REL: September 3, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-1129

S.M.B.

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-18-3537; CC-18-3538)

On Application for Rehearing

MINOR, Judge.

The opinion issued on August 14, 2020, is withdrawn, and the following opinion is substituted in its place.

S.M.B. was a freshman in college when he had sex with I.D., who was also a freshman. A few weeks later he had sexual contact with L.E., who was also a freshman. After I.D. and L.E. reported that they had not consented to the sexual encounters with S.M.B., law-enforcement officers charged S.M.B. with the first-degree rape of I.D. and with the first-degree sexual abuse of L.E.

S.M.B. was granted youthful-offender status, and the circuit court, after hearing the evidence, adjudicated S.M.B. guilty as a youthful offender under § 13A-6-65, Ala. Code 1975, of sexual misconduct for the incident involving I.D. (case no. CC-18-3537), and under § 13A-6-66(a)(1), Ala. Code 1975, of the first-degree sexual abuse of L.E. (case no. CC-18-3538).[1] This appeal followed.

---

[1]In case no. CC-18-3537, the circuit court sentenced S.M.B. to one year in a jail-like facility. The circuit court suspended that sentence pending S.M.B.'s good behavior for one year. In case no. CC-18-3538, the circuit court sentenced S.M.B. to three years in prison. The circuit court split that sentence and ordered S.M.B. to serve 48 hours in jail, followed by 3 years of probation. The circuit court ordered the sentences to run concurrently.

S.M.B. argues that the circuit court should have granted his motion for a judgment of acquittal in each case because, he says, the State produced insufficient evidence showing that S.M.B. committed the offenses on which the circuit court based its youthful-offender adjudications. S.M.B. does not deny that he engaged in sexual conduct with I.D. and with L.E., but he says that I.D. consented to having sex with him and that L.E. did not earnestly resist the sexual contact.

We hold that the State produced sufficient evidence showing that S.M.B. committed the offense of sexual misconduct for the incident involving I.D. but that it failed to produce sufficient evidence to support the first-degree-sexual-abuse claim involving L.E. We affirm the circuit court's judgment in case no. CC-18-3537, and in case no. CC-18-3538 we reverse its judgment and render a judgment for S.M.B.

Standard of Review

"Appellate courts are limited in reviewing a trial court's denial of a motion for judgment of acquittal grounded on insufficiency." McFarland v. State, 581 So. 2d 1249, 1253 (Ala. Crim. App. 1991).

> " 'The standard of review in determining sufficiency of evidence is whether evidence existed at the time of [the defendant's] motion for acquittal was made, from which the [fact-finder] could by fair inference find the [defendant] guilty.' Linzy v. State, 455 So. 2d 260, 261 (Ala. Crim. App. 1984) (citing Stewart v. State, 350 So. 2d 764 (Ala. Crim. App. 1977), and Hayes v. State, 395 So. 2d 127 (Ala. Crim. App.), writ denied, 395 So. 2d 150 (Ala. 1981)). In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State. Linzy, supra."

Ex parte Burton, 783 So. 2d 887, 890-91 (Ala. 2000).

> "Findings of fact based on ore tenus evidence are presumed correct, and a judgment based on those findings of fact will not be reversed unless it is clearly erroneous, manifestly unjust, without supporting evidence, or against the great weight of the evidence. Odom v. Hull, 658 So. 2d 442 (Ala. 1995). The reason for this tenet of the law, the ore tenus rule, is that the trial judge who sees and hears a witness testifying in person in court can better judge the credibility of the witness than a reviewing appellate court can judge the credibility from only the typed words in the transcript. Ex parte Walters, 580 So. 2d 1352 (Ala. 1991)."

Ex parte C.V., 810 So. 2d 700, 719 (Ala. 2001) (Johnstone, J., concurring specially). "Where the evidence raises a question of fact which, if believed by the [finder of fact] would be sufficient to sustain the conviction, the denial of a motion for acquittal or motion for new trial will not be

considered error." Parrish v. State, 494 So. 2d 705, 709 (Ala. Crim. App. 1985) (citing Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969)).

Case No. CC-18-3537 (I.D.)

S.M.B. and I.D. met in the fall of 2016 when S.M.B. was a freshman at a college in Mobile and I.D. was a freshman at another college in Mobile. They had mutual friends and, until March 2017, their relationship remained casual.

I.D. testified that on Wednesday, March 1, her relationship with S.M.B. began to change. She testified that between Wednesday night and Sunday night, March 5, she and S.M.B. engaged in consensual kissing, fondling, and oral sex. (R. 27.)

On Sunday night I.D. was studying in the chemistry lab on her college's campus when S.M.B. came to the building to see her. I.D. testified that S.M.B. dropped his pants and underwear in the chemistry lab but that I.D. told him she was uncomfortable so S.M.B. put his clothes back on. They left the chemistry building together and got coffee at a gasoline service station. I.D. testified that S.M.B. drove to a park and that, while they were sitting in S.M.B.'s car at the park, she told S.M.B.

that she did not want to be his girlfriend. I.D. testified that over the past few days S.M.B. had asked her several times to be his girlfriend. I.D. testified that, when she told S.M.B. that she did not want to be his girlfriend, he became "very frustrated and upset" with I.D. and "his tone was very threatening." (R. 31.) S.M.B. began driving, and I.D. tried to open the car door, but it would not open. S.M.B. drove to his parents' house, and, although I.D. did not want to go inside, she saw other cars in the driveway and assumed that S.M.B.'s parents were home, so she went inside.

