B.L. “assumed” the reference to a “burner” meant a gun, and “felt threatened” by the messages. During another conversation via Instagram in early July 2018, defendant admitted he was “retaliati[ng]” against B.L., sending “non-nude photos of [her] to [her] job,” and posting online about her, but denied ever posting videos.

In a conversation on 9 July 2018, defendant said he was not going to stop “unless [he was] satisfied[,]” and sent her “a screenshot of the video [where she was] performing oral sex.” During a subsequent conversation, B.L. told defendant that he was going to jail if he continued to harass her, to which he replied that he was “not going to jail no matter what” because he “kn[e]w the system[,]” and defendant threatened to “get [B.L.] fired from [her] job and get [her] a felony[.]”

On 11 July 2018, Ms. Eversull began seeing comments on public posts made on “the [hospital’s] Facebook page[,]” which appeared to be a video, since it had a play symbol over it. Ms. Eversull did not click on the images to determine whether it linked to the video. The posts were of the same image that was sent to the hospital the previous month with a play symbol over it. The comments were left by various Facebook profiles under the names “Ericka Chanelle, Chass Tan, [and] Derrick Full Custody Stokes.” At this time, defendant also began sharing explicit photos of B.L. with her family members and friends. In July 2018, defendant sent B.L.’s mother pictures of B.L. “with a penis in her . . . mouth” through social media. B.L.’s sister

and her friends were also contacted by defendant from various accounts under different names. B.L.'s sister was contacted on multiple platforms, including "Instagram, Facebook, [her] business page, and [B.L.'s] business page." Furthermore, a non-profit organization that B.L. worked with was sent explicit images of her.

On 11 July 2018, defendant posted on his Facebook page various images of B.L. "[p]erforming oral sex[.]" with captions that identified her by name. One post was "liked" by 800 people. On that same day, defendant posted on his Instagram an image of B.L. "performing oral sex[.]" and posted B.L.'s full name, employer, and home address. The image posted on defendant's Instagram was the same image that defendant had posted on his Facebook, and similar to the image sent to B.L.'s employer and posted on the hospital's Facebook page. Furthermore, posting B.L.'s address resulted in "different men [g]oing to [her] house looking for [her][.]" and in her having to file "multiple police reports."

In October 2018, defendant applied for, and was granted, a domestic violence protective order against B.L. After the order had been granted, defendant made allegations that B.L. had contacted him by text in violation of the order, resulting in her arrest. B.L. was eventually granted a protective order against defendant.

Detective Lindsay Kensington ("Detective Kensington") with the Onslow County Sheriff's Office Special Victim's Unit took the initial report on 8 June 2018, and began investigating. Initially, Detective Kensington began her investigation by looking at defendant's Facebook pages. On accounts belonging to defendant,

Detective Kensington located “screenshots” from the video, images of B.L.’s “face and breasts[,]” and images of B.L. clearly engaged in “oral sex” and “vaginal penetration.” One account also “contained screenshots of conversations regarding images of [B.L.]” and “a photograph of . . . a picture frame exposing [B.L.]’s children and a firearm next to the picture frame.” The posts mentioned B.L. by name. With these findings, on 16 November 2018, Detective Kensington served a search warrant on Facebook and Instagram for information from defendant’s accounts.

On 7 December 2018, while waiting for the search warrant information to be returned, Detective Kensington spoke with defendant at his residence. During their conversation, defendant admitted the Facebook accounts for “Derrick Full Custody Stokes” and “Emperor Stokes” belonged to him. During the interview, defendant provided law enforcement with his Wi-Fi password so they could obtain his IP address. The password was “complicated” and “long[,]” with numbers and upper and lowercase letters, making it difficult for the detectives to log into. At no point during the interview did defendant mention any other potential suspects.

