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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0074-DG

A.C., A CHILD UNDER EIGHTEEN — APPELLANT

v.

ON REVIEW FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-XX-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND McNEILL, JUDGES.

JONES, JUDGE: We granted A.C. discretionary review of the Franklin Circuit Court's opinion and order which was entered on December 14, 2019. In its opinion and order, the circuit court affirmed the Franklin District Court's verdict finding A.C. guilty of four counts of first-degree sexual abuse. Because the circuit court did not err in affirming the district court, we affirm.

I. BACKGROUND

At the time of the underlying incidents in this case, A.C. and Valerie[1] were both thirteen years old[2] and had been friends for about two or three years. This friendship came to an end following four separate incidents in July 2016. The first incident occurred on July 8, 2016. Valerie told her grandmother she would be sleeping over at the home of her friend, Danielle. In reality, however, both Valerie and Danielle were staying overnight at A.C.'s residence. At one point that evening, Valerie woke up to find that A.C. was holding down her right hand while holding her left hand on his penis. He was using her hand to masturbate him. Valerie told A.C. to stop and, after some time, he relented. Valerie did not initially inform an adult about this incident.

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[1] To protect the confidentiality of the juveniles in this case, we have elected to use pseudonyms for the minor victim and witnesses. We have chosen to maintain A.C.'s confidentiality through the use of his initials because that is how he is referenced in the caption of this case.

[2] A.C. is now eighteen years old, which would ordinarily cause an appeal from his commitment to the Department of Juvenile Justice to become moot; *see Q.C. v. Commonwealth*, 164 S.W.3d 515 (Ky. App. 2005). However, there are collateral consequences from being adjudicated a juvenile sex offender which prevent mootness in this case; *see, e.g.*, Kentucky Revised Statute (KRS) 635.515(1):

> A child declared a juvenile sexual offender shall be committed to the custody of the Department of Juvenile Justice and shall receive sexual offender treatment for not more than three (3) years, except that this period of sexual offender treatment may be extended for one (1) additional year by the sentencing court upon motion of the Department of Juvenile Justice, and the juvenile sexual offender shall not remain in the care of the Department of Juvenile Justice after the age of twenty-one (21) years.

The second incident occurred on July 28, 2016, during a middle school open-house event. A.C. approached Valerie and Danielle from behind and grabbed the girls' breasts. Both girls pushed his hands away. Valerie later testified that A.C. laughed and acted like he was being playful, but she did not like what he was doing. She also testified that she did not invite A.C.'s actions or consent to them.

The third incident occurred at a neighbor's home. Valerie could not remember the exact date of the incident, but she believed it may have been on July 30, 2016.[3] While Valerie was reclining on a bed in an upstairs bedroom, A.C. entered, locked the door, and proceeded to "lay[] all over" her chest while making moaning noises suggestive of a sexual encounter. Valerie's younger brother, Brad, heard the sounds, which he described as "sex noises," and tried to open the locked door. Brad eventually managed to force the lock using a knife. When he opened the door, he discovered A.C. on top of his sister making those noises as she struggled beneath him to free herself. Brad told A.C. to get off of his sister, and A.C. complied.

The fourth incident happened on the same date as the third. Valerie was walking home with Brad and her older cousin, Carl. At some point during the walk, A.C. approached her from behind, hugged her, and grabbed both of her

[3] The juvenile complaint describes the incident as occurring on July 29, 2016. The exact date is immaterial to the issues herein.

breasts. Carl witnessed the incident and told A.C. his actions were not appropriate. According to Carl, A.C. did not respond and went inside his residence. Valerie does not remember Carl's saying anything to A.C., but she remembers he was angry about the incident and told her mother and grandmother about it.

As a result of these incidents, the Commonwealth filed a juvenile public offense complaint against A.C. alleging four counts of first-degree sexual abuse.[4] The Franklin District Court conducted an adjudication hearing on the petition on February 20, 2017. The Commonwealth presented testimony from Valerie, her grandmother, Brad, and Carl which was consistent with the foregoing narrative.