Once inside the house, I.D. and S.M.B. went into S.M.B.'s bedroom. I.D. took off her shoes and threw them against the closet so that S.M.B.'s parents would hear the noise. I.D. and S.M.B. sat on his bed, and S.M.B. asked her to reconsider dating him. I.D. refused, and S.M.B. asked her if he could have "one more kiss." (R. 36.) I.D. testified that she had "some sort of feelings for him" and that she could tell he wanted her to kiss him, so she "felt bad" and agreed to kiss him. As they kissed, S.M.B. pushed I.D. down onto the bed and began kissing her more forcefully while grabbing her body, waist, and breasts. I.D. testified that S.M.B. was

partially on top of her and that, "[a]t that point, I was, like, 'whoa, whoa, whoa. What are you doing, like, acting like that.' " I.D. testified that she "began, like, muttering 'no' like very, very quietly." She said that "as it sort of progressed, I began being more forceful with it." (R. 37-38.) I.D. tried to push S.M.B. off her, but S.M.B. was much larger than her. I.D. is 5 feet 4 inches tall, and she testified that at that time she weighed 115 pounds. S.M.B. weighed 315 pounds.

I.D. testified that S.M.B. began removing their clothes. (R. 36-37.) She said that she tried to stop S.M.B. from taking off her jeans, and that she told him "whoa, whoa, stop, no." (R. 39.) I.D. testified that she did not get up and try to leave because, she said, "I had kind of become numb at this point. I kind of like reverted into myself and was just not really—just kind of like trying to wait until it was over with." She did not scream because, she said, "I couldn't find my voice." (R. 40-41.) I.D. testified that S.M.B. began choking her with one hand, and he told her that he wanted her to give him a hickey on his neck and to perform oral sex on him. I.D. testified that she was fearful for her safety and that she did "not necessarily" resist or fight back because she "wanted it to be done, to just

be done." (R. 42.) I.D. gave S.M.B. a hickey and performed oral sex on him. She testified that S.M.B. grabbed her hair and head while she was giving him oral sex and that she tried to resist "[a] little bit but not much." (R. 44.) I.D. testified that S.M.B. performed oral sex on her while holding down her hips. When the State asked I.D. whether she resisted to S.M.B. giving her oral sex, she said: "Honestly, at this point, I was—I was limp at this point." (R. 45.)

I.D. testified that S.M.B. got off the bed and got a belt from his closet. She did not try to leave but she "tried to say something," but, she said, "I don't think I was able to really fully form a sentence. I was trying to say, like, 'can we stop, just stop, please,' just something like that and I wasn't really fully able to say anything." (R. 46.) S.M.B. tied I.D.'s hands behind her back with the belt. I.D. tried to pull her hands away and she asked him to stop. I.D. said that, although over the past few days the topic of Fifty Shades of Grey[2] had come up in their conversations, bondage was "not something we had talked about wanting to try," and she

[2]Fifty Shades of Grey is a 2015 American erotic-romantic movie based on a 2011 novel of the same name.

said that she had been "very clear" with him that she did not want to have sex with him "of any form." (R. 46-47, 75-76.) After S.M.B. finished tying I.D.'s hands, he flipped her over and began "rubbing his penis" against her leg. I.D. testified that she was frightened and said "No, no, no. What are you doing? Stop." S.M.B. penetrated her with his penis. I.D. said that she "blacked out for a minute" and that the next thing she knew S.M.B. was away from her looking "kind of horrified." (R. 48-49.) I.D. began "hysterically sobbing" and asked S.M.B. to untie her. He untied her, and I.D. put her clothes back on. I.D. testified that S.M.B. apologized to her and said, "I'm so, so sorry. I just raped you. I'm so sorry that I did that." (R. 50-51.) I.D. asked S.M.B. to take her home, and S.M.B. drove I.D. back to her dorm room.

I.D. testified that over the next few weeks S.M.B. contacted her several times and that, although she tried to avoid him, eventually she "wanted to forget ... that night had ever happened" and "wanted to just pretend like nothing happened." (R. 53.) She testified that in the weeks after the incident in S.M.B.'s bedroom she and S.M.B. hung out together

alone, including going to see a movie together, going to a restaurant, and going to get coffee together.

On cross-examination, I.D. agreed that, less than 24 hours before the incident in S.M.B.'s bedroom, she was, for the most part, happy with her relationship with S.M.B. She admitted that, when Det. Glenn Barton interviewed her several weeks later about the incident, she did not tell Det. Barton that S.M.B. had dropped his pants in the chemistry lab, even though she told Det. Barton other details about being in the chemistry lab with S.M.B. She admitted she did not tell Det. Barton that S.M.B. choked her or that he made her give him a hickey. She said, though, she did not tell Det. Barton about it because she "couldn't bring myself to say it at that time." She also agreed on cross-examination that she told Det. Barton they did not have oral sex in S.M.B.'s bedroom, even though on direct examination she testified that S.M.B. forced her to perform oral sex on him and that he performed oral sex on her. I.D. testified she would "go[] with what I told the detective" and "for the most part, I want to stick with what I originally said to the detective." (R. 103-05.)

