Rel: September 22, 2023

Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-2022-0738

C.B.R.

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-17-501 and CC-17-502)

McCOOL, Judge.

C.B.R. appeals his convictions for first-degree sodomy, a violation of § 13A-6-63, Ala. Code 1975, and sexual abuse of a child less than 12 years old, a violation of § 13A-6-69.1, Ala. Code 1975. The trial court

sentenced C.B.R. to consecutive sentences of life imprisonment and 20 years' imprisonment, respectively.

Facts and Procedural History

In June 2017, a Shelby County grand jury returned an indictment charging C.B.R. with first-degree sodomy and sexual abuse of a child less than 12 years old. Those charges stemmed from acts that C.B.R. had allegedly committed against J.M., who was eight years old at the time of the alleged offenses.

On the afternoon of Friday, August 13, 2021, the trial court held a pretrial hearing at which C.B.R. appeared with counsel. At that hearing, the trial court "announced [that] the [trial] would begin at 9:00 a.m. the following business day," i.e., Monday, August 16, 2021. (C. 103.) The trial began as scheduled on Monday morning, and the trial transcript begins with the following colloquy:

> "THE COURT: The court calls case State of Alabama versus [C.B.R.] We are here at the courthouse annex ready to strike a jury. All the jurors are present. What time is it? It's 10:15, well past the time [C.B.R.] was supposed to be here. The court is going to proceed and go forward. Nobody is to make mention obviously of the fact that he is not here. Anything else anybody wants to put on the record regarding [C.B.R.]? … He was aware of his trial. I need to know if [defense counsel is] going to waive on the record?

> "….
>
> "[DEFENSE COUNSEL]: I don't think we need to waive [C.B.R.'s] presence. I think we need to object and let you overrule just to protect us.
>
> "THE COURT: So the defense has made an objection about the court proceeding. … The court is going to proceed without [C.B.R.] present. It is egregious at this point that [C.B.R.] has not appeared to defend himself. He was in front of this judge at 1:30 [p.m.] on Friday where it was discussed at length and the court gave a lot of leniency as far as timing for him to decide what he wanted to do in this case."

(R. 4-6.) The trial court and the attorneys then proceeded with voir dire, and, following jury selection, the court returned to the issue of C.B.R.'s absence:

> "THE COURT: … Now let's discuss [C.B.R.'s] absence. All right. So from the court's perspective, I have looked at the procedural history in this case and there's no doubt in my mind that [C.B.R.] is receiving notice in this matter. With the backlog of cases that we have and all of the resources that we have allotted to move forward today with [C.B.R.'s] case, it would be a miscarriage of justice for the State if we could not go forward. They have a child victim they've prepared.
>
> Also, I want to put on the record that not only has [C.B.R.] been getting notice and knowing to be here, he knew to be here Friday at my docket. He was here at 1:30. We went through all the cases. Friday was two days ago. It was the last business day before today, Monday. Counsel discussed possible settlement, were not able to reach a settlement. The attorneys discussed possible settlement in the case. We then heard in [C.B.R.'s] case, with him present in the courtroom, a

[Rule] 404(b)[, Ala. R. Evid.,] motion out loud and he witnessed that.

"After the ruling on that motion, the court even went a step further and … explained to [C.B.R.] that these bad acts were going to be able to come in in the State's case in chief. And just to make triple quadruple sure he understood that, I took a five to ten minute recess and I allowed counsel to discuss that fact with him to see if there were any developments, anything further he wanted to do but go forward to trial. He absolutely undoubtedly without any shadow of any doubt knew this case was first out. I stated the order at one point in the docket out loud and called his case out for trial first, which is why we – partially the reason we went forward with the [Rule] 404(b) and why the defense needed to get a ruling in that. So there's been notice. He knows to be here and he's chosen not to show up. Defense, anything you want to put on the record from the standpoint of any communications with your client?

"[DEFENSE COUNSEL]: [Assistant defense counsel] met with [C.B.R.] after 6:00 on Friday. She has tried multiple times to get in touch with him. We would concur with the court that he had ample notice that today was the day and to be here this morning ….

"….

