2016 IL App (4th) 150874-U

NO. 4-15-0874

FILED
April 25, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: CHRISTOPHER M., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Woodford County
v.	)	No. 14JD16
CHRISTOPHER M.,	)	
Respondent-Appellant.	)	Honorable
	)	Charles M. Feeney III,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: This court does not find (1) the State's evidence was insufficient for the circuit court to find respondent guilty beyond a reasonable doubt, (2) the court shifted the burden of proof or showed bias against respondent, (3) the criminal sexual abuse statute unconstitutional, and (4) a *per se* conflict of interest.

¶ 2 In March 2014, the State filed a petition for an adjudication of wardship, alleging respondent, Christopher M. (born in 2001), was a delinquent minor because he committed one count of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(1) (West 2012)), one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2012)), and two counts of criminal sexual abuse (720 ILCS 5/11-1.50(b) (West 2012)). After an adjudicatory hearing that ended in April 2015, the Woodford County circuit court found respondent guilty of the offenses charged in the petition and adjudicated him a delinquent minor. At the September 2015 dispositional hearing, the court made respondent a ward of the court and sentenced him to 60 days of home

confinement and probation until his twenty-first birthday for aggravated criminal sexual assault and 24 months' probation for one count of criminal sexual abuse, to run concurrently with his probation on the other count. Respondent filed a motion for a judgment of acquittal or, in the alternative, a motion for a new hearing. After an October 2015 hearing, the court denied respondent's posttrial motion.

¶ 3 Respondent appeals, asserting (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt, (2) he was denied a fair adjudicatory hearing because the trial judge impermissibly shifted the burden of proof and exhibited bias, (3) the criminal sexual abuse statute was unconstitutional because it violated respondent's rights to due process and equal protection of the laws, and (4) a *per se* conflict of interest existed because respondent's counsel was also his guardian *ad litem*. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The March 2014 wardship petition alleged respondent committed the offenses of aggravated criminal sexual assault, criminal sexual assault, and criminal sexual abuse against N.M. and criminal sexual abuse against A.M. Both N.M. and A.M. are respondent's cousins, and the alleged incidents both occurred at their grandmother's house. The State later filed an amended petition to correct respondent's mother's name on the original petition. At respondent's first appearance, the following dialogue took place between the circuit court and respondent's counsel:

> "THE COURT: Okay. Should I appoint a Guardian ad Litem as well, or are you going to act as both the Guardian ad Litem and the attorney, Ms. Wong?

MS. WONG: I think at this point I can act as both. If I do review discovery and discover that that [*sic*] may be difficult, I will advise the court.

THE COURT: Okay. And at that point I will appoint a [guardian *ad litem*].

MS. WONG: Yes."

At the first three pretrial hearings, the court referred to respondent's counsel only as his attorney. At the last four pretrial hearings, the court referred to respondent's counsel as both his attorney and his guardian *ad litem*.

¶ 6 In May 2014, the State filed a motion under section 115-10(a)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(a)(2) (West 2012)) to allow the hearsay statements of N.M. made to Tara Crady at the Woodford County Children's Advocacy Center. In October 2014, the circuit court held an evidentiary hearing on the State's section 115-10 motion, at which Crady testified. The State also presented a video of Crady's November 26, 2013, interview of N.M. and a transcript of the interview. Respondent's counsel argued the hearsay statements should not be admitted because they were unreliable. On November 19, 2014, the court entered an order granting the State's motion.

¶ 7 On January 30, 2015, the circuit court commenced the adjudicatory hearing in this case, at which respondent's counsel was identified as both his attorney and guardian *ad litem*. Before the hearing began, the State made a motion to exclude witnesses. However, the prosecutor noted the victims wanted to have their respective counselors present during their testimony. A concern was raised about N.M.'s counselor, Lucinda McArthur, becoming a witness. The court granted the motion to exclude witnesses but allowed the victims to have their

counselors present during their testimony. The State presented the testimony of N.M.; Maureen Hofmann, an advanced practice nurse with the Pediatric Resource Center; and A.M. It also presented the video and transcript of Crady's November 2013 interview of N.M. Respondent testified on his own behalf and presented the testimony of his brother, Cameron M. In rebuttal, the State called N.M.'s older brother, Daniel M. The evidence relevant to the issues on appeal is set forth below.

