REL: July 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-1097

Clyde Baggett

v.

State of Alabama

Appeal from Conecuh Circuit Court
(CC-14-79)

MINOR, Judge.

A jury convicted Clyde Baggett of three counts of first-degree sexual abuse, see former § 13A-6-66(a)(3), Ala. Code 1975.[1] The Conecuh Circuit Court sentenced Baggett to three

[1]The indictment charged Baggett with sexual abuse of a child less than 12 years old and cited current § 13A-6-69.1, Ala. Code 1975, which became effective July 1, 2006. See Act No. 2006-575, Ala. Acts 2006. As we discuss in Part III of

consecutive terms of 240 months' imprisonment.[2] On appeal, Baggett argues (1) that the circuit court erred in admitting two prior written statements made by one of the victims; (2) that the State's evidence was insufficient to support the convictions; and (3) that his sentences are illegal because they exceed the sentencing range for a Class C felony. For the reasons below, we hold (1) that the circuit court properly admitted the prior written statements under Rule 801(d)(1)(B), Ala. R. Evid.; (2) that the State's evidence of the crimes was

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this opinion, Baggett committed the offenses before July 1, 2006, the effective date of Act No. 2006-575. Act No. 2006-575 took the offense formerly codified at § 13A-6-66(a)(3), Ala. Code 1975, and punishable as a Class C felony and, with a nonsubstantive change in its wording, renamed that offense "sexual abuse of a child less than 12 years old," moved it to what is now § 13A-6-69.1, Ala. Code 1975, and made it a Class B felony.

Although the indictment charging Baggett cites the current codification of the offense rather than the former one, that citation makes no difference, and Baggett does not challenge it. See Ex parte Bush, 431 So. 2d 563, 564 (Ala. 1983) ("Miscitation of a code section does not void an indictment which otherwise states an offense; and, in the absence of a showing of actual prejudice to the defendant, reference to the erroneous code section will be treated as mere surplusage.").

[2]Baggett was also ordered to pay on each count court costs, a $5,000 fine, and a $500 crime-victims-compensation assessment.

sufficient; and (3) that Baggett's sentences are illegal and, thus, he must be resentenced.

In January 2014, M.B., J.L., and M.S., all adults, made statements to the Conecuh County Sheriff's Department that Baggett had sexually abused each of them while they were under the age of 12 years old.

M.B.[3] testified that he and Baggett were second cousins. M.B. testified that when he was nine years old, he and M.S. along with Baggett stayed overnight at a hunting camp in Conecuh County. (R. 147, 162.) M.B. testified that Baggett put his hands down M.B.'s pants. M.B. testified that Baggett pulled out M.B.'s "privates" and "fondled" him. (R. 148.) M.B. also testified that "[Baggett] put [M.B.'s] hand on [Baggett's privates] and was moving it back and forth." (R. 149.) Later that night, M.B. told M.S. about the incident.

Before M.B. reported the sexual abuse to police, M.B. wrote letters to Baggett and tried to blackmail Baggett. M.B. admitted that he was on drugs then "and was just trying to get easy money." (R. 151.) M.B. testified that, despite the

[3]M.B. was 36 years old at the time of trial.

attempted blackmail, the sexual-abuse allegations were "absolutely" true. (R. 153.)

J.L.[4] testified that his mother was married to Baggett's older brother. J.L. testified that once, when he was "approximately 11, 12 years old,"[5] he and M.S. stayed the night at Baggett's house. (R. 165.) J.L. testified that he fell asleep in the middle of the bed with M.S. and Baggett on either side of him. J.L. testified that at some point, Baggett rolled on top of him and removed J.L.'s underwear. Baggett testified that Baggett "rubb[ed] his private parts on [J.L.]" (R. 167.) Baggett then performed anal sex on J.L. and when he "finished," "he rolled back over like it was nothing to it." (R. 167.) J.L. testified that the next morning, he called his mother and told her that he was sick and to come and pick him up. J.L. testified that Baggett told him it was a "secret."

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[4]J.L. was 45 years old at the time of trial.

[5]J.L. also referenced two written statements about the sexual abuse that he had made in September 1998 and January 2014. In the 1998 statement, J.L. stated that he was "eleven years old and in the fifth grade" when Baggett "put his penis into [J.L.'s] anus." (C. 57.) In the 2014 statement, J.L. said that he was "seven or eight or maybe a little older" when "[Baggett] penetrated [J.L.'s] butt with [Baggett's] penis." (C. 56.)

(R. 170.) J.L. testified that he had not had contact with Baggett since the incident.