"[ASSISTANT DEFENSE COUNSEL]: And I will just add, Judge, we have spoken to [C.B.R.'s] fiancée and it's my understanding he was on his way here. So we do not know if he was in a car accident. We do not know where he is right now. His intention was he was supposed to be coming here and [his fiancée] has not been able to get in touch with him. I have not been able to get in touch with him, so I do not know where he is.

> "THE COURT: Do you have a good faith to believe he was in a car accident?
>
> "[ASSISTANT DEFENSE COUNSEL]: I don't know. I don't know one way or the other.
>
> "THE COURT: I just want the record to show the court has –
>
> "[ASSISTANT DEFENSE COUNSEL]: [C.B.R.'s fiancée is] worried because she hasn't heard from him, either. She's trying to get in touch with him. I'm trying to get in touch with him. We do not know where he is. He borrowed her car so she's very concerned because it's her car and she doesn't know where he is and he's not here. But I explained to her that trial was going forward and if she does get in touch with him while we are here that he needs to get here as soon as possible.
>
> "THE COURT: All right."

(R. 111-18.) The trial then proceeded with the opening statements, after which the trial court recessed the trial for the day. The next morning, C.B.R. again failed to appear for trial, and the trial continued in his absence. The State's evidence at trial tended to establish the following facts.

In July 2015, J.M.'s mother, L.M., became involved in a romantic relationship with C.B.R., and the couple lived together with J.M. At that time, J.M. was about to turn or had just turned eight years old. According to L.M., J.M. saw C.B.R. as "a father figure," and J.M. and C.B.R. "were

really good friends" and "did everything together." (R. 152.) L.M. testified, however, that J.M. "came to [her] one night" and told her that he did not "want to hang out with [C.B.R.] anymore" because C.B.R. was "mean to [him]." (R. 154.) When L.M. pressed J.M. for more information, he would not provide any further details, and C.B.R. told L.M. that he "[did not] know what [J.M. was] talking about." (R. 155.) L.M. then contacted J.M.'s psychologist and scheduled a therapy session, at which J.M. apparently discussed the alleged offenses. Following that session, Chris Jolliffe, a sexual-assault nurse examiner, conducted an "anogenital examination" and concluded that J.M. "had a perfectly normal examination." (R. 186.) According to Jolliffe, that conclusion was not surprising, however, because "[a]bout 95 percent of all kids with known sexual abuse have normal examinations" (R. 185), either because the abuse did not result in an injury in the first place or because children's bodies "just heal very resiliently." (R. 187.)

Maribeth Bowman, a forensic interviewer, subsequently interviewed J.M., and an audiovisual recording of the interview was played for the jury. The precise date of the interview is not made clear in the record, but C.B.R. concedes that J.M. was still eight years old at

that time. (C.B.R.'s brief, p. 4.) During the interview, J.M. said that he had once enjoyed spending time with C.B.R. but that there came a point at which he "didn't want [C.B.R.] around" and "didn't want to do anything with him." (State's Exhibit 3.) When asked why their relationship had changed, J.M. said that C.B.R. had begun "touch[ing] [J.M.'s] private and squeez[ing] it" and "rubbing it." (Id.) J.M. was never asked to clarify what he meant by his "private," but he said that the touching occurred "under [his] panties." (Id.) In addition, J.M. said:

> "When [C.B.R.] first moved in, a lot of times when I was not looking or something, he would normally, like when I'm watching T.V. or something and my mom's not here and she's at work or something and he's taking care of me, normally he would pull down his pants and then put his private in my private, but I could never get away from him."

(Id.) When asked to elaborate on that allegation, J.M. said that, on "multiple" occasions, C.B.R. took his "spot [that] you do the pee" and "put that private up [J.M.'s] bottom" and that "it hurts" because C.B.R. "just pushes it up" "real far." (Id.)

J.M., who was 14 years old at the time of trial, testified as follows on direct examination:

> "Q. Okay. So you know why we're here today?
>
> "A. Yes.

"Q. We're here because [C.B.R.] is charged with sodomy first degree and sex abuse?

"A. Yes.

"Q. Do you know whether or not [C.B.R.] did those things to you?

"A. Yes.

"Q. How do you know that?

"A. I don't remember what happened. I just kind of know that it did happen.

