REL: 04/29/2011

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

CR-10-0013

C.D.B.

v.

State of Alabama

Appeal from Calhoun Juvenile Court
(JU-09-502.01)

WINDOM, Judge.

C.D.B. appeals the juvenile court's order adjudicating him delinquent based on a charge of first-degree rape, as defined in § 13A-6-61(a)(1), Ala. Code 1975. Specifically, C.D.B. was adjudicated delinquent for forcibly raping D.E.D.

After adjudicating C.D.B. delinquent, the juvenile court committed him to the Department of Youth Services.

The State's evidence tended to establish the following. On July 14, 2009, C.D.B. and his father, C.J., were visiting L.D., D.E.D.'s mother, at L.D.'s two-story apartment. At the time, L.D. and C.J. were dating. At some point during the visit, L.D. and C.J. went upstairs to iron clothes and take care of other laundry. While their parents were upstairs, C.D.B., who was then 14 years old, and D.E.D., who was then 9 years old, were downstairs watching televison. C.D.B. was lying on the floor, and D.E.D. was on a couch.

While the two were watching televison, C.D.B. told D.E.D. to come to him, to take her pants off, and to get on top of him. C.D.B. also took his pants off. D.E.D. then got on top of C.D.B., and the two engaged in sexual intercourse. After two to five minutes of intercourse, D.E.D. got up, and noticed that her vagina was bleeding. She then went to the bathroom to check herself.

Shortly after D.E.D. went to the bathroom, C.J. and C.D.B. left the apartment. After they left, D.E.D. told her mother, L.D., what had happened. L.D. telephoned C.J. and

told him that he and C.D.B. needed to return to the apartment. When they returned, L.D. and D.E.D. informed C.J. of what had happened, and D.E.D. showed C.J. her bloody underwear. C.D.B. initially denied that anything had happened, but later admitted to engaging in sexual intercourse with D.E.D.

At trial, D.E.D. testified that she complied with C.D.B.'s request on the day of the incident because she was somewhat afraid of him. Specifically, D.E.D. said that she was afraid of C.D.B. because she had seen him argue with his father at some point in the past. D.E.D., however, also testified that C.D.B. did not threaten her or "do anything to make [her] feel like if [she] didn't do [what he asked], he would hurt [her.]" (R. 34.)

On appeal, C.D.B. argues that the State failed to present sufficient evidence to sustain his delinquency adjudication based on the charge of first-degree rape. See § 13A-6-61(a)(1), Ala. Code 1975. Specifically, C.D.B. asserts that the State failed to present any evidence indicating that he used forcible compulsion to engage in sexual intercourse with D.E.D. This Court agrees.

Section 13A-6-61(a)(1), Ala. Code 1975, provides that, "[a] person commits the crime of rape in the first degree if ... [h]e or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion...." Section 13A-6-60(8), Ala. Code 1975, defines forcible compulsion as, "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." Further, this Court has explained that, "Section 12-15-65(e), Ala. Code 1975, requires that an adjudication of delinquency be supported by 'proof beyond a reasonable doubt, based on competent, material[,] and relevant evidence.'" A.A.G. v. State, 668 So. 2d 122, 124 (Ala. Crim. App. 1995). "'"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."'" C.M. v. State, 889 So. 2d 57, 63 (Ala. Crim. App. 2004) (quoting Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting in turn O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)). "'"[I]n

resolving questions of sufficiency of the evidence, this court must view the evidence in the light most favorable to the state."'" D.W. v. State, 3 So. 3d 955, 957 (Ala. Crim. App. 2008) (quoting C.M., 889 So. 2d at 62-63, quoting in turn A.A.G., 668 So. 2d at 124).

Viewing the evidence in a light most favorable to the State, this Court must conclude that the State failed to "present any evidence that [C.D.B.] used physical force that overcame [D.E.D.'s] earnest resistance." D.W., 3 So. 3d at 957. Nor did the State present any evidence indicating that C.D.B. made "a threat, express or implied, that place[d] [D.E.D.] in fear of immediate death or serious physical injury to [her]self or another person." § 13A-6-60(8), Ala. Code 1975. See Ex parte J.A.P., 853 So. 2d 280, 284 (Ala. 2002) (holding that its decision in Powe v. State, 597 So. 2d 721 (Ala. 1991), under which an implied threat may be inferred, applies only in "cases involving the sexual assault of children by adults who exercised positions of domination and control over the children" and does not apply in cases involving sexual relations between two children (emphasis in original)); D.W., 3 So. 3d at 957 (same). In fact, D.E.D.

testified that C.D.B. did not do anything to threaten her or to make her fear for her safety. Consequently, this Court is compelled, pursuant to Ex parte J.A.P., 853 So. 2d at 284, and D.W., 3 So. 3d at 957, to conclude that the State did not present sufficient evidence to establish that C.D.B. "engage[d] in sexual intercourse with [D.E.D.] by forcible compulsion...." § 13A-6-61(a)(1), Ala. Code 1975.