¶ 8 N.M. testified she was currently 11 years old and in the fifth grade. In the fall of her fourth-grade year (fall 2013), she attended a wiener roast at her grandmother's house with her parents and two brothers, Zachary M. and Daniel. Her aunts, uncles, and cousins also attended the wiener roast, including respondent. Respondent and N.M.'s brother, Daniel, were very good friends and favorite cousins. According to N.M., they did a lot of things together, but they were not together all of the time.

¶ 9 N.M. testified that, during the gathering, respondent threatened her with a knife and raped her. She stated the incident happened in the upstairs bedroom, which had a bed but was used mostly as a children's playroom. N.M., her brothers, and respondent had been playing Jenga in the upstairs bedroom, and her brothers left the room. After they were alone, respondent threatened her with a knife and stated he would cut off all of her hair if she did not have sex with him. N.M. testified she saw respondent's pocketknife but could not recall where or when she saw it. It could have been earlier, when they were outside. N.M. did explain how the blade opened and closed. However, she did not recall how long the blade was or what color the knife was. N.M. believed respondent would cut off all of her hair. Respondent told her to take off her pants. After she took off her pants and underwear, he told her to get on the bed. She did not remember the exact words he used. N.M. climbed onto the bed by herself.

¶ 10 Once she was on the bed, she lay down on her back. At that point, respondent had sex with her. N.M. explained sex was "[w]hen a boy puts his pee pee in a girl's front part." N.M. described what those parts were for and where they were located. N.M. testified respondent put his pee pee in her front part and started going up and down. She thought his hands were on her arms holding her down. N.M. said she felt his pee pee inside her front part, and it felt "very uncomfortable." When asked what she meant by the term "uncomfortable," she testified it meant "[l]ike weird." N.M. testified it went on for 5 or 10 minutes until she pushed off. She had her shirt on the whole time. N.M. did not say anything to anybody that night.

¶ 11 Around two months after the incident, N.M. told her mother. Her mother had questioned her after hearing about some things respondent's oldest brother, Terry M., had done. After she told her mother, they went to the police department. N.M. later met with Crady, who N.M. referred to as "the lady." Crady asked her questions about the incident. N.M. admitted she did not tell Crady about respondent holding her down on the bed. When asked whether she told Crady she informed her mother of the incident after her mother began "drilling" her, N.M. said she would call it asking, not "drilling." After the interview with Crady, N.M had a medical exam. Moreover, N.M. talked with McArthur, her counselor, and the prosecutor. She testified she did tell McArthur and the prosecutor about the pocketknife. Additionally, N.M. testified she knew what rape and "humping" meant before the incident.

¶ 12 Hoffman testified she examined N.M. on November 27, 2013. The anogenital exam revealed a deep notch in N.M.'s hymenal tissue at the "five o'clock" position. Such a finding is an indeterminate medical finding because it could be caused by past trauma, which would include penetration, or it could just be a normal variant. Hoffman also testified most examinations following a child's disclosure of abuse, even those involving penetration, are found

to be normal, without evidence of penetration.

¶ 13 On April 10, 2015, the circuit court reconvened the adjudicatory hearing, and the State played the video of Crady's November 2013 interview of N.M. During the interview, N.M. said she was meeting with her because respondent threatened that, if she did not have sex with him, he would cut off all of her hair. N.M. explained she was protective of her hair because she really liked doing hairstyles with it. She said she had sex with him one time at her grandmother's house during a wiener roast. N.M. explained she was playing in an upstairs bedroom with respondent and her brothers Daniel and Zachary. At some point, her brothers left the room and went downstairs. Respondent mentioned having sex, and she said no. Respondent then pulled out his pocketknife and said he would cut off all of her hair if she did not have sex. N.M. then said fine because she really liked her hair. They then had sex, which N.M. explained was when a boy puts his pee pee in a girl. It happened on the bed, which she got on after he said something like "okay, get ready." On the anatomical drawings, N.M. referred to the boy's penis as a "pee pee," and she labeled the female part the "vagina." N.M. said it felt "really weird" when respondent put his pee pee in her vagina, but it did not hurt. She also explained his pee pee was sticking up when it went inside her. N.M. further stated that, when respondent put his pee pee inside her, he was "humping," which she explained was going up and down. She said the sex stopped when she told him to stop, and he did not touch her anywhere else on her body. Additionally, N.M. stated she pulled her pants and underwear down at his direction and kept her shirt on. She said respondent's clothes were off except for his socks and shirt. N.M. explained she was not wearing socks that day. She also said that, before respondent was dressed, he asked her to touch his pee pee and she said no.