"Q. What makes you feel and know that it did happen?

"A. I don't remember. I just know.

"Q. Do you want to remember any of that?

"A. No.

"Q. Why not?

"A. Because it's kind of like a bad thing.

"….

"Q. So you don't remember anything that happened between you and [C.B.R.], say, in your bedroom?

"A. No.

"Q. And you don't remember anything that happened with you and [C.B.R.] in your mother's room?

"A. No.

"Q. And you don't remember anything that happened with you and [C.B.R.] in the laundry room?

"A. No."

(R. 193-96.)

The jury convicted C.B.R. of first-degree sodomy and sexual abuse of a child less than 12 years old. On September 20, 2021, the trial court held the sentencing hearing and pronounced C.B.R.'s sentences in open court, and, on November 23, 2021, the court issued a written sentencing order. On December 16, 2021, C.B.R. filed a motion for a new trial. However, because C.B.R. filed that motion more than 30 days after his sentences were pronounced in open court, it was untimely. See Rule 24.1, Ala. R. Crim. P. ("A motion for a new trial must be filed no later than thirty (30) days after sentence is pronounced." (emphasis added)); and King v. State, 862 So. 2d 677, 678 (Ala. Crim. App. 2003) ("A sentence is pronounced when it is uttered in open court."). Nevertheless, the trial court purportedly denied the motion, and C.B.R. filed a notice of appeal.[1]

[1]Because the motion for a new trial was untimely, the trial court's order denying the motion was void. See Dixon v. State, 912 So. 2d 292, 297 (Ala. Crim. App. 2005) (noting that a trial court loses jurisdiction

This Court dismissed C.B.R.'s appeal because it had not been filed within 42 days of the date his sentences were pronounced and because that 42-day period had not been tolled, given that C.B.R.'s motion for a new trial was untimely. See Rule 4(b), Ala. R. App. P. C.B.R. subsequently filed a Rule 32, Ala. R. Crim. P., petition seeking an out-of-time appeal, arguing that his counsel had mistakenly believed that the time for filing a notice of appeal had been tolled by the filing of the motion for a new trial. The trial court granted that petition, and this appeal follows.

Discussion

C.B.R. raises three claims on appeal that, he says, entitle him to relief from his convictions.

I.

C.B.R. argues that the trial court erred by conducting his trial in his absence, and he raises two specific arguments to that effect, which we address in turn.[2]

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over a case if no postjudgment motion is filed within 30 days of the pronouncement of sentence).

[2]We question whether C.B.R. preserved his specific arguments for appellate review because his counsel did not raise those specific arguments at trial but, instead, raised only a general objection to conducting the trial in C.B.R.'s absence. See Adams v. State, 336 So. 3d

First, C.B.R. acknowledges that, pursuant to Rule 9.1(b), Ala. R. Crim. P., a defendant may implicitly waive the right to be present at trial, but he argues that a trial court cannot find an implied waiver of that right unless the defendant is present at the beginning of the trial and then fails to appear for a later part of the trial.

In Thompson v. State, 12 So. 3d 723 (Ala. Crim. App. 2008), this Court stated:

> "Rule 9.1(a), Ala. R. Crim. P., provides that a defendant has 'the right to be present at the arraignment and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing.'
>
> "Rule 9.1(b) provides, in pertinent part:
>
> > "'[A] defendant may waive the right to be present at any proceeding in the following manner:
> >
> > "'(i) With the consent of the court, by an understanding and voluntary waiver in open court or by a written consent executed by the defendant

673, 682 (Ala. Crim. App. 2020) ("'[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.'" (quoting Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003))). However, the Alabama Supreme Court has explained that an appellant may "provide additional precise reasons … in support of a theory or position properly raised below." Ex parte Knox, 201 So. 3d 1213, 1217 (Ala. 2015) (emphasis omitted). Thus, out of an abundance of caution, we have chosen to address C.B.R.'s arguments.

> and by the defendant's attorney of record, filed in the case.
>
> "'(ii) By the defendant's absence from any proceeding, upon the court's finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present, and that the defendant had notice of the time and place of the proceeding and was informed of the right to be present.'