On 12 December 2018, Detective Kensington received information back from Facebook and Instagram regarding the search warrant served the month prior. The information contained records for accounts associated with defendant from 1 July 2018 to 27 November 2018. All of the accounts accessed the IP address from defendant’s home. Furthermore, defendant’s home IP address was used to upload “a video of [B.L.] performing fellatio . . . on” him on 11 July 2018 and the explicit images

of B.L sent to B.L.'s mother.

Detective Kensington also served a search warrant on Facebook to obtain information about the accounts that defendant alleged B.L. used to contact him in violation of the protective order. The emails used to create the accounts were all used to send or post explicit images of B.L., and utilized defendant's home IP address, leading Detective Kensington to draft a statement to the court that charges related to the alleged protective order violations should be dropped against B.L.

Defendant was subsequently indicted for three counts of disclosing private images, three counts of disseminating obscenities, and for attaining the status of habitual felon. The matter came on for trial in Onslow County Superior Court on 5 April 2021, Judge Stevens presiding.

At trial, B.L. testified for the State. B.L. identified the screenshots from the messages sent to and the posts on the hospital's Facebook page as being from the video she filmed with defendant, in which she was performing sex acts and nude. B.L. specifically testified that the video was of her performing oral sex on and engaging in vaginal sex with defendant.

Detective Kensington also testified for the State. Detective Kensington detailed the explicit images of B.L., along with their inappropriate captions, posted by over eleven different accounts across a variety of social media platforms. Detective Kensington also testified that in January 2019, she received an email from an email address that had posted sexually explicit images of B.L., alleging that B.L. was



responsible for posting the images herself, and defendant was being falsely accused. Detective Kensington testified that during the investigation, she was provided access to B.L.'s phone and there was no evidence that she disclosed any of the images herself, nor did defendant mention B.L. as someone who had access to his Wi-Fi and could have used his IP address.

Furthermore, Detective Kensington testified that she had continued to monitor defendant's Facebook throughout the case, and he posted twice in late 2020 accusing B.L. of making false allegations against him and admitting he posted images of B.L. "to embarrass [her] even more." When asked why she did not interview or pursue defendant's brother as a suspect, despite one of the accounts being used to harass B.L. using his name, Detective Kensington testified that the evidence did not indicate any suspect other than defendant.

At the close of the State's evidence and at the close of all evidence, defendant made a motion to dismiss and a motion for a directed verdict, arguing there was insufficient evidence and because "no reasonable juror could conclude that [defendant] [wa]s the identified sender beyond a reasonable doubt even in the light most favorable to the State[.]" Defendant's motions were denied.

After defendant was informed by his counsel that the jury had reached a verdict, he did not return to the courtroom. The State requested, and the court allowed, the verdicts to be read without defendant. On 9 April 2021, defendant was found guilty of all charges. Thereafter, defendant was found guilty of attaining the

status of habitual felon. Sentencing was delayed due to defendant's absence.

That same day, defendant's ankle monitor was located near the Onslow County Sheriff's Department "in a ravine by a dumpster[.]" The ankle monitor "had been cut off[.]" and defendant was gone. Although law enforcement attempted to locate defendant at his last known residence on 13 April 2021, they were unable to do so. Defendant's whereabouts were unknown until 21 April 2021, when he was arrested in Maryland.

Defendant was sentenced on 10 November 2021. Prior to being sentenced for the charges in this case, defendant was found to have violated probation, and his probation was revoked. The three convictions for disseminating private images were consolidated into one judgment, and defendant was sentenced in the presumptive range of 97-129 months active sentence. The three convictions for disseminating obscenities were also consolidated into one judgment, and defendant was sentenced in the presumptive range of 38-58 months active sentence, to run consecutively with the other sentence. Defendant gave oral notice of appeal after the sentencing.

## II. Discussion

On appeal, defendant argues: (1) the trial court erred in denying his motion to dismiss the charges; and (2) if this Court vacates the trial judgments, we must also reverse the judgments revoking defendant's probation. Understanding that his oral notice of appeal may be insufficient to invoke this Court's jurisdiction over both the trial judgments and the judgment revoking probation entered immediately before

sentencing, defendant has also filed a PWC. We allow defendant's PWC, but find no error in the trial court's ruling.