I.D. admitted that less than two weeks after the incident in S.M.B.'s bedroom she went with S.M.B. to his friends' house, where they hung out and made funny videos until the early hours of the morning. I.D. could not get back into her dorm room that morning, so she went with S.M.B. to his parents' house where she slept in the guest bedroom until nearly noon. That night, she used her key card to let S.M.B. into the arts building on her college's campus, where she and S.M.B. joked around and took pictures together.

S.M.B. testified in his own behalf. He said that from Wednesday night to Sunday night his relationship with I.D. progressed from "hanging out" to kissing, touching, and oral sex. S.M.B. said that by Saturday night they were talking about Fifty Shades of Grey and about bondage, and I.D. told him that she would "be into that at some point maybe." (R. 226.)

S.M.B. testified they were in his car on Sunday night when I.D. told him she did not want to date him. He testified that he was upset about it but that afterwards they were "fooling around" and things started to "escalate." (R. 230-31.) S.M.B. suggested they go to his parents' house, and I.D. agreed.

S.M.B. testified that, when they got to his parents' house, they went to his bedroom and started kissing. He said they took off their clothes, except for their underwear, and S.M.B. left the room to use the bathroom. S.M.B. said when he returned they took off their underwear and performed oral sex on each other. S.M.B. testified that I.D. asked him to tie her up, so S.M.B. got a belt out of his closet and tied I.D.'s hands behind her back. S.M.B. again performed oral sex on I.D., and then, he said, because he thought she wanted to have intercourse, he "penetrated her with my penis." (R. 239.)

S.M.B. testified that when he penetrated I.D. she said "no" so he stopped. He testified his penis was in her for "a split second." S.M.B. turned the lights on and untied her. He saw that she was upset, so he told her he was sorry and that he did not mean to go further than she wanted. He testified that, because I.D. was crying, he told her "I feel like I just raped you," even though he knew, he said, he had not raped her. S.M.B. testified that, until he penetrated her, I.D. did not let him know she did not want to continue their sexual activity. (R. 239-40.)

S.M.B. argues the State presented insufficient evidence for the circuit court to find that he committed the offense of sexual misconduct. He says that, because I.D. testified that S.M.B. bound her and penetrated her by force against her will but the circuit court adjudicated S.M.B. a delinquent based on the charge of sexual misconduct—which does not have as an element forcible compulsion—the circuit court's "rejection" of the rape allegation "should have extended to all of her allegations as a whole." (S.M.B.'s brief, p. 22.) He says I.D.'s testimony at trial was "so inconsistent with lack of consensual sex that reversal is required." (S.M.B.'s brief, p. 23.)

We first question whether S.M.B. preserved his challenge to the sufficiency of the evidence. "A challenge to the sufficiency of the evidence must be raised in a motion to exclude, a motion for a judgment of acquittal, or a motion for a new trial," and "[a] motion for a judgment of acquittal on the charged offense will not preserve for appellate review a challenge to the sufficiency of the evidence to support a conviction for a lesser-included offense." Collier v. State, 293 So. 3d 961, 965 (Ala. Crim. App. 2019). Although in his motion for a judgment of acquittal S.M.B.

challenged the sufficiency of the State's evidence for the charge of first-degree rape, he did not challenge the sufficiency of the evidence for any lesser-included offense.

Even so, S.M.B.'s claim that the State produced insufficient evidence of sexual misconduct is meritless.

" '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)). " 'The test used in determining the sufficiency of the 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)).

Although S.M.B. was indicted for first-degree rape, which would have required a finding that he "[e]ngage[d] in sexual intercourse with another person by forcible compulsion," see § 13A-6-61(a)(1), Ala. Code 1975, the circuit court adjudicated him delinquent based on a finding that S.M.B. had committed the lesser-included offense of sexual misconduct. At that time, § 13A-6-65(a)(1), Ala. Code 1975, provided:

> "(a) A person commits the crime of sexual misconduct if:
>
> > "(1) Being a male, he engages in sexual intercourse with a female without her consent, under circumstances other than those covered by Sections 13A-6-61 and 13A-6-62; or with her consent where consent was obtained by the use of any fraud or artifice."[3]

"Sexual misconduct consists of sexual intercourse without the victim's consent, but not by forcible compulsion." Ex parte Gordon, 706 So. 2d 1160, 1163 (Ala. 1997).

---

[3]In 2019 the Alabama Legislature amended § 13A-6-65. See Act No. 2019-465, § 1. Because "the law in effect at the time of the commission of the offense controls the prosecution," see Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005), we review S.M.B.'s claim under the version of § 13A-6-65 in effect in March 2017.

S.M.B. admits that he penetrated I.D. for "[a] split second." (R. 239.) "Sexual intercourse" is defined as "any penetration, however slight; emission is not required." § 13A-6-60(4), Ala. Code 1975.[4] The question, then, is whether I.D. consented to sexual intercourse with S.M.B.

