IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL J. VOYLES, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11707 Trial Court No. 3GL-11-159 CR MEMORANDUM OPINION No. 6486 — June 21, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Patricia L. Douglass, Judge.

Appearances: Lance Christian Wells, Law Office of Lance Christian Wells, LLC, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.[*]

Senior Judge COATS.

Following a jury trial, Michael J. Voyles was convicted of first-degree sexual abuse of a minor based on allegations that he digitally penetrated a nine-year-old

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

girl who was at a sleepover at his house. On appeal, Voyles contends that the evidence presented at trial is legally insufficient to support his conviction. He also argues that the court erred in admitting a video-recorded interview with the victim at trial. For the reasons explained in this opinion, we reject these claims and uphold Voyles's conviction.

Voyles also appeals his sentence. We conclude that the superior court erred in its analysis of Voyles's proposed mitigating factor and that Voyles's conduct qualified as "among the least serious conduct included in the definition of the offense."[1] We accordingly remand for reconsideration of this proposed mitigating factor and, if appropriate, resentencing.

Factual background

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, this Court is required to view the evidence (and all reasonable inferences to be drawn from the evidence) in the light most favorable to the jury's verdict.[2] We therefore present the evidence in Voyles's case in that light.

During the weekend of September 24, 2011, D.L., age nine, was spending the weekend at the home of her Aunt Georgia and Georgia's husband, Tony Dale Jackson, in Copper Center. D.L. and her siblings lived with their grandmother, and the family had recently relocated from Anchorage to the Copper Valley. Jackson and Voyles were neighbors and had been friends since childhood. Voyles and his wife had three daughters and two sons.

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[1] AS 12.55.155(d)(9).

[2] *See, e.g.*, *Eide v. State*, 168 P.3d 499, 500 (Alaska App. 2007); *Tipikin v. Anchorage*, 65 P.3d 899, 901 (Alaska App. 2003).

On the evening of September 24, after a day of playing outside, D.L. went over to Voyles's house to play with his youngest daughter. D.L. testified that this was her first time at the house. At some point, D.L. joined Voyles, his two older daughters, and one son, who were watching TV in the living room.

D.L. got permission to stay the night at the Voyles' house. D.L. then fell asleep on the couch while watching movies.

Jackson testified that he returned to Copper Center from a trip to Anchorage around 3:00 a.m. He could see that the lights were on in Voyles's house, so he went across the street to chat with his friend Voyles and to check on D.L. He saw D.L. covered by a blanket and asleep on the couch in the living room. Voyles was sitting on the couch next to D.L., and one of Voyles's sons was also in the room. Jackson and Voyles visited for about thirty minutes, and then Jackson went home.

D.L. testified that she woke up when she felt Voyles sit down on the couch next to her. She was lying on her back with her knees up; Voyles was sitting to D.L.'s side, facing her feet. Voyles slipped his hand under the blanket that was draped over D.L.; at first D.L. thought that Voyles was trying to retrieve something from under the blanket. But then Voyles slid his hand into her pants and rubbed his finger around the inside of her vaginal lips for over a minute. Voyles then slipped his right hand underneath her shirt and fondled her breast.

D.L. stated that she did not move while Voyles was touching her; she was scared and did not know what to do. There was no one in the room except herself and Voyles. Although it was dark outside, and the television was off, the adjacent kitchen light illuminated the room enough that D.L. could identify Voyles.

D.L. waited until Voyles left the room before she got up. She then went to Voyles's son's room (which was adjacent to the living room), told him she was leaving, and ran back to her aunt's house.

Around 4:00 a.m., Jackson, who had returned home fifteen minutes prior from visiting Voyles, heard D.L. outside running toward the house and then knocking at the door. D.L. told Jackson that she wanted to sleep at his house instead of at Voyles's house. It appeared to Jackson that D.L. wanted to tell him something else; she would turn to talk to him, but then stop herself. She did this several times while the pair watched television. When Jackson asked D.L. what was going on, she told him that Voyles had "touched [her] down there." Jackson stated that D.L. was scared, confused, and embarrassed.

In the morning, D.L.'s Aunt Georgia contacted D.L.'s grandmother, Rosemarie. Rosemarie retrieved D.L. and drove her first to the trooper's office, and then to the Copper River Basin Child Advocacy Center (CAC).

Johana McMahan, a forensic interviewer at the CAC, interviewed D.L. The interview was video recorded. Based on D.L.'s statements in the interview, the troopers obtained a *Glass* warrant and had Rosemarie confront Voyles in a recorded phone call. Voyles denied touching D.L. and claimed that he had taken a sleeping pill and gone to bed that night.