¶ 14 Crady asked N.M. about when she told her parents about the incident. N.M.

explained her mother had heard something about Terry, respondent's oldest brother, and "she started to drill us and that's when I told her." Crady asked N.M. to explain what she meant by saying "started to drill you guys." N.M. explained her mother started to ask questions about whether she had been raped or if someone had touched her somewhere he or she was not supposed to. N.M. said respondent had told her not to tell or he would actually cut off her hair. At that point, she yelled because she knew he was just kidding about the hair thing and she was really mad. N.M. said she was "[k]ind of" afraid of respondent because he almost always had a pocketknife on him. N.M. did not tell anyone sooner because she was afraid he would cut off her hair.

¶ 15 A.M. testified she was 15 years old, 5' 10" tall, and weighed over 200 pounds. She is two years older than respondent. She was a similar size when the alleged incident occurred, and at that time, she was substantially taller and heavier than respondent. A few summers ago, she spent the night at her grandmother's house before going on a trip to Wisconsin. Her cousins, respondent, Cameron, N.M., Zachary, and Daniel, also spent the night there. A.M. slept in the upstairs bedroom with respondent, Daniel, and Cameron. According to A.M., that is where they always slept at their grandmother's home. A.M. had the full-size bed, Cameron was on the floor, and respondent and Daniel each had a recliner. Cameron was lying on his side with his back to the bed and listening to music with his headphones. Daniel was asleep.

¶ 16 A.M. felt bad for respondent because he was crammed up against the wall and could not really recline his chair, so she invited him to sleep in the bed with her. At that time, the lights were off. Respondent accepted her invitation and lay in the bed "facing the same direction head-to-head." They had space in between them, and the bed had plenty of room for both of them. After about five minutes in bed together, respondent began to touch A.M.'s breasts

with his hands. She asked him to stop, but he did not. Respondent then licked and kissed the cleavage of her breasts. At one point, she turned around to remove herself from the kissing and the licking, and respondent started touching her buttocks. At first, it was over her clothes, and then it was inside of her shorts. His hand was directly touching the cheeks of her buttocks. A.M. testified she did not ask him to do so, and she told him to stop multiple times. The touching, licking, and kissing lasted for 10 to 15 minutes. It stopped when she got up and walked away. Respondent did not follow her or try to make her stay.

¶ 17 After getting up, A.M. walked into the hallway. No one followed her, and she ended up going back into the room and getting Cameron, who was still listening to music. She got him because she needed to tell someone. A.M. talked with Cameron in the hallway and outside in the backyard. She talked to him for 1-1/2 to 2 hours. Before they went outside, she told Cameron what had happened. Cameron then went into the bedroom and flicked respondent on the bridge of his nose. After A.M. talked with Cameron, she returned to the bed where the incident occurred. Respondent had returned to the recliner. A.M. later disclosed the incident to her counselor.

¶ 18 On cross-examination, A.M. testified about a time when Daniel, who was also younger than her, "motorboated her." A.M. explained "motorboating" is "where you have cleavage out and someone sticks their face in between your cleavage and shakes their head." She said what respondent did to her was also "motorboating." On redirect, A.M. explained the "motorboating" incident with Daniel was at a different visit to her grandmother's house and was part of a game of truth or dare. A.M. said she and Daniel faked it. His mouth never touched her breasts or cleavage area.

