REL: October 25, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0315

Adrian Lee Black

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-17-1436)

McCOOL, Judge.

Adrian Lee Black appeals his conviction for first-degree rape, a violation of § 13A-6-61, Ala. Code 1975; his conviction for first-degree sodomy, a violation of § 13A-6-63, Ala. Code 1975; and his two convictions for first-degree

sexual abuse, a violation of § 13A-6-66, Ala. Code 1975. The trial court sentenced Black to 20 years' imprisonment for the rape conviction, 20 years' imprisonment for the sodomy conviction, and 5 years' imprisonment for each of the sexual-abuse convictions, the sentences to run concurrently.

Facts and Procedural History

The evidence at trial established the following facts. In 2008, Black moved into the house where D.K. lived with his wife, L.K., and their daughters, M.E.K. and M.K.; at that time, Black was in his "late 30s" (R. 189), and M.E.K. and M.K. were 12 and 10 years of age, respectively.[1] The testimony was inconsistent as to how and why Black came to live with D.K. and his family, but it appears that L.K. met Black "[t]hrough the internet" (R. 394) and subsequently arranged for him to move into the family's house to "help her run" the grocery store she owned (R. 188) and to serve as "a handyman around the house." (R. 246.) D.K. testified that "everyone seemed to get along with [Black]" (R. 189) and "trusted him and treated him as one of the family." (R. 190). In fact, D.K. testified that he "grew to love [Black] like a

[1]At the time of trial, M.E.K. and M.K. were 21 and 19 years of age, respectively.

brother" (R. 189) and that Black was eventually entrusted with some responsibility for supervising M.E.K. and M.K., including "dropp[ing] the girls off at school, pick[ing] them up, things like that." (R. 190.) D.K. also testified that, on multiple occasions, Black traveled on overnight trips with L.K., M.E.K., and M.K., and evidence established that, on one occasion, D.K. and L.K. allowed Black to take M.K. and M.E.K. to Perdido Key for spring break. In short, D.K. responded affirmatively when asked if Black was "like another parental figure" for M.E.K. and M.K. (R. 190.)

M.K. testified that, when Black first moved into her family's house, she "avoided him because he was a stranger" but that she "had to call [Black] Uncle ... [b]ecause [L.K.] said so." (R. 242.) However, M.K. testified that, after Black had been living in the family's house approximately one year, "everyone else trusted him, so [she] didn't see a reason to avoid him and be afraid of him." (R. 243.) In fact, it was undisputed that, at some point after Black moved into the family's house, M.E.K. and M.K. began sleeping in Black's bedroom because, D.K. testified, "they didn't like sleeping alone." (R. 194.) M.K. testified that she began spending

"one-on-one" time with Black at that point because her family "pretty much ignored her ..., and [she] was just kind of a clingy youngest child." (R. 244.) According to M.K., she and Black "would pretty much do anything, like go out to eat, sleep in the same bed together, watch movies, like anything that a couple would do." (R. 243-44.) In fact, M.K. testified that Black "referred to [her] as his wife on occasion" and that he was "excited for [her] to turn 18" so that he and she "could go across state lines and maybe get married some day." (R. 252.) However, despite Black's perception of his relationship with M.K., M.K. testified that she considered Black to be an authority figure (R. 246), that L.K. had instructed her to obey Black (R. 247), that she "obeyed [Black] more than [she] obeyed [L.K.]" (R. 320), and that L.K. would "very angrily" instruct her to apologize to Black "every time [M.K.] would make him upset." (R. 247.) M.E.K. also testified that Black "was someone that was deemed like an authority figure" in the family's house. (R. 352.)

When M.K. was 17 years of age, she reported to a social worker at her high school that Black had repeatedly sexually assaulted her from the time she was 11 years of age.

Regarding the circumstances under which those sexual assaults occurred, M.K. testified:

> "Q. Let's start at the beginning. What's the first thing that [Black] did that you felt, at least looking back on, was abusive, the very first thing?
>
> "A. Well, he would -- we were laying on his bed, and I was not wearing a bra. I believe I was either 11 or 12. He just reaches over and, like, squeezes my breast for some reason.
>
> "....
>
> "Q. After that time when he grabbed your breast in his bed, what was the next thing that happened that you remember?
>
> "A. He got really upset about something. We were home alone. He kept threatening to leave. I was terrified because I didn't want to get in trouble because, I guess, I did something to make him upset. So then he was like, 'Tell me you love me.' I was like, 'I love you.' He was like, 'Give me a kiss,' so I kissed him on the cheek. He wasn't satisfied, so he grabbed my head and planted a kiss on my lips, and I started sobbing really hard. That made him stay, but he was irritated that I wasn't happy with it.
>
> "Q. How old were you when that happened?
>
> "A. Twelve.
>
> "....
>
> "Q. Going back to that time that he grabbed your breast on the bed, ... [h]ow did that make you feel when he grabbed you?
>
> "A. Disgusted.

"Q. What did you do afterwards?

"A. I felt like I could control it in the future if maybe I told him we couldn't hug anymore from the front.

"Q. Did you make a decision not to hug him from the front anymore then?

