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2014 IL App (3d) 140058-U

Order filed June 12, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

<i>In re</i> B.S.,)	Appeal from the Circuit Court
)	of the 9th Judicial Circuit,
a Minor)	McDonough County, Illinois,
)	
(The People of the State of Illinois,)	
)	
Plaintiff-Appellee,)	Appeal No. 3-14-0058
)	Circuit No. 09-JD-7
v.)	
)	
B.S.,)	Honorable
)	Patricia A. Walton,
Defendant-Appellant).)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The State failed to prove an underlying offense to the juvenile's delinquency adjudication of aggravated criminal sexual abuse because there was no evidence presented of an element of the offense, *i.e.*, that the accused was a "family member" of the victim. The juvenile's defense counsel created a *per se* conflict of interest by functioning as both the GAL and defendant's counsel.
- ¶ 2 B.S. was adjudicated a delinquent minor after he was found guilty of committing the

offense of aggravated criminal sexual abuse. 720 ILCS 5/12-16(b) (West 2008).¹ B.S. appeals the adjudication of delinquency, arguing: (1) the State failed to prove him guilty beyond a reasonable doubt of aggravated criminal sexual abuse because there was insufficient evidence to establish an element of that offense; (2) a *per se* conflict of interest existed when his court-appointed counsel functioned as his defense counsel and the guardian *ad litem* (GAL); and (3) his defense counsel provided ineffective assistance of counsel. We reverse and remand with directions.

¶ 3

FACTS

¶ 4

After an overnight visit at his grandmother's home, nine-year-old J.D. stated that his 16-year-old uncle, B.S., woke J.D. around 1 a.m., pulled down both of their pants, and rubbed his penis against J.D.'s back. Due to these allegations, the State pursued a delinquency action based on allegations of aggravated criminal sexual abuse and a dependency action because B.S.'s mother was unable provide the 24-hour supervision that B.S. required, through no fault of her own.

¶ 5

The delinquency petition, filed on February 5, 2009, alleged that B.S. was delinquent in violation of section 12-16(b) of the Criminal Code of 1961 in that:

"on or about the 11th day of January, 2009, [B.S.], who [was] 16 years old, committed an act of sexual conduct with a younger male relative, his 9 year old nephew, in that [B.S.] pulled down his pants and pulled down the pants of his nephew and rubbed his penis on the lower back of his nephew, for the purpose of his own sexual gratification, and did then and there, thereby, commit the offense of aggravated criminal sexual abuse."

¹ Now codified at 720 ILCS 5/11-1.60(b) (West 2012).

¶ 6 On March 12, 2009, the trial court entered an order entitled both "detention order" and "temporary custody order." The order listed both the delinquency and dependency case numbers and appointed attorney Doug Miller as B.S.'s GAL and attorney. The order indicated that probable cause existed that B.S. was "dependant as well as delinquent" and was to be removed from his home and detained at the detention home because his mother was unable to provide the 24-hour supervision that he needed.

¶ 7 On April 9, 2009, the parties appeared for an adjudicatory hearing. Miller conceded that it was a matter of urgent and immediate necessity that B.S. be detained. Miller waived the time limit to proceed on the adjudication hearing so that B.S. could remain at the detention facility until an opening at a residential treatment facility became available. An order listing both case numbers was entered indicating that the parties agreed to waive the time limits for the adjudicatory hearing and that B.S. should be transported to a residential treatment facility immediately upon a placement opening. On April 13, 2009, the court entered an order for B.S. to be transferred out of the detention facility, where he had served 43 days.

¶ 8 On May 7, 2009, B.S. was adjudicated dependant. The court asked Miller if he would like to address anything in the juvenile delinquency case, to which he indicated, "Not at this point." On May 21, 2009, a dispositional hearing took place, and the court found that it was in the best interest of B.S. to appoint Department of Child and Family Services as his guardian and set a permanency goal of independence.

¶ 9 On November 12, 2009, a permanency review hearing took place in the dependency case during which the court identified both case numbers. The State informed the court that B.S. had been running away from the residential facility. Miller informed the court that when B.S. ran away, the facility administrators could not get police involved because B.S. was not a registered

sex offender. Miller suggested that the court order B.S. not to run away and to comply with the facility program so that if he did run away again the court could enter a contempt of court warrant and have him arrested, "on either case, but at least on one of the cases." A written order listing both case numbers was entered ordering B.S. not to leave the residential facility without permission and to obey all rules, with the order to be enforced by warrant of arrest for contempt of court. Thereafter, multiple permanency review hearings took place.

