REL: September 11, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-1118

Kyle Horvat

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-17-3081; CC-17-3082; CC-17-3083; CC-17-3084)

MINOR, Judge.

A jury convicted Kyle Horvat of one count of first-degree sexual abuse, see § 13A-6-66, Ala. Code 1975, and one count of attempted first-degree sexual abuse, see §§ 13A-4-2 and 13A-6-66, Ala. Code 1975.[1] The circuit court sentenced Horvat to 20

[1]In 2017, a Jefferson County grand jury returned an indictment charging Horvat with two counts of first-degree

years' imprisonment on the sexual-abuse conviction and to 10 years' imprisonment on the attempted sexual-abuse conviction. The sentences to be served concurrently.[2] For the reasons stated below, we affirm both Horvat's convictions and his sentence for the sexual-abuse conviction. But we remand this cause to the circuit court for resentencing on the attempted sexual-abuse conviction.

Because Horvat does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. Horvat and J.L. served together in the Army Reserves and were good friends, like "brothers." During his weekend drills, Horvat stayed at J.L.'s house along with J.L. and his daughter, the victim T.L., who spent every other weekend with J.L.

Several times, Horvat went into T.L.'s room at night, with the lights off, and got into bed with T.L., sometimes

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sodomy, see § 13A-6-63, Ala. Code 1975, and two counts of attempted first-degree sodomy, see §§ 13A-4-2 and 13A-6-63, Ala. Code 1975. (C. 278-81.) As noted, Horvat was convicted of the lesser-included offenses of first-degree sexual abuse and attempted first-degree sexual abuse. (C. 467-68.)

[2]The circuit court also ordered Horvat to pay court costs, attorney fees, and a $50 crime victims compensation assessment.

under the covers. Horvat told T.L. to keep quiet and played "YouTube"[3] videos to ensure her silence. When T.L. asked Horvat to leave, he refused, and kept T.L. in bed with him.

Once, Horvat told T.L., who was then eight years old, to lay on her stomach, with her bottom in the air. Horvat pulled her pants down around her upper thigh. T.L. testified that "[Horvat] put his private part in [her] butt." (R. 511.) Another time, Horvat got in the bed with T.L. and pulled down his pants. T.L. testified that she "saw [Horvat's] private part for about a second." (R. 516.) T.L. got out of the bed and hid in the closet. T.L. testified that Horvat touched her but "not as much because [she] was trying to get away." (R. 519.)

I.

Horvat argues that the circuit court erred by allowing the State to introduce evidence of "prior uncharged nonspecific allegations" that T.L. made against Horvat. (Horvat's brief, p. 19.) That evidence showed T.L.'s allegations that Horvat entered her room and got into bed with her several times. Horvat argues that the evidence was

[3]"YouTube" is an Internet video-streaming service.

inadmissible to prove motive under Rule 404(b), Ala. R. Evid. Horvat also argues that the probative value of the "nonspecific" evidence was substantially outweighed by the danger of unfair prejudice. (Horvat's brief, p. 30.)

The State filed its notice of intent to use collateral-act evidence to show motive (a passion or propensity for illicit, unusual, abnormal sexual relations or contact or both). The State argued, in a brief it filed in March 2018 in the circuit court, that the collateral-act evidence proved Horvat's illicit motive. See, e.g., Lucas v. State, 204 So. 3d 929 (Ala. Crim. App. 2016). In response, Horvat argued that the State was trying to "pigeonhole" prejudicial evidence into a motive argument. (C. 394-97.) After a hearing, the circuit court granted the State's motion, ruling that the evidence was admissible.

It is left to the trial court's discretion to make a determination on the admissibility of collateral-act evidence. See Lucas v. State, 204 So. 3d at 940 (Ala. Crim. App. 2016).

In Bedsole v. State, 975 So. 2d 1034 (Ala. Crim. App. 2006), this Court addressed the use of collateral acts to prove motive:

> "'"'Motive is defined as "an inducement, or that which leads or tempts the mind to do or commit the crime charged." Spicer v. State, 188 Ala. 9, 11, 65 So. 972, 977 (1914). Motive has been described as "that state of mind which works to 'supply the reason that nudges the will and prods the mind to indulge the criminal intent.'" [Charles Gamble, Character Evidence: A Comprehensive Approach 42 (1987).]
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> "'"'Furthermore, testimony offered for the purpose of showing motive is always admissible. McClendon v. State, 243 Ala. 218, 8 So. 2d 883 (1942). Accord, Donahoo v. State, 505 So.2d 1067 (Ala. Crim. App. 1986). "'It is permissible in every criminal case to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense.' McAdory v. State, 62 Ala. 154 [(1878)]." Nickerson v. State, 205 Ala. 684, 685, 88 So. 905, 907 (1921)."'"