A.C. and his grandmother testified in his defense. A.C. asserted he was "devastated" by Valerie's allegations against him. He claimed that he and Valerie had invented the masturbation incident as a joke to tell their friends. A.C. flatly denied groping the girls' breasts as described in the second incident. Regarding the third incident, A.C. admitted making sexually suggestive sounds with Valerie in the upstairs bedroom; however, he stated this incident, like the episode comprising the first incident, was also a joke. A.C. denied touching Valerie or locking the door, and he denied that Brad had to force the lock to get in the room. A.C. testified he did not remember the fourth incident at all. When

[4] KRS 510.110, a Class D felony.

questioned on cross-examination, he maintained that Valerie, Brad, and Carl had fabricated these incidents. A.C.'s grandmother testified she was not informed of these incidents while they were happening. She also recalled an incident in July 2016, in which Carl was intoxicated and shouted homophobic slurs against A.C., who is purportedly gay. Finally, A.C.'s grandmother testified she never saw inappropriate touching between A.C. and Valerie.

At the conclusion of the hearing, the district court took the matter under advisement. In a subsequent written verdict, the district court found that the Commonwealth had proven A.C. guilty beyond a reasonable doubt of all four counts of first-degree sexual abuse. At its disposition hearing on June 5, 2017, the district court ordered A.C. committed to the Department of Juvenile Justice and declared a juvenile sex offender; however, the district court stayed its order pending appeal to the Franklin Circuit Court. For reasons not disclosed by the record, the appeal remained in circuit court for over two years.

On December 14, 2019, the circuit court entered an opinion and order affirming the district court. The circuit court described the incidents and applied a deferential standard of review to the district court's assessment of witness credibility and its factual determinations. The circuit court then considered the described incidents and determined each contained the required elements for first-degree sexual abuse. The circuit court specifically held the incidents each involved

subjecting another to "sexual contact" by "forcible compulsion." Ultimately, the circuit court affirmed, holding that the district court had heard sufficient evidence "to allow a rational trier of fact to find that both elements of sexual abuse in the first degree were met beyond a reasonable doubt." (Record (R.) at 141.) We subsequently accepted A.C.'s petition for discretionary review.

II. ANALYSIS

A.C. submits three arguments for our review. First, he argues the circuit court inappropriately failed to apply a *de novo* standard of review to the district court's ruling. Second, he argues the district court should have applied a "reasonable child standard" to the juvenile case proceedings. Third, he argues the circuit court erroneously upheld the district court's determination that A.C. was guilty beyond a reasonable doubt, claiming the elements of sexual gratification and forcible compulsion were not met. We consider each argument in turn below.

Juvenile proceedings are conducted in accordance with KRS 610.080, which states in relevant part:

> Juvenile proceedings shall consist of two (2) distinct hearings, an adjudication and a disposition . . . .
>
> > (1) The adjudication shall determine the truth or falsity of the allegations in the petition and shall be made on the basis of an admission or confession of the child to the court or by the taking of evidence.

> (2) Unless otherwise exempted, upon motion by any child brought before the court on a petition under KRS 610.010(1), or 610.010(2)(a), (b), or (c), the Rules of Criminal Procedure shall apply. All adjudications shall be supported by evidence beyond a reasonable doubt, unless specified to the contrary by other provisions of KRS Chapters 600 to 645. . . .

On review, we are required to show deference to the factual findings of the trial court:

> The adjudication hearing is conducted by the court without a jury. Accordingly, under Kentucky Rules of Civil Procedure (CR) 52.01, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A trial court's factual finding is not clearly erroneous if supported by substantial evidence.
>
> When a juvenile challenges the sufficiency of the evidence, because the Commonwealth carries the same burden of proof as it does in an adult criminal case to show that a juvenile committed an offense, we borrow from the criminal law and apply the directed verdict standard of review. Thus, in the case of a juvenile adjudication, a reviewing court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth and determine if, under the evidence as a whole, it would be clearly unreasonable for the trial court to find guilt, only then the juvenile is entitled to a directed verdict of acquittal.

W.D.B. v. Commonwealth, 246 S.W.3d 448, 452-53 (Ky. 2007) (footnotes omitted).

In his first argument, A.C. contends the district court's finding that he engaged in the incidents described "for the purposes of sexual gratification[] presents a mixed question of law and fact[.]" (Appellant's Brief at 8.) A.C. specifically asserts the circuit court should not have deferred to the district court's finding that Valerie's testimony was credible. (Appellant's Brief at 9.) Therefore, he argues, the circuit court erred in its failure to apply *de novo* review. We disagree.

