Rel: September 22, 2023

Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-2022-0919

Cody Lee Zink

v.

State of Alabama

Appeal from Morgan Circuit Court
(CC-19-78)

COLE, Judge.

Cody Lee Zink was convicted of first-degree sexual abuse, a violation of § 13A-6-66(a)(1), Ala. Code 1975, for subjecting his 12-year-old cousin, K.O., to sexual contact by forcible compulsion. The circuit court sentenced him to five years' imprisonment.

I.

On appeal, Zink argues that the State's evidence was insufficient to support his conviction because, he says, there was no evidence of "forcible compulsion."

Recently, this Court succinctly set out our sufficiency-of-the-evidence standard:

> "'"The test used in determining the sufficiency of 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)). '"'"[T]he credibility of witnesses and the weight or probative force of testimony is for the jury to judge and determine."'"' Zumbado v. State, 615 So. 2d 1223, 1241 (Ala. Crim. App. 1993) (quoting Johnson v. State, 555 So. 2d 818, 820 (Ala. Crim. App. 1989), quoting other cases). And circumstantial evidence can support a conviction, and that question is for the jury. See White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989)."

Johnson v. State, [Ms. CR-21-0291, May 5, 2023] ___ So. 3d ___, ___ (Ala. Crim. App. 2023).

Zink was charged with and convicted of first-degree sexual abuse, which required the State to prove that Zink subjected K.O. "to sexual contact by forcible compulsion." § 13A-6-66(a)(1), Ala. Code 1975. Zink does not argue that the State's evidence did not establish a prima facie

case of "sexual contact"; rather, Zink challenges only the State's evidence as to the forcible-compulsion element of the offense. According to Zink, the evidence showed that he "made no verbal threats to K.O."; that he "never touched her 'behind' or breasts"; that he "never told her not to tell anyone"; that he was "never 'mean,' never talked to [K.O.] about sex and never made a pass at her nor came on to her"; that he "only touched her through her clothes, including her private area" '; that he "only touched her with his hand ... there was no penetration"; and that there "was no testimony or evidence that K.O. resisted [his] actions in any way." (Zink's brief, pp. 17-18.)

At the time of Zink's offense in 2017, the phrase "forcible compulsion" was defined in § 13A-6-60(8), Ala. Code 1975, as follows: "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."[1] And, in Black v. State,

[1]Effective September 1, 2019, the legislature amended § 13A-6-60, Ala. Code 1975, and the phrase "forcible compulsion" is now defined as:

> "Use or threatened use, whether express or implied, of physical force, violence, confinement, restraint, physical injury, or death to the threatened person or to another person. Factors to be considered in determining an implied threat

295 So. 3d 1120 (Ala. Crim. App. 2019), this Court explained "forcible compulsion" as follows:

> "In Powe [v. State, 597 So. 2d 721 (Ala. 1991)], the 11-year-old victim, N.S., testified that, while she was lying on a bed beside her father, Willie Powe, he 'told her to get on top of him'; that she 'obeyed her father'; and that he 'physically lifted her up on top of him,' 'unbuttoned and unzipped her pants,' and 'then pulled down the ... pants that he was wearing and put his penis inside her vagina.' Powe, 597 So. 2d at 723. N.S. testified that the defendant 'did not expressly threaten her before or during the incident' but also testified that 'she was afraid of her father.' Id. Powe was subsequently convicted of first-degree rape.
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> "… [T]he Alabama Supreme Court recognized that there was neither 'evidence that N.S. was overcome by her father's physical force' nor 'evidence of any express threat by Powe.' Powe, 597 So. 2d at 724. However, in a question of first impression, the Court considered 'whether, viewing the totality of the circumstances, a jury could properly find that an implied threat was made against the victim sufficient to satisfy the element of forcible compulsion.' Id. at 726 (emphasis added). In addressing that question, the Court examined State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673

> include, but are not limited to, the respective ages and sizes of the victim and the accused; the respective mental and physical conditions of the victim and the accused; the atmosphere and physical setting in which the incident was alleged to have taken place; the extent to which the accused may have been in a position of authority, domination, or custodial control over the victim; or whether the victim was under duress. Forcible compulsion does not require proof of resistance by the victim."

§ 13A-6-60(1), Ala. Code 1975.

