

2013 IL App (2d) 110849-U  
No. 2-11-0849  
Order filed January 22, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

|                                       |   |                               |
|---------------------------------------|---|-------------------------------|
| <i>In re</i> D.M.,                    | ) | Appeal from the Circuit Court |
| A Minor                               | ) | of Winnebago County.          |
|                                       | ) |                               |
|                                       | ) | No. 09-JD-105                 |
|                                       | ) |                               |
| (The People of the State of Illinois, | ) | Honorable                     |
| Petitioner-Appellee, v. D.M.,         | ) | K. Patrick Yarbrough,         |
| Respondent-Appellant).                | ) | Judge, Presiding              |

---

PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

¶1 *Held:* The State proved respondent guilty beyond a reasonable doubt of aggravated criminal sexual abuse, specifically that he acted for the purpose of sexual gratification or arousal: because respondent’s conduct was so overtly sexual—simulating intercourse after having asked the victim to make “a porno” with him—the trial court was permitted to infer a sexual purpose instead of a merely bullying one.

¶2 D. M., the respondent to a delinquency petition, appeals his delinquency adjudication on two sex-offense counts. (He does not challenge adjudications on aggravated battery counts.) He asserts that the State did not present evidence adequate to sustain its burden to prove that the conduct at issue was committed “for the purpose of sexual gratification or arousal of the victim or the accused.” 720 ILCS 5/12-12(e) (West 2010). He asserts that, because the conduct at issue was public and

because none of the evidence suggested that he was sexually aroused, it was likely that his purpose was to humiliate the victim, not to gratify sexual urges. We hold that, because D.M.'s interaction with the victim was overtly sexual, the State sustained its burden of proof. We therefore affirm the adjudication.

¶ 3

### I. BACKGROUND

¶ 4 The State filed a supplementary delinquency petition against then 13-year-old D.M. on December 14, 2010. (He had been adjudicated delinquent as a result of two earlier petitions.) As later amended, the supplementary petition had 12 counts.

¶ 5 The petition charged three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(2)(ii) (West 2010)): count I was that “[the] minor who was under 17 years of age [] knowingly committed an act of sexual conduct with KJD (DOB 5-12-97), who was at least 9 years of age but under 17 years of age when the act was committed, in that by the use of force or by the threat of force the minor touched the vagina of KJD for the purposes of the sexual gratification or arousal of the minor or KJD” (720 ILCS 5/12-16(c)(2)(ii) (West 2010)). Counts II and III were in the same format, but instead of “touched the vagina” they were “touched the anus” and “touched the breast.”

¶ 6 Counts IV, V, and VI were attempted aggravated criminal sexual abuse (720 ILCS 5/8-4, 12-16(c)(2)(ii) (West 2010)). Counts IV and VI alleged that D.M. “grabbed at” K.J.D.’s vagina and chest , and count V alleged that D.M. “thrust his pelvis into the buttocks of KJD.”

¶ 7 Counts VII, VIII, and IX were counts of criminal sexual abuse (720 ILCS 5/12-15(b) (West 2010)). These alleged essentially the same facts as the aggravated criminal sexual abuse counts, but omitted the force or threat of force.

¶ 8 Counts X, XI, and XII were aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)). These alleged conduct of an insulting or provoking nature: touching buttocks, grabbing, and shoving.

¶ 9 At the evidentiary hearing, Don West, bus terminal manager for the Rockford public schools, testified that he was in charge of the video recording devices on the district's buses. A video camera was present and recording on the relevant bus trip. West described how the recording system worked and how he produced a copy of the recording.

¶ 10 Patrice Turner, a Rockford police officer, testified that she had gone to West Middle School on business unrelated to this case. While she was there, Shinnika White, the mother of K.J.D., approached her to ask her to talk to K.J.D. Based on what K.J.D. told her, Turner requested a copy of the relevant video recording. Turner described how she preserved the recording. The State offered the recording as substantive evidence, and the court admitted it.

