Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-221

JANUARY TERM, 2019

State of Vermont v. Michael S. Thomas*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1111-11-15 Bncr
		Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals from one of three convictions—lewd and lascivious conduct with a child—arguing that the evidence was insufficient to support the intent element of the offense and that the trial court committed plain error in instructing the jury on that element. We affirm.

The State charged defendant with aggravated sexual assault, lewd and lascivious conduct with a child, and domestic assault based on two incidents that occurred sometime between August and December of 2012 when the complainant was nine years old. At that time, the complainant and his father were living with defendant's family. Approximately three years after the complainant and his father moved out of that home, the complainant revealed to his father that defendant had assaulted him on two occasions. A police investigation followed this revelation, leading to the charges against defendant. A two-day trial was held in January 2018, after which the jury convicted defendant on all three charges. The trial court imposed concurrent sentences of ten years to life for the aggravated sexual assault, two-to-five years for the lewd and lascivious conduct, and six-to-twelve months for the domestic assault. Defendant appeals only the conviction for lewd and lascivious conduct with a child.

Defendant first argues that the trial court committed plain error in instructing the jury on the intent element of the lewd and lascivious charge. "[W]e will reverse on plain error only when: (1) there was an error; (2) the error is obvious; (3) the error affects substantial rights and results in prejudice to defendant; and (4) the error seriously undermines the fairness, integrity, or public reputation of judicial proceedings." State v. Butson, 2008 VT 134, ¶ 15, 185 Vt. 189. We will not find error in reviewing jury instructions "if the jury charge as a whole conveys the true spirit and doctrine of the law, and there is no fair ground to say the jury had been misled by it." State v. Bruno, 2012 VT 79, ¶ 43, 192 Vt. 515 (quotation omitted).

Here, the trial court instructed the jurors that the State had to prove the following elements for the jury to convict defendant on the charge of lewd and lascivious conduct with a child:

> [O]n or between August 1, 2012 and December 31, 2012 in Bennington, one, Michael Thomas; two, committed a lewd and lascivious act upon or with the body of D.B., or any part or member thereof, being contact with D.B.'s penis by defendant's hand; three, he was a child under the age [o]f sixteen at the time; four, defendant did so willfully; five, and lewdly and lasciviously; and six, with the specific intent of appealing to his own sexual desires, lusts, or passions or of D.B.'s.

The court then went on to further define lewd and lascivious behavior and the intent element and also clarified the element with respect to the child's age.

Defendant does not argue that any of the elements are missing from the trial court's instruction on the lewd and lascivious charge. Rather, he compares the Vermont Bar Association's Model Criminal Jury Instructions with the instruction given and contends that the court did not fully instruct the jury on the intent element—that defendant intended the contact between his hand and D.B.'s penis to appeal to either his or D.B.'s sexual desires, lusts, or passions. We find no error, let alone plain error. The court instructed the jurors in plain language that defendant must have willfully engaged in lewd and lascivious conduct—in this case hand-to-penis contact—with the specific intent of appealing to either his or D.B.'s sexual desires, lusts, or passion. No more was needed to inform the jury of the requisite intent element.

Defendant also argues that the evidence was insufficient to prove that he engaged in lewd and lascivious conduct with the intent to appeal to either his or D.B.'s sexual desires, lusts, or passions. The trial court denied defendant's motion judgment of acquittal on the lewd and lascivious charge. The question, which we review de novo, "is whether the State has produced evidence that could reasonably support a guilty verdict." State v. Vuley, 2013 VT 9, ¶ 30, 193 Vt. 622; State v. Turner, 2003 VT 73, ¶ 7, 175 Vt. 595 ("The standard of review for the denial of a V.R.C.P. 29 motion for judgment of acquittal is whether the evidence, when viewed most favorably to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." (quotation omitted)).

The lewd and lascivious charge was based on defendant's alleged act of grabbing and pulling on the complainant's penis. Defendant argues that there was insufficient evidence that he intended the act to gratify to his or D.B.'s sexual desires. He points out that the acts that occurred during the first incident and that formed the basis for the domestic assault conviction—throwing an object at the complainant's head and hitting him with a belt—were arguably intended to inflict pain rather than gratify his or D.B.'s sexual desires. He contends that the most logical inference, given these initial acts, is that the grabbing and pulling on the penis was intended to inflict pain, not to gratify sexual desires. See State v. Durenleau, 163 Vt. 8, 12-13 (1994) ("The evidence and inferences . . . must add up to more than mere suspicion; the jury cannot bridge evidentiary gaps with speculation.").

We conclude that a reasonable jury could have determined beyond a reasonable doubt that the act in question was done with the intent to gratify either defendant's or D.B.'s sexual desires. The complainant testified concerning two incidents. Regarding the first incident, he testified that when he came out of the shower, defendant was standing there. Defendant then threw a small object at the complainant's head and hit him with a belt. Regarding the second incident, which the complainant testified occurred about a week after the first incident, defendant was again standing there when the complainant came out of the shower. This time, according to the

complainant, defendant first grabbed the complainant's penis and pulled on it. Then he told the complainant to close his eyes, kneel down, and open his mouth, at which point defendant placed his penis in the complainant's mouth and moved the complainant's head back and forth. According to the complainant, during that same incident, defendant followed him into his room and hit him with a belt.

Although some of the acts that defendant committed during the two incidents involved an assault on non-private parts of defendant's body, the grabbing and pulling on the complainant's penis occurred shortly before defendant placed his penis in defendant's mouth. It was entirely reasonable—and not merely speculative—for the jury to conclude, given the circumstances, that defendant grabbed and pulled on the complainant's penis to arouse his or D.B.'s sexual desires. "Intent is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence." See State v. Cole, 150 Vt. 453, 456 (1988). "In assessing circumstantial evidence, the fact-finder may draw rational inferences to determine whether ultimate facts occurred." Durenleau, 163 Vt. at 12-13. That is what the jury did here.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice