REL: August 14, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0945

Hunter Wayne Scott

v.

State of Alabama

Appeal from Henry Circuit Court
(CC-14-267)

McCOOL, Judge.

Hunter Wayne Scott appeals his conviction for sexual abuse of a child less than 12 years old, a violation of § 13A-6-69.1, Ala. Code 1975, and his resulting sentence of 20 years' imprisonment.

Facts and Procedural History

The evidence presented at Scott's trial tended to establish the following facts. S.B. began a romantic relationship with Scott when her daughter, K.N., was approximately one month old. Scott and S.B. continued a sporadic relationship for approximately the next four years, during which they lived together at various times. Near the beginning of 2013, Scott and S.B. moved into the house of S.B.'s mother, S.Y., where K.N., who was then four years old, was already living with S.Y. However, Scott was incarcerated in March 2013, and although Scott and S.B. maintained a relationship for some time thereafter, S.B. eventually terminated the relationship later that year.

S.B. testified that, in November 2013, she was "having a conversation with [S.Y.] ... and ... was telling [S.Y.] she was done. [She] wasn't going back to [Scott]." (R. 123-24.) Regarding what occurred next, S.B. testified:

> "A. [K.N.] come in and she asked me if [Scott] was going to be gone for a while. I told her, Yes. She told me there was something that she needed to tell me. I left with my daughter and went to her bedroom at the time.
>
> "....

> "A. I got to the bedroom, and the first thing my daughter said was, 'Has [Scott] ever sucked on you?' I flipped. I didn't know why my daughter would be asking me something like that. I asked her -- I told her that was not something that we needed to discuss, you know. And I asked her why she was asking me this. And she told me that she had something she needed to tell me, that she should have told me a long time ago. She told me that [Scott] had been putting his mouth on her thing, and putting his tally whacker on her butt.
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> "....
>
> "Q. ... [L]et me ask you this. When [K.N.] said [Scott] put his mouth on her thing, did she indicate to you or did you know what she was referring to?
>
> "A. She put her hand between her legs."

(R. 125.)

K.N., who was nine years old at the time of trial, testified that she overheard the conversation between S.B. and S.Y. and that, once she had been assured Scott was not going to return, she told S.B. that, on multiple occasions, Scott "was sticking his mouth where [K.N.'s] private parts were and stick[ing] his private parts where [K.N.'s] private parts [were]." (R. 74.) When asked at trial to identify her "private parts," K.N. indicated that they included her "butt and [her] other area" "between [her] legs." (R. 75.)

Marie McCarty, a forensic interviewer with the Southeast Alabama Child Advocacy Center, interviewed K.N. the day after K.N. reported the alleged sexual abuse, and an audiovisual recording of the interview was played for the jury. After the recording was played for the jury, McCarty testified that K.N. had alleged that Scott "pulled [her clothes] down" (R. 232) and "put his mouth on her thang." (R. 223.) Using an anatomical drawing of the female figure, K.N. had identified her "thang" as her genitalia. (R. 221.) McCarty also testified that K.N. had alleged that Scott "put his tally whacker on her butt." (R. 231.) Using an anatomical drawing of the male figure, K.N. had identified a "tally whacker" as the male genitalia. (R. 222.)

On January 29, 2019, the jury found Scott guilty of sexual abuse of a child less than 12 years old. § 13A-6-69.1. On May 3, 2019, the trial court held a sentencing hearing. After hearing arguments from the State and defense counsel regarding the appropriate sentence for Scott's conviction, the trial court sentenced Scott to 20 years' imprisonment. On May 30, 2019, Scott filed a motion for a new trial in which he argued, among other arguments, that the jury's verdict was

against the great weight of the evidence; Scott filed a notice of appeal that same day. Scott's motion for a new trial was denied by operation of law on July 2, 2019. See Rule 24.4, Ala. R. Crim. P.

Analysis

On appeal, Scott raises one claim challenging his conviction and one claim challenging his sentence. We address each claim in turn.

I.