Nurse Mary McCarty examined D.L. D.L. told the nurse that Voyles put his "finger in her vagina but not inside her body." McCarty testified that D.L. had no physical injuries to her genitals.

The State charged Voyles with one count of sexual abuse of a minor in the first degree (sexual penetration of a child under thirteen years old)[3] and two counts of sexual abuse of a minor in the second degree (sexual contact with a child under thirteen

[3] AS 11.41.434(a)(1).

years old).[4] Voyles's first trial ended with the jury unable to reach a verdict. The State elected to retry Voyles. The second jury convicted Voyles.[5]

At sentencing, the court merged Voyles's convictions into a single count of sexual abuse of a minor in the first degree. Voyles, a first felony offender, faced a presumptive sentencing range of 25 to 35 years.[6] At sentencing, Voyles proposed the mitigating factor under AS 12.55.155(d)(9) — that his conduct was "among the least serious conduct included in the definition of the offense." Voyles argued that his conduct qualified as "among the least serious" first-degree sexual abuse of a minor because it involved a single act of minimal digital penetration. The court rejected Voyles's proposed mitigating factor.

The judge ultimately sentenced Voyles to 30 years with 5 suspended (25 years to serve), plus 15 years of probation.

The evidence presented at trial was sufficient to support Voyles's conviction

Voyles contends that the evidence presented at trial was insufficient to support his conviction. He argues that D.L.'s testimony was not credible because it was not corroborated by other witnesses, physical injury, or DNA evidence.

But as we explained earlier, the law requires us to review the evidence in the light most favorable to upholding the jury's verdict.[7] We do not weigh the evidence

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[4] AS 11.41.436(a)(2).

[5] Voyles's second trial was in Anchorage. The first trial was in Glennallen.

[6] AS 12.55.125(i)(1)(A)(i); former 12.55.125(o) (2014), *repealed by* ch. 36, § 179, SLA 2016.

[7] *Eide*, 168 P.3d at 500.

or determine the credibility of witnesses, as those "are matters for the jury to consider in reaching a verdict, not for the reviewing court to decide in ruling on the legal sufficiency of the evidence."[8]

Viewed in the light most favorable to the verdict, the evidence was sufficient to support Voyles's conviction. First, the jury heard D.L.'s account of what happened to her. Despite Voyles's argument to the contrary, the jury could reasonably believe D.L.'s testimony that Voyles touched her. Additionally, the jury also heard Jackson's testimony that corroborated D.L.'s account. Jackson observed D.L. on the couch next to Voyles shortly before the alleged abuse. He also testified that D.L.'s behavior after the incident indicated to him that she was scared and confused about what had happened. The jury could have made reasonable inferences from this evidence that the abuse occurred.

Voyles also argues that D.L.'s testimony is uncorroborated because there was no DNA evidence or physical injury. But physical injury is not an element of first- or second-degree sexual abuse of a minor and thus the State does not need to prove injury occurred.[9] Moreover, Nurse McCarty testified that, in her experience, it was normal not to find physical injuries in a case like this one. In addition, the trooper who testified explained that the police did not conduct DNA testing in this case because, based on D.L.'s account of what happened, they did not think they would likely find DNA evidence.

For these reasons we reject Voyles's claim that the evidence was legally insufficient to support his conviction.

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[8] *Ratliff v. State*, 798 P.2d 1288, 1291 (Alaska App. 1990), *disagreed with on other grounds by Jeffries v. State*, 169 P.3d 913, 920-21 (Alaska 2007).

[9] *See* AS 11.41.434(a)(1); AS 11.41.436(a)(2).

The court did not err in admitting the video recording of the statement that D.L. made to Johana McMahan

As we have previously stated, Johana McMahan interviewed D.L. at the Copper River Basin CAC. The interview was video recorded.

In Voyles's trial, the State sought to admit the video recording of D.L.'s statement under Alaska Evidence Rule 801(d)(3) as a recorded statement by a child victim of a crime. Voyles objected to the admission of this statement, arguing that there was insufficient identification of two of the people who observed the statement — one person was identified only as "the trooper" and another person was only identified by their first name. Rule 801(d)(3) requires, *inter alia*, that "each person who participated in the statement is identified in the recording."[10]

The superior court overruled the objection, concluding that the identification was sufficient because neither person had actually participated in the statement. The superior court also made the other required findings under Rule 801(d)(3).[11] The State then played the video recording to the jury.

In his opening brief, Voyles argues that the court erred in admitting the statement under Alaska Evidence Rule 801(d)(1)(B) as a prior consistent statement. But the superior court did not admit D.L.'s recorded statement as a prior consistent statement. Instead, the court admitted the statement as a recorded statement by a child victim of a crime under Rule 801(d)(3).