The State presented evidence by which the circuit court could have found that I.D. did not consent to sexual intercourse with S.M.B. The State's evidence showed that, in the days before S.M.B. penetrated I.D. in his bedroom, I.D. told S.M.B. she did not want to have sex with him. When I.D. told S.M.B. on Sunday night she did not want to be his girlfriend, S.M.B. became upset and drove I.D. to his parents' house. I.D. reluctantly went inside the house with S.M.B. They sat down on S.M.B.'s bed, and I.D. agreed to kiss S.M.B. because she had "some sort of feelings" for him and she "felt bad." As they began to kiss, though, S.M.B. pushed I.D. onto his bed. When S.M.B. was partially on top of her and was touching her, I.D. asked S.M.B. what he was doing and she quietly told

---

[4]At the time of this offense, the definition for "sexual intercourse" was found at § 13A-6-60(1). The 2019 amendment referred to in note 3, supra, changed only the numbering of that section and did not change the substance of the definition of "sexual intercourse."

him "no." I.D. tried to push S.M.B. off her, but he was much bigger than she was. When S.M.B. began removing I.D.'s jeans, I.D. told S.M.B. "Stop, no." When S.M.B. began to tie I.D.'s hands behind her back with a belt I.D. tried to pull her hands away, and she asked S.M.B. to stop. As S.M.B. began rubbing his penis on her leg, I.D. told him "No, no. no. What are you doing? Stop." S.M.B. then penetrated her with his penis. When I.D. began crying, S.M.B. apologized for raping her. Based on this evidence, the circuit court could have found beyond a reasonable doubt that S.M.B. engaged in sexual intercourse with I.D. without her consent.

S.M.B. stresses that, in the days and even the hours before this incident, I.D. and S.M.B. engaged in consensual kissing, fondling, and oral sex. It does not follow, though, that because I.D. had other, consensual sexual activity with S.M.B. before this incident, she consented to having sexual intercourse with him. The circuit court found that S.M.B. committed the offense of sexual misconduct, so it found that S.M.B. engaged in sexual intercourse with I.D. without her consent. Whatever other, lesser sexual activity I.D. consented to does not negate the State's

evidence showing that I.D. did not consent to sexual intercourse with S.M.B.

S.M.B. also says that I.D.'s testimony about whether she resisted S.M.B. in his bedroom—her testimony that she only "very, very quietly" said no at first; that she did not scream or try to leave the bedroom; that she did "not necessarily" resist or fight back; and that she did not resist when S.M.B. performed oral sex on her—shows that I.D. did not let him know that she did not want their sexual relationship to continue to escalate.

That I.D. did not immediately rebuff S.M.B.'s advances or, after resisting him, repeat her protestation each time S.M.B. escalated his behavior, does not mean that she consented to that behavior. In Ex parte Gordon, supra, the Alabama Supreme Court held that the State presented sufficient evidence of sexual misconduct under § 13A-6-65 when the victim, who was 16 years old at the time of the incident, did not immediately rebuff the defendant's advances but asked him what he was doing and then, after he began touching her and pushed her onto a bed, told him "no."

> "Gordon drove to the Masters Inn motel, where he handed the prosecutrix a key in the parking lot and told her to go to the motel room and wait on him. He told the prosecutrix that he was going to drive around for a few minutes because he did not want to be seen going into the room with her. After approximately 10 minutes, Gordon arrived at the room. The prosecutrix had sat in a chair and awaited his arrival. Upon his arrival, they talked for a few minutes, after which he approached her and removed her shoes. She testified that he ran his hand across the bottom of her foot and afterwards pulled her up from the chair, and that she then walked to the bed with him. She said that he began unbuttoning her pants; that she asked him what he was doing and that he did not respond; that he then began touching her breasts and pushed her onto the bed; and that at this point, she said 'no.' She stated that as he pushed her down he held her wrists and arms; that he climbed on top of her, unzipped and lowered his pants; and that he put on a condom and intercourse occurred. She testified that at that time she began crying."

Ex parte Gordon, 706 So. 2d at 1161-62.

Although I.D. admitted that she did not at times outwardly resist S.M.B.'s advances, she testified that at other times—including when he pushed her onto the bed and began groping her, when he removed her jeans, when he tied her hands, and when he rubbed his penis on her leg before penetrating her—she told S.M.B. "no" and asked him to stop, and she tried to push him off her and pull away from him. Whatever S.M.B. thought of I.D.'s consent to other sexual activity, I.D.'s resistence to and

verbalization of her opposition to being penetrated—the sexual act on which the circuit court based S.M.B.'s adjudication of guilt as a youthful offender—could not reasonably be understood by S.M.B. as consent to intercourse.