M.S.[6] testified that he and Baggett were neighbors. M.S. testified that Baggett sexually abused him from the time he was five years old until he was eight years old. M.S. testified that "[Baggett] perform[ed] oral sex on [him] all the time, pretty much every chance he got" and subjected him to "countless times of inappropriate touching." (R. 201.) M.S. testified that Baggett attempted anal sex with him on a few occasions. M.S. recalled the incident at the hunting camp, and confirmed that M.B. told him about what Baggett had done to M.B. M.S. testified that most of the incidents occurred in Conecuh County but that the incident at the hunting camp occurred in Baldwin County.

I.[7]

Baggett argues that the circuit court erred by allowing into evidence two prior written statements made by J.L.

[6]M.S.'s testimony revealed that he was at least 20 years old at the time of trial because, he said, he had lived at a certain address in Brewton for "[r]ight at 20 years" and that he had an uncle he had not seen "in 20-something years" since the allegations. (R. 198, 208.)

[7]We address Baggett's issues in an order different from the order in which he presents them.

because, he says, the prior statements were inadmissible hearsay.[8]

At trial, J.L. testified that he was "approximately 11, 12 years old" when Baggett rubbed his "private parts" on J.L. and anally raped J.L. during a sleepover at Baggett's house. (R. 165.) On cross-examination, defense counsel questioned J.L. about the written statements, making several inferences. For example, as the State points out, defense counsel inferred that J.L.'s statements differed from each other and from J.L.'s testimony, that J.L.'s allegations were fabricated after he conferred with the other victims, and that J.L. intended to use the statements to blackmail Baggett. On redirect, the State moved to introduce both statements, and defense counsel made a hearsay objection. The circuit court overruled the objection, and both statements were admitted into evidence.

"The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed

[8]See State's Exhibits 1 and 2.

except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000).

"Rule 801(d)(1)(B), Ala. R. Evid., states:

> "'(d) Statements That Are Not Hearsay. A statement is not hearsay if--
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> "'(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.'

"(Emphasis added.)

> "'[A] prior consistent statement need not be identical in every detail to the declarant's ... testimony at trial,' because '[i]nevitably, witnesses' recollections of past events will diverge.' United States v. Vest, 842 F.2d 1319, 1329 (1st Cir. 1988). That being said, however, the declarant's testimony and prior statement must be 'sufficiently close to fall within .... [Rule] 801(d)(1)(B).' Vest, 842 F.2d at 1329."

J.D.W. v. State, 176 So. 3d 863, 868 (Ala. Crim. App. 2014).

J.L. was subject to cross-examination, and the statements were offered "to rebut an express or implied charge against

the declarant of recent fabrication or improper influence or motive." Thus, the statements were not hearsay, and the circuit court did not err when it allowed the statements into evidence.

II.

Baggett argues that the circuit court erred by denying his motion for a judgment of acquittal of all charges because, he says, the State "failed to prove a prima facie case of sexual abuse" in all three counts.[9]

> "In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Crim. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Crim. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant

[9]Baggett's claim, raised at trial but not raised on appeal, that the State "failed to prove venue" has been abandoned. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief."). Even so, the claim was meritless. The record shows that the State's evidence was sufficient to prove venue.

> guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Crim. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Crim. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993).

> "'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985).
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> "'....
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> "'"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 to the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978). An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." Kelly v. State, 273 Ala. 240, 244, 139 So. 2d 326 (1962). ... A verdict on conflicting evidence is conclusive on appeal. Roberson v. State, 162 Ala. 30, 50 So. 345 (1909). "[W]here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence

> offered by the defendant is in sharp conflict therewith and presents a substantial defense." Fuller v. State, 269 Ala. 312, 333, 113 So. 2d 153 (1959), cert. denied, Fuller v. Alabama, 361 U.S. 936, 80 S. Ct. 380, 4 L. Ed. 2d 358 (1960).' Granger [v. State], 473 So. 2d [1137,] 1139 [(Ala. Crim. App. 1985)].
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> "... 'Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S. Ct. 373, 46 L. Ed. 2d 288 (1975). 'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989).

Former § 13A-6-66(a)(3), Ala. Code 1975, provided that "[a] person commits the crime of sexual abuse in the first-degree if ... [h]e, being 16 years or older, subjects another person to sexual contact who is less than 12 years old."[10] Section 13A-6-60, Ala. Code 1975, defines "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a

[10]Section 13A-6-69.1, Ala. Code 1975, provides that "[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."

person not married to the actor, done for the purpose of gratifying the sexual desire of either party."