After the State pointed out Voyles's mistake in its brief, Voyles attempted to address the trial court's Rule 801(d)(3) ruling in his reply brief, renewing his original argument that the participants in the video were not sufficiently identified for purposes

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[10] Alaska Evid. R. 801(d)(3)(F).

[11] *See* Alaska Evid. R. 801(d)(3)(F)-(H).

of Rule 801(d)(3)(F). Voyles also argued that the court erred in admitting the videotape because he claimed that there was "no showing … as to why this video was required at all."

Arguments raised for the first time in a reply brief will generally not be considered by an appellate court.[12] Both of these arguments are therefore waived. They also lack merit. As already explained, Voyles's only objection to the videotape in the trial court proceedings was that the observers were allegedly not sufficiently identified. But Voyles has not argued, nor is there anything in the record to suggest, that Voyles was prejudiced by the limited identification of these two observers.

The superior court erred in rejecting Voyles's proposed mitigating factor that his conduct was "among the least serious conduct included in the definition of the offense"

Voyles was convicted of sexual abuse of a minor in the first degree — sexual penetration of a child under thirteen years old. As a first felony offender, Voyles faced a presumptive sentencing range of 25 to 35 years for this crime.[13] At the time of sentencing, Voyles was sixty-one years old. He had an extensive history of alcohol-related misdemeanor convictions, but no prior felonies and no prior sex offenses.

At sentencing, Voyles proposed the mitigating factor under AS 12.55.-155(d)(9) — that his conduct was "among the least serious conduct included in the definition of the offense." If the court found the proposed mitigating factor, the court

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[12] *Braun v. Alaska Commerical Fishing & Agric. Bank*, 816 P.2d 140, 145 (Alaska 1991).

[13] AS 12.55.125(i)(1)(A)(i); former AS 12.55.125(o) (2014), *repealed by* ch. 36, § 179, SLA 2016.

would then have the authority to sentence Voyles within an adjusted sentencing range of 12½ to 35 years.[14]

The sentencing judge rejected Voyles's proposed mitigating factor, concluding that his conduct did not qualify as "among the least serious" given the age of the victim and her status as an overnight guest in Voyles's home. In her findings, the judge acknowledged that the sexual penetration had been minimal and of brief duration, but she concluded that the intrusion, although minor, was traumatic to the nine-year-old child. After rejecting Voyles's proposed mitigator, the court sentenced Voyles to the lowest sentence available within the presumptive range — 30 years in jail with 5 years suspended, 25 years to serve.

On appeal, Voyles argues that the sentencing judge erred in rejecting his proposed mitigator. He asserts that if the conduct for which he was convicted did not qualify as "among the least serious conduct included in the definition of the offense," then essentially *no* sexual penetration of a child under thirteen would ever qualify for this statutory mitigator.

We agree with Voyles that the structure of presumptive sentencing presumes that, for any offense, there is conduct that qualifies as "among the least serious" as well as conduct that qualifies as "among the most serious."[15] We also agree that principles of fairness and equity require sentencing courts to consider the nature of the defendant's conduct relative to other instances of the same crime — here, the crime of first-degree sexual abuse of a minor — despite the difficulties that such comparisons may present. As we explained in *Simants v. State*, application of the (d)(9) mitigator to

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[14] AS 12.55.155(a)(2).

[15] *See* AS 12.55.155(c)(10) (allowing a sentencing court to find a factor in aggravation "if the conduct constituting the offense was among the most serious conduct included in the definition of the offense").

a particular sexual offense "does not mean that the [offense] is somehow 'not serious' or that the victim has not been harmed."[16] "Rather, the determination of the 'seriousness' of the defendant's conduct is a relative one — the defendant's conduct is considered 'among the least serious' only in contrast to the range of conduct included within the definition of the offense."[17]

On appeal, the State argues that the sentencing judge's rejection of the statutory mitigating factor is entitled to great deference, citing older cases that have since been abrogated by the Alaska Supreme Court.[18]

Whether a defendant's conduct qualifies as "among the least serious" is a mixed question of law and fact.[19] As the Alaska Supreme Court explained in *Michael v. State*:

> The determination of whether the defendant's conduct is among the least serious conduct within the definition of the offense involves a two-step process: the court must (1) assess the nature of the defendant's conduct, a factual finding, and then (2) make the legal determination of whether that conduct falls within the statutory standard of "among the least serious conduct within the definition of the offense." Any factual findings made by the court regarding the nature of the defendant's conduct are reviewed for clear error, but whether those facts establish that the conduct "is among the least serious" under AS 12.55.155(d)(9) is a legal question.[20]

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[16] 329 P.3d 1033, 1036 (Alaska App. 2014).