¶ 11 Anthony Sanders, K.J.D.'s stepfather, testified that, on December 1, 2010, he was at home when K.J.D. came home from school. K.J.D. went to her room and slammed the door. He asked her if something was wrong, and she said, "Yes." He asked her whether she wanted to talk to her mother about whatever was upsetting her, and she said that she did.

¶ 12 White testified that, when she came home from work not long after 8 p.m., K.J.D., as was her habit, met White at the door. K.J.D. was crying and said immediately that she needed to tell White something. K.J.D. then said that she had been on the after-school activity bus. Because the bus was crowded, the driver told the students to sit three to a seat. K.J.D. was sitting with another girl in a seat at the back when D.M. approached and asked if he could sit with them. K.J.D. told him that he could not—he was too big. He responded with the suggestion that she sit on his lap. She told

him, “No,” but he tried to sit anyway. She got up to move, and he turned and “asked her if she wanted to make a porno with him.” She again told him, “No.”

“She said when she was moving to the front of the bus, that’s when the incident occurred when the other guys grabbed her, \*\*\* w[ere] holding her down while the other guys w[ere] grabbing on her chest, in between her legs, and on her butt.

She said they stopped for a minute, and then they started doing it again. Then that’s when [D.M.] came from behind her and started humping her on her butt.”

After that, the boys left her alone. The bus had to turn around to go back to the school because the driver got hit by a pen. As K.J.D. was telling White this, she was crying and upset. White called the police immediately, but was told to wait until the next day. White went to school with K.J.D. the next day, noticed Turner, and spoke to her about the incident.

¶ 13 K.J.D. testified that, on December 1, 2010, she stayed after school for tutoring. She got on the “activity bus” to go home. It was crowded, as was typical, and she knew only a few of the other students. The State started playing the recording; she recognized herself and D.M. in the recording. She said that she got on the bus and took a seat near her brother and a friend. D.M. walked to the back and asked if he could sit with her. She said that he would not fit. He responded that she would have to sit on his lap. She told him that such an arrangement was not acceptable, but he tried to sit with the group anyway. She got up to leave; he commented that he “wanted to make a porno with [her] in the back of the bus.”

¶ 14 The driver stopped letting students off the bus and started to return to the school because someone threw a pen at him. Some of the other boys started forcing her down. D.M. started “holding [her] down and humping.” He also touched her breasts. K.J.D.’s testimony was, in large

part, a narration of the recording. On cross-examination, K.J.D. agreed that she had not felt D.M.'s penis when his pelvis was pressed against her back.

¶ 15 The recording is of low quality, so that facial expressions and similar details mostly are impossible to make out. Often, other riders in the foreground obscure the relevant activity. The recording does show the general location of those present. However, without a witness to identify the participants, a viewer cannot easily tell individuals apart. Nevertheless, the person whose actions most closely match those ascribed to D.M. is easier to follow than most, as he is taller than anyone visible in most of the recording.

¶ 16 The State rested after K.J.D.'s testimony. D.M. moved for directed findings on grounds that included, other than for the aggravated battery counts, the asserted insufficient proof that the conduct was for the purposes of the sexual gratification or arousal of D.M. or K.J.D. His arguments to the court were similar to those he now makes on appeal. The court denied the motion, and D.M. rested.

¶ 17 The court stated that it could see that K.J.D. had moved from the back of the bus to the front and then changed seats again. D.M. then came from the back where she had been to the front near to where she had moved. The court could see that another boy was holding K.J.D. while D.M. placed himself behind her. It accepted K.J.D.'s testimony that that was when D.M. touched her breasts and humped her, his pelvis against her buttocks. Further, it saw that D.M., while he was seated, had tried to pull K.J.D. onto himself by grabbing her by the arm.