Defendant has also contemporaneously filed a MAR with this Court, pursuant to N.C. Gen. Stat. § 15A-1418, arguing N.C. Gen. Stat. § 14-190.5A is "facially unconstitutional and [an] overbroad criminalization of protected speech that fails strict scrutiny[.]" requiring his convictions under this statute be vacated. This motion is denied by separate order.

A. Motion to Dismiss

In his first argument on appeal, defendant contends the trial court erred in denying his motion to dismiss the charges of disseminating an obscenity because "the images . . . were not obscene . . . and were protected by the First Amendment." Defendant also argues the trial court erred in failing to dismiss the dissemination of private images charges because the posts to the hospital's Facebook page did not show B.L. engaged in sexual conduct. We find these arguments to be without merit.

1. Standard of Review

Our "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) (citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and internal quotation marks omitted). "Substantial evidence is such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and internal quotation marks omitted). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

“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. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citation omitted). 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, internal quotation marks, and emphasis omitted). However, if the evidence “is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citation omitted).

2. Motion to Dismiss the Disseminating an Obscenity Charges

On appeal, defendant contends that the posts to the hospital's Facebook page nor the posts to his Facebook page of B.L. meet the definition of obscenity, since the screenshots entered into evidence only showed "B.L. unclothed from the shoulders up" and her face. In the alternative, defendant argues there was a fatal variance, necessitating reversal. As an initial matter, defendant contends that since the term "image" was on the indictment, our review is limited to the screenshots in the exhibits, and we cannot consider the State's evidence that the video of B.L. was posted. Defendant presents no legal argument for this contention, other than the mere statement that sufficiency is limited to the crime charged in the indictment. As the crime charged in the indictment is disseminating an obscenity and not disseminating an image, we will not limit our review based on defendant's assertions.

Under N.C. Gen. Stat. § 14-190.1(b), material is obscene if:

- (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
- (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
- (3) The material lacks serious literary, artistic, political, or scientific value; and
- (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b) (2022). "Sexual conduct" includes "vaginal, anal, or oral

intercourse[.]” *Id.* § 14-190.1(c)(1).

a. Hospital’s Facebook Page Posts

Defendant first contends the trial court erred in denying his motion to dismiss the charges of disseminating an obscenity because the posts of B.L. on the hospital’s Facebook page did not meet the statutory definition of obscene since they do not depict sexual conduct in a patently offensive way, and, because the video was not shown to the jury, the jury could not have found that “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” These arguments are without merit.

First, we note that “[n]othing in section 14-190.1 requires the State to produce the precise material alleged to be obscene[.]” *State v. Mueller*, 184 N.C. App. 553, 566, 647 S.E.2d 440, 450, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (Mem) (2007). In *Mueller*, this Court held that the trial court properly denied the defendant’s motion to dismiss the dissemination of obscene materials charge, since the victim “describe[d] in detail” the material in question and the jury was shown similar images “only for the purposes of illustrating and corroborating [her] testimony.” *Id.* at 566-67, 647 S.E.2d at 450-51. Here, B.L. testified that the video depicted her nude, performing oral sex on defendant and them having “vaginal sex[.]” and she identified the screenshots of the posts as having come from the video.

Defendant also contends the requirement that the material be “taken as whole” should be construed to mean that the entire video should have been shown to the

jury. This argument is without merit, as we have never held the exact material must be shown to the jury and we will not do so today. *See id.* Therefore, defendant's argument that the jury had to see the full video to determine whether it was obscene is without merit.

Furthermore, defendant contends the material sent to and posted on the hospital's Facebook page cannot meet the definition of obscene because it did not depict sexual conduct. Here, B.L. testified that she and defendant recorded a video where they "had oral sex and vaginal sex." Furthermore, B.L. and Ms. Eversull testified that the materials sent to the hospital and posted on their Facebook page appeared to be a video, since it had a play button over it.