S.M.B. also points to the inconsistencies in I.D.'s testimony in court compared to what she told Det. Barton a few weeks after the incident. In that interview, I.D. did not tell Det. Barton about S.M.B. dropping his pants and his underwear in the chemistry lab, or about S.M.B. choking her in his bedroom. She also denied in the interview that she and S.M.B. had oral sex in his bedroom, which, S.M.B. points out, conflicts with her testimony in court. And I.D.'s behavior after the incident—the fact that she continued to call S.M.B. and to spend time alone with him in the weeks after the incident, including returning to S.M.B.'s parents' house to sleep there—is inconsistent, S.M.B. says, with I.D. being a victim. I.D.'s testimony, he says, is "simply not believable." (S.M.B.'s brief, p. 23.)

But any inconsistencies between what I.D. told Det. Barton and what she testified to in court goes to her credibility. See Petersen v. State, [Ms. CR-16-0652, Jan. 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019)

("Generally, a witness's prior inconsistent statement is admissible to impeach the witness's credibility ...."). And whether I.D. is a credible witness goes to the weight of the State's evidence. Gargis v. State, 998 So. 2d 1092, 1096 (Ala. Crim. App. 2007) (quoting Parker v. State, 395 So. 2d 1090, 1103 (Ala. Crim. App. 1980)) ("Weight of the evidence refers to whether the State's evidence is palpably less persuasive than the defense's evidence."). "[T]he credibility of witnesses and the weight or probative force of testimony is for the [fact-finder] to judge and determine," and "it is not the province of the court to reweigh the evidence presented at trial." Williams v. State, 710 So. 2d 1276, 1338 (Ala. Crim. App. 1996) (internal quotation marks and citations omitted).

The State presented sufficient evidence from which the circuit court could have found beyond a reasonable doubt that S.M.B. engaged in sexual intercourse with I.D. without her consent. Because it is not the province of this Court to weigh the evidence or to determine the credibility of the witnesses and because conflicting evidence presents a question for the fact-finder that is not subject to review on appeal, see Murphy v.

State, 108 So. 3d 531, 543 (Ala. Crim. App. 2012), we will not disturb the judgment of the circuit court.

Case No. CC-18-3538 (L.E.)

In the spring of 2017 S.M.B. and L.E. were freshmen at a college in Mobile. They had mutual friends and were friendly with each other.

On March 31, L.E. wanted to go to a party at a bar in downtown Mobile, but, because her boyfriend was out of town and because she had missed the last shuttle bus of the evening taking students downtown, L.E. asked S.M.B. to give her a ride to the party. L.E. testified that S.M.B. often gave people rides to downtown Mobile because his family owned property in the downtown area where he could park his car. S.M.B. agreed to drive L.E. downtown, so L.E. drove her car to S.M.B.'s parents' house and rode with S.M.B. in his car to downtown Mobile.

L.E. testified that at the party she had two small drinks and that she was "tipsy" but not drunk. (R. 321-22, 365.) When the bar closed around 1:00 or 2:00 a.m. L.E. asked S.M.B. for a ride home. L.E. got in S.M.B.'s car, and, before taking L.E. to her car, S.M.B. picked up a friend, David Niles. L.E. testified S.M.B. drove to a gasoline service station and

that S.M.B. and Niles bought alcohol at the gas station. L.E. said the three of them drank alcohol in S.M.B.'s car before meeting some of S.M.B.'s friends at a Waffle House restaurant. They left the Waffle House and went to an apartment complex where some of S.M.B.'s friends lived. L.E. testified she was tired, so around 5:00 a.m., she told S.M.B. she wanted to go home. L.E. testified she fell asleep in the car and when she woke up, they were at S.M.B.'s parents' house and Niles was not in the car with them.

When L.E. woke up she was lying on the console of S.M.B.'s car, and her right hand was resting on her left arm. L.E. testified that S.M.B.'s penis was exposed and that he was using her left hand to "make himself hard." She said that S.M.B.'s hand was on top of her hand and he was "manipulating" her hand. L.E. testified she was confused and did not immediately do anything because "nothing was processing." Although she was "kind of internally freaking out," she said her body "was just so exhausted I just—I couldn't do anything." L.E. pulled her hand back, and S.M.B. said, "come on, you know you want this." L.E. told S.M.B. "no, I just want to go home." (R. 332-33, 382, 402.) L.E. testified that she

moved her hand away from S.M.B. and sat up, but S.M.B. reached across the console and tried to touch her leg, and he tried to slide his hand under her shirt. She said that at one point he put his hands down her pants. L.E. squeezed her legs together and pushed herself against the car door to get away from him. L.E. testified that when S.M.B. tried touching her it was "not like in an aggressive way." (R. 334.) She told S.M.B. she did not want to do anything and that she did not think it was a good idea. L.E. testified: "I know I didn't say 'no' but I just—I just didn't want it to happen. I just wanted to go home and just sleep in my bed." (R. 335.)

L.E. testified S.M.B. lifted up her shirt and grabbed her breasts. She said that, although he was trying to touch her, "he wasn't, like, being aggressive about it." (R. 335.) L.E. tried to push S.M.B. away, but she did not want to be forceful with him, she said, because she did not want him to get mad. She testified S.M.B. is a "bigger guy" and she had seen videos of him fighting. She also did not want him to get mad at her because, she said, "he was a friend." (R. 336.)

L.E. said she tried to get out of the car but she heard the lock "click," and she was "just too exhausted at the time to just try and do anything." (R. 337.)

