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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN TAYANITA NORRIS, Defendant and Appellant.	2d Crim. No. B280307 (Super. Ct. No. 2014005068) (Ventura County)

A jury convicted John Tayanita Norris of two counts of oral copulation on a child age 10 years or younger. (Pen. Code,[1] § 288.7, subd. (b).) The trial court sentenced him to concurrent terms of 15 years to life in state prison. Norris contends: (1) his conviction on count 2 should be reversed because of insufficient evidence to establish the corpus delicti of that offense, (2) the prosecutor committed misconduct by misrepresenting the corpus delicti rules to jurors, (3) CALCRIM No. 1128 is overly broad because it does not instruct the jury on a

[1] All further statutory references are to the Penal Code.

sexual intent element, and (4) his sentence constitutes cruel and/or unusual punishment. We reverse Norris's conviction on count 2, and otherwise affirm.

BACKGROUND

Robert B.[2] walked into a bedroom where Norris was massaging his son, R.B. R.B.'s diaper was pulled down around his calves, and Norris's face was near R.B.'s groin. When Norris saw Robert, he attempted to get to his feet. Robert pushed Norris down and told him to get out of the house.

Robert contacted the police, and a detective helped him orchestrate a telephone call to Norris. During the call, Robert asked Norris, "[H]ow many times have you done it?" "I've done it twice," Norris replied. "What was it?" Robert asked. Norris said that R.B. pulled his pants down during a massage and revealed an erection. R.B.'s sister told Norris, "I think he wants you to lick it for him." Norris did. He admitted that his actions were "completely wrong" and "completely stupid."

Robert asked, "So you licked his penis[,] is that what you're telling me?" "Yes, Robert," Norris replied. Robert then asked if Norris had done anything to his daughter. Norris said he had not, and reiterated that he had only licked R.B.'s penis twice.

R.B. had a sexual assault examination the next day. Swabs collected from R.B.'s penis and scrotum contained Norris's DNA.

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[2] We identify Robert B. by his first name to protect R.B.'s privacy. (Cal. Rules of Court, rule 8.90(b)(11).)

DISCUSSION

Corpus delicti

Norris contends his conviction on count 2 should be reversed because the prosecution failed to establish the corpus delicti of that crime independent of his extrajudicial statements. We agree.

"'"'The corpus delicti of a crime consists of two elements[:] the fact of the injury or loss or harm, and the existence of a criminal agency as its cause.'" [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 301.) The corpus delicti must be established "independently from the extrajudicial statements, confessions, or admissions of the defendant." (*People v. Wright* (1990) 52 Cal.3d 367, 403, disapproved on another ground by *People v. Williams* (2010) 49 Cal.4th 405, 459.) "Such independent proof may consist of circumstantial evidence [citations], and need not establish the crime beyond a reasonable doubt [citations]." (*People v. Jones*, at p. 301.) "The amount of independent proof of a crime required for this purpose is . . . 'slight' [citation]," and need only permit a "'"reasonable inference that a crime was committed.'" [Citations.]" (*Ibid.*) Where, as here, the facts are undisputed, we independently review whether the prosecution put forth the requisite independent proof to establish the corpus delicti. (*Id*. at p. 302 [undisputed facts raise a legal question]; *People v. Arroyo* (2016) 62 Cal.4th 589, 593 [legal questions reviewed de novo].)

The prosecution failed to establish the corpus delicti of count 2 because mere evidence of opportunity to commit a crime does not provide sufficient independent proof that the crime occurred. (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 396.) Other than the statements in his phone conversation

with Robert, the only evidence that Norris committed more than one act of oral copulation was Robert's testimony that Norris had previously massaged R.B. while R.B. wore only a diaper. That testimony may show that Norris had the opportunity to commit a crime, but it shows neither harm nor criminal agency. It is even more "slight" than the evidence in *People v. Schuber* (1945) 71 Cal.App.2d 773, 776-777, where the court reversed a conviction for lascivious conduct because the evidence—that the victim slept in the same bed as the defendant just before she suffered a lacerated vagina—was insufficient to show criminal agency.