The dissent asserts that this Court's opinion: 1) erroneously "suggests that Ex parte J.A.P. holds that the State may never prove the element of forcible compulsion by an implied threat when the accused is a juvenile," ___ So. 3d at ___; 2) mischaracterizes the State's argument as requesting that this Court infer a threat where none (express or implied) existed; and 3) erroneously held that the State failed to establish an implied threat based on the size and age discrepancy between the two children and based on the fact that the child-accuser saw the child-accused argue with his father and thus generally feared the child-accused.

First, nothing in this opinion suggests, much less holds, that an implied threat is insufficient to establish the forcible-compulsion element of first-degree rape when both the

accuser and the accused are children. See §§ 13A-6-61(a)(1), and 13A-6-60(8), Ala. Code 1975. Instead, this Court faithfully applies the Alabama Supreme Court's holding in Ex parte J.A.P. and declines to infer that C.D.B. -- a child -- impliedly threatened D.E.D. -- another child -- when there was no evidence indicating that C.D.B. explicitly or implicitly "communicated [an] intent to inflict harm on [D.E.D.]." Black's Law Dictionary 1519 (8th ed. 2004) (defining a threat).

Next, the dissent asserts that this Court mischaracterized the State's argument and contends that the State presented sufficient evidence of an implied threat. Both the State and the dissent contend that the following factors are sufficient to establish an implied threat: 1) C.D.B. was older than D.E.D.; 2) C.D.B. was larger than D.E.D.; and 3) D.E.D. was, in general, afraid of C.D.B. because she had seen C.D.B. argue with his father and grab a belt out of his father's hand. Contrary to the contentions of both the State and the dissent, none of these factors indicate, much less establish, that C.D.B. impliedly threatened D.E.D. A threat, whether explicit or implicit, is

defined as "[a] communicated intent to inflict harm on another or on another's property." Black's Law Dictionary 1519 (emphasis added). Thus, to establish a threat (implied or otherwise), the State must present some evidence indicating that the accused made some verbal or nonverbal communication indicating an intent to harm. In the present case, the State failed to present any evidence indicating that C.D.B. communicated an intent to harm. In fact, the State failed to present any evidence indicating that C.D.B. behaved in any threatening manner toward D.E.D. at any point in the past. Instead, D.E.D. testified that C.D.B. did not do anything to threaten her or to make her fear for her safety.

Despite the fact that C.D.B. did not do anything to threaten D.E.D. or to make her fear for her safety on the day of the incident, the State argues -- and the dissent would hold -- that an implied threat existed based on factors that do not establish any type of threatening communication, i.e., age discrepancy, size discrepancy, and a parent-child argument that did not involve the accuser. In other words, under the guise of an implied threat, the State and the dissent would infer a threat nothwithstanding the fact that C.D.B. neither

expressly or implicitly "communicated [an] intent to inflict harm ... on [D.E.D.]" Black's Law Dictionary 1519. The inference of a threat urged by the State and the dissent in this case, which involves two children, is precisely the type of inference prohibited under the Alabama Supreme Court's opinion in Ex parte J.A.P.

Because the State failed to present any evidence of physical force or a threat of harm, it failed to establish an essential element of first-degree rape under to § 13A-6-61(a)(1), Ala. Code 1975. Accordingly, C.D.B.'s adjudication of delinquency based on the charge of first-degree rape must be reversed and a judgment rendered in his favor.

REVERSED AND JUDGMENT RENDERED.

Kellum, J., concurs. Welch, P.J., and Burke, J., concur specially, with opinion. Joiner, J., dissents, with opinion.

WELCH, Presiding Judge, concurring specially.

I concur with the majority in this case that there was insufficient evidence to convict C.D.B. of first-degree rape; however, for the reasons that follow, I encourage the Alabama Legislature to amend § 13A-6-60, Ala. Code 1975, to eliminate "forcible compulsion" as an element of the sexual offenses in Article Four of the Criminal Code for child victims, the age of which should be determined by the legislature.

In this case, the majority correctly concludes that there was insufficient evidence tending to prove that C.D.B., who was then 14 years old, used physical force to overcome any earnest resistance by D.E.D., who was then nine years old. In addition, D.E.D. testified that C.D.B. did not threaten her or make her afraid for her safety when C.D.B. asked her to take her clothes off and get on top of him.

"Forcible compulsion" is defined as "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." § 13A-6-60(8), Ala. Code 1975. Further, "forcible compulsion does not exist in a vacuum; rather it is viewed in light of the

surrounding circumstances, such as the respective ages of the victim and the perpetrator, the relationship between them, the circumstances under which the act took place, and any injuries the victim suffered." Ex parte Williford, 931 So. 2d 10, 14 (Ala. 2005).