CR 52.01 requires a reviewing court to defer to the trial court on factual findings and witness credibility. *W.D.B.*, 246 S.W.3d at 452-53. Furthermore, the circuit court correctly described its standard of review when it quoted *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994), for the proposition that "[a] reviewing court does not consider matters on appeal *de novo*, and 'cannot reevaluate the evidence or substitute its judgment as to the credibility of a witness for that of the trial court[.]'" (R. at 138.) The circuit court also noted, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jones*, 880 S.W.2d at 545 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)). Although an appellate court should apply *de novo* review in certain contexts, *e.g.*, questions of statutory interpretation, a trial court's factual

determinations and assessment of witness credibility are not two of them. We discern no error.

For his second argument, A.C. contends the district court should have applied a "reasonable child standard" to the juvenile proceedings. A.C. argues a relatively recent precedent from the United States Supreme Court, *J.D.B. v. North Carolina,* 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), as well as *J.D.B.*'s application by Kentucky courts, required the district court to consider the age of a reasonable child in analyzing his actions.

After examining A.C.'s argument and his citations to *J.D.B.* and its progeny, we have determined these precedents are readily distinguishable from the facts of this case because they concern the application of *Miranda*'s[5] custody determination to minors. Furthermore, the Kentucky Supreme Court has held that the common law presumption, in which a child lacks criminal capacity, does not apply to juvenile court proceedings. *See W.D.B.*, 246 S.W.3d at 450-51. Our Supreme Court held the enactment of the Kentucky Unified Juvenile Code extinguished this common law presumption because "a delinquency adjudication in juvenile court is not a criminal conviction[]" and "allowing the presumption would frustrate the clinical and rehabilitative purposes of the juvenile code." *Id*. at 450. We may not depart from *W.D.B.* because we are bound by the established

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

precedents of the Kentucky Supreme Court and its predecessor court. *Power v. Commonwealth*, 563 S.W.3d 97, 98 (Ky. App. 2018); SCR[6] 1.030(8)(a). We discern no error in declining to utilize a reasonable child standard under the facts of this case.

For his third issue on appeal, A.C. contends the circuit court erroneously affirmed the district court in finding him guilty beyond a reasonable doubt on all four counts of first-degree sexual abuse.

> A person is guilty of sexual abuse in the first degree when:
>
> > (a) He or she subjects another person to sexual contact by forcible compulsion; or
> >
> > (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
> >
> > > 1. Is physically helpless;
> > >
> > > 2. Is less than twelve (12) years old;
> > >
> > > 3. Is mentally incapacitated; or
> > >
> > > 4. Is an individual with an intellectual disability[.]

KRS 510.110(1). To convict a defendant, as a matter of due process, the Commonwealth must submit "proof beyond a reasonable doubt of each fact necessary to prove all the elements of a crime." *Lisle v. Commonwealth*, 290

[6] Kentucky Rules of the Supreme Court.

S.W.3d 675, 680 (Ky. App. 2009) (citing *Perkins v. Commonwealth*, 694 S.W.2d 721, 722 (Ky. App. 1985); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970)). A.C. argues that the evidence presented to the district court did not show he subjected Valerie to "sexual contact" by "forcible compulsion."

"Sexual contact" and "forcible compulsion" are both defined in KRS 510.010. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" KRS 510.010(7). All of the incidents in this case involve alleged touching of "sexual or other intimate parts of a person[.]" The question posed to us is whether this touching was for the purpose of sexual gratification. A.C. argues his "sexual orientation, combined with his age, creates a circumstance in which the 'sexual gratification' aspect of the alleged actions is called into serious question." (Appellant's Brief at 17.)

The circuit court correctly determined that the sexual contact element was met for each charge in this case. "In the first instance, [Valerie] was made to touch A.C.'s penis, while in instances two, three, and four A.C. touched [Valerie's] breasts." (R. at 140.) The circuit court then determined it was not unreasonable for the trial court to view the incidents as being for A.C.'s sexual gratification,

particularly in light of the first incident. Without citing any law in support, A.C. contends this constitutes "improper bootstrapping."

