REL: 12/19/2014

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-1305

Eric Lemont Higdon

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-13-365)

PER CURIAM.

Eric Lemont Higdon appeals his convictions for first-degree sodomy of a child less than 12 years old, see § 13A-6-63(a)(3), Ala. Code 1975, and first-degree sodomy by

forcible compulsion, see § 13A-6-63(a)(1), Ala. Code 1975.[1] The circuit court sentenced Higdon to concurrent sentences of 23 years in prison for first-degree sodomy of a child less than 12 years old and 15 years in prison for first-degree sodomy by forcible compulsion.

In the summer of 2012, Higdon, who was 17 years old, worked as an intern at Momma's Place Christian Academy, a day-care facility. Higdon's duties primarily consisted of cleaning the day-care facility and supervising children, either alone or in conjunction with another adult. During that summer, K.S., who was then four years old, was enrolled as a student at Momma's Place.

During August 2012, Higdon accompanied K.S. to the bathroom on multiple occasions. While in the bathroom, Higdon pulled down K.S.'s pants, touched K.S.'s penis, and performed

[1]The State also charged Higdon with first-degree sodomy of a child less than 12 years old, a violation of § 13A-6-63(a)(3), Ala. Code 1975, and first-degree sodomy by forcible compulsion, a violation of § 13A-6-63(a)(1), Ala. Code 1975, in two other cases involving two other alleged victims. All three cases were tried together. The jury convicted Higdon in only one of the three cases, and that case is the subject of this appeal.

oral sex on K.S. K.S. did not report Higdon's actions because Higdon told K.S. not to tell anyone.

On August 23, 2012, A.D., the parent of another child enrolled in the day-care facility, filed a police report alleging that Higdon had performed similar acts on her son. A.D. contacted K.S.'s mother, K.W., to alert her to the allegations against Higdon. K.W. asked K.S. if anyone at the day-care facility had touched him inappropriately. K.S. replied that Higdon had touched him and had "put his mouth on his wee-wee." (R. 304.) During an interview with the clinical director of the Prescott House, a child-advocacy center, K.S. stated that Higdon had touched him and had performed oral sex on him on several occasions in the bathroom at Momma's Place.

On appeal, Higdon argues that the State's evidence was insufficient to sustain his conviction for first-degree sodomy by forcible compulsion.[2] Specifically, he asserts that the State failed to present any evidence indicating that he used

[2]Higdon does not appear to make an argument challenging the sufficiency of the evidence in relation to his conviction for first-degree sodomy of a child less than 12 years old, a violation of § 13A-6-63(a)(3), Ala. Code 1975.

forcible compulsion to engage in deviate sexual intercourse with K.S. This Court agrees.

> """In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998) (quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985)). '"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."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997) (quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998) (quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990)). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978)."

R.E.N. v. State, 944 So. 2d 981, 983-84 (Ala. Crim. App. 2006) (emphasis in original).

Section 13A-6-63(a)(a), Ala. Code 1975, provides that "[a] person commits the crime of sodomy in the first degree if

... [h]e engages in deviate sexual intercourse with another person by forcible compulsion." Section 13A-6-60(8), Ala. Code 1975, defines forcible compulsion as a "[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places another person in fear of immediate death or serious physical injury to himself or another person."

In viewing the evidence in the light most favorable to the State, this Court must conclude that the State failed to "present any evidence that [Higdon] used physical force that overcame [K.S.'s] earnest resistance." D.W. v. State, 3 So. 3d 955, 957 (Ala. Crim. App. 2008). Additionally, the State failed to present any evidence that Higdon made an express threat that "placed [K.S.] in fear of immediate death or serious physical injury to himself or another person." § 13A-6-60(8), Ala. Code 1975. The State asserts, however, that it presented sufficient evidence of an implied threat, citing the difference in age between Higdon and K.S. and Higdon's position as an intern at the day-care facility as factors sufficient to establish an implied threat. In Powe v. State, the Supreme Court of Alabama held that an implied threat may be inferred in cases "concerning the sexual assault of

children by adults with whom the children are in a relationship of trust." 597 So. 2d 721, 728 (Ala. 1991). In Ex parte J.A.P., however, the Supreme Court clarified that the holding in Powe "would apply only to cases involving the sexual assault of children by adults who exercised positions of domination and control over the children." 853 So. 2d 280, 284 (Ala. 2002) (emphasis in original). See also D.W., 3 So. 3d at 957. Although Higdon was in an apparent relationship of trust with K.S., he was 17 years old and not yet an adult at the time of the offense. Thus, an implied threat may not be inferred as a result of his position as an intern at the day-care facility. Additionally, this Court has held that an age discrepancy between the perpetrator and the victim does not constitute an implied threat. C.B.D. v. State, 81 So. 3d 399, 402 (Ala. Crim. App. 2011) (holding that age discrepancy and size discrepancy "do not establish any type of threatening communication"). Thus, the State's argument that it presented sufficient evidence of forcible compulsion by implied threat is without merit.

Because the State failed to present any evidence of physical force or threat of harm, it failed to establish an

essential element of first-degree sodomy under § 13A-6-63(a)(1), Ala. Code 1975. Accordingly, Higdon's conviction based on the charge of first-degree sodomy by forcible compulsion must be reversed, and a judgment rendered in his favor on that charge. Higdon does not challenge his conviction for first-degree sodomy of a child less than 12 years old, see § 13A-6-63(a)(3), Ala. Code 1975; therefore, the circuit court's judgment as to that conviction is affirmed.

AFFIRMED IN PART; REVERSED IN PART AND JUDGMENT RENDERED.

Welch, J., concurs. Windom, P.J., concurs specially, with opinion, which Kellum, J., joins. Burke, J., concurs specially, with opinion. Joiner, J., concurs in part and concurs in the result, with opinion.

WINDOM, Presiding Judge, concurring specially.

I concur with the majority's opinion that, under the Supreme Court of Alabama's holding in Ex parte J.A.P., 853 So. 2d 280, 284 (Ala. 2002), the State presented insufficient evidence to sustain Higdon's conviction for first-degree sodomy by forcible compulsion, see § 13A-6-63(a)(1), Ala. Code 1975. Specifically, under the Supreme Court's holding in J.A.P., the State may not rely on an implied threat when prosecuting a child for forcible sodomy. Id. The Supreme Court made it "quite clear [the theory under which a threat may be implied] appl[ies] only to cases involving the sexual assault of children by adults who exercised positions of domination and control over the children" Ex parte J.A.P., 853 So. 2d at 284. Higdon was not an adult; rather, he was 17 years old. Accordingly, under J.A.P., this Court is required to reverse Higdon's conviction for forcible sodomy.

I write specially to urge the Alabama Supreme Court to revisit its holding in J.A.P. Specifically, I do not believe that the Supreme Court's restriction of an implied threat "only to cases involving the sexual assault of children by adults who exercised positions of domination and control over

the children," Ex parte J.A.P., 853 So. 2d at 284, sufficiently accounts for the relationships between some individuals who have not reached the age of adulthood and young children. This case is a perfect example. Higdon was 17 years old and worked at a day-care facility, where he acted in a role of authority over the children. A four-year-old child would have believed that Higdon was an authority figure who, like a parent, had to be obeyed. For all relevant purposes, Higdon was in no different position that an adult who exercised a position of domination and control over a child. A four-year-old child in these circumstances would have believed that disobeying Higdon's instructions carried "an implied threat of some sort of disciplinary action." Powe v. State, 597 So. 2d 597 So. 2d 721, 728-29 (Ala. 1991). I see no reason to treat 17-year-old Higdon any differently than an adult in Higdon's position would have been treated. Accordingly, I encourage the Supreme Court to revisit its holding in Ex parte J.A.P. to prevent a similar injustice in the future.

Kellum, J., concurs.

BURKE, Judge, concurring specially.

Although I concur with the majority's opinion that, under the Supreme Court of Alabama's holding in Ex parte J.A.P., 853 So. 2d 280, 284 (Ala. 2002), the State presented insufficient evidence to sustain Higdon's conviction for first-degree sodomy by forcible compulsion, see § 13A-6-63(a)(1), Ala. Code 1975, I write specially to voice my opinion that the result in this case is unjust. As Presiding Judge Windom notes in her special concurrence,

> "Higdon was 17 years old and worked at a daycare facility, where he acted in a role of authority over the children. A four-year-old child would have believed that Higdon was an authority figure who, like a parent, had to be obeyed. For all relevant purposes, Higdon was in no different position that an adult who exercised a position of domination and control over a child. A four-year-old child in these circumstances would have believed that disobeying Higdon's instructions carried 'an implied threat of some sort of disciplinary action.' Powe v. State, 597 So. 2d 597 So. 2d 721, 728-29 (Ala. 1991)."

___ So. 3d at ___ (Windom, P.J., concurring specially). I would encourage the Alabama Legislature to amend the definition of forcible compulsion contained in § 13A-6-60(8), Ala. Code 1975, to ensure that it encompasses a factual scenario like the one present in this case.

JOINER, Judge, concurring in part and concurring in the result.

I concur in the Court's judgment affirming Eric Lamont Higdon's conviction for first-degree sodomy of a child less than 12 years old, see § 13A-6-63(a)(3), Ala. Code 1975. As to the Court's judgment reversing Higdon's conviction for first-degree sodomy by forcible compulsion, see § 13A-6-63(a)(1), Ala. Code 1975, and rendering a judgment in Higdon's favor, I concur in the result.

I agree that the Alabama Supreme Court's decision in Ex parte J.A.P., 853 So. 2d 280, 284 (Ala. 2002), compels this Court to reverse Higdon's conviction for first-degree sodomy by forcible compulsion. Like my colleagues, I also urge the Alabama Supreme Court to revisit its holding in Ex parte J.A.P.

A case such as C.B.D. v. State, 81 So. 3d 399 (Ala. Crim. App. 2011), cited in the Court's decision today, further demonstrates the need for the Supreme Court to reconsider the Ex parte J.A.P. decision. In C.B.D., this Court, in its words, "faithfully applie[d]" Ex parte J.A.P. to reject an implied threat of forcible compulsion under the particular

facts present there. Those facts were as follows: At the time of the incident in question, the accused, C.B.D., was 14 years old, 6 feet 1 inch tall, and weighed 327 pounds. The accuser, D.E.D., was 9 years old, 4 feet 3 inches tall, and weighed less than 85 pounds. D.E.D., whose mother had been dating C.B.D.'s father, testified that she had seen C.B.D. "'rip a belt away from his dad while [C.B.D.] was being whipped'" and that, based on that experience, she complied with C.D.B.'s instructions to take off her pants and "'sit down on top of [him]'" out of fear that he might "'find [something] around me that he could hit me with and hurt me.'" 81 So. 3d at 411 (Joiner, J., dissenting).

In my dissenting opinion in C.B.D., I stated:

> "'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).
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> "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.' 81 So. 3d at 401 (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.
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> "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.')."

81 So. 3d at 410-11 (Joiner, J., dissenting) (some emphasis added).

The facts of the instant case, although different than those in C.B.D., are also egregious. Higdon's case, like C.B.D., illustrates the problems in applying Ex parte J.A.P. The legislature, as noted, has included "implied" threats in its definition of "forcible compulsion." For that definition to have appropriate application in cases involving a juvenile defendant and juvenile accuser, the Alabama Supreme Court needs to revisit Ex parte J.A.P.