¶ 10 On November 6, 2013, a hearing took place in the delinquency case on the State's motion *in limine* to introduce nontestimonial statements of the victim and his grandmother. Miller had no objection to the State's request to introduce the victim's statements. The court granted the State's motion *in limine*.

¶ 11 On November 15, 2013, the adjudicatory hearing took place in the delinquency case. The State presented evidence that B.S. had engaged in an act of sexual conduct with J.D. Miller cross-examined witnesses as to whether B.S. and the victim had separate residences. In closing, Miller argued that the State failed to prove aggravated criminal sexual abuse in that it had not shown that B.S. was a family member of J.D., under the 2009 definition of family member. The court found a family member relationship existed between B.S. and J.D. and that B.S. had committed the offense of aggravated criminal sexual abuse. The court adjudicated B.S. delinquent.

¶ 12 On December 19, 2013, the court denied B.S.'s motion to reconsider. The court committed B.S. to the Department of Juvenile Justice for an indeterminate period not to exceed the period for which an adult could be committed for the same act or until B.S.'s twenty-first birthday, whichever came first. B.S. was remanded to the detention home until his twenty-first birthday on January 2, 2014. B.S. filed a motion to reconsider sentence, which the juvenile court

denied. B.S. appealed.

¶ 13

ANALYSIS

¶ 14

On appeal, B.S. argues: (1) the State failed to prove him guilty beyond a reasonable doubt of aggravated criminal sexual abuse because there was insufficient evidence that he was a "family member" of the victim; (2) his court-appointed counsel's representation as both his defense counsel and GAL was a *per se* conflict of interest requiring a new adjudicatory hearing; and (3) his attorney provided ineffective assistance of counsel by failing to object to the State's motion to admit the victim's out-of-court statements.

¶ 15

I. Sufficiency of the Evidence

¶ 16

The State concedes that there was insufficient evidence to prove B.S. was a "family member" of J.D. in order to prove him guilty of aggravated criminal sexual abuse. Aggravated criminal sexual abuse occurs where the accused commits an act of sexual conduct with a victim who was under 18 years of age and the accused was a family member. 720 ILCS 5/12-16(b) (West 2008). At the time of the charged conduct, "family member" was statutorily described as "a parent, grandparent, or child, whether by whole blood, half-blood or adoption and includes a step-grandparent, step-parent or step-child" or "where the victim is a child under 18 years of age, an accused who has resided in the household with such child continuously for at least one year." See 720 ILCS 5/12-12(c) (West 2008).² Here, B.S. was J.D.'s uncle. At the time of the charged conduct, "uncle" was not included in the statutory definition of "family member," and B.S. and the victim did not reside in the same household. Therefore, we accept the State's concession that there was insufficient evidence that B.S. was a family member of the victim for aggravated criminal sexual abuse.

² Now codified at 720 ILCS 5/11-0.1(b) (West 2012).

¶ 17 As a result of the State's failure to prove B.S. committed the offense of aggravated criminal sexual abuse, B.S. requests that this court reverse the adjudication of delinquency outright. The State, on the other hand, requests that we remand this matter for an entry of judgment on the uncharged lesser included offense of criminal sexual abuse.

¶ 18 Generally, a criminal defendant may not be convicted of an uncharged offense because he has a right to due process, which encompasses the right to be notified of the charges brought against him. *People v. Robinson*, 232 Ill. 2d 98 (2008). However, when evidence fails to prove an element of the convicted offense beyond a reasonable doubt, a reviewing court may enter judgment on a lesser included offense, even if the lesser included offense was not charged. *People v. Kennebrew*, 2013 IL 113998; Ill. S. Ct. R. 615(b)(3) (the reviewing court may "reduce the degree of the offense of which the appellant was convicted").

