

IN THE COURT OF APPEALS OF IOWA

No. 9-158 / 08-1027
Filed April 22, 2009

**IN THE INTEREST OF Z.W.S.,
Minor Child,**

**Z.W.S., Minor Child,
Appellant.**

Appeal from the Iowa District Court for Wright County, James A. McGlynn,
Associate Juvenile Judge.

A minor appeals from the juvenile court's order adjudicating him to have
committed a delinquent act. **REVERSED.**

Joel J. Yunek of Yunek Law Firm, Mason City, for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Eric R. Simonson, County Attorney, for appellee State.

David Johnson of Brinton, Bordwell & Johnson, Clarion, for appellee
parent.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

On the evening of October 13, 2006, five young girls were staying overnight at the house of M.S. to celebrate her eighth birthday. M.T., an eight-year-old who was M.S.'s best friend at the time, attended the birthday party. The six girls played in the basement family room, where they planned to sleep. Z.S., M.S.'s brother who was fifteen years old at the time, had a bedroom in the basement located next to the family room. He and two friends spent the evening hours upstairs together. Z.S. and M.S.'s parents were home.

M.T. claims that sometime after midnight, M.S. took her by the arm and said she had to take her somewhere. M.T. asserts that M.S. took her into Z.S.'s bedroom, where Z.S. was watching television, and shut the door. M.T. claims that M.S. pulled down M.T.'s pants and underwear, pushed her onto her hands and knees, and held her on the ground. M.T. testified that without saying a word, Z.S. "came and pulled down his pants and stuck his penis into my butt." M.T. testified that she did not actually see Z.S. or his penis, but that he stuck his penis about "halfway" in and that he did not move it around. M.T. said that Z.S. did not put his hands on her as he put his penis in her anus. M.T. stated that after about ten seconds, she stood up and left the room. She testified that the incident was not painful and that she did not scream or cry. She returned to the family room, where all of the young girls eventually went to bed. She claims that she did not mention the incident to anyone because M.S. threatened that if she did, she would get in trouble, M.S. would no longer be her friend, and M.S. would smack her in the face.

Of the four other girls at M.S.'s birthday party, one testified that Z.S. was in his room after his parents had gone to bed. She testified that M.S. was going back and forth between her brother's room and the family room with notes that she gave to M.T. She also stated that she saw M.S. take M.T. into Z.S.'s room, but she did not see M.T. come out of Z.S.'s room. Two of the other girls at the party testified that they did not see M.T. or M.S. enter Z.S.'s room. The fourth girl testified that she did not see M.S. enter Z.S.'s room but did not know whether M.T. had. The record is unclear as to when each of the six girls went to sleep.

Z.S. denies ever touching M.T. He and his girlfriend and her friend were at his house on the evening of the party. He testified that he was only downstairs briefly earlier in the night with his girlfriend so they could find a movie to watch. He and his mother took the two girls home around 1:00 or 1:30 a.m. Z.S. claims that upon returning home, he had a quick snack and fell asleep on a couch upstairs. Z.S.'s mother testified that when she went to bed and when she woke up, Z.S. was asleep on the upstairs couch. M.S. denied that the incident ever occurred.

M.T. did not mention the alleged incident to anyone immediately afterward. M.T.'s mother testified that she did not notice any abnormal behavior after the birthday party. There is no evidence that M.T. avoided either Z.S. or M.S. after the alleged incident. M.T. continued to spend time with M.S. during the following year. M.T. invited M.S. to spend a week at her grandmother's house in the summer of 2007. M.T. went to M.S.'s house on the night of Z.S.'s sixteenth birthday party in September 2007, and the two girls spent time watching the older kids at the party. Sometime before M.S.'s ninth birthday party

in October 2007, however, the two best friends broke up. M.T. then became best friends with another girl. M.T. was not invited to M.S.'s sleepover birthday party in October 2007.