Alabama's first-degree-rape statute, Section 13A-6-61(a), Ala. Code 1975, states:

> "(a) A person commits the crime of rape in the first-degree if:
>
> > "(1) He or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion; or
> >
> > "(2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being physically helpless or mentally incapacitated; or
> >
> > "(3) He or she, being 16 years or older, engages in sexual intercourse with a member of the opposite sex who is less than 12 years old."

Here, the State was required to prove under § 13A-6-61(a)(1), Ala. Code 1975, that D.E.D., a nine-year-old, either earnestly resisted C.D.B.'s physical force or perceived that C.D.B. was threatening her life or threatening her with serious physical injury if she did not comply with his sexual

advances. Because C.D.B. was 14 years old at the time of the offense, the State could not charge him under § 13A-6-61(a)(3), Ala. Code 1975, which does not require the State to prove forcible compulsion for victims less than 12 years of age. Under the Alabama Criminal Code, if the offender is 16 years of age or older it is unnecessary that a victim less than 12 years of age show resistance to the rapist or perceive a threat. However, the burden on the prosecution becomes much heavier if the defendant is less than 16 years of age because the prosecution must prove the element of forcible compulsion. When the offender is a juvenile, the child victim must exert more of a struggle or feel threatened than if the offender had been an adult, which is counter-intuitive.

I acknowledge that juveniles of a certain age may not consent to sexual intercourse; however, situations where juveniles instigate crimes of sexual assault, rape, or sexual abuse against other juveniles represent a substantial proportion of sexual offenses committed.

> "Although the numbers vary, studies report a growing number of juvenile sexual offenders. As recently as the 1980s, little attention was given to juvenile sexual offenders. However, this growing problem is finally attracting attention. In 2000, twenty-three percent of all sexual offenders were

under the age of eighteen. Forty percent of those offenders victimized children under the age of six. In 2003, the Federal Bureau of Investigation (FBI) reported that of the 18,446 arrests made for forcible rapes, 1,108 of those arrested were under the age of fifteen and 2,966 were under the age of eighteen. Most disturbing is the report that of those 18,446 arrested, twenty-eight were under the age of ten, 266 were between the age of ten and twelve, and 814 were ages thirteen to fourteen. The report also showed that of the 63,759 arrests made for sexual offenses other than rape and prostitution, 6,531 of those arrested were under the age of fifteen and 12,747 were under the age of eighteen. Of those arrested under the age of fifteen, 420 were under age ten, 1,873 were ages ten to twelve, and 4,238 were ages thirteen to fourteen. Two commentators noted that '[t]he best available estimates claim that approximately twenty percent of all rapes and between thirty and fifty percent of all child molestations are perpetrated by adolescent males.'

"Some studies report that, overall, juvenile arrest rates have decreased since the 1980s. The FBI's Violent Crime Index reports arrest rates for the most serious crimes, such as murder, forcible rape, robbery, and aggravated assault. In 2002, this report showed that, on average, juvenile arrests for these offenses had dropped by nineteen percent since 1998 to their lowest levels since 1980. While these numbers are encouraging, a closer look at the statistics reveals that there has not been a significant drop in juvenile sexual offenses. Forcible rape arrests dropped fourteen percent from 1998-2002, but arrests for sex offenses other than forcible rape and prostitution increased nine percent during that same period. In 2002, juveniles still made up twenty percent of arrests for sex offenses other than forcible rape and prostitution, and seventeen percent of arrests for forcible rapes.

"One study, by Howard Snyder of the National Center for Juvenile Justice, compiled data from the National Incident-Based Reporting System (NIBRS) to provide an interesting look at the age differences between juvenile offenders and juvenile victims. This data suggested that children nine-years-old and younger constituted seventy-eight percent of the victims of ten-year-old and under offenders, but only thirteen percent of the victims of seventeen-year-old offenders were nine or younger. Moreover, of all the victims under nine-years-old, sixty percent were victimized by offenders younger than fourteen and eighty-eight percent by offenders younger than fifteen.

"Not only are more and more juveniles committing sexual offenses, but their crimes are worsening in severity. For instance, in one [Texas] 2004 case, a fourteen-year-old juvenile was adjudicated delinquent on two counts of aggravated sexual assault for an attack on a nine-year-old girl. The victim's head and genital region were bruised. Her injuries were severe enough to leave blood on her clothes and in her home. The examining counselor described the fourteen-year-old as a power rapist. In another case in Georgia, a sixteen-year-old was charged with raping two eight-year-olds, one of whom was his nephew. The youth was sentenced as a child molester because the rapes allegedly occurred on several occasions over an extended period of time.

"....

"Illustrations of this trend can be seen in Alabama in the first few months of 2003. In January of 2003, an Alabama boy, only twelve-years-old, was accused of involvement in the raping of a nine-year-old girl. One month later, a fourteen-year-old Alabama boy was accused of raping a thirteen-year-old girl at their junior high school. In April, also at a school, a

> fifteen-year-old Alabama boy was accused of raping a fourteen-year-old girl."

