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SUPREME COURT OF ARKANSAS

No. CR-11-818

VINCENT KEVIN WEBB
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 16, 2012

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR-2010-3193]

HON. HERBERT T. WRIGHT, JR., JUDGE

AFFIRMED.

DONALD L. CORBIN, Associate Justice

Appellant Vincent Kevin Webb appeals the judgment of the Pulaski County Circuit Court convicting him of kidnapping and rape and sentencing him as a habitual offender to concurrent sentences of forty years' and life imprisonment. In addition to the forty-year sentence, Appellant was also fined $15,000 for having committed kidnapping. For reversal, Appellant contends the circuit court abused its discretion in refusing his request to instruct the jury that second-degree sexual assault was a lesser-included offense of rape. As Appellant received a life sentence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2011). We find no merit to his argument and affirm.

Because Appellant does not challenge the sufficiency of the evidence supporting his convictions, only a brief recitation of the facts is necessary. *See, e.g.*, *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325. Appellant was charged with the kidnapping and rape of N.H., a young girl who was twelve years old at the time. N.H. testified that Appellant pulled her into his car, then drove her to his apartment, where he ordered her to undress at gunpoint and raped her

vaginally. N.H. stated that Appellant also put a vibrator in her mouth and in her private area. Medical evidence indicated that N.H. had abrasions within her labia majora that were consistent with a sexual assault or rape. Appellant took the stand in his own defense and emphatically denied that he ever penetrated N.H. because she had a vaginal discharge. Appellant did, however, admit to masturbating while watching N.H. masturbate.

Appellant was charged with violating Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2011), which provides that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. A person commits sexual assault in the second degree under Ark. Code Ann. § 5-14-125(a)(3) (Supp. 2011) if he is eighteen years of age or older and engages in sexual contact with another person who is not his spouse and is less than fourteen years of age.

Based on his testimony, Appellant proffered the model instructions on second-degree sexual assault and requested that the circuit court instruct the jury that second-degree sexual assault was a lesser-included offense of rape. The circuit court denied Appellant's request, ruling that second-degree sexual assault is not a lesser offense included in rape as charged pursuant to section 5-14-103(a)(3) because second-degree sexual assault contained additional elements that rape did not, including the age of the perpetrator. As his sole point on appeal, Appellant contends the circuit court abused its discretion in denying his request to instruct the jury that second-degree sexual assault is a lesser offense included in rape.

A defendant is entitled to an instruction on a lesser-included offense if two conditions are satisfied. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996). First, the proffered instruction must truly cover a lesser-included offense. *Id.* The question of when an offense is

included in another offense is determined solely by whether it meets one of the three alternative tests set out in Ark. Code Ann. § 5-1-110(b) (Supp. 2011). *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002). The second condition is that there must be "a rational basis for a verdict acquitting the defendant of the offense charged and convicting him [or her] of the included offense." Ark. Code Ann. § 5-1-110(c) (Supp. 2011); *Weber*, 326 Ark. at 571, 933 S.W.2d at 374. This court zealously protects the right of an accused to have the jury instructed on a lesser-included offense, and it is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *McCoy*, 347 Ark. 913, 69 S.W.3d 430. Accordingly, once an offense is determined to be a lesser-included offense, the circuit court is obligated to instruct the jury on that offense only if there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser-included offense. *Green v. State*, 2012 Ark. 19, 386 S.W.3d 413. A circuit court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. *Id.*

This court has previously ruled that second-degree sexual assault, as it might have been proven in this case pursuant to section 5-14-125(a)(3), and as Appellant asked that it be described to the jury in his proffered instruction, contains two elements not included in rape, and thus it is not a lesser offense included in the rape offense charged. *Joyner v. State*, 2009 Ark. 168, 303 S.W.3d 54. The two additional elements identified in *Joyner* were the defendant's age and the defendant's marital status with respect to the victim. The *Joyner* court applied the three alternative tests in section 5-1-110(b) and determined that because of the two additional elements,

> [s]exual assault is not "established by proof of the same or less than all of the elements required" to establish rape. Sexual assault does not consist of an attempt to commit rape or to commit an offense otherwise included within rape. Sexual assault does not differ from rape "*only in the respect* that a less serious injury or risk of injury to that same person . . . ."