According to M.T.'s mother, M.T. had difficulty spending the night at friends' houses. M.T.'s mother first thought this difficulty had lasted around two years. Later, she testified the problem had developed slowly over the last year. M.T. attended M.S.'s birthday party in 2004 but did not spend the night. In late October 2007, M.T.'s mother became frustrated by M.T.'s increasingly persistent refusal to spend the night at friends' houses. She arranged for M.T. to spend the night with her new best friend after basketball practice, but M.T. became anxious and emotional when her mother told her of the plans. M.T.'s mother insisted that M.T. needed to tell her why she became so upset about spending the night with friends. M.T. then told her mother that Z.S. had placed his penis in her anus at M.S.'s birthday party in October 2005.¹

Following M.T.'s accusation, the school nurse talked to M.S. about her brother, Z.S. M.S. told the nurse that Z.S. had touched her with his penis the previous month, September 2007. Both girls were interviewed by forensic investigator Tamara Bibbins.

The State filed a delinquency petition against Z.S. for two counts of sexual abuse in the second degree in violation of Iowa Code section 709.3 (2005), one involving M.S. and one involving M.T. After an adjudicatory hearing, the juvenile court dismissed the charge involving M.S., who recanted at trial, saying that she

¹ After determining that M.S. did not have a birthday party in 2005, M.T. decided that the assault had actually occurred in 2006.

had lied to get her older brother in trouble. The juvenile court adjudicated Z.S. to have committed a delinquent act against M.T. Z.S. appeals, arguing: (1) the evidence was insufficient to support adjudication; and (2) the juvenile court abused its discretion in admitting testimony from M.T.'s mother and videotapes and testimony from the forensic interviewer who questioned M.T. as part of the investigation of M.T.'s allegations.

II. Standard of Review

We review juvenile delinquency proceedings de novo. *In re J.D.F.*, 553 N.W.2d 585, 587 (Iowa 1996). We review questions of both fact and law. *Id.* We give weight to the juvenile court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

III. Sufficiency of the Evidence

The State has the burden of proving beyond a reasonable doubt that the child committed a delinquent act. *In re D.L.C.*, 464 N.W.2d 881, 882-83 (Iowa 1991). Upon our de novo review of the record, we cannot find that the State proved Z.S.'s guilt beyond a reasonable doubt. We give weight to the juvenile court's findings that M.T.'s testimony was "very believable" and that her credibility was bolstered by the testimony of her mother. However, after considering all of the evidence, we cannot find that the State presented evidence of guilt beyond a reasonable doubt.

Z.S. consistently and repeatedly denied the allegations of sexual assault. His mother saw him asleep on the couch upstairs when she went to bed, and he was still sleeping there when she woke up. Three of M.T.'s friends at the party

do not remember M.S. ever going into Z.S.'s bedroom. M.S. and her mother testified at trial that Z.S. was upstairs and denied that the incident occurred.

M.T.'s mother testified that she did not notice anything abnormal right after the birthday party. M.T. continued to spend a significant amount of time with M.S., who had allegedly stripped her pants and held her down during the assault. M.T. went to M.S.'s house, even when she knew Z.S. would be home. She invited M.S. to spend a week's vacation with her at her grandmother's home.

The juvenile court gave substantial weight to the testimony of M.T.'s mother regarding M.T.'s difficulty spending nights with friends, as corroboration of her accusation against Z.S. The evidence showed that M.T. had trouble spending the night with friends before the alleged assault. M.T.'s mother testified that she had to take M.T. home from M.S.'s birthday party in 2004 because M.T. was having trouble spending the night. M.T.'s mother also testified that she made arrangements with M.S.'s mother to take M.T. home if she got shy staying overnight. This evidence significantly reduces the impact of the testimony of M.T.'s mother regarding M.T.'s unwillingness to spend the night at friends' houses after the 2006 birthday party.

We agree with the juvenile court that "the case is a matter of 'he said, she said.'" We do not find that the State proved Z.S. guilty beyond a reasonable doubt after considering all the evidence. Because we reverse the juvenile court on our de novo review, we decline to address Z.S.'s evidentiary argument.

REVERSED.