Jessica S. Varnon, Difficult Decisions: Should Alabama Laws Be Tougher on Juvenile Sexual Offenders? 57 Ala. L. Rev. 205, 205-08 (Fall 2005)[(footnotes omitted)].

It is well settled that whether there has been forcible compulsion is a question for the trier of fact. McGlocklin v. State, 910 So. 2d 154 (Ala. Crim. App. 2005). Yet, proving the element of forcible compulsion as to a child victim is a daunting task because children have a limited understanding of sexual relations. There is a plethora of caselaw in Alabama as to the difficulty of proving this element as to a child victim. In Williford, the Supreme Court stated:

> "The force necessary to sustain a conviction for first-degree rape or first-degree sodomy is relative. Pittman v. State, 460 So. 2d 232, 235 (Ala. Crim. App. 1984) ('The force required to consummate the crime [of rape] against a mature female is not the standard for application in a case in which the alleged victim is a child thirteen years of age.'), writ quashed, 466 So. 2d 951 (Ala. 1985). '[T]he "totality of the circumstances" should be considered in deciding whether there was sufficient evidence of forcible compulsion....' Parrish v. State, 494 So. 2d [705] at 713 [(Ala. Crim. App. 1985)].
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> "In concluding that the evidence was sufficient to support a finding of forcible compulsion, the Court of Criminal Appeals relied on Parrish v.

State, supra. In Parrish the evidence showed that Parrish touched a 12-year-old girl's 'private parts' while the child pretended to be asleep on a bed in Parrish's house. 494 So. 2d at 706-09. Parrish was the boyfriend of the child's mother. The child testified that Parrish eld her down by placing his foot over her leg and that Parrish left the bedroom when she pretended to wake up. 494 So. 2d at 707. There was blood in the child's panties, and the Court of Criminal Appeals concluded there was no evidence of any reason for the blood 'other than the attack itself.' 494 So. 2d at 711."

"In affirming Parrish's conviction, the Court of Criminal Appeals held that the fact that a 12-year-old girl makes no effort to resist a sexual confrontation beyond pretending to be asleep does not negate the inference that sufficient legal force was used to satisfy the element of forcible compulsion. 494 So. 2d at 709. The Court of Criminal Appeals also held that when the issue of sufficiency of the evidence is raised in a sexual-abuse case, questions involving resistance and consent must be viewed '"in the frame of the age of the assaulted girl."' 494 So. 2d at 710 (quoting Smith v. State, 36 Ala. App. 209, 213, 55 So. 2d 202, 206 (1951)). There was no evidence suggesting 'that the victim requested, encouraged, consented to or otherwise gave permission or sanction to, [Parrish's] actions.' 494 So. 2d at 713. The record did not contain any indication that Parrish could have entertained, at any time, '"any idea or expectation of permissive" sexual contact.' 494 So. 2d at 713. The Court of Criminal Appeals also concluded that there was no reason for there to be blood in the child's panties, other than Parrish's attack. Considering the totality of the circumstances, the Court of Criminal Appeals concluded that the record showed sufficient evidence of forcible compulsion to support a conviction of first-degree sexual abuse. [footnote omitted] 494 So. 2d at 713. Therefore, forcible compulsion does

> not exist in a vacuum; rather, it is viewed in light of the surrounding circumstances, such as the respective ages of the victim and the perpetrator, the relationship between them, the circumstances under which the act took place, and any injuries the victim suffered."

Ex parte Williford, 931 So. 2d at 13-14).

In Powe v. State, 597 So. 2d 721 (Ala. 1991), the Supreme Court stated:

> "In Pittman [v. State, 460 So. 2d 232, 235 (Ala. Crim. App. 1984)], the Court of Criminal Appeals held that '[i]t is clear that the force required to consummate rape in the first degree is necessarily relative. The force required to consummate the crime against a mature female is not the standard for application in a case in which the alleged victim is a child.' 460 So. 2d at 235. The Pittman court concluded that the evidence in that case was sufficient to satisfy the forcible compulsion element of rape in the first degree. Id. The evidence consisted mainly of the 13-year-old victim's testimony that she initially refused to have intercourse with her stepfather, the defendant, but that she eventually cooperated after she was expressly threatened. 460 So. 2d at 234-35.
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> "In Parrish, the Court of Criminal Appeals addressed a sufficiency-of-the-evidence argument with regard to a first degree sexual abuse conviction. The first degree sexual abuse statute, like the first degree rape statute, requires a finding of forcible compulsion. See § 13A-6-66(a)(1), Ala. Code 1975.
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> "The evidence in Parrish showed that the defendant, who was the boyfriend of the victim's mother, touched the 12-year-old victim's private parts while the victim pretended to be asleep on a