Although Ms. Eversull did not click on the link to determine if it was a video, she did "screenshot" the material that was sent, and provided the screenshots to B.L., who gave them to law enforcement. These screenshots were the ones admitted during the trial as Exhibit 1, which B.L. confirmed were screenshots from the video she and defendant made where they were engaged in sexual conduct. Here, in the light most favorable to the State, there was substantial evidence from which a reasonable jury could conclude defendant posted a video of B.L., which contained sexual conduct.

However, defendant argues that even if the posts contained "sexual conduct," they did not do so in a patently offensive manner and therefore did not meet the definition of obscene. We do not agree.

Sexual conduct is "patently offensive" "if the average adult, applying

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contemporary community standards, would find that the [material] in question appealed to a prurient interest in sex in a patently offensive manner.” *State v. Anderson*, 322 N.C. 22, 36, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). Whether sexual conduct is portrayed in a patently offensive way is a question of fact for the jury to decide. *Anderson*, 322 N.C. at 29, 36, 366 S.E.2d at 464, 468 (finding that “[w]hether material appeals to the ‘prurient interest’ and what is ‘patently offensive’ are questions of fact” for the jury to decide) (quoting *Miller v. California*, 413 U.S. 15, 30, 37 L. Ed. 2d 419, 434, *reh’g denied*, 414 U.S. 881, 38 L. Ed. 2d 128 (1973)). This Court has previously upheld jury verdicts finding defendants guilty of disseminating obscene material when that material depicts nudity, fellatio, and intercourse. *State v. Mayes*, 86 N.C. App. 569, 570-71, 359 S.E.2d 30, 32-33 (1987), *aff’d*, 323 N.C. 159, 371 S.E.2d 476 (1988).

Here, in the light most favorable to the State, there was evidence submitted, the post itself, testimony that the posts appeared to be videos, and B.L.’s testimony about what the video contained, from which a reasonable jury could conclude the post was of a video which displayed sexual conduct in a patently offensive manner. Thus, the trial court did not err in denying defendant’s motion to dismiss the charge of disseminating obscene material and the issue was properly submitted to the jury.

b. Posts to Defendant’s Facebook Page

Regarding the posts of B.L. engaged in fellatio that defendant posted on his Facebook page, he admits that the image depicts sexual conduct, but argues it does



not meet the definition of obscenity because it does not do so in a patently offensive way. For the reasons stated above, whether the post was patently offensive was an issue that was properly submitted to the jury, considering the evidence in the light most favorable to the State. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

c. Fatal Variance

Lastly, defendant argues that since the indictment alleged dissemination of an "image[.]" but the evidence presented at trial "indicated that a video was posted[.]" and the trial court erroneously instructed the jury that an image can include a video, there was a fatal variance necessitating reversal of his convictions. This argument is without merit.

"In order to prevail on [a motion to dismiss for variance], the defendant must show a fatal variance between the offense charged and the proof as to 'the gist of the offense.' This means that the defendant must" demonstrate the variance is "material[.]" or "regarding an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations, brackets, and internal quotation marks omitted); *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). "When an averment in an indictment is not necessary in charging the offense, it will be deemed to be surplusage." *Pickens*, 346 N.C. at 646, 488 S.E.2d at 172 (citations and internal quotation marks omitted). The statute in question makes it unlawful for someone "to intentionally disseminate [an] obscenity." N.C.

Gen. Stat. § 14-190.1(a) (2022). The statute clarifies that the offense includes the dissemination of “any obscene writing, picture, record or other representation or embodiment of the obscene[.]” *Id.* § 14-190.1(a)(1). However, the form of the obscene material is not an essential element of the offense, and defendant does not argue that it is, therefore whether the “material” was a photograph or a video is of no consequence.