"The Committee Comments to Rule 9.1(b), as quoted in Simpson v. State, 874 So. 2d 575, 578 (Ala. Crim. App. 2003), state:

> "'Section (b) allows a defendant to waive the right to be present. The defendant may make an express waiver in open court or may waive the right by voluntary absence from the proceeding. See Taylor v. United States, 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973) ....
>
> "'Waiver of the right to be present must be clear and unequivocal. Waiver must be affirmative and positive in nature and made by the defendant personally. Consent or acquiescence of a defendant to a waiver of the right cannot be presumed but must affirmatively appear from the record. Berness v. State, 263 Ala. 641, 83 So. 2d 613 (1955). Thus, section (b) allows the court to find an implied waiver only when the defendant has been present at the commencement of the trial and fails to appear at some later stage of the trial. Such a waiver may not be inferred if the defendant has never appeared at trial, except in the case of a minor misdemeanor, which by definition carries no threat of imprisonment. (Emphasis added [in Simpson].)'

"The Simpson court went on to explain why the Committee Comments stating that a defendant had to be present at the commencement of the trial before an implied waiver could be found are no longer necessarily valid.

> "'In Meadows v. State, 644 So. 2d 1342 (Ala. Crim. App. 1994), this court considered whether a defendant charged with a felony could be tried in absentia if he was not present at the beginning of trial. We held that, in the absence of affirmative evidence indicating that a defendant has voluntarily waived his right to be present, a defendant charged with a felony cannot be tried in absentia if he is not present at the beginning of his trial. In reaching this decision, we relied on the Committee Comments to Rule 9.1(b), quoted above, and on H. Maddox, Alabama Rules of Criminal Procedure (1990), in which former Justice Hugh Maddox concludes that a court cannot infer a waiver of the right to be present unless the defendant was present at the commencement of the trial. We also relied on Crosby v. United States, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993), in which the United States Supreme Court held that the Federal Rules of Criminal Procedure do not permit the trial of a defendant who is not present at the beginning of trial. However, the Crosby Court declined to review Crosby's claim that his trial in absentia was unconstitutional. Therefore, the states may consider this issue in light of their own statutes and procedural rules.
>
> "'The Committee Comments to Rule 9.1 and Justice Maddox's treatise were based on a draft of Rule 9.1 which, like Rule 43, Fed. R. Crim. P., provided that the court may infer waiver of the

> right to be present if a defendant is absent after his trial has "commenced." However, Rule 9.1 adopted by the Alabama Supreme Court on May 31, 1990, does not include the "commenced" language. Rule 9.1(b)(ii), Ala. R. Crim. P., currently provides that the court may find that a defendant's absence was voluntary and that it constituted an understanding and voluntary waiver of his right to be present if the defendant had notice of the time and place of the proceeding and if the defendant was informed of his right to be present. When there is a conflict between a statement found in the committee comments and the plain language of a rule, the rule takes precedence. Ex parte Anderson, 644 So. 2d 961 (Ala. 1994) (interpreting Rule 27, Ala. R. Civ. P.).'
>
> "Simpson, 874 So. 2d at 578-79 (footnote omitted)."

Thompson, 12 So. 3d at 726-27 (second emphasis added).

Thus, C.B.R. correctly notes that Alabama law once provided that a trial court could not find an implied waiver of the defendant's right to be present at trial unless the defendant appeared at the beginning of the trial and then failed to appear for a later part of the trial. However, Thompson makes clear that this rule no longer applies and that an implied waiver can occur if a defendant voluntarily and knowingly fails to appear for any part of the trial. Therefore, contrary to C.B.R.'s belief, the fact that he was not present at the beginning of his trial did not prohibit the trial court from finding that he had implicitly waived his

right to be present. See Simpson v. State, 874 So. 2d 575, 579 (Ala. Crim. App. 2003) (holding that the trial court did not err by finding an implied waiver of the defendant's right to be present, even though the defendant had not appeared for the beginning of his trial, and, in support of that holding, noting that there is "no distinction between a defendant's absence at the beginning of trial and his absence at some point during the trial").