"A. Yes, but then it just gradually ended up happening anyway.

"Q. After that time ... that he kissed you against your will, what was the next thing that happened?

"A. We would just be laying in bed together, and he used to hold me from behind because I was, for some reason, terrified of the dark and being alone, so I liked the security. At first it was fine, but then he made it only an opportunity to rub his penis against my behind with his clothes on.

"Q. When you say he held you from behind, were you --

"A. It was like spooning.

"....

"Q. Did this happen one time or more than one time?

"A. More than once.

"Q. How old were you the first time it happened?

"A. Thirteen.

"Q. How old were you the last time it happened?

"A. Seventeen.

"....

"Q. What was the next thing that you remember after [Black] pressing up against you in the bed?

"A. He would make me touch his genitals over his clothes. Then, after that, he would be like, 'Put your hand inside,' and I really didn't want to, and I just kept saying that. He was like, 'Do it for me.'

"....

"Q. Was that one time or more than one time?

"A. More than one time.

"Q. How old were you the first time it happened?

"A. Fourteen.

"Q. How old were you the last time that he made you touch his genitals over his clothes?

"A. I guess 16.

"Q. When [you] said he made you touch him, what part of your body did he make you touch him with?

"A. My hands.

"Q. You said that eventually he told you to touch him under his clothes?

"A. Yes.

"Q. Do you remember the first time that happened?

"A. I believe I was 14.

"Q. It was your hand?

"A. Yes.

"....

"Q. What was happening before he made you touch him?

"A. We were just laying there.

"Q. Did he say anything to you?

"A. I don't remember.

"Q. Did you say anything to him?

"A. No.

"....

"Q. How did it come about that your hand was on his genitals? Did he place your hand there or tell you where to put your hand?

"A. He placed my hand there.

"....

"Q. About how long did your hands stay on his genitals?

"A. Until it was okay for me ... not to do it, like, he wouldn't get mad at me if I stopped.

"Q. How would you know that he wouldn't get mad at you if you stopped?

"....

"A. I would usually just try [to] get away by saying, 'I have to go to the bathroom,' and that would make him upset, but at least it would make it stop for a minute.

"Q. Do you remember how many times he made you touch his genitals under his clothes?

"A. No. It was quite a bit.

"....

"Q. I want you to think of a time that ... he made you touch him under his clothes. Tell me how old you were.

"A. I believe I was either 14 or 15. Me and him would go to church in the morning at 8:00 a.m., so the rest of the family would go either in the afternoon or evening, so he would take that time when they went in the afternoon. We would go to his bedroom, and we would -- he would pull my pants down and put me over the edge of the bed and take his pants down as well and just, like, use my legs that were pressed together and put his large penis, like -- basically like scrape it underneath my vagina ....

"....

"Q. ... After the first time that he made you touch his genitals, what was the next thing that happened between you that made you uncomfortable?

"A. When I was 15, before he would drop me off at school, he would penetrate me with his fingers in his bed.

"....

"Q. Was this one time or more than one time?

"A. More than one time.

"....

"Q. Where did he put his finger?

"A. In my vagina.

"Q. What was happening before he did that to you?

"A. We were just lying down; we were laying down in bed.

"....

"Q. Did he say anything when it happened or while he was doing it?

"A. No.

"Q. Did you say anything?

"A. No.

"....

"Q. What did you do -- how did it stop? What caused it to end where he would stop touching you on that occasion?

"A. I guess just getting bored.

"....

"Q. Tell me about the next thing that happened that made you uncomfortable.

"A. Well, practically from there it was mostly me being bent over, like, the edge of the bed.

"....

"Q. How did you get bent over the bed? Did he bend you over or did you bend over?

"A. He bent me over.

"Q. What would happen after he bent you over the bed?

"A. He would pull my pants down and then his pants down, and then just rub against the outside of my vagina.

"Q. I'm sorry to do this, but what part of his body rubbed outside of your vagina?

"A. His penis.

"Q. Do you remember the first time that happened?

"A. Yes.

"Q. How old were you?

"A. Fifteen.

"....

"Q. What was happening before he bent you over the bed?

"A. I don't remember.

"Q. Did he say anything when that happened?

"A. He asked me how it felt, and I said 'warm.'

"Q. Did he say anything else?

"A. No.

"Q. Did you say anything else?

"A. No.

"....

"Q. What caused it to stop?

"A. I guess he just wanted to stop. I don't remember him ever ejaculating.

"....

"Q. Did he put his mouth on any other -- and I'm sorry. You described him forcefully kissing you on the lips in the past?

"A. Yes.

"Q. Did he put his mouth anywhere else on your body that made you uncomfortable?

"A. Yes. One time he was already confingering [sic] me. He put his mouth down there and kissed me. Then he looked up and asked, 'Do you like that?' and I said, 'No.'

"Q. How old were you when that happened?

"A. Fourteen or 15.

"....

"Q. When you say 'down there,' can you explain what you mean?

"A. Like on the outside of my vagina.

"Q. Was that the only time he ever put his mouth in your genital area?

"A. Yes.

"....

"Q. You described him touching you with his penis, right?