The sole claim Scott raises with respect to his conviction is that the jury's verdict was contrary to the great weight of the evidence. However, it is well settled that

> "'"'[t]he credibility of witnesses and the weight or probative force of testimony is for the jury to judge and determine.'"' Johnson v. State, 555 So. 2d 818, 820 (Ala. Crim. App. 1989), quoting Harris v. State, 513 So. 2d 79, 81 (Ala. Crim. App. 1987), quoting in turn Byrd v. State, 24 Ala. App. 451, 451, 136 So. 431, 431 (1931). More importantly, '"[t]he question of the victim['s] credibility [is] one for the jury and not for this Court."' Rowell [v. State], 647 So. 2d [67,] 69 [(Ala. Crim. App. 1994)], quoting Coats v. State, 615 So. 2d 1260, 1260 (Ala. Crim. App. 1992). 'We have repeatedly held that it is not the province of this court to reweigh the evidence presented at trial.' Johnson, 555 So. 2d at 820. '"When the jury has passed on the credibility of evidence tending to establish the

> defendant's guilt, this Court cannot disturb its finding."' Rowell, 647 So. 2d at 69, quoting Collins v. State, 412 So. 2d 845, 846 (Ala. Crim. App. 1982). Furthermore, '"[t]his Court must view the evidence in the light most favorable to the State, and 'draw all reasonable inferences and resolve all credibility choices in favor of the trier of fact.'"' D.L. v. State, 625 So. 2d 1201, 1204 (Ala. Crim. App. 1993), quoting Woodberry v. State, 497 So. 2d 587, 590 (Ala. Crim. App. 1986)."

Buford v. State, 891 So. 2d 423, 429 (Ala. Crim. App 2004).

> "'Once a prima facie case has been submitted to the jury, this Court will not upset the jury's verdict except in extreme situations in which it is clear from the record that the evidence against the accused was so lacking as to make the verdict wrong and unjust. Deutcsh v. State, 610 So. 2d 1212, 1234-35 (Ala. Cr. App. 1992). This Court will not substitute itself for the jury in determining the weight and probative force of the evidence. Benton v. State, 536 So. 2d 162, 165 (Ala. Cr. App. 1988).'
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> "May v. State, 710 So. 2d 1362, 1372 (Ala. Crim. App. 1997).
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> "'Furthermore, on appeal, there is a presumption in favor of the correctness of the jury verdict. Saffold v. State, 494 So. 2d 164 (Ala. Cr. App. 1986). Although that presumption of correctness is strong, it may be overcome in a limited category of cases where the verdict is found to be palpably wrong or contrary to the great weight of the evidence. Bell v. State, 461 So. 2d 855, 865 (Ala. Cr. App. 1984).'

> "Henderson v. State, 584 So. 2d 841, 851 (Ala. Crim. App. 1988)."

Thompson v. State, 97 So. 3d 800, 810 (Ala. Crim. App. 2011).

"A person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact." § 13A-6-69.1(a), Ala. Code 1975. At the time the alleged sexual abuse in this case occurred, "sexual contact" was defined as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party." § 13A-6-60(3), Ala. Code 1975.[1]

Here, K.N. testified that Scott subjected her to sexual contact by placing his mouth on her genitalia and placing his penis on her "butt," and it was undisputed that K.N. was less than 12 years old and that Scott was 16 years old or older when the alleged sexual abuse occurred. It is well settled that "'[t]he victim's testimony alone is sufficient to

[1]Section 13A-6-60(3) was amended by Act No. 2019-465, Ala. Acts 2019, to define "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person, done for the purpose of gratifying the sexual desire of either party. The term does not require skin to skin contact."

establish a prima facie case of ... sexual abuse,'" and "[w]hether [Scott] touched [K.N.] ... to gratify [either party's] sexual desires '"is a question for the jury and may be inferred from the act itself."'" Williams v. State, 10 So. 3d 1083, 1087 (Ala. Crim. App. 2014) (quoting, respectively, Jones v. State, 719 So. 2d 249, 255 (Ala. Crim. App 1996), and Ex parte A.T.M., 804 So. 2d 171, 174 (Ala. 200), quoting in turn Roughton v. State, 644 So. 2d 1339, 1340 (Ala. Crim. App. 1994)). Thus, the State presented a prima facie case of sexual abuse of a child less than 12 years old, and, as a result, the trial court properly submitted the case to the jury for the jury to pass on the credibility of the witnesses and to weigh the evidence, Buford, supra, which the jury did by finding Scott guilty. As noted, the jury's determinations regarding the witnesses' credibility are not reviewable on appeal once the State presents a prima facie case. Id. Accordingly, this Court will not disturb the jury's verdict against Scott -- a verdict the Court presumes to be correct. Thompson, supra. To do so would be to disregard the sanctity of the function of the jury and to make this Court a trier of fact, which Alabama law forbids. See Ex parte Foley, 864 So.