C.B.R.'s second argument is that the trial court did not warn him that his trial could proceed in his absence – a fact that, he says, "solidif[ies] that there was no waiver of his right to be present." (C.B.R.'s brief, p. 20.) Instead, C.B.R. argues, the trial court issued a scheduling order that, according to C.B.R., indicated that the "only consequence for failing to appear for trial would be a bond revocation and arrest warrant." (C.B.R.'s brief, p. 18.)

In Brown v. State, 821 So. 2d 219, 223 (Ala. Crim. App. 2000), this Court stated that "[one] factor to consider in deciding whether a defendant's absence is voluntary is whether the defendant knew the proceeding would go forward in his absence." The Court went on to note, however, that it is "not … incumbent on the [trial] court to expressly warn

the defendant" of that potential consequence "where the defendant has appeared at the commencement of trial" because, in that situation, "it [is] reasonable for [the defendant] to expect that his trial [will] continue" if he chooses not to return to the trial. Id. Thus, in that case, this Court affirmed the trial court's decision to continue with the defendant's trial, even though he had not been warned that the trial could proceed in his absence, because the defendant was present when the trial began and simply chose not to return following a recess.

The United States Supreme Court reached the same conclusion in Taylor v. United States, 414 U.S. 17 (1973). In that case, the defendant was also present for the beginning of his trial but failed to return after the lunch recess and again failed to return the next day. There was no dispute that the defendant's absence was unjustified, but he argued that

> "his mere voluntary absence from his trial [could not] be construed as an effective waiver [of his right to be present] unless it [was] demonstrated that he knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence."

Id. at 19. The Court held, however, that it "[could not] accept this position," noting that it would be "incredible" to conclude that "a defendant who flees from a courtroom in the midst of a trial – where

judge, jury, witnesses and lawyers are present and ready to continue – would not know that as a consequence the trial could continue in his absence." Id. at 20 (citation omitted).

Both Brown and Taylor involved a defendant who appeared at the beginning of his trial and then chose not to return following a recess. In other words, the trial had commenced in the defendant's presence, and it was thus reasonable to presume that he knew the trial would not stop simply because he chose not to return to the trial following a recess. However, with respect to that presumptive knowledge, we find no appreciable difference between a defendant who "flees from a courtroom in the midst of a trial," Taylor, 414 U.S. at 20, and a defendant who knows when his trial is scheduled to occur and chooses not to appear at all. In both situations, the defendant certainly knows that the judge, court personnel, the prosecutor, his own counsel, the jury, and witnesses are all present for trial or will all be present for trial at the appointed time and place, and it would be "incredible" to conclude that in either situation the defendant believed the wheels of the criminal-justice system would grind to a halt simply because he chose not to appear for trial. Id. "The busy trial courts of our state cannot stop the wheels of an already

burdened criminal justice system because a defendant chooses to be absent from his own trial," and it is patently unreasonable for a defendant in either situation to believe otherwise. Tates v. State, [Ms. 13-20-00280, May 25, 2023] ___ S.W.3d ___, ___ (Tex. App. 2023) (citation omitted). See People v. Sanchez, 65 N.Y.2d 436, 444, 482 N.E.2d 56, 60, 492 N.Y.S.2d 577, 581 (1985) ("There is no significant difference between … a defendant who deliberately leaves the courtroom shortly after the trial begins and that of a defendant who does so after he has been told that the trial is about to begin. In either case, his conduct unambiguously indicates a defiance of the processes of law and it disrupts the trial after all parties are assembled and ready to proceed."); and State v. Hudson, 119 N.J. 165, 184, 574 A.2d 434, 444 (1990) (holding that defendants who appeared in court on the morning of the day their trial began, but did not return in the afternoon when the trial actually began, had waived their right to be present, even though "there was no explicit evidence that these defendants knew that the trial would proceed in their absence").