The record shows that the State's evidence was sufficient to show that Baggett sexually abused M.B., J.L., and M.S. when he was 16 years or older and they were younger than 12 years old. Baggett's arguments that M.S.'s testimony proved no "sexual touching" and that J.L.'s testimony failed to prove that J.L. was under 12 years old at the time of the offense are both refuted by the record. Indeed, M.S. testified that "[Baggett] perform[ed] oral sex on [him] all the time, pretty much every chance he got" and subjected him to "countless times of inappropriate touching." (R. 201.) J.L. testified when he was "approximately 11, 12 years old," Baggett "rubb[ed] his private parts on him" and that Baggett anally raped him. Statements that J.L. was under the age of 12 years old were also admitted as substantive evidence of Baggett's guilt.[11] See Chestang v. State, 837 So. 2d 867, 869-70 (Ala. Crim. App. 2001) ("Any 'inconsistencies and contradictions in the State's evidence, as well as [any] conflict between the State's evidence and that offered by the appellant, [goes] to

[11]See Part I, supra.

the weight of the evidence and [creates a question] of fact to be resolved by the jury.'"). And Baggett's argument that the jury should have discounted M.B.'s testimony--which, he claims, was "tainted" because he tried to blackmail Baggett on the sexual abuse--challenges the weight of the evidence. Baggett did not preserve this issue for appellate review because he did not raise it in his motion for a new trial. See Frazier v. State, 258 So. 3d 369, 384 (Ala. Crim. App. 2017) ("The issue of the weight of the evidence is preserved by a motion for a new trial, stating 'that the verdict is contrary to law or the weight of the evidence.'"). Thus, the State's evidence was sufficient to support the jury's guilty verdicts for sexual abuse of a child less than 12 years old, and the circuit court did not err in denying Baggett's motion for a judgment of acquittal.

III.

Baggett argues, as does the State, that Baggett's sentences are illegal. Baggett argues that he committed the offenses "between 1982 and 1991," which was before § 13A-6-69.1, Ala. Code 1975, became effective on July 1, 2006, and elevated sexual abuse of a child less than 12 years old to a

Class B felony. Relying on M.H. v. State, 6 So. 3d 41 (Ala. Crim. App. 2008), Baggett argues that former "§ 13A-6-66 applies" and thus he should be sentenced for a Class C felony to "not more than 10 years or less than 1 year and 1 day." We agree.

In M.H., this Court held:

> "'It is well settled that the law in effect at the time of the commission of the offense controls the prosecution.' Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005). See also Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App. 1990) ('A defendant's sentence is determined by the law in effect at the time of the commission of the offense.'); Hardy v. State, 570 So. 2d 871 (Ala. Crim. App. 1990) (unless otherwise stated in the statute, the law in effect at the time the offense was committed controls the offense); and Jefferson v. City of Birmingham, 399 So. 2d 932 (Ala. Crim. App. 1981) (law in effect at the time of the offense governs prosecution). '"As a general rule, a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes."' Zimmerman v. State, 838 So. 2d 404, 406 n.1 (Ala. Crim. App. 2001), quoting 24 C.J.S. Criminal Law § 1462 (1989). As this Court explained in White v. State, 992 So. 2d 783 (Ala. Crim. App. 2007):
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> > "'It is well settled that "[u]nless the statute contains a clear expression to the contrary, the law in effect at the time of the commission of the offense

> 'govern[s] the offense, the offender, and all proceedings incident thereto.'" Hardy v. State, 570 So. 2d 871, 872 (Ala. Crim. App. 1990), quoting Bracewell v. State, 401 So. 2d 123, 124 (Ala. 1979). "In Alabama, retrospective application of a statute is generally not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as prospectively." Jones v. Casey, 445 So. 2d 873, 875 (Ala. 1983).'

"992 So.2d at 785. We have reviewed Act No. 2006-575, Ala. Acts 2006, and § 13A-6-69.1, Ala. Code 1975, and there is no express statement that § 13A-6-69.1 apply retroactively, nor can we find any indication that the legislature intended that § 13A-6-69.1 apply retroactively. Therefore, § 13A-6-69.1 applies only to those crimes that occurred after July 1, 2006, its effective date.

"Because § 13A-6-69.1 does not apply to crimes that occurred before July 1, 2006, it does not apply to [Baggett], who committed the sexual abuse ["between 1982 and 1991."] Rather, § 13A-6-66 applies to [Baggett's] sexual-abuse conviction, making his conviction a Class C felony. Section 13A-5-6(a)(3), Ala. Code 1975, provides that a person convicted of a Class C felony shall be punished by 'not more than 10 years or less than 1 year and 1 day.' [Baggett's] sentences for his [sexual-abuse-of-a-child-less-than-12-years-old] convictions exceeded the maximum authorized by law and [were], thus, illegal."

M.H., 6 So. 3d at 49.

Thus, we affirm Baggett's convictions for first-degree sexual abuse of a child less than 12 years old, see former § 13A-6-66(a)(3), Ala. Code 1975. But we remand this case to the circuit court for it to conduct a new sentencing hearing and to resentence Baggett in accordance with this opinion. Due return must be filed with this Court within 42 days of the date of this opinion and must include a transcript of the sentencing hearing conducted on remand, as well as the circuit court's amended sentencing order.

AFFIRMED AS TO CONVICTIONS; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

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