2d 1094, 1099 (Ala. 2003) ("[A]n appellate court may not substitute its judgment for that of the trial court."); and Meeker v. State, 801 So. 2d 850, 853 (Ala. Crim. App. 2001) ("The sanctity of the jury function demands that this court never substitute its decision for that of the jury.") (citations omitted)).

Furthermore, this is not one of the "limited category of cases" or "extreme situations in which it is clear from the record that the evidence against the accused was so lacking as to make the verdict wrong and unjust." Thompson, 97 So. 3d at 810 (citations omitted). As noted, K.N.'s testimony alone was sufficient to establish the State's prima facie case, Williams, supra, and, thus, the State's case was not lacking in evidence. Although Scott argues that "K.N.'s account [the alleged sexual abuse] is simply too vague to be believable," Scott's brief, at 13, "[t]he question of the victim['s] credibility [is] one for the jury and not for this Court." Buford, 891 So. 2d at 429 (citations omitted).

Because the only claim Scott raises with respect to his conviction is a challenge to the weight of the evidence and

because that claim does not entitle Scott to relief, Scott's conviction is affirmed.

II.

With respect to his sentence, Scott argues that he is entitled to a new sentencing hearing because the trial court did not afford him an opportunity to make a statement before the court imposed sentence.[2] For its part, the State concedes that a remand is required for a new sentencing hearing. State's brief, at 11. This Court recently addressed the same claim in Norton v. State, [Ms. CR-18-0174, March 13, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020):

> "Norton argues that the circuit court erred in not giving him an opportunity to speak before it imposed sentence. Norton argues that Rule 26.9(b)(1), Ala. R. Crim. P., requires the court to '[a]fford the defendant an opportunity to make a statement in his or her behalf before imposing sentence.' Norton argues that the circuit court heard arguments of counsel as to the appropriate sentence and then immediately imposed sentence without affording him an opportunity to speak. See Banks v. State, 51 So. 3d 386 (Ala. Crim. App. 2010) (a sentence imposed without allowing an allocution is erroneous). The

[2]Although Scott did not object to the trial court's failure to afford him an opportunity to make a statement before the court imposed sentence, "this Court has held that such matters are an exception to the general rules of preservation." R.V.D. v. State, 268 So. 3d 96, 101 (Ala. Crim. App. 2018).

> State agrees that Norton should have been given an opportunity to speak before his sentence was imposed. (State's brief, p. 21-22.)
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> "Because Norton was not afforded an opportunity to make a statement in his own behalf before the circuit court sentenced him, this Court is compelled to reverse the sentence and to remand this case to the circuit court for that court to resentence Norton. See Green v. State, 200 So. 3d 677, 678-79 (Ala. Crim. App. 2015) (holding that the lack of allocution requires remand because a sentence imposed without allowing an allocution is erroneous).
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> "On remand the circuit court shall conduct a sentencing hearing at which a proper allocution is provided pursuant to Rule 26.9(b), Ala. R. Crim. P. The circuit court is directed to make a return to this Court showing compliance with these instructions within 49 days from the date of this opinion. The return to remand shall include a transcript of the sentencing hearing and copies of documents, if any, relied upon by the circuit court in imposing Norton's sentence."

Similarly, in this case, the trial court heard arguments from the State and defense counsel regarding the appropriate sentence for Scott's conviction and then immediately imposed sentence without affording Scott an opportunity to make a statement. Thus, as we did in Norton, we reverse Scott's sentence and remand the case for the trial court to conduct a new sentencing hearing at which the trial court "shall ... [a]fford [Scott] an opportunity to make a statement in his ...

own behalf before imposing sentence." Rule 26.9(b)(1), Ala. R. Crim. P. The trial court "is directed to make a return to this Court showing compliance with these instructions within 49 days from the date of this opinion," and "[t]he return to remand shall include a transcript of the sentencing hearing and copies of documents, if any, relied upon by the [trial] court in imposing [Scott's] sentence." Norton, ___ So. 3d at ___.

AFFIRMED AS TO CONVICTION; REVERSED AND REMANDED WITH INSTRUCTIONS AS TO SENTENCE.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.