¶ 19 Moreover, on cross-examination, A.M. admitted she had previously told Crady she "freaked out," ran over to Cameron, and jumped on him after the incident. She further admitted the jumping on Cameron was the correct version, not the version she described on direct examination. Additionally, A.M. was on her sides during the incident, and at one point, respondent turned her over with force. He was behind her and he tugged on her shoulder and arm. It happened once or twice. Last, she did not recall telling Crady the following: " 'I didn't want to talk to him whatsoever because I know—I knew that I was—if I said anything, I will beat the crap out of him.' " The parties stipulated that A.M. did in fact say the aforementioned statement to Crady when Crady asked A.M. the following question: " 'Did you say anything to him when you did that?' "

¶ 20 Cameron testified that, on the night before the Wisconsin trip, he went to bed on a mattress on the floor in the upstairs bedroom. When he entered the room, respondent was already asleep on the bed, and Daniel was asleep in one of the recliners. He did not recall where A.M. was. Cameron also did not see her enter the room because he was lying on his stomach, looking at his cellular telephone, and listening to music with headphones. In fact, he never saw where she was trying to sleep in the upstairs bedroom. A.M. never jumped on him or shook him while he was in the room. He also did not hear her cry or say she had been touched by respondent. At one point, he got up, started walking to the bedroom door, and turned around, and A.M. was right behind him. She said she needed some fresh air. According to Cameron, she did not appear upset. They went outside and talked for 15 to 20 minutes. A.M. did not mention respondent touched her inappropriately. After they came back in, they both stayed downstairs. Cameron also testified he did not flick respondent on the bridge of his nose that night. Last,

Cameron denied talking to respondent about the sleeping arrangements on the night of the alleged incident.

¶ 21 Respondent testified he was 13 years old and lived with his father and Cameron. His cousin Daniel is 29 days younger than him and is his favorite cousin. When they are together, they do not leave each other's side. Sometimes, they play games with the other cousins. On the night before the Wisconsin trip, his grandmother told him and Daniel to go to bed before Cameron and A.M. They went to the upstairs bedroom, and Daniel took the comfy red recliner, and he took the bed. No one else was in the bed. Respondent did not remember Cameron and A.M. coming into the room because he was sleeping. The next thing he remembered was waking up and seeing Daniel getting dressed. Respondent denied having any physical contact with A.M. that night. He also did not remember Cameron flicking him on the forehead. Respondent did not recall but testified he likely talked to A.M. the morning before they left for Wisconsin and during the trip.

¶ 22 As to the last wiener roast at his grandmother's house, he recalled playing outside and Nintendo 64 with Daniel. He denied carrying a knife that day. Respondent testified he was probably in the upstairs bedroom that day but was not in the room by himself with N.M. Respondent denied ever being alone in a room with N.M. at his grandmother's house. Even if they played hide and seek, it would have been outside and he would have been Daniel's partner. Respondent explained he rarely played with N.M. Usually, she would ask to play, and he and Daniel would tell her no. Only after she got her mother involved would they allow her to play. Respondent also denied ever taking his clothes off in front of N.M. and telling N.M. to take off her clothes. When he slept at his grandmother's house, he wore boxers, and he doubted N.M. would even see that. He further denied having sex with N.M. and threatening to cut her hair off.

Respondent also had never held N.M. down or kissed her. Additionally, respondent testified he did not have any type of pocketknife and never carried a pocketknife.

¶ 23 The State called Daniel in rebuttal. Daniel testified he and respondent were close and trusted each other. They saw each other at family gatherings at their grandmother's home. He and Daniel spent a lot of time together at the family gatherings. Daniel "hung out" with respondent most of the time. He saw respondent carry a pocketknife "[q]uite a bit." Respondent sometimes had the pocketknife at family gatherings. He mostly kept it in his pocket. Further, respondent sometimes extended the blade out of the knife at his grandmother's home. Daniel stated he was not with respondent 100% of the time during family gatherings. Daniel was present when N.M. first talked about the incident with respondent. He had never discussed the incident with N.M. and his parents did not talk about it in front of N.M. Daniel also testified he was surprised he needed to testify. His mother told him he needed to come because respondent said he never brought a pocketknife.