¶ 18 In concluding that D.M. had acted for purposes of sexual gratification, it considered that D.M. had told K.J.D. that he wanted to make a porno with her. It also noted that "it appeared by viewing this videotape that D.M. was involved in simulating a sex act." Further:

“[I]t’s also described that when this was taking place that the minor touched the breasts and the butt of the victim while he was thrusting his pelvis against her buttocks on the bus. Couple this action with the words of the minor as well as his other actions in pursuing this victim throughout the bus from the back of the bus to the front bus [*sic*] to one side of the bus to the other side of the bus, it appears from the evidence that has been presented to the Court that the State has proven its case beyond a reasonable doubt in regards to aggravated criminal sexual abuse, attempted aggravated criminal sexual abuse \*\*\* in that the minor grabbed the chest of the victim, criminal sexual abuse in that the minor touched the breast of the victim, [and three counts of aggravated battery].”

The court entered an order of adjudication, entering judgment on one aggravated criminal sexual abuse count (count III, touched the victim’s breast) and one aggravated battery count (count XI, grabbed the victim). The court committed D.M. to an indeterminate period of custody with 180-day review.

¶ 19 D.M. filed a timely motion to reconsider the disposition, arguing, among other things, that the evidence that D.M. acted for sexual gratification was insufficient. The State also sought reconsideration of the court’s ruling that certain counts had merged under the one-act, one-crime rule.

¶ 20 The court denied D.M.’s motion and granted the State’s motion in part. It entered a “corrected” adjudication order, further entering judgment on count V (attempted aggravated criminal sexual abuse/thrust pelvis into buttocks) and count X (aggravated battery/touched buttocks) as separate acts. It then reimposed the same sentence. D.M. filed a timely notice of appeal.

¶ 21

## II. ANALYSIS

¶ 22 On appeal, D.M. again asserts that the State failed to present sufficient evidence that he acted for the purpose of sexual gratification or arousal. He acknowledges that such purpose is generally proved by implication. However, he notes that this court has held that “it is not justified to impute the same intent into a [13-year-old] child’s action that one could reasonably impute into the actions of an adult.” *In re A.J.H.*, 210 Ill. App. 3d 65, 72 (1991).

¶ 23 He argues that a child could have nonsexual reasons for behavior that a court would infer to be sexual in an adult. Further, he suggests that “the video speaks volumes about D.M.’s non-sexual intent: D.M. set out to bully or humiliate K.D., but not to satiate any sexual desires.” He points out that “D.M. is seen in the video punching, pushing, and yelling at other students on the crowded school bus.” Furthermore, “the State here did not present any evidence that D.M. removed his clothing, was breathing heavily, placed K.D.’s hand on his penis, or had an erection or any other observable signs of arousal.”

¶ 24 He further points to the circumstances of the incident—the crowded school bus—as evidence that the intent was to annoy and humiliate. He asserts in reply that the comment about making a “porno” was, again, “trying to embarrass or humiliate K.D.” He cites *In re Matthew K.*, 355 Ill. App. 3d 652, 655-56 (2005), in particular, but also *In re Kyle O.*, 703 N.W. 2d 909 (Neb. App. 2005), and *In re Jerry M.*, 59 Cal. App. 4th 289, 69 Cal. Rptr. 2d 148 (1997), as cases that support his claim that the court should be slow to infer sexual intent on facts such as these.

¶ 25 The evidence in this case was sufficient to allow the court to infer that D.M.’s actions were for the purpose of sexual gratification or arousal. The actions were overtly sexual, and any evidence for a nonsexual motivation lacked the strength that would require this court to conclude that the trial court’s decision to make the natural inference was unreasonable.

¶ 26 To prove the relevant forms of the aggravated criminal sexual abuse and criminal sexual abuse, the State must prove that the person accused engaged in “sexual conduct.” 720 ILCS 5/12-15(b), 12-16(c)(2)(ii) (West 2010). “ ‘Sexual conduct’ means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused \*\*\* for the purpose of sexual gratification or arousal of the victim or the accused.” 720 ILCS 5/12-12(e) (West 2010). “Sexual gratification” does not have a statutory definition. Concerning another use of the phrase as an element of a criminal offense, it has been held that the trier of fact should determine the meaning. *People v. Alexander*, 369 Ill. App. 3d 955, 957 (2007).