We thus hold that a defendant is presumed to have known that his trial could proceed in his absence when the record indicates that he (1) had notice of the date, time, and place that his trial was scheduled to

occur, (2) knew he had the right to be present at the trial, and (3) voluntarily chose not to appear for the trial. In those circumstances, the trial court may validly find an implied waiver of the defendant's right to be present and therefore may conduct the trial in the defendant's absence, even if the defendant was not expressly warned that the trial could proceed in his absence. Indeed, although Brown cited this warning as a factor to consider in the implied-waiver analysis, nothing in the text of Rule 9.1 requires the warning as a prerequisite to an implied waiver of the defendant's right to be present. Instead, Brown relied on the Committee Comments to Rule 9.1, and, although those comments are persuasive, they are not binding and are not the rule itself. See Ex parte Living By Faith Christian Church, 360 So. 3d 340, 346 (Ala. 2021) (noting that the Committee Comments to Alabama's rules of court are persuasive but are not binding); and Simpson, 874 So. 2d at 579 (noting that the "plain language" of a rule of court "takes precedence" over the Committee Comments to the rule).

In this case, C.B.R. has not argued that he was not aware of the date, time, and place of his trial or that he was not aware of his right to be present. Moreover, defense counsel conceded on the morning the trial

began that C.B.R. "had ample notice that today was the day and to be here this morning." C.B.R. also has not argued that his absence was justified; in fact, we note that, when C.B.R. appeared for the sentencing hearing, he did not provide an explanation for his absence, nor has he provided an explanation in his brief to this Court. In other words, there is no basis for reaching any conclusion other than that C.B.R. deliberately and voluntarily refused to appear for his trial, which he clearly knew was scheduled to occur on August 16, 2021, in the Shelby County courthouse, where he knew that all other trial participants would be "assembled and ready to proceed." Sanchez, 65 N.Y.2d at 444, 482 N.E.2d at 60, 492 N.Y.S.2d at 581. We therefore presume that C.B.R. knew his trial would go forward at that time, even without an express warning to that effect. As to C.B.R.'s argument regarding the trial court's scheduling order, that argument is not convincing because, contrary to C.B.R.'s contention, the order does not indicate that the revocation of his bond and the issuance of an arrest warrant would be the only consequences of his failure to appear. Accordingly, the trial court did not exceed its discretion by finding that C.B.R. had voluntarily waived his right to be present at trial and conducting the trial in his absence.

II.

C.B.R. argues that the trial court erred by admitting J.M.'s out-of-court statement because, he says, the State did not provide him with notice that it intended to use the statement at trial.

The Child and Protected Person Physical and Sexual Abuse, and Violent Offense Victim Protection Act, codified at § 15-25-30 et seq., Ala. Code 1975 ("the Act"), states:

> "An out-of-court statement made by a child under 12 years of age at the time the statement is made … concerning an act that is a material element of any crime involving a … sexual offense …, which statement is not otherwise admissible in evidence, is admissible in evidence in criminal proceedings, if the requirements of Section 15-25-32[, Ala. Code 1975,] are met."[3]

§ 15-25-31, Ala. Code 1975. However,

> "[t]he proponent of the statement must inform the adverse party of the opponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered."

§ 15-25-35, Ala. Code 1975.

[3]C.B.R. does not argue that the requirements of § 15-25-32 were not met in this case.

C.B.R. argues that he did not receive notice of the State's intent to use J.M.'s out-of-court statement at trial until the prosecutor told the jury during the opening statement that it would see the audiovisual recording of the statement during the trial. Thus, according to C.B.R., the State failed to provide him with notice of its intent to use the statement "sufficiently in advance of the proceeding to provide [him] with a fair opportunity to prepare a response to the statement." § 15-25-35. The State argues, as it did at trial, that the statement was provided to C.B.R.'s counsel during discovery. C.B.R. does not dispute that his counsel received the statement during discovery, and assistant defense counsel conceded at trial that she had "previous knowledge of the [statement]" and that she "got a copy of it." (R. 218.) C.B.R. argues, however, that the State was required to file a written notice that it actually intended to use the statement at trial. C.B.R. is incorrect.

In Mosley v. State, 644 So. 2d 1299 (Ala. Crim. App. 1994), the defendant was convicted of sexual offenses against a child less than 12 years old. Citing § 15-25-35, the defendant argued on appeal that the trial court erred in admitting the victim's out-of-court statement because,

he said, the State did not provide him with notice of its intent to use the statement at trial. In rejecting that argument, this Court stated:

> "In this case, the appellant had notice of the substance of the statement in advance of his trial because a transcript of [the victim's] interview was provided to him [several weeks before the trial]. We find his argument that he was not aware of the State's intention to use the statements to be without merit. The substance of the statements [was] provided to the appellant because the State, indeed, intended to use them at the trial."

