

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D19-1515

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STATE OF FLORIDA,

Appellant,

v.

GARY DEWAYNE HARDLEY,

Appellee.

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On appeal from the Circuit Court for Escambia County.  
Jeffrey Burns, Judge.

August 24, 2022

NORDBY, J.

A jury found Gary Dewayne Hardley guilty of incest with a 25-year-old female relative. At sentencing, the State sought to add sexual penetration points to Hardley's sentencing guidelines scoresheet. The trial court denied the request and sentenced Hardley to thirty days in county jail and forty-eight months of probation. The State now appeals that sentence and challenges the trial court's failure to assess the penetration points. Because we conclude the trial court erred, we vacate Hardley's sentence and remand the case to the trial court for resentencing.

## I.

The State charged Hardley with (1) sexual battery upon the 25-year-old relative, and (2) incest for having sexual intercourse with her. The jury found Hardley guilty of incest but declined to find him guilty of sexual battery. For both counts, however, the jury's verdict form included the specific finding that Hardley's penis had penetrated the woman's vagina.

At sentencing, the State requested the addition of 80 sexual penetration points to the victim injury portion of Hardley's criminal punishment code scoresheet under sections 921.0021(7)(b) and 921.0024, Florida Statutes (2018). Adding these points would have raised the lowest permissible prison sentence to 46.5 months. After hearing arguments from both sides, the trial court declined to assess the penetration points, assessing only 10 points for the incest conviction (a level 2 offense). The trial court sentenced Hardley to thirty days in county jail and forty-eight months of probation.

Soon after sentencing, the trial court issued a written order detailing its reason for denying the State's request to assess victim injury penetration points. The trial court noted that it had "heard the same case that the jury did, and [it] reached the same conclusion as the jury—there was a shortage of evidence to support the position that the incest was involuntary." In the trial court's view, applying victim injury penetration points would violate the Equal Protection Clause. No party had raised any constitutional claims. Yet the trial court ruminated that, although the incest statute was likely constitutional (in that it was supported by a rational basis), the assessment of victim injury penetration points would not pass constitutional muster because it would apply only in cases of heterosexual incest. The State challenges that ruling.

## II.

Hardley urges affirmance and claims that victim injury points, which include penetration points, cannot be assessed when there is no victim. In his view, because the jury acquitted him of sexual battery, there was no finding that the sex was nonconsensual, so there is no victim. The State seeks reversal

based on a specific statutory provision it argues required the scoring of penetration points.

We generally review a trial court's decision to impose victim injury points for an abuse of discretion. *Sims v. State*, 998 So. 2d 494, 504 (Fla. 2008). In cases like this, however, where the issue presented is a pure question of law involving statutory interpretation, the standard of review is de novo. *See id.*

Florida's Criminal Punishment Code provides that "a digitized sentencing scoresheet must be prepared for every defendant who is sentenced for a felony offense." § 921.0024(7), Fla. Stat. This uniform scoresheet, located in section 921.0024, Florida Statutes, guides the calculation of sentencing points "to determine the permissible range for the sentence that the court may impose." *Id.* § 921.0024(3).

An entire section of the worksheet addresses "Victim Injury." *Id.* § 921.0024(1)(a). Under that heading, the scoresheet itemizes multiple types of injury and assigns a specific amount of sentencing points to each category. Among that list is "Sexual penetration," which scores in at 80 points.

The Legislature has expressly defined "Victim injury" in section 921.0021(7), Florida Statutes:

(a) "Victim injury" means the physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

The statute goes on to expressly address offenses involving sexual penetration—they "must" be scored:

(b) Except as provided in paragraph (c) and (d),

1. If the conviction is for an offense involving sexual contact that includes sexual penetration, the sexual penetration must be scored in accordance with the sentencing points provided under s. 921.0024 for sexual

penetration, regardless of whether there is evidence of any physical injury.

....

If the victim of an offense involving sexual contact suffers any physical injury as a direct result of the primary offense or any additional offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the points scored for the sexual contact or the sexual penetration.

(c) The sentence points provided under s. 921.0024 for sexual contact or sexual penetration may not be assessed for a violation of s. 944.35(3)(b)2.

(d) If the conviction is for the offense described in s. 872.06, the sentence points provided under s. 921.0024 for sexual contact or sexual penetration may not be assessed.

§ 921.0021(7), Fla. Stat.