bed in the appellant's house. 494 So. 2d at 706-09. The victim in Parrish testified that the defendant held her down by putting his foot over her leg and that when she pretended to wake up, the defendant left the room. 494 So. 2d at 707. In affirming the conviction, the Parrish court held that the mere fact that a 12-year-old girl makes no effort to resist a sexual confrontation does not negate the inference that sufficient legal force existed. 494 So. 2d at 709. The court went on to hold that when a sufficiency-of-the-evidence issue is raised in cases stemming from an alleged sexual assault of minors, questions involving resistance and consent must be viewed in the context of the age of the assaulted minor. 494 So. 2d at 710. Applying a totality-of-the-circumstances test, the court concluded that the record revealed a sufficient evidentiary showing on the forcible compulsion element of the crime charged. 494 So. 2d at 713.

"Although the Parrish court ultimately held that the element of forcible compulsion was satisfied by the fact that the victim was held down by the defendant and by the fact that the victim stated that she had blood in her panties after the assault, other factors that the court considered significant were: (1) the victim's age and the fact that the attack was perpetrated by the boyfriend of the victim's mother; (2) that the defendant, who had been drinking and smoking marijuana, got into bed with the victim; (3) that the victim testified that the defendant had sexually molested her on another occasion but that her mother had ignored her when she tried to tell her about the assault; and (4) that the victim was in a particularly vulnerable situation because the assault took place at the defendant's residence. 494 So. 2d at 710. The court, in Parrish, further noted that the jury had the opportunity to consider factors such as the relative size of the parties, their ages, and their social differences. Id.

"A third Court of Criminal Appeals case cited by the parties is Rider v. State, 544 So. 2d 994 (Ala. Crim. App. 1989), [overruled by R.E.N. v. State, 944 So. 2d 981 (Ala. Crim. App. 2006),] which was relied on by the court below in its reversal of Powe's conviction. In Rider, as in Pittman and in Parrish, the defendant's primary argument was that the evidence was insufficient to support a finding of forcible compulsion. 544 So. 2d at 994. The defendant in Rider, the 27-year-old stepfather of the alleged victim, a child, was convicted of sexual abuse in the first degree and sodomy in the first degree. Id. The child testified that the defendant forced her hand onto his penis and that the defendant touched her breasts and her vagina. Id. The child further testified that the defendant performed oral sex on her and asked her to perform oral sex on him. Id. She testified that the touching began sometime after her 9th birthday and continued until around her 12th birthday. 544 So. 2d at 995. When the prosecutor asked the child if she 'voluntarily' performed oral sex acts on the defendant, she did not answer. Id. She testified that she tried to 'mind' her stepfather because she 'liked the way he treated her, like she was his only child.' Id. She further stated that the defendant had never done anything to make her afraid of him and that she was not afraid of him. Id. In reversing the defendant's conviction, the Rider court concluded that there was no evidence that the child made any protest or complaint to the defendant sufficient to indicate that her earnest resistance was overcome. Id. Applying the totality-of-the-circumstances standard, the court found that the evidence was insufficient to support a finding of either physical force or a threat, express or implied. 544 So. 2d at 996.

"After reviewing the Court of Criminal Appeals' decisions in Pittman, Parrish, and Rider, we find the facts of each to be distinguishable from the facts presented in the instant case. In Pittman,

> there was evidence that the victim was expressly threatened, and that evidence was held to be sufficient on the element of forcible compulsion. In Parrish, there was evidence that physical force was used to restrain the victim, and that evidence was held to be sufficient evidence on the element of forcible compulsion. Finally, in Rider, there was neither a threat of any kind nor the use of any physical force. Furthermore, there was nothing in the record to show that the sex acts were anything other than voluntary.
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> "The record in this case reveals no evidence that physical force was used on the victim or that the victim was expressly threatened. Therefore, we find the Court of Criminal Appeals' decisions in Pittman and Parrish, since those cases, respectively, concern evidence of physical force and evidence of an express threat, to be inapplicable under the facts of the present case. Furthermore, we distinguish the Rider case because we find that the evidence in the present case, unlike the evidence in Rider, merits an analysis of whether, viewing the totality of the circumstances, a jury could properly find that an implied threat was made against the victim sufficient to satisfy the element of forcible compulsion."

Powe v. State, 597 So. 2d at 725-26.