This case is unlike *People v. Tompkins* (2010) 185 Cal.App.4th 1253, on which the Attorney General relies. In *Tompkins*, the court upheld the defendant's convictions for 11 counts of lewd acts on a minor because the victim testified that the defendant molested her "more than once but less than 50 times" and told an investigator that he molested her "'on many occasions'" over two years. (*Id.* at p. 1260.) Here, in contrast, the prosecution presented no testimony to corroborate multiple criminal acts. This case is also unlike *People v. Culton* (1992) 11 Cal.App.4th 363, 372-373, in which the court upheld convictions for 10 counts of lewd acts on a minor because a physician testified that the victim had been molested multiple times. Again, the prosecution presented no evidence of multiple criminal acts here. The conviction on count 2 must be reversed.[3]

CALCRIM No. 1128

Norris next contends CALCRIM No. 1128's definition of "oral copulation"—that is, "any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of

[3] Our conclusion renders it unnecessary to consider Norris's contention of prosecutorial misconduct.

another person"—is overly broad and inaccurate because it fails to include a sexual intent element. We review this contention de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218), and reject it.

CALCRIM No. 1128 correctly defines the elements of section 288.7, subdivision (b), because oral copulation is a general intent crime that "'contain[s] no "sexual gratification" specific intent element . . . .' [Citation.]" (*People v. Warner* (2006) 39 Cal.4th 548, 557; see also *People v. Dement* (2011) 53 Cal.4th 1, 41-42 [instruction correctly defines statute's substantive elements], abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Oral copulation is not transmuted into a specific intent crime simply because it is a "lewd or lascivious act." (See *People v. Murphy* (2001) 25 Cal.4th 136, 142-143 (*Murphy*).) "[O]ral copulation on a child . . . is always harmful, always improper, and always lewd, regardless of the perpetrator's intent." (*Id.* at p. 147.)

People v. Martinez (1995) 11 Cal.4th 434 (*Martinez*) is in accord. As the *Murphy* court explained:

> *Martinez* defined "lewd or lascivious act" *only* for purposes of applying section 288 and in light of that statute's basic purpose: to expand the kinds of criminal sexual misconduct where children are concerned by reaching sexually motivated conduct not otherwise made criminal. Section 288 thus is part of a statutory scheme that recognizes that some touchings of children are *always* harmful and improper, whereas others may or may not be, depending upon the actor's intent. To address

> the former, the Legislature passed statutes—like section 288a, subdivision (c)(1) [oral copulation of a person under age 14]—that precisely describe the inherently harmful acts and prohibit them in all circumstances. To address the latter, the Legislature passed section 288. And to implement this statutory scheme, *Martinez* reaffirmed a broad definition of a lewd or lascivious act that includes *any* touching committed with the intent section 288 describes, so as to *extend* protection *beyond* the inherently lewd acts precisely described and prohibited by the other statutes in the family of felony sex offenses.

(*Murphy*, *supra*, 25 Cal.4th at p. 147, original italics.) In other words, an act can be inherently harmful, or it can be harmful due to the perpetrator's intent. (*Ibid*.) Oral copulation is of the former category. (*Ibid*.)

Norris contends oral copulation's lack of a sexual intent element renders section 288.7 and its related instruction unconstitutionally vague. But this contention was rejected more than 90 years ago. (*People v. Parsons* (1927) 82 Cal.App. 17, 19.) And since then courts have further refined the definition of "oral copulation." (See *Murphy*, *supra*, 25 Cal.4th at p. 147 [intent]; *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242-1243 [act].) "[T]here [can] be no complaint of vagueness or lack of notice that [Norris's] conduct was criminal where the acts [he] committed were among those that prior cases had held covered by the statute." (*Wainwright v. Stone* (1973) 414 U.S. 21, 22.)

We also reject Norris's suggestions that devenomizing a child's snake-bitten penis or blowing a raspberry on it render section 288.7 unconstitutionally vague. A statute is "not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." (*United States v. National Dairy Products Corp.* (1963) 372 U.S. 29, 32.) CALCRIM No. 1128's definition of "oral copulation" is not overly broad or inaccurate.

Cruel and/or unusual punishment

Norris contends that his mandatory 15-years-to-life sentence constitutes cruel and/or unusual punishment under the federal and state constitutions if oral copulation does not require proof of sexual intent. We disagree.

1. U.S. Constitution

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." (U.S. Const., 8th Amend.) A sentence violates the federal constitution if it is grossly disproportionate to the crime for which it is imposed. (*Graham v. Florida* (2010) 560 U.S. 48, 72.) We independently review whether a sentence meets this standard. (See *United States v. Bajakajian* (1998) 524 U.S. 321, 336-337.)