Id. at 12, 303 S.W.3d at 61 (quoting in part Ark. Code Ann. § 5-1-110(b)(1), (b)(3)). Thus, *Joyner* held that none of the three alternatives in section 5-1-110(b) had been satisfied, and therefore, second-degree sexual assault as defined in section 5-14-125(a)(3)(A)–(B) is not a lesser-included offense of the rape of a person less than fourteen years of age, as defined in section 5-14-103(a)(3)(A).

The *Joyner* decision was not discussed or relied on below, although it certainly could have been as it was decided on April 2, 2009, and Appellant's trial occurred April 12, 2011. The circuit court's reasoning and decision, however, were entirely consistent with *Joyner*. *Joyner* decided the precise issue presented here, and it controls the present case. Based on *Joyner*, second-degree sexual assault does not meet the definition of a lesser offense included in rape, and we therefore conclude the circuit court did not abuse its discretion in refusing Appellant's requested instruction.

For the first time on appeal, Appellant acknowledges this court's holding in *Joyner* and asks this court to overrule that case because its application of section 5-1-110(b)(1) renders section 5-1-110(b)(3) superfluous in cases where the included offense has *more* elements than the charged offense. Appellant argues that if section 5-1-110(b)(3) is not to be rendered superfluous, then it should be interpreted to remove the word "only" and define an included offense where the offenses are of the same generic class and the purported included offense sets forth a less serious injury or risk of injury to the victim. Stated another way, Appellant

argues that the phrase "differs . . . only in the respect," found in section 5-1-110(b)(3), which this court emphasized in *Joyner* was the reason second-degree sexual assault was not a lesser-included offense of rape, is the same concept as "same or less than all of the elements" found in section 5-1-110(b)(1).

Section 5-1-110(b) provides as follows:

> (b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:
>
> (1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;
>
> (2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or
>
> (3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

Appellant's argument that we overrule *Joyner* and interpret section 5-1-110(b) in the manner he requests is in one aspect a request that we return to previous definitions or tests for deciding when one offense is included as a lesser offense of another. We take this opportunity to express that we remain resolute in our decision to follow the statutory tests in section 5-1-110(b). *See McCoy*, 347 Ark. 913, 69 S.W.3d 430 (reciting history of how this court has determined when offenses are included as lesser offenses of others).

In another aspect, Appellant's argument on appeal requires us to engage in the rules of statutory construction. This statutory-interpretation aspect of Appellant's argument was neither presented to nor ruled on by the circuit court. It is well settled that a party is bound by the nature and scope of the objections and arguments made at trial and may not enlarge

or change those grounds on appeal. *See, e.g.*, *Frye v. State*, 2009 Ark. 110, 313 S.W.3d 10. This is a direct appeal following a criminal conviction, and as such, our jurisdiction is appellate only, which means we have jurisdiction to review a decision, order, or decree of an inferior court, but not to decide issues that were not decided first by the inferior court. *See Gwin v. Daniels*, 357 Ark. 623, 184 S.W.3d 28 (2004). Because Appellant did not ask the circuit court to interpret section 5-1-110(b)(3) in the manner that he now requests on appeal, there is nothing for this court to review on appeal. This court cannot, and will not, decide this issue of statutory interpretation for the first time on appeal. *See id.* We therefore do not address the component of Appellant's argument concerning the interpretation of section 5-1-110(b).

In summary, consistent with *Joyner*, 2009 Ark. 168, 303 S.W.3d 54, the circuit court correctly determined that second-degree sexual assault requires proof of additional elements that rape does not, and therefore it is not a lesser offense included in rape. We therefore find no abuse of discretion and affirm the circuit court's refusal of Appellant's proffered jury instruction.

Appellant was sentenced to life imprisonment; therefore, pursuant to Ark. Sup. Ct. R. 4-3(i) (2011), we have examined the record for all objections, motions, and requests made by either party that were decided adversely to appellant, and we have found no prejudicial errors.

The judgment of conviction is affirmed.