¶ 24 On April 22, 2015, the circuit court resumed the adjudicatory hearing and heard the parties' arguments. The court then found respondent guilty beyond a reasonable doubt of all of the allegations in the State's wardship petition and explained its reasoning for making those findings, which included commenting on the witnesses' credibility.

¶ 25 After a September 16, 2015, dispositional hearing, the circuit court made respondent a ward of the court. It also placed him on probation until his twenty-first birthday and imposed 60 days of home confinement for committing aggravated criminal sexual assault against N.M. For the offense of criminal sexual abuse against A.M., the court sentenced respondent to 24 months' probation, to run concurrently with his probation for aggravated criminal sexual assault. That same day, respondent filed a motion for judgment of acquittal, or

in the alternative, a motion for a new hearing, asserting the State's evidence was insufficient to prove him guilty beyond a reasonable doubt based on the victims' inconsistent statements. After an October 23, 2015, hearing, the court denied respondent's posttrial motion.

¶ 26 On October 27, 2015, respondent filed a timely notice of appeal under Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 660(a) (eff. Oct. 1, 2001) (providing the rules applicable to criminal cases govern appeals from final judgments in delinquent-minor proceedings, unless specifically provided otherwise). However, the notice of appeal contained inaccurate information. In November 2015, this court granted respondent leave to file a late notice of appeal in accordance with Illinois Supreme Court Rule 606(c) (eff. Dec. 11, 2014), and respondent did so. A sentencing order in a juvenile-delinquency proceeding is a final order (see *In re Justin L.V.*, 377 Ill. App. 3d 1073, 1079, 882 N.E.2d 621, 626 (2007)), and thus we have jurisdiction over this appeal under Illinois Supreme Court Rule 660(a) (eff. Oct. 1, 2001).

¶ 27 II. ANALYSIS

¶ 28 A. Motion To Strike

¶ 29 In its brief, the State moved to strike respondent's brief because of violations of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) and the tone of the brief. Respondent filed an objection, disagreeing with the State's assertions. Respondent's brief does not hinder or preclude our review of the issues in this case, and thus we deny the State's motion to strike respondent's brief.

¶ 30 B. Sufficiency of the Evidence

¶ 31 Respondent contends the State's evidence was insufficient to prove beyond a reasonable doubt he committed the offenses alleged in the wardship petition because the testimony of both victims was not credible. The State disagrees.

¶ 32 In delinquency proceedings, the reasonable doubt standard applies, and the State must prove the elements of the substantive offenses alleged in the delinquency petition beyond a reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47, 958 N.E.2d 227. On review, the appellate court considers "whether, 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." *Jonathon C.B.*, 2011 IL 107750, ¶ 47, 958 N.E.2d 227. When considering a challenge to the sufficiency of the evidence, this court will not retry the respondent. *Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227. The trier of fact had the best position to judge the witnesses' credibility, and this court gives due consideration to the fact the circuit court saw and heard the witnesses. *Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227. Moreover, the trier of fact has the responsibility of resolving conflicts or inconsistencies in the evidence. *Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227. "Nonetheless, while a trier of fact's decision to accept testimony is entitled to deference, it is neither conclusive nor binding." *Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227. This court will uphold a circuit court's credibility determinations unless they are against the manifest weight of the evidence. *In re Christopher K.*, 217 Ill. 2d 348, 373, 841 N.E.2d 945, 960 (2005). " 'A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *In re M.W.*, 2013 IL App (1st) 103334, ¶ 13, 986 N.E.2d 737 (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995)).

¶ 33 Additionally, our supreme court has stated the following:

> "The trier of fact, however, need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. [Citation.] Rather, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the accused's guilt. [Citation.] A trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor must the trier of fact search out all possible explanations consistent with innocence, and raise those explanations to a level of reasonable doubt. [Citation.] A conviction will not be reversed simply because the defendant tells us that a witness was not credible." (Internal quotation marks omitted.) *Jonathon C.B.*, 2011 IL 107750, ¶ 60, 958 N.E.2d 227 (quoting *People v. Brown*, 185 Ill. 2d 229, 250, 705 N.E.2d 809, 819 (1998)).