This Court has previously held that the element of forcible compulsion can be proved without evidence of physical force or evidence of an express threat if the defendant was in position of dominance or control over the victim, which is evidence of an implied threat. Powe v. State, 597 So. 2d 721 (Ala. 1991). In Ex parte J.A.P., 853 So. 2d 280 (Ala. 2002),

a "delinquency petition was filed in the Jefferson Juvenile Court, charging J.A.P., a 14-year-old male, with the attempted first-degree rape of his 9-year-old half sister, L.P." 853 So. 2d at 281. J.A.P. argued on appeal that there was insufficient evidence of forcible compulsion to adjudicate him delinquent of the petition. The Court of Criminal Appeals held that there was sufficient evidence to adjudicate J.A.P. delinquent of attempted first-degree rape:

> "The record indicates the following: The incident in question occurred when the appellant and the victim were alone at home. The appellant, who was approximately four and a half years older than the victim, made the victim watch a pornographic video, attempted to engage in sexual intercourse with her, and told the victim not to tell anyone. This was not the first incident of the sexual abuse of the victim. From the time that she was four or five years old, the victim had been the object of continued sexual abuse by older males, including C.P. (the appellant's brother, who was five years older than the appellant), a friend of C.P.'s, an uncle, and the appellant. (R. 60-61, 72-73.) The appellant had shown the victim a pornographic video on at least one previous occasion; he had touched the victim in her genital area with his penis on at least one occasion before this incident; and he had touched the victim's genital area with his fingers on numerous occasions. (R. 60, 62, 72, 79-81.) The evidence also indicated that the appellant and the victim were raised in a dysfunctional household, in the presence of a parent and a stepparent who abused alcohol and/or took illegal drugs, and that they were quite often left to fend for themselves,

> without parental supervision, and with ready access to pornographic videos. (R. 119-61.)
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> "With respect to the incident in question, the victim testified that the appellant 'made' her watch the pornographic video by telling her to 'come on' and that she always knew when she was told to watch one of the pornographic videos with her older half brothers that sexual contact would follow. The victim also testified that she was 'afraid' of the appellant and that she knew that what he was doing was wrong. (R. 51-54, 57-59, 65-69, 79, 83-85, 90.) The evidence revealed a continuing pattern of sexual abuse by the victim's older half brothers. The victim acknowledged a fear of any male who wanted to touch her. (R. 92-93.)
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> "The appellant testified that he had been sexually abused by his brother, C.P., on a number of occasions. (R. 172-75.) He also stated during the hearing that nothing had physically prevented him from engaging in sexual intercourse with the victim. He testified that he had aborted his attempt to penetrate the victim because she began to cry. The evidence also indicated, and the juvenile court noted, that the appellant had previously told a police investigator that he had stopped because he could not physically insert his penis into the victim's vagina. (R. 202-06.)"

J.A.P. v. State, 853 So. 2d 264, 266-67 (Ala. Crim. App. 2001).

The Court of Criminal Appeals relied on B.E. v. State, 778 So. 2d 863 (Ala. Crim. App. 2000), which held that there was sufficient evidence of forcible compulsion where the juvenile offender was an older family member who exerted

dominance and control over the juvenile victim. However, the Alabama Supreme Court reversed the judgment of the Court of Criminal Appeals, overruling B.E. v. State, and limited Powe's holding to cases involving sexual assaults by adults on child victims.

Therefore, requiring that the State prove that a child victim "earnestly resisted" another juvenile's physical force to perform sexual acts, in effect, requires the victim to understand the nature of sexual activity and appreciate why it is inappropriate or wrong, which the child victim may be incapable of doing. Certainly very young children do not understand the ramifications of sexual activity but can be emotionally scarred for life when victimized. Further, whether the offending juvenile exerted control or dominance over the juvenile victim may not be considered as sufficient evidence that there was forcible compulsion. However, younger children are often placed under the supervision of older, more mature children for shorter periods when adult supervision may not be available. Moreover, even if a younger child is not being supervised by another older child, the younger child often will imitate the older child or accede to the wishes of

the older child either out of ignorance or peer pressure. Older children have an acute effect upon the behavior of a younger children, and there is a tendency among young children to imitate and accede to the demands of an older child, which may stem from a desire to act more like a "grown up." Older children may use this willingness to take advantage of younger children, sometimes in ways that are harmless, but sometimes, as in this case, in an invidious manner to entice a younger child to do something harmful to themselves.

In addition, § 13A-6-70(c)(1), Ala. Code 1975, states that victims less than 16 years old are incapable of consent as a matter of law. I believe that child victims of young and tender years do not understand the nature and consequences of sexual relations; therefore, force and/or threats, whether express or implied, should not be an element of a juvenile sex offense if the victim is below a certain age, regardless of the age of the offender. The precise age at which forcible compulsion should continue to be an element of juvenile sex offenses is a matter to be determined by the legislature.

The Alabama Juvenile Justice Act, § 12-15-101, Ala. Code 1975, was enacted "to facilitate the care, protection, and

discipline of children who come under the jurisdiction of the juvenile court, while acknowledging the responsibility of the juvenile court to preserve the public peace and security." Under the provisions and mechanisms of this act, juvenile sex offenders may be appropriately disciplined and rehabilitated for the offenses which they commit. I respectfully request the Alabama Legislature to remove "forcible compulsion" as an element from sexual offenses committed against child victims of young and tender years who have been sexually assaulted by child offenders of young and tender years. Without this amendment, there is no adequate statute to bring these juvenile offenders within the jurisdiction of the juvenile court for punishment and treatment.

BURKE, Judge, concurring specially.

I agree that the current law in Alabama allows some rape and sexual-abuse crimes against child victims to go unpunished, where the perpetrator was also a child. Judge Windom's well written opinion states the law as applied to the facts of this case. In this matter, a 14-year-old boy who was more than 6 feet tall and who weighed approximately 300

pounds,[1] had sexual intercourse with a 9-year-old, 90-pound girl. These circumstances are greatly disturbing and demand justice for this little girl. However, because the rape statute requires a showing of forcible compulsion by the 14-year-old boy, he cannot be convicted of rape. Requiring the district attorneys of our State to prove forcible compulsion in these types of cases fails to take into account that children may believe that they must acquiesce to other children, especially when the perpetrator is older and bigger than the victim. In sex crimes involving two children, I believe that the element of forcible compulsion should be replaced with elements that reflect a child's naivete and resultant acquiescence, even where the perpetrator is another child. I believe this should be done by modifying those statutes to consider the age differential between the victim and the perpetrator, as well as other circumstances surrounding the act and the parties, rather than adhering to the requirement of forcible compulsion. This would present a matter for the fact-finder's consideration and weighing determination, and ensure justice for victims like the little

[1] According to the forensic report made following the incident, he weighed 360 pounds at that time. (C. 30.)

girl in this matter. Therefore, I respectfully ask the legislature to revisit this statute.

JOINER, Judge, dissenting.

I respectfully dissent. The issue in this appeal is whether the State presented sufficient evidence of the forcible-compulsion element of first-degree rape. See § 13A-6-61(a)(1), Ala. Code 1975 ("A person commits the crime of rape in the first-degree if ... [h]e or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion ...."). "Forcible compulsion" is defined as "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." § 13A-6-60(8), Ala. Code 1975 (emphasis added).

The main opinion holds that there was insufficient evidence of forcible compulsion to support C.D.B.'s conviction for first-degree rape. As to whether the State presented sufficient evidence of forcible compulsion by an implied threat, the main opinion cites Ex parte J.A.P., 853 So. 2d 280

(Ala. 2002). The main opinion states that in Ex parte J.A.P. the Alabama Supreme Court held that "its decision in Powe v. State, 597 So. 2d 721 (Ala. 1991), under which an implied threat may be inferred, applies only in 'cases involving the sexual assault of children by adults who exercised positions of domination and control over the children' and does not apply in cases involving sexual relations between two children." ___ So. 3d at ___ (quoting Ex parte J.A.P., 853 So. 2d at 284). The main opinion also cites D.W. v. State, 3 So. 3d 955, 957 (Ala. Crim. App. 2008), for the same proposition.

To the extent the main opinion suggests that Ex parte J.A.P. holds that the State may never prove the element of forcible compulsion by an implied threat when the accused is a juvenile, I respectfully disagree. If Ex parte J.A.P. indeed stands for the proposition that forcible compulsion may never be proved by an implied threat in a case involving two juveniles, the decision is in conflict with the plain meaning of the language in the statutory definition of "forcible compulsion" in § 13A-6-60(8), Ala. Code 1975, which does not exclude from its application cases involving two juveniles.

The holding in Ex parte J.A.P., however, is clearly limited to those situations in which the State attempts to prove an implied threat solely by alleging that the threat may be inferred based upon the accused's allegedly exercising a position of domination and control over the alleged victim. Ex parte J.A.P., 853 So. 2d at 284 ("This Court [in Powe v. State, 597 So. 2d 721 (Ala. 1991),] made it quite clear that its holding would apply only to cases involving the sexual assault of children by adults who exercised positions of domination and control over the children.").

In the present case, the State does not argue, as the main opinion suggests, that an implied threat may be inferred because C.D.B. allegedly exercised a position of domination and control over D.E.D. Rather, the State cites the size discrepancy between C.D.B. and D.E.D.--at the time of the incident, C.D.B. was 6 feet 1 inch tall and weighed 327 pounds, and D.E.D. was less than 4 feet 3 inches tall and weighed less than 85 pounds. The State also cites D.E.D's testimony that at some point before the incident in question she had seen C.D.B. "rip a belt away from his dad while he was

being whipped." (State's brief, p. 9.) Specifically, D.E.D. testified:

> "Q. ... [W]hat did you think would happen if you told [C.D.B.], no, I'm not going to sit down on top of you, I'm not going to do that? What did you think was going to happen?
>
> "A. When Daddy was whooping [C.D.B.] when he did something before that, he snatched the belt away from Daddy, and when Daddy came out of the kitchen, his toe was bleeding. I didn't want him to find anything around me that he could hit me with and hurt me."