Norris's sentence is not so grossly disproportionate that it presents one of the "exceedingly rare" or "extreme" cases that violate the federal constitution. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.) For example, in *Lockyer*, consecutive sentences of 25 years to life for two petty-theft-with-priors convictions did not violate the Eighth Amendment. (*Id.* at pp. 68, 77.) In *Ewing v. California* (2003) 538 U.S. 11, 18-20, 30-31 (plur. opn. of O'Connor, J.), a sentence of 25 years to life for stealing three golf clubs did not constitute cruel and unusual punishment. In

Harmelin v. Michigan (1991) 501 U.S. 957, 961, 995, a sentence of life without possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment. And in *Rummel v. Estelle* (1980) 445 U.S. 263, 268-285, a life sentence for credit card fraud, passing a forged check, and theft by false pretenses did not violate the constitution. Norris's sentence of 15 years to life for oral copulation of a child does not run afoul of the Eighth Amendment.

2. California Constitution

The California Constitution prohibits the imposition of "cruel or unusual punishment." (Cal. Const., art. I, § 17.) A sentence violates the state constitution if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) To determine whether a sentence is so disproportionate, courts: (1) examine the nature of the offense and the offender, "with particular regard to the degree of danger both present to society"; (2) compare the punishment imposed to punishments for other offenses; and (3) compare the punishment imposed to other jurisdictions' punishments for the same offense. (*In re Lynch* (1972) 8 Cal.3d 410, 425-429 (*Lynch*).) The court considers the totality of circumstances when applying the three *Lynch* factors. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1389.) The importance of each factor depends on the facts of the case. (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.) Whether a sentence constitutes cruel or unusual punishment is a question subject to de novo review. (*People v. Rhodes*, at p. 1390.)

Norris fails to bear his "considerable burden" of showing that his sentence violates the state constitution. (*People*

v. Wingo (1975) 14 Cal.3d 169, 174.) As to the nature of the offense, the State of California has a "strong public policy to protect children of tender years." (*People v. Olsen* (1984) 36 Cal.3d 638, 646.) And section 288.7's mandatory sentencing scheme embodies the Legislature's "zero tolerance" attitude toward those who violate this policy. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 200-201.) As to the nature of the offender, Norris is a military veteran with no prior criminal record and a low risk of reoffending. While Norris's personal characteristics would generally weigh in his favor (see *Lynch*, *supra*, 8 Cal.3d at p. 425), the Legislature's "zero tolerance" attitude toward child molesters predominates (*People v. Alvarado*, at pp. 200-201). The first *Lynch* factor weighs against a finding of cruel or unusual punishment.

The second *Lynch* factor also weighs against Norris's contention. The sentence he received is not disproportionate when compared to other crimes that mandate sentences similar to or longer than his. (See, e.g., *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092-1094 [15 years to life for lewd act on a child]; *People v. Nichols* (2009) 176 Cal.App.4th 428, 431, 437 [25 years to life for failure to register as a sex offender].) His comparison to sentences for second degree murder (15 years to life; see § 190, subd. (a)) and lewd or lascivious acts (three, six, or eight years; see § 288, subd. (a)) is not persuasive: "The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Moreover, punishments imposed under section 288.7 must be considered alongside those mandated by section 288a. The latter section mandates a sentence of prison or county jail for a person found guilty of oral copulation of a minor (§ 288a, subd. (b)(1)); a sentence of 16 months, two years, or three years for oral copulation of a minor under 16 by a person over 21 (*id.*, subd. (b)(2), see § 18, subd. (a)); and a sentence of three, six, or eight years for oral copulation of a child under the age of 14 by a person more than 10 years older (§ 288a, subd. (c)(1)). Section 288.7, subdivision (b), builds on section 288a's graduated punishment scheme, mandating a sentence of 15 years to life for oral copulation of a child age 10 or younger by a person 18 or older. Read together, sections 288a and 288.7 reflect the Legislature's desire to increase punishment for younger victims.

As to the third *Lynch* factor, Norris compares the sentence he received to that mandated in New York. But in New York, his minimum sentence could have been up to 10 years longer than that the trial court imposed. (See N.Y. Pen. Law, §§ 70.00, subd. (2), par [b], 130.50, subd. (3).) Because all three *Lynch* factors weigh against Norris, his is not one of the "rarest of cases [in which a] court [could] declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*People v. Martinez*, *supra*, 76 Cal.App.4th at p. 494.)

DISPOSITION

The conviction on count 2 is reversed, and the corresponding sentence is vacated. The clerk of the superior court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Nancy L. Ayers, Judge

Superior Court County of Ventura

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

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