L.E. testified that she "moved or something" and that her head "had gotten down to where, like, his penis was. His pants were unzipped and his penis was exposed." (R. 337.) She said S.M.B. kept trying to push her head down, but L.E. resisted and "sideswipe[d]" her head to the side to get away from him. She testified that, although S.M.B. was "guiding" her head, he was not aggressive or forceful. "It was like something that he wanted to happen that just wasn't happening." (R. 338-39.)

L.E. sat up and told S.M.B. she had to go home to let her dogs out. S.M.B. unlocked the car door, and L.E. got into her car and went home.

On cross-examination, L.E. testified S.M.B. was not aggressive with her and that he never threatened her with physical violence. She said that, other than when he pushed her head down, he was not forceful with her. L.E. said that as S.M.B. was "guiding" her head he told her, "come on, it's okay," and she thought, "I don't know how to say 'no' in this situation. I don't know what to do." She agreed she put her head in his

lap, but she testified "I don't know why I did that." (R. 389-90.) She also testified that she felt she had not adequately communicated to S.M.B. her unwillingness to engage in sexual conduct with him.

> "A. I knew what was happening. Like, it was going on. And then it was just happening. Like, I don't know how to describe it. Like, that's just how I was feeling.
>
> "Q. Okay. But you weren't fighting or resisting, were you?
>
> "A. No, sir. But I was trying to be, like, 'no,' because I don't—
>
> "Q. I'm sorry, ma'am?
>
> "A. I was trying to say I don't want to do this. I was trying and it—and it just wasn't coming out in the way that I needed it to.
>
> "Q. Okay. You were trying to say you didn't want to do it but it wasn't coming out in the way you needed it to?
>
> "A. (Nods head.)
>
> "Q. So you don't feel like you were communicating it properly to [S.M.B.] that you didn't want to do this?
>
> "A. Yes.
>
> "Q. So you don't feel you were being able to communicate that to him properly?
>
> "A. Yes, sir.

> "Q. So you weren't resisting and you weren't able to communicate your reluctance to him. Is that right?
>
> "A. It was because I just felt weird and it was—
>
> "Q. And you're nodding. The court reporter can't take nodding.
>
> "A. Yes.
>
> "Q. So you felt you could not communicate your resistance to him or your reluctance to him?
>
> "A. Yes, sir.
>
> "Q. Okay. And would that be true for the whole time y'all were in the car there?
>
> "A. Yes, sir. Because I just felt—
>
> "Q. Okay.
>
> "A. I didn't know how. It was—it was different."

(R. 391-92.) L.E. testified that from her perspective S.M.B. was "just trying to change [her] mind," and that he was trying to "convince" her to do things, rather than physically force her. (R. 361.)

S.M.B. testified in his own defense. He said that, when he and L.E. were at his friends' apartment after he picked L.E. up from the downtown area, he and L.E. began flirting. He asked L.E. if she wanted to leave.

She said she did, so on the drive to his parents' house, S.M.B. asked L.E. if her boyfriend would get mad at him if something happened between S.M.B. and L.E. S.M.B. explained that some time earlier L.E. had told him that her boyfriend had a "hall pass" and that they were "testing this open relationship thing."[5] (R. 476-77.) L.E. told S.M.B. that it would be fine and that her boyfriend would not get mad.

S.M.B. testified he and L.E. engaged in "flirty touching" on the drive to his parents' house and that, when he parked in his parents' driveway, he and L.E. kissed for a little while. S.M.B. said that he asked L.E. to give him oral sex, and she did. S.M.B. testified that L.E. did not push him away or resist in any way, and he said that he did not force L.E. to do anything.

Niles testified that when he was in the car with S.M.B. and L.E. he thought, from the way they were acting toward each other, that they were

---

[5]L.E. testified that several months earlier she had given her boyfriend a "hall pass," which, she said, meant that he could "kiss someone else" if he wanted to. (R. 344.) L.E.'s boyfriend testified that L.E. gave him a one-time hall pass months earlier to engage in a "purely physical" relationship with someone else "if it was, like, kissing." (R. 414-15.)

dating. He said that L.E. was not asleep when S.M.B. dropped Niles off at his house but that L.E. was listening to music and dancing in the car.

Dan Wells, a private investigator, testified that S.M.B. hired him to perform an investigation of S.M.B.'s car. Wells testified that the front passenger door of S.M.B.'s car opens and unlocks from the inside when the door handle is pulled, and that the front passenger door does not have a child-lock mechanism that would prevent someone inside the car from opening the door.