¶ 27 “When the accused is an adult, a fact finder can infer that an accused intended sexual gratification. However, ‘it is not justified to impute the same intent into a child’s action that one could reasonably impute into the actions of an adult.’ [Citation.] The standard of review in a challenge to the sufficiency of the evidence is whether, when considering all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. [Citation.] We will not substitute our judgment for the judgment of the trier of fact unless the judgment was inherently implausible or unreasonable.” *Matthew K.*, 355 Ill. App. 3d at 655.

¶ 28 “ ‘Intent to arouse or satisfy sexual desires may be established by circumstantial evidence, which the trier of fact may consider in inferring [a] defendant’s intent from his conduct.’ [Citation.] ‘[T]he issue of intent of sexual gratification in minors must be determined on a case-by-case basis. There can be no bright-line test.’ [Citation.]” *In re D.H.*, 381 Ill. App. 3d 737, 741 (2008).

“The fact finder must consider all of the evidence, including the offender’s age and maturity, before deciding whether intent can be inferred.” *Matthew K.*, 355 Ill. App. 3d at 657.

¶ 29 Here, D.M.’s behavior was overtly sexual: he suggested to K.J.D. that they should make a porno and, according to the court’s unchallenged finding, engaged in simulated sexual intercourse. D.M. suggests that his immaturity, the lack of evidence of arousal, and the school bus context negated the overtly sexual nature of his behavior. We disagree: the court’s conclusion that this was not so was not inherently implausible or unreasonable.

¶ 30 D.M. first argues that positive evidence existed that he was not sexually aroused. He suggests that K.J.D. would have *necessarily* noticed had he been breathing heavily or had an erection. We agree that K.J.D. had some *opportunity* to notice. However, the recording, for all its flaws, clearly shows that the most relevant events occurred in a confused mass scuffle. D.M. was far from K.J.D.’s only problem. One would not have expected one person’s heavy breathing to be notable. Further, given how much was happening at once, that K.J.D. did not detect that D.M. had an erection is weak evidence that he did not. On this point, that K.J.D. was also a child is relevant. Although it was not suggested that she was completely sexually naive, we cannot assume that she would have had the same awareness of sexual arousal as an adult. In any event, we also note that “the statute [defining sexual conduct] does not require a defendant to actually achieve sexual gratification or arousal in order to satisfy the definition of sexual conduct.” *People v. Carney*, 229 Ill. App. 3d 690, 696-97 (1992).

¶ 31 Beyond that, it was completely reasonable for the court to reject D.M.’s claim that what occurred was nonsexual bullying. The recording shows D.M. acting boisterously and aggressively as he got on the bus. D.M. says that this was a display of “immaturity.” That is so, but only in the

sense that most 13-year-olds are immature. The aggression and boisterousness were nonsexual, as best one can tell from the recording. The same qualities may have been present in the contact with K.J.D., but that does not explain the sexual element of D.M.'s actions.

¶ 32 D.M. implies that the motive for the sex-related talk and behavior was K.J.D.'s humiliation, not D.M.'s sexual gratification. Obviously, those motives are not incompatible; in some individuals they are strongly linked. It is true that a 13-year-old could engage in what amounted to the play acting of sexually themed behavior—as could an adult. That does not mean that a trial court cannot make proper inferences to distinguish play acting from sexually motivated behavior. On this point, the cases D.M. cites as supporting his position in fact serve to emphasize what is different here.

¶ 33 *Matthew K.* is the case that most nearly supports D.M.'s position:

“[T]he State presented evidence that, at the time of the alleged offenses, Matthew was 12 and Allena was 8 years old. Allena testified that, on one occasion, she and Matthew were in Matthew's bedroom playing a game they called 'survival.' \*\*\* While Allena and Matthew were alone in Matthew's room, Allena sat on Matthew's lap and Matthew told Allena that they would 'do massages.' With Allena's pants down, Matthew touched Allena's 'privates.' Matthew slid his finger in 'a little' but 'not too much.' When Allena told Matthew that it tickled, Matthew told her to cover her mouth. Then Matthew gave Allena a 'tongue massage' by putting his mouth to her mouth and wiggling his tongue. Matthew also lifted Allena's shirt and gave Allena a belly massage. Allena did not notice anything unusual about Matthew, and Matthew did not make any special sounds, threaten Allena, or remove his own clothing. Matthew told Allena to keep the incident a secret.” *Matthew K.*, 355 Ill. App. 3d at 653-54.

