FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5253

RAYMOND LAMAR DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
A.C. Soud, Jr., Judge.

June 29, 2020

WOLF, J.

Appellant raises two issues concerning his trial after which he was found guilty of various counts involving improper sexual encounters with two minors. We find no error requiring reversal as to these two issues. He raises one issue concerning his sentencing, whether the trial court impermissibly relied on conduct for which he was acquitted in imposing sentence. We agree with appellant as to this issue and remand for resentencing.

Recently in *Love v. State*, 285 So. 3d 344 (Fla. 2d DCA 2019), the Second District held that a sentencing judge may not consider or rely on acquitted conduct when imposing a sentence. In *Love*, the court reversed the sentence where the sentencing judge

considered the use of a firearm in sentencing after the jury had acquitted the defendant of possessing a firearm. *Id.* at 346.

In this case, the sentencing judge made it clear on the record that he was relying on conduct that the defendant was acquitted of in imposing sentence. During the sentencing proceeding, the trial court made the following statements:

> Count 2, the crime of battery. The offense was presented to the jury and the jury found you . . . guilty of the things that I'm going to mention in just a minute. I personally reviewed . . . the testimony of the kids . . . . *N.D., the young girl, testified that the defendant touched himself as he showed her videos of children engaging in sexual acts*. He touched her vagina, made her put her mouth to his back part, quote, back part. He forced her hand to touch his front. N.D., the young girl, made these statements under oath, did not waiver under cross examination.
>
> I will also add . . . that *the young girl . . . observed you, when her brother [I.T.] was asleep, putting your mouth to the young brother's penis. The young boy corroborated his sister's testimony, testifying that the defendant exposed himself to the young boy and showed him and his sister sexual things on his phone* and whatever the complete record would describe.

The comments in italics are at issue here—each comment refers to a charge of which the defendant had been acquitted:

> • At the close of the state's case, the court acquitted the appellant of count 3, charging "sexual battery by placing mouth on penis of I.T.". Referring to count 3 at sentencing, the court stated, *"[T]he young girl . . . observed you, when her brother [I.T.] was asleep, putting your mouth to the young brother's penis."*
>
> • By its "not guilty" verdict, the jury acquitted the appellant of counts 7 and 8, which were charges of "showing obscene materials" to I.T. and N.D. Although

the defendant was acquitted of those charges, the sentencing judge stated, *"N.D., the young girl, testified that the defendant touched himself as he showed her videos of children engaging in sexual acts"* and *"[t]he young boy corroborated his sister's testimony, testifying that the defendant exposed himself to the young boy and showed him and his sister sexual things on his phone . . ."*

- The court also commented on the jury's verdict of acquittal on the charges of sexual battery and showing obscene materials to minors by opining on N.D.'s credibility, stating *"N.D., the young girl, made these statements under oath, did not waiver under cross examination."*

Immediately following these comments, the court sentenced the defendant to two life sentences, to run concurrently with the other sentences pronounced.

It is well settled that when portions of the record show the trial court relied upon prior acquittals in determining a defendant's sentence, the state has the burden to demonstrate that those considerations "played no part in the sentence imposed." *Williams v. State*, 8 So. 3d 1266, 1267 (Fla. 1st DCA 2009) (citing *Doty v. State*, 884 So. 2d 547, 549 (Fla. 4th DCA 2004)); *see also Nichols v. State*, 283 So. 3d 947, 950 (Fla. 2d DCA 2019). Although the State argues that the court had reasons for mentioning the three crimes of which the defendant was acquitted, the appellee does not suggest what those reasons might have been.

Based on the trial court's remarks made during the sentencing, just prior to pronouncing sentence, the law supports a determination that the court improperly considered charges of which the appellant had been acquitted. The State has presented no persuasive argument showing the court did not consider his acquittals during sentencing.

We, therefore, AFFIRM appellant's convictions, but REMAND for resentencing before a different trial judge.

NORDBY, J., concurs; MAKAR, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring.

I fully concur in Judge Wolf's opinion but point out that it is a debatable question whether the successor judge should have allowed a brief continuance to permit defense counsel to address and potentially challenge the initial judge's rulings, particularly those regarding victim testimony. The successor judge, who was brought in mid-trial after the prosecution had rested and defense was on its second witness, seemed to believe that the recusal of the initial judge—who made prejudicial comments about the defendant outside the jury's presence—immunized the initial judge's ruling from further review. ("Well, he's out of the case. So we're beyond that at this point."). That is incorrect. Fla. R. Jud. Admin. 2.330(h) ("Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist."). At the hearing, the defense did not clearly explain the basis for why the successor judge should reevaluate the prior rulings (the trial judge was not made fully aware of the nature or specifics of the prejudicial comments) and the trial judge denied the motion without prejudice to it being raised at the close of trial. The defense also sought a new trial based on *McCloud v. State*, 150 So. 3d 822, 823 (Fla. 1st DCA 2014), which held that "a successor judge, who was not present at trial, could not competently assess the weight of the evidence as required to resolve Appellant's motion for new trial." *McCloud* was discussed in detail at the hearing, and would appear to have relevance, but has not formed the basis for relief on appeal. Overall, on the record presented and argument presented it can't

be concluded that the successor judge's denial of a continuance was an abuse of discretion.

Diana L. Johnson of Johnson and Lufrano, P.A., Jacksonville, for Appellant.

Ashley Moody, Attorney General, Adam B. Wilson and Benjamin L. Hoffman, Assistant Attorneys General, Tallahassee, for Appellee.