[17] *Id.*

[18] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005) (holding that *de novo* review of application of mitigator to certain facts is required to promote uniformity in sentencing and overruling prior Court of Appeals decisions on this issue).

[19] *Id.*

[20] *Id.*

Here, it was undisputed that the conduct at issue involved a single, minimal act of digital penetration. The victim told the examining nurse that "there was a finger in her vagina but not inside her body," which the State, at closing argument, acknowledged was penetration of the labia but not the vaginal canal. The sentencing judge also recognized that the penetration was minimal, but the judge rejected Voyles's argument that this made his conduct "among the least serious" because "maybe to us as adults, fingering a [nine]-year-old little girl is a minimal intrusion on her body and her privacy. However, from the point of view of the [nine]-year-old girl, it's probably not so minimal, so I don't find that the behavior was least serious." The judge also noted that the victim was a guest in Voyles's home. The judge did not, however, comment on whether Voyles was in a "position of authority" over the victim.

On appeal, Voyles argues that the surrounding circumstances of the crime are irrelevant and that his conduct should be judged solely in relationship to the duration and extent of the penetration. We disagree. First-degree sexual abuse of a minor is defined as sexual penetration of a child under thirteen years old;[21] the age of the victim is therefore a relevant circumstance in judging the defendant's conduct.[22]

We nevertheless agree with Voyles's claim that his conduct qualified as *among* the least serious conduct included in the definition of first-degree sexual abuse of a minor. First-degree sexual abuse of a minor — penetration of a child under thirteen years old — is an unclassified felony that carries a presumptive range of 25 to 35 years to serve.[23] Under Alaska law, penetration includes "an intrusion, however slight, of an

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[21] AS 11.41.434(a)(1).

[22] *Cf.* AS 12.55.155(c)(18)(E) (allowing a sentencing court to find a factor in aggravation if the defendant was convicted of a felony under "AS 11.41.434-11.41.458 or AS 11.61.128 and the defendant was 10 or more years older than the victim").

[23] AS 12.55.125(i)(1)(A)(i).

object or any part of a person's body into the genital or anal opening of another person's body."[24] Under this definition, any intrusion inside the labia majora constitutes sexual penetration.[25] Contact right outside the labia majora, however, would not qualify as "sexual penetration." Instead, the defendant would be guilty of second-degree sexual abuse of a minor under AS 11.41.436 — sexual contact with a child under thirteen years old. Second-degree sexual abuse of a minor is a class B felony which carries a presumptive range of 5 to 15 years to serve.[26]

Thus, the primary difference between first-degree sexual abuse of a minor and second-degree sexual abuse of a minor — and the primary difference between a presumptive range of 25 to 35 years or a presumptive range of 5 to 15 years — is whether the sexual contact involves penetration. Here, there is no disagreement that there was only a single act of penetration and that the intrusion was slight and of brief duration. Although the age of the child and her presence in Voyles's home could be appropriately considered as part of the surrounding circumstances, we conclude that the superior court erred in failing to recognize that the underlying conduct qualified as "among the least serious conduct" included in the definition of this offense.[27]

We note that application of the statutory mitigator (d)(9) to this case authorizes, but does not require, the sentencing court to reduce Voyles's sentence.[28]

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[24] AS 11.81.900(b)(60)(A).

[25] *See Littlefield v. State*, 2008 WL 4822916, at *3 (Alaska App. Nov. 5, 2008) (unpublished) (rejecting defendant's argument that intrusion between the labia majora is merely "sexual contact" rather than "sexual penetration").

[26] AS 12.55.125(i)(3)(A).

[27] *Cf. Benboe v. State*, 698 P.2d 1230, 1232 (Alaska App. 1985) (conduct that approximates a higher level of offense can be considered "among the most serious").

[28] *See* AS 12.55.155(a)(2).

Application of the mitigating factor means only that the court is authorized to sentence Voyles within a 12½- to 35-year range rather than a 25- to 35-year range.[29] We express no opinion on what sentence is appropriate in this case; this is a matter for the superior court to decide after considering the totality of the circumstances presented by this case and the *Chaney* criteria.[30]

Accordingly, we reverse the superior court's rejection of the proposed mitigator and we remand this case to the superior court for reconsideration of the appropriate sentence in this case.

Conclusion

The conviction is AFFIRMED. The case is remanded for resentencing.

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[29] *Id.*

[30] *See State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970).