"'Hatcher v. State, 646 So. 2d 676, 679 (Ala. 1994) (emphasis added).

"'In determining whether evidence concerning a collateral act of sexual abuse is admissible to prove motive, we must consider the following factors: "'(1) the offense(s) charged; (2) the circumstances surrounding the offense(s) charged and the

> collateral offense(s); (3) the other collateral evidence offered at trial; and (4) the other purpose(s) for which it is offered."' Campbell v. State, 718 So. 2d 123, 130 (Ala. Crim. App. 1997), quoting Bowden v. State, 538 So. 2d 1226, 1237 (Ala. 1988)."

Bedsole, 975 So. 2d at 1038-39.

T.L. testified that Horvat would come into T.L.'s bedroom at night and get in the bed with T.L.; that Horvat would "sometimes" get under the covers with her; that Horvat would tell T.L. to keep quiet and would bribe T.L. with videos to keep her quiet; that, when T.L. would ask Horvat to leave the room, he would refuse to; and that, when T.L. would try and get out of the bed, Horvat would pull her back in. (R. 508-10.) T.L. also testified that Horvat once "put his private part in [T.L.'s] butt." (R. 511.) But Horvat's actions of coming into her room at night, T.L. said, had occurred on other occasions.[4] The State's evidence showed "a pattern of behavior toward [T.L.] that was relevant to establishing [Horvat's] motive when he entered [T.L.'s] bedroom [on that one occasion]." Lucas, 204 So. 2d at 943. And the probative value of the collateral-act evidence was not substantially

[4]Any conflicting evidence about the exact number of incidents involving Horvat was for the jury to resolve.

outweighed by undue prejudice. See Rule 403, Ala. R. Evid. (providing that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Thus, the circuit court did not abuse its discretion by allowing the State to introduce the challenged evidence, and Horvat is due no relief.

II.

Horvat argues that the circuit court erred by denying his motion to continue because he needed time to locate witnesses. Horvat argues that the State never disclosed the contact information of the two classmates who T.L. first told about the abuse and that the evidence they might provide was "critical" to him and his constitutional rights. (Horvat's brief, p. 35.)

Before trial, Horvat argued that he wanted to know the context in which the classmates' statements were made; that he had the right to confront the classmates; and that he had a right to obtain the information under Brady v. Maryland, 373

U.S. 83, 87 (1963). Horvat also argued that, based on discovery, it appeared that T.L. reported the incidents as sexual abuse rather than sodomy, indicating that Horvat might have committed a lesser crime. The State responded that it did not intend to elicit any testimony from the classmates and intended to introduce the information only to show how the investigation began--that T.L. had spoken with the classmates, who then told the school counselor, who passed the information along to a school-resource officer, who then contacted the Department of Human Resources.

It is within a trial court's discretion whether to deny a motion to continue. See Sullivan v. State, 939 So. 2d 58, 65 (Ala. Crim. App. 2006).

> "In Brady[v. Maryland], 373 U.S. [83] at 87, 83 S. Ct. at 1196-97 [(1963)], the Supreme Court held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' A Brady violation occurs where: (1) the prosecution suppresses evidence; (2) the evidence is favorable to the defendant and (3) material to the issues at trial."

Williams v. State, 710 So. 2d 1276, 96 (Ala. Crim. App. 1996).

> "'The term suppression "means non-disclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence." Ogden v. Wolff, 522 F.2d 816, 820 (8th Cir. 1975), cert. denied, 427

> U.S. 911, 96 S. Ct. 3198, 49 L. Ed. 2d 1203 (1976). "The concept of 'suppression' implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant would benefit from knowing." United States v. Natale, 526 F.2d 1160, 1170 (2d Cir.1975), cert. denied, 425 U.S. 950, 96 S. Ct. 1724, 48 L. Ed. 2d 193 (1976).'
>
> "....
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> > "'"Because the government's duty to disclose covers only evidence within the government's possession, the government is not obliged to furnish information already known by the defendant, or information, evidence, or material that is available or accessible to the accused, which the defendant could obtain by exercising reasonable diligence."'"