"A. Yes.

"Q. Was there just one place on your body that he touched with his penis or more than one place?

"A. Just my hands and my genital area.

"....

"Q. I want you to think of a time that that happened that you remember clearly. How old were you then?

"A. Fifteen.

"Q. Where were you when it happened?

"....

"A. On the side of the bed.

"Q. How were you positioned on the bed?

"A. I was bent over.

"Q. Where was he?

"A. He was behind me.

"....

"Q. What was happening before this started?

"A. Nothing, really.

"Q. You said that he bent you over the bed, I believe?

"A. Yes. The only reason why this particular incident stands out is because since he was rubbing against the outside of my vagina and not the inside, it was dry, so he ripped the foreskin and he started

bleeding on the carpet. He ran to the bathroom and quickly came out and frantically tried to blot it out of the carpet.

"....

"Q. I want to go back to ... the times that you said he put his fingers in your vagina. Do you ever remember him saying anything to you during any of those incidents when he put his fingers into you?

"A. Well, sometimes he would ask if it was okay. I was like 'Yeah, yeah,' because I didn't want him to get mad at me.

"Q. When he would -- I want to talk a little bit more about when he put his mouth on your private area. Can you tell me -- you said you were about 14 or 15 years old; is that right?

"A. Yes.

"Q. Tell me what was happening before he put his mouth on you.

"A. Just the usual of him touching me in some way. I can't recall exactly what was happening.

"....

"Q. What part of his body specifically touched you?

"A. His mouth.

"Q. Was it the outside of his mouth, his lips, or was any part of the inside of his mouth touching you?

"A. Just his lips.

"Q. What part of your body did his lips touch?

"A. The outside of my vagina.

"Q. You mentioned that he had you touch his penis, right?

"A. Yes.

"....

"Q. You may have already said this ... but how did your hand get on his private parts? Did he put it there or did you put it there?

"A. Like over his clothes, he put my hand there.

"Q. When it was under his clothes?

"A. I put it there because he asked me to.

"Q. How long was your hand on his private part?

"A. I don't know.

"Q. What was your hand doing when it was on his penis?

"A. Stroking.

"Q. Did he ask you to do that?

"A. Yes.

"Q. I want to go back to the time that you said that he put his penis on or near or around your vaginal area.

"....

"Q. What was happening before he bent you over the bed?

"A. I don't remember.

"....

"Q. Did he say anything to you before, during or after it happened?

"A. Usually just if I made it end by saying that I had to go to the bathroom, he would just be upset about that.

"Q. Did you say anything to him besides saying you needed to go to the bathroom?

"A. No."

(R. 256-88.) M.K. further testified:

"Q. You testified that sometimes you would just do what he wanted so that he wouldn't get upset; is that right?

"A. Yes.

"Q. What were you afraid ... would happen if you upset him?

"A. He would get very angry and take all of his things and just leave.

"Q. What made you continue to get into his bed even after he started abusing you?

"A. If I even said that I wanted to go back to my bed in my bedroom, it would make him upset.

"....

"Q. I want to go back and clarify a little bit. I'm sorry to ask you to keep talking about this, but the incident when you said the defendant put his penis on or against your vagina, can you describe the way his penis was positioned in relation to your genitals area?

> "A. So my legs were together, and he practically just put his penis in between my thighs right up against my vagina and would just go back and forth ....
>
> "Q. So ... is his penis ... coming at you vertically or horizontally?
>
> "A. Horizontally."

(R. 339-41.) On cross-examination, M.K. testified that, after reporting the sexual assaults, she had stated during a forensic interview that Black's penis "'was under [her] vagina, not in the vagina'" (R. 346) and "'would never go inside.'" (R. 314.) M.K. further testified on cross-examination:

> "Q. You have testified today, just a little while ago, that you were terrified of [Black]?
>
> "A. In the beginning I wasn't.
>
> "Q. But you were terrified later?
>
> "A. Yes.
>
> "Q. You became really afraid of him?
>
> "A. Yes."

(R. 311.) On redirect examination, M.K. reiterated that she began to fear Black after he began sexually assaulting her:

> "Q. You testified that in the beginning you felt safe around the defendant; is that correct?

"A. Yes.

"....

"Q. But did those feelings change after he started to abuse you?

"A. Yes.

"Q. After he started abusing you, did you feel unsafe?

"A. Yes."

(R. 348.)

In April 2016, when M.K. was 17 years of age, police officers came to her house after they received an anonymous tip concerning M.K.'s "well-being."[2] (R. 363.) In response to the officers' questions, M.K. denied that she had been sexually assaulted. However, M.K. testified that she did not report Black's conduct to the officers because Black was at the house at that time, and she "didn't want to have to witness a confrontation like that." (R. 338.) M.K. also testified that she had stated during the forensic interview that she was afraid that she "'would lose everything'" if she

[2]M.E.K. testified that the anonymous tip came from a friend in whom M.E.K. confided while she was in college. According to M.E.K., the friend "expressed concern for [M.K.'s] safety" and "offered to do an anonymous tip." (R. 363.)

reported the sexual assaults. (R. 298.) Specifically, M.K. testified that she was afraid she would lose "[p]retty much most of the things that [she] owned, along with the only person that [she] had associated with, pretty much, in the past five years." (R. 338-39.) M.K. also answered in the affirmative when asked on cross-examination if she "went and climbed in the bed with [Black]" after the police officers left. (R. 311.) After "trying to convince [herself] to tell someone" about the sexual assaults (R. 337), M.K. reported the assaults the following day.

On April 7, 2017, a Madison County grand jury returned a four-count indictment against Black. Count one charged Black with first-degree sexual abuse, in violation of § 13A-6-66(a)(1), for subjecting M.K. "to sexual contact by forcible compulsion by forcibly penetrating [M.K.'s] vagina with his fingers." (C. 16.) Count two charged Black with first-degree sexual abuse for subjecting M.K. "to sexual contact by forcible compulsion by forcing [M.K.] to touch [Black's] penis." (C. 16.) Count three charged Black with first-degree sodomy, in violation of § 13A-6-63(a)(1), for "engag[ing] in deviate sexual intercourse with [M.K.] by forcible compulsion

by forcibly putting his mouth on [M.K.'s] vagina." (C. 16.) Count four charged Black with first-degree rape, in violation of § 13A-6-61(a)(1), for "engag[ing] in sexual intercourse with [M.K.] by forcible compulsion." (C. 16.)

On August 30, 2018, following a trial at which the State presented the evidence set forth above, the jury found Black guilty of each of the charged offenses, and the trial court sentenced Black on November 15, 2018. On December 14, 2018, Black filed a motion for a judgment of acquittal or, alternatively, for a new trial. That motion was denied by operation of law on January 14, 2019, see Rule 20.3, Ala. R. Crim. P., and Black appealed.

Analysis

On appeal, Black challenges the sufficiency of the evidence supporting each of his four convictions.

> "'"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)."

Wilson v. State, 142 So. 3d 732, 809 (Ala. Crim. App. 2010).

At the time of the events in this case, the offenses for which Black was convicted were defined as follows.[3] Section 13A-6-61(a)(1) defined rape in the first degree as follows: "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-6-63(a)(1) defined first-degree sodomy as follows: "A person commits the crime of sodomy in the first degree if ... [h]e engages in deviate sexual intercourse with another person by

[3] Sections 13A-6-61(a)(1), 13A-6-63(a)(1), 13A-6-66(a)(1), and 13A-6-60(8), Ala. Code 1975, were amended by Act No. 2019-465, Ala. Acts 2019, effective September 1, 2019.

forcible compulsion." Section 13A-6-66(a)(1) defined first-degree sexual abuse as follows: "A person commits the crime of sexual abuse in the first degree if ... [h]e subjects another person to sexual contact by forcible compulsion." The term "forcible compulsion" was 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.

On appeal, Black raises two issues with respect to the sufficiency of the evidence. First, Black argues that the State failed to present sufficient evidence establishing that the sexual assaults giving rise to his convictions were committed by "forcible compulsion," which was a necessary element of each of the offenses of which Black was convicted. See §§ 13A-6-61(a)(1), 13A-6-63(a)(1), and 13A-6-66(a)(1). Second, as to the first-degree-rape conviction, Black argues that the State failed to present sufficient evidence establishing that he engaged in sexual intercourse with M.K., which was a necessary element of that offense. See § 13A-6-61(a)(1). We address each of these arguments in turn.

I.

Black first argues that the State failed to present sufficient evidence establishing that the sexual assaults giving rise to his convictions were committed by "forcible compulsion." As noted, at the time of the events in this case, "forcible compulsion" was 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).[4] Here, Black argues that M.K.'s testimony "fail[s]

[4]As amended and renumbered by Act No. 2019-465, Ala. Acts 2019, the Code section defining "forcible compulsion" now defines it as follows:

> "Use or threatened use, whether express or implied, of physical force, violence, confinement, restraint, physical injury, or death to the threatened person or to another person. Factors to be considered in determining an implied threat include, but are not limited to, the respective ages and sizes of the victim and the accused; the respective mental and physical conditions of the victim and the accused; the atmosphere and physical setting in which the incident was alleged to have taken place; the extent to which the accused may have been in a position of authority, domination, or custodial control over the victim; or whether the victim was under duress. Forcible compulsion does not require proof of resistance by the victim."

§ 13A-6-60(1), Ala. Code 1975.

to show resistance, much less earnest resistance," to what, he says, was the "de minimis" physical force he asserted in committing the sexual assaults. (Black's brief, at 30.) Black also argues that M.K.'s testimony failed to establish that the sexual assaults were accompanied by threats -- express or implied -- of immediate death or serious physical injury to M.K. or another person. Rather, Black argues, "[t]he only evidence of a threat ... is testimony regarding instances where Black is alleged to have threatened to leave the family home." (Black's brief, at 33-34.) Thus, Black argues that his convictions must be reversed because, he says, the State failed to present sufficient evidence establishing that he committed the sexual assaults underlying these convictions by "forcible compulsion" and, as a result, failed to establish a prima facie case of first-degree rape, first-degree sodomy, or first-degree sexual abuse.

In support of his argument, Black relies on Rider v. State, 544 So. 2d 994 (Ala. Crim. App. 1989), in which the defendant was convicted for first-degree sodomy and first-degree sexual abuse based on sexual assaults he had committed against his stepdaughter when she was between 9 and 12 years

of age. The evidence in Rider established that, during the sexual assaults, the defendant "'would force [the stepdaughter's] hand ... [b]etween his legs'" and "'asked' or made' [the stepdaughter] touch his private part with her mouth." Rider, 544 So. 2d at 994. However, the stepdaughter testified that the defendant "had never done anything to make her afraid of him and that she was not afraid of him." 544 So. 2d at 995. The stepdaughter also testified that "she tried to 'mind' her stepfather because she 'liked the way he treated [her], like [she] was his only child,' and she considered him her father." Id. Thus, when asked why she "'let [the defendant] do those things to [her],'" the stepdaughter testified: "Because I thought if I would stop, that [the defendant] wouldn't treat me the way he did.'" Id. The stepdaughter also testified that she did not report the defendant's sexual assaults because the defendant had told her that "'he would probably go to jail'" if she told anyone, and she "did not want the defendant to go to jail." Id. Concluding that there was sufficient evidence to establish that the defendant had committed the sexual assaults by

forcible compulsion, the trial court denied the defendant's motion for a judgment of acquittal. Id.

On appeal, this Court noted: "There are two kinds of forcible compulsion. First, forcible compulsion may be that physical force which overcomes earnest resistance. Second, forcible compulsion may be a threat, either express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." Rider, 544 So. 2d at 996. After concluding that there was "absolutely no evidence to support this second type," the Court concluded that, although there was "evidence that some physical force was involved," there was no "evidence of earnest resistance." Id. Thus, the Court reversed the defendant's convictions after noting that this Court "cannot embrace a nebulous and ever-expanding construction of a crime in order to supply the proof of facts which the prosecution has failed to provide." Id.

Relying on Rider, Black contends that his convictions must likewise be reversed because, he says, the evidence in this case, like the evidence in Rider, failed to establish that his sexual assaults against M.K. were accompanied by

physical force, M.K.'s earnest resistance to such force, or express or implied threats. However, this Court held in R.E.N. v. State, 944 So. 2d 981, 985 (Ala. Crim. App. 2006), that the Alabama Supreme Court had implicitly overruled Rider in Powe v. State, 597 So. 2d 721 (Ala. 1991). In Powe, the 11-year-old victim, N.S., testified that, while she was lying on a bed beside her father, Willie Powe, he "told her to get on top of him"; that she "obeyed her father"; and that he "physically lifted her up on top of him," "unbuttoned and unzipped her pants," and "then pulled down the ... pants that he was wearing and put his penis inside her vagina." Powe, 597 So. 2d at 723. N.S. testified that the defendant "did not expressly threaten her before or during the incident" but also testified that "she was afraid of her father." Id. Powe was subsequently convicted of first-degree rape.

Citing Rider, this Court reversed Powe's conviction on the basis that there was insufficient evidence to establish the element of forcible compulsion necessary to sustain a conviction for first-degree rape. See Powe v. State, 597 So. 2d 720 (Ala. Crim. App. 1991). On certiorari review, the Alabama Supreme Court recognized that there was neither

"evidence that N.S. was overcome by her father's physical force" nor "evidence of any express threat by Powe." Powe, 597 So. 2d at 724. However, in a question of first impression, the Court considered "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." Id. at 726 (emphasis added). In addressing that question, the Court examined State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987), and Commonwealth v. Rhodes, 510 Pa. 537, 510 A.2d 1217 (1986), each of which involved a child victim of sexual assault who was not subjected to either physical force or an express threat by the perpetrator.

The Alabama Supreme Court noted that, in Etheridge, the North Carolina Supreme Court held that "a child's general fear of a parent can suffice as the [constructive] force necessary to commit a forcible sexual assault." Powe, 597 So. 2d at 726 (citing Etheridge, 352 S.E.2d at 682). Expanding on that holding, the Etheridge court stated:

> "'The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, create[] a unique situation of dominance and control

> in which explicit threats and displays of force are not necessary to effect the abuser's purpose.'
>
> "319 N.C. at 47, 352 S.E.2d at 681....
>
> "'The child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist, and the child may acquiesce rather than risk his father's wrath. As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, Rape, 95 Yale L.J. 1087, 1115 (1986).
>
> "'In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces.'
>
> "319 N.C. at 48, 352 S.E.2d at 681-82."

Powe, 597 So. 2d at 726-27. The Alabama Supreme Court also noted that Etheridge

> "was regarded in [North Carolina] as a positive step toward dealing more effectively with intrafamilial sexual abuse cases. See Note, State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault, 66 N.C.L. Rev. 1177 (1988). As one commentator noted:
>
> "'A defendant who plays a parental role in the victim's world can greatly influence and dominate that world. He or she is the victim's authoritarian, enforcing that authority through the role of disciplinarian. Etheridge recognizes that in any order given by a parent these dual roles create an implied threat of some sort

> of disciplinary action .... The victim is young, inexperienced, and perhaps ignorant of the "wrongness" of the conduct. The child may submit because he does not know he can resist or because he assumes the conduct is acceptable.'
>
> "Id. at 1184-85."

Powe, 597 So. 2d at 727.

The Alabama Supreme Court noted that, in Rhodes, the Pennsylvania Supreme Court held that "the term 'forcible compulsion' ... includes not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person's will." Powe, 597 So. 2d at 728 (citing Rhodes, 510 Pa. at 554-56, 510 A.2d at 1226). Expanding on that holding, the Rhodes court stated:

> "'There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion ... derives from the respective capacities of the child and the adult sufficient to induce the child to submit to

> the wishes of the adult ... without the use of physical force or violence or the explicit threat of physical force or violence.'
>
> "510 Pa. at 557, 510 A.2d at 1227."

Powe, 597 So. 2d at 728. The Rhodes court noted that a determination whether there was "forcible compulsion" in a case where the perpetrator is an adult and the victim is a child is based on the totality of the circumstances and that

> "significant factors to be weighed in that determination would include
>
> > "'the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.'
>
> "510 Pa. at 556, 510 A.2d at 1226. The court further noted, however, that this list of factors is by no means exclusive. Id."

Powe, 597 So. 2d at 728.

Finding Etheridge and Rhodes persuasive, the Alabama Supreme Court concluded:

> "Therefore, applying the reasoning of Etheridge and Rhodes, and taking into consideration the totality of the circumstances as outlined in the record in

this case, we conclude that the evidence in the present case is sufficient to support the jury's finding that Willie James Powe had sexual intercourse with his daughter, N.S., through the use of forcible compulsion.

"Powe was the natural father of N.S. At the time of the incident, Powe was married to N.S.'s mother and resided in the household with N.S. and her mother. Powe's arrest records indicate that at the time of the incident, he was approximately 40 years old, while N.S., on the other hand, was 11 years old. The incident between N.S. and her father occurred in her parents' bedroom while no one else was at home. Furthermore, N.S. indicated that she was afraid of her father. From this evidence, we conclude that a jury could reasonably infer that Powe held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands.

"At this point, however, we note that our holding in this case is limited to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust. The reason for the distinction between cases involving children as victims and those involving adults as victims is the great influence and control that an adult who plays a dominant role in a child's life may exert over the child. When a defendant who plays an authoritative role in a child's world instructs the child to submit to certain acts, an implied threat of some sort of disciplinary action accompanies the instruction. If the victim is young, inexperienced, and perhaps ignorant of the 'wrongness' of the conduct, the child may submit to the acts because the child assumes that the conduct is acceptable or because the child does not have the capacity to refuse. Moreover, fear of the parent resulting from love or respect may play a role as great as or greater than that played by fear of

> threats of serious bodily harm in coercing a child to submit to a sexual act. Note, State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault, 66 N.C.L. Rev. 1177, 1185 (1988).
>
> "....
>
> "Our holding in this case establishes a mechanism by which the unique relationship between children and the adults who exercise a position of domination and control over them may be taken into consideration in determining whether the element of forcible compulsion has been established. To hold otherwise would be to require a child to be mangled, to see a deadly weapon, or to hear the actual utterance of specifically threatening words before a jury would be authorized to discern a rational fear of violence. Making these criteria absolute would be ignoring reality. See McQueen v. State, 423 So. 2d 800 (Miss. 1982) (Hawkins, J., dissenting)."

Powe, 597 So. 2d at 728-29 (emphasis added).

Thus, under Powe, where an adult charged with the sexual assault of a child is in "a position of authority and domination," Powe, 597 So. 2d at 728, over the child, a jury may conclude, based upon the totality of the circumstances, that the sexual assault carried an implied threat sufficient to establish the element of forcible compulsion. See also R.E.N., supra (holding that there was sufficient evidence of forcible compulsion where the evidence established that the defendant sexually assaulted his daughter but where there was

no evidence of earnest resistance by the daughter or an express threat by the defendant).

We recognize that Powe involved a sexual assault by the victim's biological parent and that Powe is therefore factually distinguishable from the unique circumstances of this case. However, the holding in Powe is not limited to cases in which the perpetrator of a sexual assault against a child is the child's parent. Rather, the Alabama Supreme Court more generally held that Powe's implied-threat analysis is applicable to any "adult[] [perpetrator] who exercise[s] a position of domination and control" over the child victim. Powe, 597 So. 2d at 729 (emphasis added). In fact, not only is Powe not limited to cases in which the perpetrator is the child's parent, Powe is also no longer limited to cases in which the perpetrator is an adult. In Higdon v. State, 197 So. 3d 1019 (Ala. 2015), the Alabama Supreme Court extended Powe's implied-threat analysis to a case in which a 17-year-old juvenile offender, who worked at a day-care facility, sexually assaulted the 4-year-old victim, who was a student at the facility. See Higdon, 197 So. 3d at 1022 (overruling Ex parte J.A.P., 853 So. 2d 280 (Ala. 2002), in which the Court

had refused to extend Powe's implied-threat analysis to a case involving a 14-year-old perpetrator, after concluding that the proper inquiry in determining whether an implied threat exists is not the defendant's age but, rather, is "the perspective of the child victim"). Thus, Powe is applicable in any case in which a defendant who sexually assaults a child "exercise[d] a position of domination and control" over the child, regardless of whether the defendant is the child's parent. Of course, whether a defendant who sexually assaults a child "exercise[d] a position of domination and control" over the child will depend upon the specific circumstances of each case.

In this case, the evidence established that Black lived in M.K.'s house for approximately eight years, which equaled nearly half of M.K.'s life at the time she reported the sexual assaults. The evidence also established that L.K. instructed M.K. to call Black "Uncle"; that M.K. was required to obey Black and that she therefore considered him to be an authority figure; that Black had certain supervisory responsibilities over M.K. both at the house and on overnight trips; that Black was "the only person that [M.K.] had associated with, pretty

much," from the time she was 12 years of age to 17 years of age; and that, in short, Black was "another parental figure" for M.K. Regarding the sexual assaults, the evidence established that Black was in his "late 30s" when he began making sexual advances toward M.K. and that M.K. was 11 or 12 years of age at that time and was 14 or 15 years of age when the incidents giving rise to Black's convictions occurred. The evidence also established, as it did in Powe, that the sexual assaults occurred almost exclusively in Black's bedroom and that at least some of the assaults occurred while Black and M.K. were alone in the house. In addition, just as N.S. testified that she was afraid of Powe, M.K. testified that she became afraid of Black and felt "unsafe" after Black began sexually assaulting her. M.K. also testified that she submitted to the sexual assaults because she "didn't want [Black] to get mad" and that she was "terrified" she would "get in trouble" if she "did something to make him upset."

It is not the role of this Court to "say what the facts are." Wilson, supra. That is to say, it is not the role of this Court to determine, as a matter of fact, whether Black's sexual assaults of M.K. carried an implied threat sufficient

to constitute the element of forcible compulsion necessary to sustain Black's convictions. Rather, it is the role of this Court to determine whether the State presented sufficient evidence from which the jury could make that determination. Id. Given the holding in Powe, and construing the evidence set forth above in a light most favorable to the State and according the State all legitimate inferences from that evidence, Wilson, supra, we conclude that the jury "could reasonably infer that [Black] held a position of authority and domination with regard to [M.K.] sufficient to allow the inference of an implied threat to her if she refused to comply with his demands." Powe, 597 So. 2d at 728. Thus, the State presented sufficient evidence to prove the element of forcible compulsion necessary to sustain Black's convictions. Powe, supra. Accordingly, the trial court did not err by denying Black's motion for a judgment of acquittal insofar as the motion challenged the sufficiency of the evidence establishing the element of forcible compulsion.[5]

[5]In his reply brief, Black suggests that Powe should be overruled because, he says, Powe "stretches the definition of forcible compulsion beyond the plain meaning of the words in the statute." (Black's reply brief, at 7.) However, whatever the merits, if any, of Black's argument, this Court is "bound by the decisions of the Alabama Supreme Court and ... cannot

II.

Black also argues that the State failed to present sufficient evidence to sustain his first-degree-rape conviction because, he says, the evidence established that he did not engage in sexual intercourse with M.K., which is a necessary element of first-degree rape. § 13A-6-61. The term "sexual intercourse" "has its ordinary meaning and occurs upon any penetration, however slight; emission is not required." § 13A-6-60(1) (renumbered to § 13A-6-60(4) by Act No. 2019-465, Alabama Acts 2019).

Regarding the sexual assaults that gave rise to Black's first-degree-rape conviction, Black notes that M.K. testified that Black would "basically like scrape [his penis] underneath [her] vagina"; that Black "would pull ... his pants down and then just rub [his penis] against the outside of [her] vagina"; and that Black would "put his penis in between [her] thighs right up against [her] vagina and would just go back and forth." Black also notes that M.K. testified that she stated during the forensic interview "that Black's penis never

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overrule the decisions of that Court." L.J.K. v. State, 942 So. 2d 854, 873 (Ala. Crim. App. 2005) (citing § 12-3-16, Ala. Code 1975).

went inside of her, that it was 'under' her vagina and not in her vagina." (Black's brief, at 43.) Thus, Black argues that M.K.'s testimony unequivocally failed to establish penetration and that, as a result, the State failed to prove the element of sexual intercourse necessary to sustain his first-degree-rape conviction. Black is incorrect.

In Seales v. State, 581 So. 2d 1192 (Ala. 1991), the Alabama Supreme Court stated:

> "'The amount of penetration that is required to meet the "sexual intercourse" element of rape is minimal:
>
> "'"In Vol. 75 C.J.S. Rape § 10b we find the following:
>
> "'"'However, penetration to any particular extent is not required, ... nor need there be an entering of the vagina or rupturing of the hymen, the entering of the vulva or labia being sufficient; but some degree of entrance of the male organ within the labia pudendum is essential.'"'
>
> "'Harris [v. State], 333 So. 2d 871 [Ala. Crim. App. 1976] (emphasis added).'
>
> "....
>
> "...The terms 'pudendum' or 'vulva,' as generally applied, include the parts of the external genital organs of the human female such as the labia

> majora, the labia minora, and the vaginal orifice. See C.M. Goss, Gray's Anatomy, Ch. 17, pp. 1328-29 (28th ed. 1966)."

Seales, 581 So. 2d at 1194-97 (quoting Seales v. State, 581 So. 2d 1188 (Ala. Crim. App. 1990), for an accurate summary of the applicable law but reversing this Court's decision in that case based upon this Court's application of the law to the facts of that case (some emphasis added)). Thus, to establish the minimal amount of penetration necessary to prove the element of sexual intercourse required to sustain a conviction for first-degree rape, the State need not present evidence that the perpetrator's penis entered the victim's vagina; evidence establishing that the perpetrator's penis entered the "external genital organs" of the female victim is sufficient. Id.

As noted, in support of his argument that the State failed to present sufficient evidence of penetration, Black relies on M.K.'s testimony that Black's penis "was ... not in the vagina" and "would never go inside." However, M.K. also testified that Black would "put his penis right up against [her] vagina and would just go back and forth," that Black would "rub [his penis] against the outside of [her] vagina,"

and that Black would "scrape [his penis] underneath [her] vagina." (Emphasis added.) In addition, M.K. testified:

> "Q. I'm going to show you a diagram. What does this diagram show?[6]
>
> "A. The vagina.
>
> "....
>
> "Q. Can you show me what part on this diagram his penis touched?
>
> "A. Can I just put what it didn't? Just pretty much everything but this.
>
> "Q. I'm going to draw some arrows. Did it touch this part right here?
>
> "A. (Pause)
>
> "Q. Did it come in contact with this part; do you know?
>
> "A. Yes.
>
> "Q. Did it go inside this part right here?
>
> "A. Yes."

(R. 289-90.) (Emphasis added.)

It is well established that "'the victim's testimony alone is sufficient to establish a prima facie case of either rape or sexual abuse.'" Shouldis v. State, 953 So. 2d 1275,

[6]The diagram M.K. was shown was not admitted into evidence.

1285 (Ala. Crim. App. 2006) (quoting Jones v. State, 719 So. 2d 249, 255 (Ala. Crim. App. 1996)). Thus, construing M.K.'s testimony in a light most favorable to the State and according the State all legitimate inferences therefrom, Wilson, supra, we conclude that the jury, "by fair inference," id., could have found beyond a reasonable doubt the element of sexual intercourse, i.e., penetration, necessary to sustain a conviction for first-degree rape. Although M.K. testified that Black's penis "was ... not in the vagina" and "would never go inside," she also testified that Black's penis was "right up against ... the outside of [her] vagina"; that Black's penis was inside some part of the anatomy on the diagram she was shown, which she testified was a diagram of a vagina; and that Black's penis touched "pretty much everything" on the anatomy reflected on the diagram.

In addition, M.K. further testified:

> "Q. You testified today that in your forensic interview you said that [Black's] penis never went in you; is that right?
>
> "A. Yes.
>
> "Q. And when you say 'in you,' were you referring to a specific part of your anatomy that his penis didn't go into?

"A. Yes, ma'am, my vagina.

"Q. But did his penis go into other parts of your anatomy or touch other parts of your anatomy?

"A. The outside of my vagina and my hands."

(R. 349.) (Emphasis added.) From this testimony, the jury could have by fair inference reached the conclusion that Black inserted his penis into the "outside of [M.K.'s] vagina."

Jurors are not required to check their common sense at the courthouse door, as they would an overcoat. Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995) (noting that jurors are "presumed ... not [to] leave their common sense at the courthouse door"). Based on all the testimony and evidence in this case, jurors using their collective common sense could have determined that, although Black's penis never entered M.K.'s actual vagina, it did enter M.K.'s "external genital organs," which, as noted, is sufficient to establish the minimal amount of penetration necessary to prove the element of sexual intercourse required to sustain a conviction for first-degree rape. Seales, 581 So. 2d at 1197. Furthermore, to the extent M.K.'s testimony is inconsistent, it is well settled that inconsistencies in the evidence create a question of fact for the jury, Gargis v. State, 998 So. 2d 1092, 1097

(Ala. Crim. App. 2007), and that "[w]hether there is 'actual penetration' is a question for the jury." Boyd v. State, 699 So. 2d 967, 970 (Ala. Crim. App. 1997) (quoting Seales, 581 So. 2d at 1193).

Because the State presented sufficient evidence to establish penetration, i.e., the element of sexual intercourse, and because we have already concluded that there was also sufficient evidence to establish the element of forcible compulsion, the trial court did not err by denying Black's motion for a judgment of acquittal on the first-degree-rape charge and submitting that charge to the jury.

Conclusion

Because the State presented sufficient evidence to establish a prima facie case of first-degree rape, first-degree sodomy, and first-degree sexual abuse, the trial court did not err by denying Black's motion for a judgment of acquittal and submitting those charges to the jury. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum and Minor, JJ., concur. Cole, J., concurs in the result.