Mosley, 644 So. 2d at 1301 (emphasis added). Thus, when the State provides a defendant with a child victim's out-of-court statement, that act is sufficient to put the defendant on notice that the State intends to use the statement at trial and satisfies the notice requirement of § 15-25-35.[4]

[4]C.B.R.'s reliance on C.L.Y. v. State, 928 So. 2d 1047 (Ala. Crim. App. 2003), is misplaced. According to C.B.R., this Court held in C.L.Y. that compliance with § 15-25-35 requires the State to file a written notice of its intent to use a child victim's out-of-court statement at trial. However, in making this argument, C.B.R. cites the dissenting opinion in C.L.Y., which suggested that "the State must file a notice to introduce such statements." Id. at 1058 (Cobb, J., dissenting). Nothing in the main opinion holds that compliance with § 15-25-35 requires the State to file a written notice of its intent to use a child victim's out-of-court statement at trial; in fact, the main opinion does not address the notice requirement at all.

In this case, it is undisputed that C.B.R. received a copy of J.M.'s out-of-court statement in discovery, and C.B.R. has not argued that the discovery was not provided "sufficiently in advance of the [trial] to provide [him] with a fair opportunity to prepare a response to the statement." § 15-25-35. Thus, we hold that C.B.R. had sufficient notice of the State's intent to use J.M.'s out-of-court statement at trial, and, as a result, C.B.R. has not demonstrated that the statement was inadmissible.

III.

C.B.R. argues that the State's evidence was not sufficient to sustain his convictions.

> "In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. … When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."

Stoves v. State, 238 So. 3d 681, 690 (Ala. Crim. App. 2017) (citations omitted).

At the time of C.B.R.'s offenses, § 13A-6-63(a)(3) provided that "[a] person commits the crime of sodomy in the first degree if … [h]e, being 16 years old or older, engages in deviate sexual intercourse with a person who is less than 12 years old." At that time, § 13A-6-60(2), Ala. Code 1975, defined "deviate sexual intercourse" as "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another."

Section 13A-6-69.1 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." At the time of C.B.R.'s offenses, § 13A-6-60(3), Ala. Code 1975, defined "sexual contact" 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."

We begin our analysis of this claim by noting that C.B.R.'s argument hinges on his contention that J.M.'s out-of-court statement was inadmissible. In other words, C.B.R.'s specific argument is that there was not sufficient evidence to sustain his convictions <u>if that statement is excluded from consideration</u>. However, we have already concluded in

Part II, supra, that C.B.R. has failed to demonstrate that J.M.'s out-of-court statement was inadmissible, so we must consider that statement in reviewing the sufficiency of the evidence.

During his out-of-court statement, J.M. said that C.B.R. had touched J.M.'s "private" "under [J.M.'s] panties" and that C.B.R. had "squeez[ed]" and "rubb[ed] it." J.M. also said that C.B.R. had taken the "spot [that] you do the pee" and "put that private up [J.M.'s] bottom." When considered in a light most favorable to the State and accounting for all reasonable inferences, J.M.'s allegations support a finding that C.B.R. had touched either J.M.'s penis or his buttocks and that C.B.R. had placed his penis inside J.M.'s anus, and J.M.'s credibility was a question for the jury. Adams v. State, 336 So. 3d 673, 686 (Ala. Crim. App. 2020). The State's evidence also established that J.M. was less than 12 years old and that C.B.R. was at least 30 years old when those acts occurred. As to whether C.B.R. committed those acts for the purpose of gratifying his sexual desire, this Court has held that "[t]he intent to gratify the sexual desires of either party may be inferred from the act itself." Marshall v. State, 992 So. 2d 762, 773 (Ala. Crim. App. 2007) (citation omitted). Thus, the State's evidence was sufficient to establish

the elements of first-degree sodomy under § 13A-6-63(a)(3) and sexual abuse of a child less than 12 years old. Accordingly, the trial court did not err by denying C.B.R.'s motion for a judgment of acquittal and submitting the case to the jury.

Conclusion

C.B.R. has not demonstrated that he is entitled to relief from his convictions. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

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