Mashburn v. State, 148 So. 3d 1094, 1119-20 (Ala. Crim. App. 2013).

Horvat admits that he had the first and last names of the two classmates. (Motion Hearing, R. 131.) But he wanted the classmates' contact information, including their parents' names and addresses. Horvat did not have a constitutional right under Brady to that information. The record does not show that the State had that evidence in its exclusive possession or that it suppressed any evidence. Rather, the information was "as equally available" to Horvat as it was to

the State. Mashburn, supra. Thus, there was no Brady violation, and Horvat is due no relief.

III.

Horvat argues that the circuit court erred by allowing the State's expert witness to testify that Horvat "groomed" T.L. (Horvat's brief, p. 44.) Horvat argues that the evidence was an improper statement on the ultimate issue of the case.

During the redirect testimony of forensic interviewer Debbie Wilbourn the following occurred:

> "[Prosecutor]: Ms. Wilbourn, after listening to the recording of your interview with [T.L.], was there anything that you heard that sounded like the grooming behavior you described earlier?
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> "[Defense counsel]: Objection, Your Honor. That calls for Ms. Wilbourn to make a comment on the evidence.
>
> "THE COURT: Repeat the question again, I'm sorry.
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> "[Prosecutor]: Was there anything that she heard in her interview that sounded like grooming behavior to her.
>
> "THE COURT: Okay. Sustained as to form.
>
> "[Prosecutor]: Is there anything that you heard in the interview with [T.L.] that, in your experience and training, could be considered grooming behavior?
>
> "[Defense counsel]: Same objection.

"THE COURT: Overruled.

"[Wilbourn]: Yes.

"[Prosecutor]: What did you hear?

"[Wilbourn]: She said that she would be bribed with watching YouTube videos."

(R. 1158-89.)

> "A defendant must state grounds of objection, and all grounds not specified are waived on appeal. Reeves v. State, 456 So. 2d 1156 (Ala. Crim. App. 1984). Here, [Horvat] did not specify at trial the ground that he now argues on appeal. The trial court will not be put in error on grounds not assigned at trial. Brown v. State, 701 So. 2d 314 (Ala. Crim. App. 1997)."

Parker v. State, 777 So. 2d 937, 939 (Ala. Crim. App. 2000). Horvat's argument is not preserved for appellate review; thus, Horvat is due no relief.

IV.

Horvat argues that the circuit court erred by imposing a 10-year mandatory minimum to his sentence for attempted sexual abuse (a Class C felony).[5] Horvat argues that his sentence is "illegal" and, thus, that he is entitled to be resentenced. (Horvat's brief, p. 51.) We agree.

[5]Horvat does not challenge his other sentence.

The record shows that Horvat was found guilty of first-degree sexual abuse and attempted first-degree sexual abuse. At the sentencing hearing, all parties--the circuit court, the State, and defense counsel--believed that the attempted sexual-abuse charge carried a mandatory minimum of 10 years because it involved a child under the age of 12.[6] Thus, the circuit court held: "And so as it relates to the attempted sodomy in the--I'm sorry--attempted sexual abuse first degree, I have no choice by law there's no option--by law to sentence you, Mr. Horvat, to ten years. So I hereby sentence you to ten years on the attempted sexual abuse." (R. 1419 (emphasis added).)

Section 13A-6-69.1(a), 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." According to § 13A-6-69.1(b), this is a Class B felony. Section 13A-4-2(d)(3), provides that an attempt at a Class B felony is a Class C felony. Thus, attempted first-

[6]Section 13A-5-6(a)(3), Ala. Code 1975, provides that the sentencing range for a Class C felony is not more than 10 years or less than 1 year and 1 day.

degree sexual abuse is a Class C felony. Also, § 13A-5-6(a)(6), Ala. Code 1975, provides: "For ... a Class B felony sex offense involving a child ... [a sentence should be] not less than 10 years."

Because attempted sexual-abuse is a Class C felony, the enhancement under § 13A-5-6(a)(6), Ala. Code 1975, did not apply here. Although the circuit court sentenced Horvat within the statutory range for that conviction, we remand this cause for a new sentencing hearing on that conviction, "so that it may be established with certainty that the circuit court has exercised the discretion allowed it." McClintock v. State, 773 So. 2d 1057, 1059 (Ala. Crim. App. 2000). 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 IN PART; AND REMANDED WITH INSTRUCTIONS.

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