We note two observations about these provisions. First, the statute defines “victim injury” in terms of *physical* injury (including fatal injury). So for a defendant to be scored for victim injury under section 921.0021(7), he must be sentenced for an offense that directly caused a physical injury, up to and including death. Any such injury is scored on a continuum—120 points for death, down to 4 points for slight physical injury. *See* § 921.0024(1)(a), Fla. Stat. By contrast, and despite its inclusion under the “victim injury” heading of the scoresheet, section 921.0021(7) requires that sexual penetration be scored separately, whether or not there is physical injury. In other words, sentencing points assessed for sexual penetration stand apart from victim injury points assessed for physical injury to a victim.

Second, for sexual penetration points, the statute contains two clear exceptions. Paragraph (c) expressly precludes the assessment of penetration points for sexual misconduct between a corrections officer and an inmate that does not involve sexual battery. *See*

§ 944.35(b)2., Fla. Stat. (“Any employee of the department or a private correctional facility as defined in s. 944.710 who engages in sexual misconduct with an inmate or an offender supervised by the department in the community, without committing the crime of sexual battery, commits a felony of the third degree . . .”). And paragraph (d) does the same for instances of sexual abuse upon a human corpse. *See* § 872.06(2), Fla. Stat. (“A person who mutilates, commits sexual abuse upon, or otherwise grossly abuses a dead human body commits a felony of the second degree . . .”).

Turning to the crime at issue—incest—section 826.04, Florida Statutes, provides:

Whoever knowingly marries or has sexual intercourse with a person to whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest, which constitutes a felony of the third degree . . . “Sexual intercourse” is the penetration of the female sex organ by the male sex organ, however slight; emission of semen is not required.

§ 826.04, Fla. Stat.

The State argues that the plain language of section 921.0021(7) requires the assessment of sexual penetration points. As Hardley’s conviction is for an offense involving sexual contact that includes sexual penetration, the points “must” be scored.

Hardley counters that the victim injury statute requires there to be a victim. Under his reading, the trial court could not assess any victim injury points because the incest consisted of consensual sexual intercourse between adults. As a result, there was no victim, and thus no basis for victim injury points. Hardley supports this point by noting that, under section 826.04, Florida Statutes, both parties to incest could be charged as perpetrators of the crime. He thus relies heavily on the classic characterization of incest between consenting adults as a “victimless crime.”

But that point does not render sexual penetration points inapplicable here. The State did not pursue charges against Hardley’s female relative; instead, the State charged Hardley not

only with incest, but also sexual battery. And the jury convicted Hardley of incest—a criminal offense “involving sexual contact that includes sexual penetration.”

We agree with the State; the language of section 921.0021(7) could not be clearer. Sexual penetration points “must be scored” for Hardley’s incest conviction. That the Legislature included two express exceptions to the mandatory scoring of penetration points confirms this reading of the statute. Paragraphs (c) and (d) show that the Legislature managed to craft exceptions to address sexual offenses that are either consensual or “victimless.” It did not include an exception for incest, however, and we will not judicially add one.

A brief word on the trial court’s reasoning. The trial court based its rationale on constitutional claims that no party had raised. It should not have done so. We take this opportunity to reiterate the longstanding principle that it is the role of *parties* to raise constitutional challenges against duly enacted laws, not *judges*. See *State v. Turner*, 224 So. 2d 290, 291 (Fla. 1969) (“This Court has, on a number of occasions, held that it is not only unnecessary, but improper for a Court to pass upon the constitutionality of an act, the constitutionality of which is not challenged; that Courts are not to consider a question of constitutionality which has not been raised by the pleadings . . . .”); *Mott v. Cochran*, 117 So. 2d 408, 409 (Fla. 1960) (“Statutes come to us clothed with a presumption of validity. It is not a part of the judicial responsibility to undertake to invalidate them unless the parties to the cause raise the question and assault the statute because of organic weaknesses.”). On appeal, Hardley has not presented any argument challenging the validity of the statutes at issue, and we decline to reach a constitutional issue not pressed by the parties.

### III.

Incest is an “offense involving sexual contact that includes sexual penetration” under section 921.0021(7), Florida Statutes. Because it falls under neither express exception set out in that statute, the trial court erred by not assessing sexual penetration

points at Hardley's sentencing. We accordingly vacate Hardley's sentence and remand the case to the trial court for resentencing.

VACATED and REMANDED for resentencing.

ROBERTS and TANENBAUM, JJ., concur.

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*Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.*

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