S.M.B. argues the State presented insufficient evidence from which the circuit court could find that S.M.B. committed the offense of first-degree sexual abuse. He says that the State did not prove the "forcible compulsion" element of that offense because, he says, he did not threaten L.E. or act forcefully toward her, and L.E. did not earnestly resist him. Although acknowledging that the "totality of the circumstances" should be considered in deciding whether there was sufficient evidence of forcible compulsion, S.M.B. confines the incident triggering the forcible-compulsion question to L.E.'s touching his penis in his car: "The issue is

when L.E. touched his penis, was there forcible compulsion by S.M.B. causing her to do so." (S.M.B.'s brief, p. 29.)[6]

Count one of the indictment charging S.M.B. with first-degree sexual abuse specifically stated:

> "The Grand Jury of said County charge, that ... [S.M.B.] ... did knowingly subject [L.E.] to sexual contact, to-wit: forcing her to grip his penis with her hand and moving it up and down by forcible compulsion, in violation of § 13A-6-66(a)(1) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 10.) (Emphasis added.)[7] The circuit court adjudged S.M.B. a youthful offender under count one of the indictment for committing first-degree sexual abuse under § 13A-6-66(a)(1). That section provides that a person

---

[6]The State contends that S.M.B.'s objection to the sufficiency of the evidence did not preserve for our review the question whether the State had to prove the specific facts it alleged in the indictment. We disagree. Cf. Smoak v. State, 186 So. 3d 493, 501-02 (Ala. Crim. App. 2015) (considering on appeal whether the State had to prove certain facts alleged in the indictment, even though the defendant's objection at trial and on appeal was that the State failed to prove an element of the offense charged in the indictment).

[7]Law-enforcement officers charged S.M.B. with one count of first-degree sexual abuse under § 13A-6-66(a)(1), Ala. Code 1975, and with one count of first-degree sexual abuse under § 13A-6-66(a)(2), Ala. Code 1975. After adjudicating S.M.B. a youthful offender under § 13A-6-66(a)(1), the circuit court dismissed the other count.

commits first-degree sexual abuse if he "subjects another person to sexual contact by forcible compulsion." At the time of S.M.B.'s offense "forcible compulsion" was defined as "Physical 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.[8]

S.M.B. admits that there was sexual contact. The question is whether he subjected L.E. to that contact by physical force that overcame her earnest resistance.

> " 'Issues involving " 'consent, force and intent to gratify the sexual desire of either [party]' " are generally questions for the trier of fact.' C.M. v. State, 889 So. 2d 57, 63–64 (Ala. Crim. App. 2004) (quoting Parrish v. State, 494 So. 2d 705, 709 (Ala. Crim. App. 1985), quoting in turn Hutcherson v. State, 441 So. 2d 1048, 1052 (Ala. Crim. App. 1983)). See also Kirby v. State, 581 So. 2d 1136, 1143 (Ala. Crim. App. 1990) (whether forcible compulsion existed based on the facts is a

[8]At the time of this offense the definition of "forcible compulsion" was found at § 13A-6-60(8). A 2019 amendment, see Act No. 2019-465, renumbered that definition as § 13A-6-60(1) and, among other things, eliminated the requirement that the State prove resistence by the victim. We review S.M.B.'s claim under the definition of "forcible compulsion" in effect at the time of this offense. See Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005).

> jury question). However, as this Court recognized in Lee v. State, 586 So. 2d 264, 266 (Ala. Crim. App. 1991), '[t]he force required to consummate the crime ... is relative'; different standards apply based on whether the victim is a child or an adult. ' "Earnest resistance" is likewise a relative term, and when determining whether there was earnest resistance, the relative strength of the victim and the defendant, the victim's age, the victim's physical and mental condition, and the degree of force employed must be considered.' C.M. v. State, 889 So. 2d at 64 (citing Richards v. State, 475 So. 2d 893, 895 (Ala. Crim. App. 1985))."

McGlocklin v. State, 910 So. 2d 154, 157 (Ala. Crim. App. 2005). In Richards v. State, 475 So. 2d 893 (Ala. Crim. App. 1985), this Court discussed what type of earnest resistence is needed to show the use of forcible compulsion.

> " ' "Earnest resistance[]" ... is a relative term and whether or not the statutory requirement was satisfied must be measured by the circumstances surrounding the alleged assault .... Resistance may appear to be useless, and may eventually prove to be unavailing, but there must have been a genuine physical effort on the part of the complainant to discourage and to prevent her assailant from accomplishing his intended purpose.' "

Richards, 475 So. 2d at 895 (quoting State v. Jones, 62 Haw. 572, 612 P.2d 1214, 1217 (1980)).

Viewing the evidence in the light most favorable to the State, see Ballenger, 720 So. 2d at 1034, we must conclude that the State failed to present sufficient evidence of forcible compulsion as charged in this particular indictment. L.E. testified that when she woke up in the front passenger seat of S.M.B.'s car S.M.B. was using her left hand to "manipulat[e]" his exposed penis. L.E. testified that she at first did nothing but that eventually she pulled her hand back and sat up in the seat. S.M.B. told her, "come on, you know you want this," and he reached across the console to grab her leg and put his hand under her shirt, but "not like in an aggressive way." There was no testimony that S.M.B. tried to grab L.E.'s hand again or that he tried to put L.E.'s hand on his penis after L.E. pulled her hand away. This Court has held that, when a defendant stops touching a victim because the victim resists the touching, that original touching does not subject the victim to sexual contact by forcible compulsion. McGlocklin, 910 So. 2d 154.

In McGlocklin, this Court reversed the defendant's conviction for first-degree sexual abuse because it concluded that the State failed to present sufficient evidence of forcible compulsion.