(R. 27 (emphasis added).) Under these particular circumstances, the State argues that it was reasonable for D.E.D. to think that C.D.B. would hurt her if she did not do what he told her to do. D.E.D.'s fear was not based on a generalized "implied threat of some sort of disciplinary action" as might exist in the context of a parent-child relationship. Instead, according to her testimony, her fear was based on a specific instance: having seen C.D.B. "snatch" a belt from his father while the father was disciplining him. Accordingly, I think the facts in this case distinguish it from Ex parte J.A.P., supra, as well as Powe, supra, on which Ex parte J.A.P. relied. In both Ex parte J.A.P. and Powe, there was no evidence indicating that the alleged victims

claimed to have been afraid based on observing the actions of the accused in a specific past incident like that described by D.E.D. in the present case.[2]

"[F]orcible compulsion does not exist in a vacuum; rather it is viewed in light of the surrounding circumstances, such as the respective ages of the victim and the perpetrator, the relationship between them, the circumstances under which the act took place, and any injuries the victim suffered." Ex parte Williford, 931 So. 2d 10, 14 (Ala. 2005). In this case, the juvenile court had the "opportunity to observe the appellant's physical characteristics, including his size and strength, as compared to [the victim's] size and strength, during the delinquency hearing." C.M. v. State, 889 So. 2d 57, 63 (Ala. Crim. App. 2004). Although D.E.D. testified that C.D.B. did not expressly threaten her or "do anything to make [her] feel like if [she] didn't do [what he asked], he would

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[2]L.P., the alleged victim in Ex parte J.A.P., did testify that she was "afraid" of J.A.P. "and that she knew that what he was doing was wrong." J.A.P. v. State, 853 So. 2d 264, 267 (Ala. Crim. App. 2001), rev'd, 853 So. 2d 280 (Ala. 2002). That fear, however, apparently was based on alleged previous instances of "sexual contact" between J.A.P. and L.P. There was no evidence indicating that L.P. claimed to be afraid of J.A.P. because she thought he would hurt her if she did not comply.

hurt [her]," ___ So. 3d at ___, the juvenile court also had before it D.E.D.'s testimony that because she had seen C.D.B. overpower his father before, she was afraid that C.D.B. would hurt her if she did not comply. Thus, the juvenile court had conflicting evidence as to whether C.D.B. implicitly threatened D.E.D. Consequently, I think there was sufficient evidence from which the juvenile court could conclude that the State proved the element of forcible compulsion based on an implied threat that C.D.B. would harm D.E.D. if she did not do what he told her to do. See Poole v. State, 650 So. 2d 541, 543 (Ala. Crim. App. 1994):

> "' ... "[A] jury may believe part of the evidence of a witness and reject part." Cochran v. State, 42 Ala. App. 144, 147, 155 So. 2d 530, cert. denied, 275 Ala. 693, 155 So. 2d 533 (1963). "In order to convict the defendant the jury was not required to accept as true every statement of the witnesses." Freeman v. State, 37 Ala. App. 623, 630, 74 So. 2d 513, cert. denied, 261 Ala. 697, 74 So. 2d 520 (1954). "Conflicting evidence should be reconciled by the jury, if possible, and if they can not reconcile it, they may base their verdict on that part of the testimony which they consider worthy of credit, and reject that which they deem to be unworthy of belief. Inconsistencies and contradictions in the testimony of a witness do not make it inherently improbable." Arnold v. State, 33 Ala. App. 146, 147, 30 So. 2d 587

> (1947). "It is not the law that mere contradicting statements or declarations of a witness are sufficient to raise a reasonable doubt in the minds of the jury as to the truth of the testimony of a witness." Walters v. State, 24 Ala. App. 370, 373, 135 So. 600 (1931).
>
> "'"The inconsistencies may impair the credibility of the witness and reduce the weight of the testimony, but they do not destroy the probative force of the testimony as a matter of law--the weight to be given such testimony is for the trier of fact to determine." 30 Am. Jur. 2d Evidence § 1082 (1967).'

"Jones v. State, 469 So. 2d 713, 716-17 (Ala. Cr. App. 1985). 'The weight and probative value to be given to the evidence, the credibility of the witnesses, the resolution of conflicting testimony, and the inferences to be drawn from the evidence, even where susceptible to more than one rational conclusion, are for the jury.' Ward v. State, 356 So. 2d 238, 240 (Ala. Cr. App.), cert. denied, 356 So. 2d 242 (Ala.1978). The credibility of the 11-year-old victim was an issue for the jury. 'It is not the business of this court to second-guess juries.' Smith v. State, 604 So. 2d 434, 436 (Ala. Cr. App. 1992)."

In this case, this juvenile court was the trier of fact and was in the best position to weigh and evaluate the evidence, including the evidence going to the issue whether an implied threat existed. This Court should not reweigh the evidence or substitute its judgment for that of the juvenile

court. I would therefore affirm the juvenile court's adjudication of C.D.B. as delinquent.