Furthermore, “‘a variance does not require reversal unless the defendant is prejudiced as a result.’” *State v. Glidewell*, 255 N.C. App. 110, 113, 804 S.E.2d 228, 232 (2017) (citations and ellipsis omitted). “This Court has required that a defendant demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error.” *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (citation omitted), *cert. denied, disc. review denied*, 344 N.C. 636, 477 S.E.2d 53 (Mem) (1996). Here, defendant makes no such argument. Accordingly, there was no fatal variance.

Defendant also argues that the trial court erroneously instructed the jury that an image could also be a video for purposes of N.C. Gen. Stat. § 14-190.1. Although defendant’s counsel objected generally to the jury instructions, they did not provide specific grounds for their objection. Accordingly, the issue was not preserved for appeal. N.C.R. App. P. 10(a)(2) (2023) (“A party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection

is made and the grounds of the objection[.]”). Furthermore, defendant did not allege this addition to the instructions was plain error on appeal. N.C.R. App. P. 10(a)(4) (explaining that unpreserved issues in criminal cases “may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error”). Accordingly, we do not address this contention as it was not preserved.

3. Motion to Dismiss the Disseminating Private Images Charges

Defendant next argues the trial court erred in failing to dismiss the dissemination of private images charges related to the posts on the hospital’s Facebook page because they did not depict B.L. engaged in sexual conduct. As an initial matter, we note that although defendant attempts to address the constitutionality of N.C. Gen. Stat. § 14-190.5A through a MAR filed separately with this Court and by referencing the MAR briefly in his brief, this issue was not preserved. Therefore, we will not address it as a part of defendant’s appeal. *See Gobal*, 186 N.C. App. at 320, 651 S.E.2d at 287. Accordingly, we only address defendant’s contention that the trial court erred in denying his motion to dismiss, and we deny defendant’s MAR via a separate order.

Under N.C. Gen. Stat. § 14-190.5A(b), “[a] person is guilty of disclosure of private images” if:

- (1) The person knowingly discloses an image of another person with the intent to do either of the following:

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- a. Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
  - b. Cause others to coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
- (2) The depicted person is identifiable from the disclosed image itself or information offered in connection with the image.
- (3) The depicted person's intimate parts are exposed *or the depicted person is engaged in sexual conduct in the disclosed image*.
- (4) The person discloses the image without the affirmative consent of the depicted person.
- (5) The person obtained the image without consent of the depicted person or under circumstances such that the person knew or should have known that the depicted person expected the images to remain private.

N.C. Gen. Stat. § 14-190.5A(b) (2022) (emphasis added). An “image” is defined by the statute as “[a] photograph, film, videotape, recording, live transmission, digital or computer-generated visual depiction, or any other reproduction that is made by electronic, mechanical, or other means.” *Id.* § 14-190.5A(a)(2). “Sexual conduct” includes “vaginal, anal, or oral intercourse[.]” *Id.* § 14-190.5A(a)(6)(a).

Here, in the light most favorable to the State, there was substantial evidence presented from which a reasonable jury could conclude defendant posted the video he made with B.L., in which she was engaged in sexual conduct. Both B.L. and Ms. Eversull testified that the materials sent to the hospital and posted on the hospital's

Facebook page appeared to be a video, since it had a play button over it. As discussed above, the screenshots taken of the posts by Ms. Eversull, which provided the basis for these charges, were admitted during trial. B.L. confirmed the screenshots were from the video in which she and defendant were engaged in sexual conduct. Whether the post was a photograph, or a video which contained B.L. engaged in sexual conduct, was a question for the jury, and we will not upset their decision on appeal.

Accordingly, the trial court properly denied defendant's motion to dismiss. Since we find no error in the trial court's ruling, we do not reach defendant's argument regarding his probation.

### III. Conclusion

For the foregoing reasons, we hold the trial court did not err.

NO ERROR.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).