> "Here, K.L.K. was an 18-year-old young woman, not a child. Thus, we apply a different standard in determining whether the State presented sufficient evidence of forcible compulsion to sustain McGlocklin's conviction. When the evidence is viewed in the light most favorable to the prosecution, K.L.K. was subjected to unwanted physical contact by a 60-year-old man at her place of employment. There was no evidence offered regarding the relative size and strength of K.L.K. and McGlocklin. However, K.L.K. testified that McGlocklin never threatened her and that she never resisted his actions until he touched her breasts. She testified that when McGlocklin slid his hands inside her clothing, placed his hands on her breasts, and asked her if she 'liked that,' she replied, 'no,' then pulled forward and pushed his hands away. Following this show of resistance, McGlocklin did not touch K.L.K. again. McGlocklin's actions, while reprehensible, did not subject K.L.K. to sexual contact by forcible compulsion, because he stopped touching K.L.K. when she resisted his actions. Thus, we have no choice but to conclude that the State failed to prove that McGlocklin subjected K.L.K. to sexual contact by forcible compulsion."

McGlocklin, 910 So. 2d at 157. See also Lucas v. State, 204 So. 3d 929, 937-38 (Ala. Crim. App. 2016) ("Lucas's actions, while reprehensible, did not subject H.B. to sexual contact by forcible compulsion because Lucas stopped touching H.B. when H.B. pulled back and covered her mouth."). Although S.M.B. subjected L.E. to unwanted sexual contact he did not subject her to sexual contact by forcible compulsion, because after L.E.

pulled her hand away from him, S.M.B. did not try to get L.E. to touch his penis with her hand.

That L.E. was asleep when S.M.B. used her hand to grip his penis does not mean that he did so by forcible compulsion. In Lucas, supra, this Court held that the State failed to prove that the defendant subjected the victim to sexual contact by forcible compulsion because when the sleeping victim woke up and pulled away from the defendant, the defendant did not touch the victim again.

> "When the evidence is viewed in a light most favorable to the State, H.B., who was almost 16 years old at the time, was subjected to unwanted physical contact by Lucas while she was sleeping in her bedroom. Lucas never threatened H.B., and H.B. did not resist Lucas's actions until she woke up. Once H.B. woke up, pulled back, and covered her mouth, Lucas immediately pulled up his pants and left H.B.'s bedroom. Lucas did not speak to H.B. or touch her again. Lucas's actions, while reprehensible, did not subject H.B. to sexual contact by forcible compulsion because Lucas stopped touching H.B. when H.B. pulled back and covered her mouth."

Lucas, 204 So. 3d at 937-38.

We note that, after L.E. pulled her hand away from S.M.B.'s penis and sat up in her seat, S.M.B. tried to persuade her to engage in other sexual activity with him, and he subjected her to other unwanted sexual

contact. But the only sexual contact alleged in the indictment was that S.M.B. "forc[ed] [L.E.] to grip his penis with her hand and mov[e] it up and down by forcible compulsion." That act of sexual contact, then, was the only act on which the circuit court's youthful-offender adjudication could be based. Cf. Williams v. State, 701 So. 2d 832, 833-34 (Ala. Crim. App. 1997).[9] Yet the State offered no evidence showing that S.M.B. grabbed

---

[9]In his opening statement S.M.B. pointed out that the only alleged act of sexual abuse was S.M.B.'s forcing L.E. to touch his penis and move it up and down.

> "And it is important in the case, Judge, as [the prosecutor] said, the allegation of sexual abuse and the specific act that is alleged to be a sexual abuse is a—either by incapacitation or force placing her hand on his penis and moving it up and down. There's no allegation of sexual abuse other than that allegation in the indictment. I think that will be important during the course of the trial."

(R. 310-11.) After the State pointed out, at the end of the hearing, that the indictment alleged alternate counts of first-degree sexual abuse under § 13A-6-66(a)(1) and § 13A-6-66(a)(2), S.M.B.'s counsel reminded the circuit court that both counts in the indictment were based on a specific act:

> "And, Judge, as to the indictment, we would also like to point out that the indictment alleges sexual abuse and, to-wit, as a specific act was—was the touching of the penis and moving up and down."

L.E.'s hand or tried to get her to touch his penis after she pulled her hand away from him. For the specific sexual contact alleged in the indictment, the State did not prove forcible compulsion.

Conclusion

The State presented sufficient evidence that S.M.B. committed the offense of sexual misconduct for the incident involving I.D.; thus, we affirm the circuit court's judgment in case no. CC-18-3537. But because the State did not prove the element of forcible compulsion for first-degree sexual abuse in case no. CC-18-3538, we reverse the circuit court's judgment and render a judgment for S.M.B.

APPLICATION FOR REHEARING OVERRULED; OPINION OF AUGUST 14, 2020, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED AS TO CASE NO. CC-18-3537; REVERSED AND JUDGMENT RENDERED AS TO CASE NO. CC-18-3538.

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

(R. 499-500.) The State did not object to S.M.B.'s characterization of the offense alleged in the indictment, nor did the State move to amend the indictment. See Rule 13.5(a), Ala. R. Crim. P. ("The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.").