(1987), and Commonwealth v. Rhodes, 510 Pa. 537, 510 A.2d 1217 (1986), each of which involved a child victim of sexual assault who was not subjected to either physical force or an express threat by the perpetrator.

"The Alabama Supreme Court noted that, in Etheridge, the North Carolina Supreme Court held that 'a child's general fear of a parent can suffice as the [constructive] force necessary to commit a forcible sexual assault.' Powe, 597 So. 2d at 726 (citing Etheridge, 352 S.E.2d at 682). Expanding on that holding, the Etheridge court stated:

> "'"The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, create[ ] a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose."

"'319 N.C. at 47, 352 S.E.2d at 681 ....

> "'"The child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist, and the child may acquiesce rather than risk his father's wrath. As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, Rape, 95 Yale L.J. 1087, 1115 (1986).
>
> "'"In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces."

"'319 N.C. at 48, 352 S.E.2d at 681-82.'

"Powe, 597 So. 2d at 726-27. The Alabama Supreme Court also noted that Etheridge

> "'was regarded in [North Carolina] as a positive step toward dealing more effectively with intrafamilial sexual abuse cases. See Note, State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault, 66 N.C.L. Rev. 1177 (1988). As one commentator noted:
>
> > "'"A defendant who plays a parental role in the victim's world can greatly influence and dominate that world. He or she is the victim's authoritarian, enforcing that authority through the role of disciplinarian. Etheridge recognizes that in any order given by a parent these dual roles create an implied threat of some sort of disciplinary action .... The victim is young, inexperienced, and perhaps ignorant of the 'wrongness' of the conduct. The child may submit because he does not know he can resist or because he assumes the conduct is acceptable."
>
> "'Id. at 1184-85.'

"Powe, 597 So. 2d at 727.

"The Alabama Supreme Court noted that, in Rhodes, the Pennsylvania Supreme Court held that 'the term "forcible compulsion" ... includes not only physical force or violence but also moral, psychological, or intellectual force used to compel

a person to engage in sexual intercourse against that person's will.' Powe, 597 So. 2d at 728 (citing Rhodes, 510 Pa. at 554-56, 510 A.2d at 1226). Expanding on that holding, the Rhodes court stated:

> "'"There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion ... derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult ... without the use of physical force or violence or the explicit threat of physical force or violence."
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> "'510 Pa. at 557, 510 A.2d at 1227.'

"Powe, 597 So. 2d at 728. The Rhodes court noted that a determination whether there was 'forcible compulsion' in a case where the perpetrator is an adult and the victim is a child is based on the totality of the circumstances and that

> "'significant factors to be weighed in that determination would include
>
> "'"the respective ages of the victim and the accused, the respective mental and

> physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress."
>
> "'510 Pa. at 556, 510 A.2d at 1226. The court further noted, however, that this list of factors is by no means exclusive. Id.'

"Powe, 597 So. 2d at 728.

"Finding Etheridge and Rhodes persuasive, the Alabama Supreme Court concluded:

> "'Therefore, applying the reasoning of Etheridge and Rhodes, and taking into consideration the totality of the circumstances as outlined in the record in this case, we conclude that the evidence in the present case is sufficient to support the jury's finding that Willie James Powe had sexual intercourse with his daughter, N.S., through the use of forcible compulsion.
>
> "'Powe was the natural father of N.S. At the time of the incident, Powe was married to N.S.'s mother and resided in the household with N.S. and her mother. Powe's arrest records indicate that at the time of the incident, he was approximately 40 years old, while N.S., on the other hand, was 11 years old. The incident between N.S. and her father occurred in her parents' bedroom while no one else was at home. Furthermore, N.S. indicated that she was afraid of her father. From this

evidence, we conclude that a jury could reasonably infer that Powe held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands.

"'At this point, however, we note that our holding in this case is limited to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust. The reason for the distinction between cases involving children as victims and those involving adults as victims is the great influence and control that an adult who plays a dominant role in a child's life may exert over the child. When a defendant who plays an authoritative role in a child's world instructs the child to submit to certain acts, an implied threat of some sort of disciplinary action accompanies the instruction. If the victim is young, inexperienced, and perhaps ignorant of the "wrongness" of the conduct, the child may submit to the acts because the child assumes that the conduct is acceptable or because the child does not have the capacity to refuse. Moreover, fear of the parent resulting from love or respect may play a role as great as or greater than that played by fear of threats of serious bodily harm in coercing a child to submit to a sexual act. Note, State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault, 66 N.C.L. Rev. 1177, 1185 (1988).

"'....

"'Our holding in this case establishes a mechanism by which the unique relationship between children and the adults who exercise a position of domination and control over them may be taken into consideration in determining

> whether the element of forcible compulsion has been established. To hold otherwise would be to require a child to be mangled, to see a deadly weapon, or to hear the actual utterance of specifically threatening words before a jury would be authorized to discern a rational fear of violence. Making these criteria absolute would be ignoring reality. See McQueen v. State, 423 So. 2d 800 (Miss. 1982) (Hawkins, J., dissenting).'

"Powe, 597 So. 2d at 728-29 (emphasis added).

"Thus, under Powe, where an adult charged with the sexual assault of a child is in 'a position of authority and domination,' Powe, 597 So. 2d at 728, over the child, a jury may conclude, based upon the totality of the circumstances, that the sexual assault carried an implied threat sufficient to establish the element of forcible compulsion. See also R.E.N. [v. State, 544 So. 2d 981 (Ala. Crim. App. 2006)] (holding that there was sufficient evidence of forcible compulsion where the evidence established that the defendant sexually assaulted his daughter but where there was no evidence of earnest resistance by the daughter or an express threat by the defendant).

"We recognize that Powe involved a sexual assault by the victim's biological parent and that Powe is therefore factually distinguishable from the unique circumstances of this case. However, the holding in Powe is not limited to cases in which the perpetrator of a sexual assault against a child is the child's parent. Rather, the Alabama Supreme Court more generally held that Powe's implied-threat analysis is applicable to any 'adult[ ] [perpetrator] who exercise[s] a position of domination and control' over the child victim. Powe, 597 So. 2d at 729 (emphasis added). In fact, not only is Powe not limited to cases in which the perpetrator is the child's parent, Powe is also no longer limited to cases in which the perpetrator is an adult. In Higdon v. State, 197 So. 3d

> 1019 (Ala. 2015), the Alabama Supreme Court extended Powe's implied-threat analysis to a case in which a 17-year-old juvenile offender, who worked at a day-care facility, sexually assaulted the 4-year-old victim, who was a student at the facility. See Higdon, 197 So. 3d at 1022 (overruling Ex parte J.A.P., 853 So. 2d 280 (Ala. 2002), in which the Court had refused to extend Powe's implied-threat analysis to a case involving a 14-year-old perpetrator, after concluding that the proper inquiry in determining whether an implied threat exists is not the defendant's age but, rather, is 'the perspective of the child victim'). Thus, Powe is applicable in any case in which a defendant who sexually assaults a child 'exercise[d] a position of domination and control' over the child, regardless of whether the defendant is the child's parent. Of course, whether a defendant who sexually assaults a child 'exercise[d] a position of domination and control' over the child will depend upon the specific circumstances of each case."

Black v. State, 295 So. 3d 1120, 1130-34 (Ala. Crim. App. 2019). This Court further explained that, in the context of an implied threat of force,

> "it is not the role of this Court to determine, as a matter of fact, whether [the] sexual assaults ... carried an implied threat sufficient to constitute the element of forcible compulsion necessary to sustain [a] conviction[]. Rather, it is the role of this Court to determine whether the State presented sufficient evidence from which the jury could make that determination."

Black, 295 So. 3d at 1134.

Here, the evidence, when viewed in a light most favorable to the State, was sufficient to establish the element of forcible compulsion

necessary to sustain Zink's conviction for first-degree sexual abuse of K.O.

At his trial, the State's evidence established that Zink, who, at the time of the offense in 2017, was 19 years old, roughly 6 feet tall, and weighed approximately 175 pounds (R. 256), and K.O., who, at the time of the offense, was 12 years old, roughly 5 feet tall, and weighed approximately 80 pounds (R. 222), are first cousins. K.O. lived with her mother (R.B.), and Zink lived about five miles away with one of R.B.'s sisters. (R. 136.) R.B. said that Zink was welcome in her home and that, although "he had only been around for a couple years at that time," K.O. knew him and trusted him. (R. 136.)

On the night Zink sexually abused K.O., R.B. left her house to go to work, and she left Zink at her house to babysit K.O. and her sister, C.O. K.O. said that, after she finished doing her chores, she, Zink, and C.O. watched television. (R. 195.) K.O. said that she and C.O. were on the love seat in the living room and that Zink was on the couch. (R. 200.) K.O. said that, after C.O. fell asleep next to her on the love seat, Zink came over to her and started "touching [her] legs," and she "asked him repeatedly, like, what he was doing, and he never said anything." (R.

202.) K.O. testified that she was confused and did not understand why Zink was touching her. (R. 202.) K.O. said that Zink touched her for about five minutes and then he stopped. K.O. then fell asleep on the love seat with C.O.

Later, K.O. was awakened by Zink touching her again, but he had moved her to the couch with him. (R. 206.) K.O. said that Zink had placed her on the couch in front of him and they were "head to head." (R. 205.) According to K.O., Zink touched the inside of her thighs and "then up" to her "private part" on the outside of her clothes. (R. 207-08.) K.O. said that she again asked Zink what he was doing and she "got no response." (R. 207.) K.O. said that Zink also tried to kiss her, but she "rolled away" from him. (R. 210-11.) K.O. said that Zink did not threaten her and she did not leave the room. K.O. also admitted that she did not tell anyone, but she said that she did not "really think anybody would believe [her] because [she] was 12 and he was 19, and obviously, they're going to side with the adult, not the child." (R. 209.) K.O. said that, at 12 years old, she had had no experience with a boy and never had to "slap a boy's hand away or anything" -- Zink "was the first one." (R. 222.) K.O. also said that she did not think she could "struggle" with Zink at that

time and she agreed that struggling "did not seem like a realistic option." (R. 223.)

At around 10:00 p.m. that night, R.B. returned home from work. At that time, K.O. was asleep on the couch and C.O. was asleep on the love seat. (R. 145-46.) R.B. and Zink then went to a Subway restaurant to get food and they returned to the house. (R. 145.) Zink stayed at R.B.'s house that night. The following morning, R.B. took K.O. and C.O. to school and she took Zink back to her sister's house.

A few days later, R.B. went to use K.O.'s cellphone and found the following messages from Zink to K.O. on Facebook Messenger:

> "9:21 AM
>
> "Zink: Heyy.
>
> "K.O.: Hi.
>
> "Zink: Lol cutie
>
> "Zink: About the other night, i just have one question
>
> "K.O.: I'm not cute lol
>
> "....
>
> "Zink: Did u like it, or did it make u uncomfortable, if u liked it just say yes.
>
> "K.O.: Yeah I liked it

"Zink: Lol that's all i needed ta kno

"Zink: 😉

"K.O.: Lol ok

"Zink: Ugh i wanted u so bad after that lol

"K.O.: Really? Lol

"Zink: Lol yea, but didn't kno how u would react to be going all the way under your shorts

"9:52 AM

"K.O.: Wow lol"

(C. 78-80.) R.B. then contacted law enforcement,

After law enforcement made contact with R.B., R.B. took K.O. to the Child Advocacy Center where she was interviewed by Stephanie McGrew. (R. 143-44.) According to McGrew, K.O. told her that Zink had made sexual contact with her. (R. 164.)

Buffie Morgan, who at the time of the offense worked for Morgan County Department of Human Resources, also investigated the allegations that Zink had sexually abused K.O. During her investigation, Morgan spoke with Zink, who told her the following:

"[H]e told me that he had arrived at the house prior to the family, including [K.O.], and that he had used several illicit

> substances, and that he explained that he was more disgusted with himself, this was his words, he was more disgusted with himself than anyone in the entire situation. I asked him why he felt like he was disgusted with himself, and he said that he knew that it was wrong, that he had laid down with -- or was sitting with [K.O.] and was rubbing her and he said legs, rubbing her legs, and that he became aroused and told her to move at that point because he knew it was wrong."

(R. 174.)

Zink also spoke with Sgt. Charles Radke with the Morgan County Sheriff's Office. After waiving his rights, Zink told Sgt. Radke the following:

> "There was one day in August of 2017, I don't remember what day it was, I was at [R.B.'s] house. She left to go with some dude. I was left with her kids. I was sitting on the couch watching TV. [K.O.] was in the love seat. At some point, she moved to the couch where I was sitting. When she sat down, she put her feet in my lap. I did not think anything of it. She started rubbing my crouch [sic] with the heel of her foot. I started rubbing on her leg. I did not rub any higher than her knee. I was under the influence of illegal narcotics at the time. I have been clean since September of 2017. After about 10 minutes rubbing her leg, I realized that I should not be rubbing her leg, even though I was getting aroused. I know it was wrong, she was family, and I told her to go back to the love seat. And she got up and moved. [K.O.] fell asleep in the love seat. I went outside and smoked around 6:00 a.m. and [R.B.] took me home. At no time did I touch any of her private parts. I did not kiss her. These allegations are false."

(R. 255.)

Based on this evidence, when viewed in a light most favorable to the State, the jury could reasonably conclude based on the totality of the circumstances -- including the difference in their heights and weights; their respective ages; the position of authority that Zink had over K.O. as an adult family member who was babysitting her and her sister; Zink's physically moving K.O. to the couch to lay with him; K.O.'s naiveté; and K.O.'s questioning Zink about what he was doing, his not responding to her questioning, and his continuing to touch her for sexual gratification -- that the State had proved beyond a reasonable doubt the forcible-compulsion element of first-degree sexual abuse. Thus, Zink is due no relief on this claim.

II.

We must note, however, that Zink's five-year straight sentence does not comply with § 13A-5-6(a)(3), Ala. Code 1975. Although neither party raises this issue on appeal, "it is well settled that '[m]atters concerning unauthorized sentences are jurisdictional,' Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994), and that this Court may take notice of an illegal sentence at any time, see, e.g., Pender v. State, 740 So. 2d 482

(Ala. Crim. App. 1999)." Jackson v. State, 317 So. 3d 1018, 1024 (Ala. Crim. App. 2020).

Zink was convicted of first-degree sexual abuse, which is a Class C felony. See § 13A-6-66, Ala. Code 1975. At the time Zink committed this offense, § 13A-5-6(a)(3), Ala. Code 1975, limited a sentence of imprisonment "[f]or a Class C felony" to "not more than 10 years or less than 1 year and 1 day" and required the sentence "be in accordance with subsection (b) of Section 15-18-8 [, Ala. Code 1975,] unless sentencing is pursuant to Section 13A-5-9 [, Ala. Code 1975]."[2] Zink was not sentenced as a habitual felony offender. (C. 67-69.) Thus, Zink's sentence "must fall within the range set out in § 13A-5-6(a)(3), Ala. Code 1975, and must comply with subsection (b) of the Split Sentence Act." Jackson, 317 So. 3d at 1024.

[2]Notably, § 13A-5-6(a)(3) has been amended twice since Zink committed this offense in 2017. However, the version in effect at the time of Zink's offense applies. See, e.g., Zimmerman v. State, 838 So. 2d 404, 405 n.1 (Ala. Crim. App. 2001) (quoting 24 C.J.S. Criminal Law § 1462 (1989)) ("'As a general rule, a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes.'").

Section 15-18-8(b) of the Split Sentence Act provides in relevant part:

> "Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C … felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense … for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best. …"

"In short, in 2017, §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, d[id] not allow a trial court to impose a 'straight' sentence for a Class C felony when the Habitual Felony Offender Act does not apply." Jackson, 317 So. 3d at 1025. Because Zink was not a habitual felony offender, the trial court could not impose a straight sentence. Rather, once the trial court imposed a sentence within the statutory range for a Class C felony, the trial court should have either sentenced Zink to "probation, drug court, or a pretrial diversion program" or "split" Zink's sentence for him to serve a confinement period of no more than two years, suspended the remainder, and imposed a term of probation of no more than three years.

Accordingly, we must remand this case to the trial court for that court to order the execution of Zink's sentence in a manner that complies with §§ 13A-5-6(a)(3) and 15-18-8(b). Zink's five-year sentence, however, is valid and cannot be changed. Jackson, 317 So. 3d at 1025 (citing Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003) (recognizing that, when the base sentence imposed by the trial court is valid, the trial court cannot alter it on remand)).

Conclusion

For these reasons, Zink's conviction for first-degree sexual abuse is affirmed. However, this case is remanded to the trial court for that court to resentence Zink in accordance with this opinion. On remand, the trial court shall take all necessary action to ensure that return be made to this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS.

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