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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. CASE NO. 5D19-153

MARK S. BROWN,

Appellee.

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Opinion filed June 19, 2020

Appeal from the Circuit Court for
Citrus County,
Richard A. Howard, Judge.

Ashley Moody, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Appellant.

Keeley R. Karatinos, of Mander Law
Group, Dade City, for Appellee.

WALLIS, J.

The State appeals the trial court's imposition of a downward departure sentence on the Appellee, Mark Brown, for two crimes involving sex with a minor. The State contends that there was insufficient evidence to support a finding that the victim was a willing participant in the sexual activity. We agree and reverse.

The Appellee is the victim's uncle. This case began when the Appellee, who was fifty-two years old, accompanied the seventeen-year-old victim and her family on a vacation in April of 2018. Immediately after returning from that vacation, the victim asked her parents if she could go on a trip to Maine with the Appellee. The victim's parents agreed and, during this second trip, the Appellee allowed the victim to drink alcohol and they began sleeping in the same bed. On the return trip to Florida, the Appellee first expressed his love for the victim and stressed the importance of keeping their relationship a secret. The Appellee also encouraged the victim to kiss him on his mouth during this trip. Following the trip to Maine, the Appellee and the victim took numerous trips together, during which time the Appellee's advances became progressively more aggressive and violent, and they began having oral, vaginal, and anal sex. The Appellee also became abusive, causing the victim physical injuries, and he made progressively more serious threats to the victim in order to continue their sexual relationship, including threatening to falsely accuse her brother of several crimes. After a particularly violent encounter with the Appellee, the victim told her mother what occurred and they contacted the police.

The State charged the Appellee with one count of sexual battery on a person 12-18 years by a person in familial or custodial authority and one count of unlawful sexual activity with a minor. The Appellee originally entered a not guilty plea but, during a pre-trial conference, he informed the trial judge that he wished to enter an open plea of no contest to the charges. During that hearing, the State presented testimony from Detective Anthony Ricci who described how the Appellee had "slowly and methodically groomed" the victim into thinking that they were in a relationship and how he sexually abused her twenty times. The State presented a written victim impact statement at the hearing,

wherein the victim described only continuing her involvement with the Appellee out of fear for herself and her brother. At the hearing, the trial court stated that, "this appears to be classic grooming . . . I mean, it's . . . literally the definition of it." Ultimately, the trial judge accepted the plea and, despite the Appellee scoring a minimum of 264 months in prison, he imposed a downward departure sentence of five years for each count to run concurrent. The trial court also designated the Appellee a sexual predator. The reason quoted by the trial judge for the downward departure was his finding that the victim "was a willing participant."

A trial court's decision whether to impose a downward departure sentence is a two-part process. Banks v. State, 732 So. 2d 1065, 1067 (Fla. 1999). The first step involves the trial court determining "whether it *can* depart, i.e., whether there is a valid legal ground and adequate factual support for that ground in the case pending before it." Id. The facts supporting the ground for departure "must be proved . . . by 'a preponderance of the evidence.'" Id. "This aspect of the court's decision to depart is a mixed question of law and fact and will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports its ruling." Id. The second step of the analysis, which requires the trial court to determine whether it should depart from the sentencing guidelines, is only necessary when the requirements of the first step are met.[1] Id. at 1068. In the second part of the analysis, "the court must weigh the totality of the circumstances in the case." Id. "This second aspect of the decision to depart is a judgment call within

[1] Because we conclude that there was no competent, substantial evidence supporting the trial court's finding that the victim was a willing participant, a discussion of the second step of the Banks analysis is unnecessary.

the sound discretion of the court and will be sustained on review absent an abuse of discretion." Id.

Section 921.0026, Florida Statutes, permits a trial court to impose a downward departure sentence under certain circumstances. It states that "a downward departure from the lowest permissible sentence . . . is prohibited unless there are circumstances or factors that reasonably justify the downward departure." § 921.0026(1), Fla. Stat. (2018). The statute then sets forth a number of mitigating circumstances that may reasonably justify a downward departure, including that "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident." Id. § 921.0026(2). State v. Rife, 789 So. 2d 288 (Fla. 2001) provides guidance on a trial court's decision to depart from a guidelines sentence based on a minor's willing participation in sexual activity with an adult. The Rife court specifically focused on the mitigator provided in section 921.0026(2)(f) and stated that, "the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim." 789 So. 2d at 296. The Florida Supreme Court further explained that, "'consent' means 'intelligent, knowing and voluntary consent and does not include coerced submission.' Further, the fact that a young victim does not resist is *not* the same as willing participation." Id. (quoting § 794.011(1)(a), Fla. Stat. (2018)).

In this case, the evidence showed that the Appellee made early advances in an attempt to have sex with the victim. The victim responded by telling the Appellee that she was uncomfortable with the propositions and that she did not want to have sex with him. Despite these rejections, the Appellee continued to pursue a sexual relationship with the victim by giving her alcohol and telling her that he was in love with her. The

Appellee's behavior escalated to the point that he threatened the victim and her family with physical violence and he threatened to falsely accuse the victim's brother of several crimes in order to secure the victim's continued involvement in the sexual relationship. Finally, the victim's written statements showed that she only continued to have sex with the Appellee because she believed that the Appellee would harm her or her family if she left him. This evidence clearly shows that even though the victim did not always resist having sex with the Appellee, she was not a willing participant in their sexual relationship as defined in Rife. Rather, the evidence clearly established that any consent given by the victim in this case was coerced and it was not intelligent, knowing, and voluntary.

Furthermore, all of the evidence below established that the Appellee groomed the victim. "Child sexual abuse is often effectuated following a period of 'grooming' and the sexualization of the relationship." United States v. Brand, 467 F.3d 179, 203 (2d Cir. 2006) (quoting Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. Legal Med. 471, 479 (1998)). "Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity." United States v. Chambers, 642 F.3d 588, 593 (7th Cir. 2011). In fact, the trial judge recognized that this was a case of "classic grooming." This acknowledgement by the trial judge is inconsistent with his finding that the victim was a willing participant in the sexual activity that occurred. This inconsistency in the trial judge's findings coupled with the overwhelming evidence that showed that the victim was not a willing participant in the crimes convinces us that there was not competent, substantial evidence supporting the trial judge's decision to impose

a downward departure sentence under these circumstances. Therefore, we reverse and remand with instructions that the Appellee may either withdraw his plea and proceed to trial or he may proceed to resentencing by a different judge.

REVERSED and REMANDED with Instructions.

EDWARDS and GROSSHANS, JJ., concur.