“Allena’s mother testified that Allena told her that after locking the door to his bedroom, Matthew massaged Allena’s ‘pee-pee’ with his tongue and asked Allena to ‘suck his wiener.’” *Matthew K.*, 355 Ill. App. 3d at 654. Matthew told a psychiatrist that he had engaged in consensual petting at summer camp, but had been “very uncomfortable” with the situation. *Matthew K.*, 355 Ill. App. 3d at 654. He also told the psychiatrist that his motivation had been “that he wanted to see what it felt like.” *Matthew K.*, 355 Ill. App. 3d at 654. The psychiatrist emphasized Matthew’s extreme social immaturity. *Matthew K.*, 355 Ill. App. 3d at 654. This court held that, “[a]lthough the trier of fact was free to ignore [the psychiatrist’s] testimony,” the State presented no evidence that contradicted it, and, given that evidence and the lack of any positive evidence from the State, the trial court’s ruling that the State had proven the purpose element was irrational. *Matthew K.*, 355 Ill. App. 3d at 655-56.

¶ 34 In *Matthew K.*, the minor presented positive evidence suggesting that, unlike more socially mature 12-year-olds, he had not fully come to an awareness of what sexual gratification was, and, in a way that would be more typical of a younger child, was acting out curiosity. Here, nothing suggests that D.M. was less mature than a typical 13-year-old. Thus, the trial court was justified in drawing inferences of age-typical motivations in a way that the court in *Matthew K.* was not.

¶ 35 In *Kyle O.*, a witness saw the 14-year-old minor pull down the pants of a 5-year-old boy, grab his penis, and show other child how small the penis was. *Kyle O.*, 703 N.W.2d at 911. The relevant statute contained a definition of “sexual contact” stating that “ ‘[s]exual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.’ ” *Kyle O.*, 703 N.W. 2d at 913-14 (quoting Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2004)). The court concluded that, because the conduct could reasonably be construed

as being for the purpose of humiliation or abuse, it could not reasonably be construed as being for the purpose of sexual arousal or gratification. *Kyle O.*, 703 N.W. 2d at 918.

¶ 36 In *Kyle O.*, although the conduct involved the victim’s penis, the conduct lacked a clear sexual charge. It likely was sexual primarily in the sense that, for instance, the unwelcome disclosure that an adult has no sexual experience might be called a “sexual humiliation”; the conduct referred to sex but did not have a directly sexual purpose.

¶ 37 In *Jerry M.*, a California appellate court concluded that the State had failed to meet its burden of proving a specific intent of arousing the sexual desires of either the perpetrator or the victim. The 11-year-old minor had engaged in several acts of grabbing or touching the breasts of similar-aged girls. The court concluded that, given the minor’s prepubescence and the brief and public nature of the touching, the “intent [was] to annoy and obtain attention [rather] than [to obtain] sexual arousal.” *Jerry M.*, 59 Cal. App. 4th at 300, 69 Cal. Rptr. 2d at 154.

¶ 38 D.M.’s behavior in this case was more overtly sexual than the behavior in the marginal cases. Briefly touching a breast is not comparable to talking about making “a porno” and simulating intercourse. There may be instances in which what is apparently overtly sexual is not what it appears. However, where no evidence compels a finding of another purpose, it will be an unusual case in which the fact finder is found to be unreasonable in concluding that such behavior is for the purpose of sexual arousal or gratification. This is not that unusual case.

¶ 39

### III. CONCLUSION

¶ 39 For the reasons stated, we affirm D.M.’s adjudications on the aggravated criminal sexual abuse count and the attempted aggravated criminal sexual abuse count.

¶ 40 Affirmed.