¶ 19 In determining whether a judgment may properly be entered on an uncharged lesser included offense, we use the charging instrument approach. *Kennebrew*, 2013 IL 113998. Under the charging instrument approach, an offense may be deemed a lesser included offense even though every element of the lesser offense is not explicitly contained in the indictment so long as the missing element can be reasonably inferred from the allegation in the indictment. *Id.* In implementing the charging instrument approach, an offense is a lesser included offense of the charged offense if: (1) the factual allegations in the indictment provide a broad foundation or main outline describing the lesser offense; and (2) the evidence was sufficient to uphold a conviction on the lesser offense. *Id.*

¶ 20 Criminal sexual abuse occurs where the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who is at least 9 years old but less

than 17 years old when the act was committed. 720 ILCS 5/12-15(b) (West 2008).³ Here, the allegations described the elements of criminal sexual abuse by indicating: (1) B.S. was under 17 year of age; (2) B.S. committed an act of sexual conduct against the victim; and (3) the victim was between the ages of 9 and 17. The evidence of B.S. and the victim's ages at the time of the offense and B.S.'s act of sexual conduct against the victim was sufficient to uphold a conviction of criminal sexual abuse under section 12-15(b). Therefore, the offense of criminal sexual abuse (720 ILCS 5/12-15(b) (West 2008)) is a lesser included offense of aggravated criminal sexual abuse as it was alleged in this case, and a judgment on the lesser included offense can be entered.

¶ 21 Because B.S. has reached his twenty-first birthday, there is no need to remand this cause for resentencing because any disposition would be moot. See *In re Jaime P.*, 223 Ill. 2d 526 (2006) (holding that the intent of the Juvenile Court Act of 1987 was to set the age of 21 as the maximum age for all juvenile dispositions). Nonetheless, as we discuss below, this case must be remanded for a new adjudicatory hearing on the lesser included offense of criminal sexual abuse. See *In re B.S.*, 73 Ill. App. 3d 507 (1979) (where a juvenile has been denied due process of law in his adjudication as a delinquent, an appeal will not be considered moot).

¶ 22 II. *Per Se* Conflict

¶ 23 B.S. contends that a *per se* conflict of interest existed where his defense attorney was appointed to also act as the GAL. Due to the *per se* conflict, defendant requests that this case be remanded for a new adjudicatory hearing.

¶ 24 Where a *per se* conflict is established, automatic reversal is required, and defendant need not make a showing of an actual conflict. *People v. Taylor*, 237 Ill. 2d 356 (2010). A *per se* conflict of interest exists when a minor's counsel in a delinquency proceeding simultaneously

³ Now codified at 720 ILCS 5/11-1.50(b) (West 2012).

functions as both defense counsel and GAL. *People v. Austin M.*, 2012 IL 111194. This is true because a defense attorney's loyalty rests solely with the client, whereas a GAL's duty is to the court and to seeing the minor's best interests are sufficiently represented. *Id.*

¶ 25 Here, the record indicates that Miller acted as both defense counsel and the GAL in the juvenile delinquency proceedings. The court specifically appointed Miller to serve in both capacities. Miller functioned in both roles contemporaneously. Therefore, a *per se* conflict of interest existed, and we must reverse and remand for a new adjudicatory hearing in the delinquency proceedings.

¶ 26 The State argues that Miller was not acting under a *per se* conflict because counsel did not act as GAL during the adjudicatory hearing in the delinquency case but only did so in the dependency proceedings. Implicit in the State's argument is a requirement that the evidence show an actual conflict of interest to support a finding of a *per se* conflict. As noted by our supreme court in *Austin M.*, a *per se* conflict of interest will be found where certain facts about a defense attorney's status engender, by themselves, a disabling conflict. *Id.* The reason for having a *per se* rule prohibiting representation by an attorney with possible conflicting interest is that certain associations may have " 'subliminal effects' " on counsel's performance which are difficult to detect and demonstrate. *Id.* ¶ 81 (quoting *People v. Washington*, 101 Ill. 2d 104, 110 (1984)). Therefore, if a *per se* conflict is established, the defendant need not show that the conflict affected the attorney's actual performance.

¶ 27 Here, the record shows that Miller was appointed as defense counsel and GAL and subsequently acted as both defense counsel and GAL during the hearings leading up to the delinquency adjudicatory hearing. Consequently, a *per se* conflict of interest existed, and this court must reverse B.S.'s delinquency conviction and remand for a new adjudication hearing. As

discussed above, the State failed to prove B.S. committed the offense of aggravated criminal sexual abuse. Therefore, to avoid any double jeopardy concerns, we remand for a new adjudicatory hearing only as to the lesser included offense of criminal sexual abuse. See *People v. McKown*, 236 Ill. 2d 278 (2010). Because we reverse and remand for a new adjudication hearing, there is no need for us to reach B.S.'s remaining issue claiming he received ineffective assistance of counsel.

¶ 28

CONCLUSION

¶ 29

The judgment of the circuit court of McDonough County is reversed, and this case is remanded for a new adjudication hearing as to the offense of criminal sexual abuse.

¶ 30

Reserved and remanded with directions.