We disagree. As the trier of fact, the trial court "may believe any witness in whole or in part" and "may take into consideration all the circumstances of the case[.]" *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). "[I]ntent can be inferred from the actions of an accused and the surrounding circumstances." *Edmondson v. Commonwealth*, 526 S.W.3d 78, 87 (Ky. 2017) (quoting *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988)). Finally, the trial court, as the finder of fact, "has wide latitude in inferring intent from the evidence." *Id*. (quoting *Anastasi*, 754 S.W.2d at 862). The incidents in this case began with A.C. using Valerie's sleeping body to aid in an act of masturbation. After this incident, A.C. repeatedly made deliberate contact with Valerie's breasts, an intimate part of her body. In the final incident in this case, A.C. was on top of Valerie's body while making what Brad referred to in his testimony as "sex noises." Although A.C. claimed these incidents either did not happen or were "a joke," the trial court was not required to believe him over the other witnesses. *Anderson*, 934 S.W.2d at 278. In light of all the testimony, it was not clearly unreasonable for the trial court to infer A.C.'s acts were for sexual gratification.

A.C. also argues the evidence presented to the trial court did not meet the "forcible compulsion" requirement. He contends Valerie was never "placed in

fear of death or physical injury, and she also could not have been in fear that [he] was going to commit a sexual offense, when she did not believe his actions were done for a sexual purpose." (Appellant's Brief at 13.) Under the current statutory definition,

> "Forcible compulsion" means physical force *or* threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

KRS 510.010(2) (emphasis added). The General Assembly had previously defined forcible compulsion "as physical force that overcomes an earnest resistance." KRS 510.010 Kentucky Crime Commission / LRC Commentary (1974). The current language, requiring no physical resistance by the victim, was inserted into the statute in 1996.[7]

As currently written, the first part of the forcible compulsion element ("physical force" forcible compulsion) merely requires unconsented contact with the victim. The Kentucky Supreme Court's best guidance on this aspect of forcible compulsion may be found in *Yates v. Commonwealth*, 430 S.W.3d 883 (Ky. 2014). In its discussion, the *Yates* Court noted:

> While it is true that *an act as simple as grabbing someone's hand can amount to lack of consent by*

[7] 1996 Ky. Acts ch. 300 § 2 (effective Jul. 15, 1996).

> *forcible compulsion* given the right circumstances, not all touching will provide those circumstances. If that were the case, then every sex act between otherwise consenting adults would satisfy the elements of the first-degree rape statute, because there is always physical contact between them. Instead, the phrase "forcible compulsion" requires another factual element, namely, lack of consent by the victim, in the sense of lack of voluntariness or permissiveness. This is dictated by the use of the word "compulsion."

Id. at 890 (emphasis added). In short, it appears that the definition of "physical force" forcible compulsion, as opposed to "threat" forcible compulsion, requires nothing more than physical contact without permission of the victim. "[T]he evaluation of physical force is based on a victim's express non-consent, or other involuntariness, to a defendant's act. Thus, it may be in one case that a touch of the hand constitutes forcible compulsion while in another it does not." *Id*. at 891. A.C. argues that forcible compulsion requires some "fear of death or physical injury" on the part of the victim. However, it appears from *Yates* that this applies solely to "threat" forcible compulsion and not "physical force" forcible compulsion.

Turning to the four incidents of first-degree sexual abuse at issue here, we can discern no compelling argument to reverse based on a lack of forcible compulsion. The first incident did not require a showing of forcible compulsion at all because the record shows A.C. subjected Valerie to sexual contact while she was asleep and incapable of consent, *i.e.*, "physically helpless" under KRS

510.110(1)(b)1.; *see Boone v. Commonwealth*, 155 S.W.3d 727, 731 (Ky. App. 2004). The second and third incidents, involving the grabbing of Valerie's breasts, clearly involved an unconsented application of physical force as described in *Yates*. Finally, the fourth incident also described an application of physical force. At the adjudication hearing, Brad described how A.C.'s body weight held Valerie down on the bed while she struggled to free herself. The circuit court correctly held that the forcible compulsion element was met on all four convictions.

III. CONCLUSION

For the foregoing reasons, we affirm the Franklin Circuit Court's opinion and order affirming the district court.

ALL CONCUR.

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