¶ 34 1. *N.M.*

¶ 35 As to N.M., respondent was sentenced on the aggravated criminal sexual assault count. Respondent challenges the credibility of N.M.'s version of the incident and notes no evidence corroborates her story. He essentially makes another closing argument and lists numerous reasons why N.M. should not be believed. Most of his arguments do not merit being addressed in this order. We have reviewed the evidence presented at respondent's adjudicatory hearing and do not find N.M.'s testimony and prior statements were so inconsistent as to raise a reasonable doubt of respondent's guilt.

¶ 36 N.M has consistently stated the following core facts about the incident. During a

family wiener roast at her grandmother's house, she was in the upstairs bedroom playing with her brothers and respondent. After her brothers left the room, respondent threatened to cut off all of her hair with a knife if she did not have sex with him. N.M. described the knife as a pocketknife. She removed her pants and underwear after respondent told her to do so and was still wearing her shirt. Respondent removed his pants and underwear and kept his shirt on too. She then lay on the bed, and respondent had sex with her, which she described as a boy putting his "pee pee" in a girl. At the adjudicatory hearing, she did use the term "front part," and with Crady, she described the part as the "vagina." After respondent put his pee pee inside her, he was going up and down, which she labeled "humping." N.M. told Crady it felt weird, and at the hearing, she said it was uncomfortable but later explained uncomfortable meant weird.

¶ 37 On the other hand, N.M. was inconsistent about seeing the knife during the incident. N.M. told Crady respondent pulled out his pocketknife and told her he would cut off her hair if she did not do it. At the hearing, she testified she saw the pocketknife respondent had but could not remember when she saw it. On cross-examination, N.M. admitted she could have seen the knife earlier at the wiener roast and could not recall how long the blade was and the color of the knife. We note whatever N.M. said in the presence of her counselor regarding the incident and the knife or, lack thereof, was never introduced into evidence at respondent's hearing. N.M. was also inconsistent on the duration of the sex, telling Crady it lasted 5 seconds and, at the hearing, saying it was 5 to 10 minutes. Additionally, she was inconsistent on whether respondent touched another part of her body. During the interview, she told Crady respondent did not touch her anywhere else, and at the adjudicatory hearing, she testified respondent held her arms down on the bed. She also was inconsistent on how the encounter ended, telling Crady she told him to stop and testifying she broke her arms free and pushed off.

¶ 38 However, given her age and the length of time between the incident and her testimony, this court does not find those inconsistencies hurt her credibility to the point of raising a reasonable doubt. Further, we do not find the circuit court's credibility determinations were against the manifest weight of the evidence. Moreover, this court disagrees with respondent that the circuit court criticized respondent for failing to produce contrary medical evidence. The court was merely shifting gears from discussing the State's case to addressing respondent's case. Further, we do not find any significance in N.M.'s use of the word "drill." After using the word, she was asked to explain what it meant. She said it meant to ask questions and then listed the questions her mother asked her. Those questions were general and not specific to respondent.

¶ 39 Last, the circuit court stated N.M.'s testimony about being threatened with a knife was bolstered by Daniel's rebuttal testimony he saw a knife. That does not mean the court recalled Daniel's testimony as being he saw a pocketknife on the day of the incident. The fact Daniel had sometimes seen respondent at his grandmother's house with a pocketknife itself bolsters N.M.'s testimony and hurts respondent's credibility. Thus, we do not find an error with the court's aforementioned knife comment.

¶ 40 Accordingly, we find the State's evidence was sufficient for the circuit court to find beyond a reasonable doubt respondent committed the offense of aggravated criminal sexual assault against N.M.

¶ 41 2. *A.M.*

¶ 42 Respondent also challenges the sufficiency of the State's evidence as to A.M. The court found respondent committed the offense of criminal sexual abuse against A.M. Specifically, respondent asserts a lack of evidence showing sexual gratification and attacks the credibility of A.M.'s version of the facts.

¶ 43 Under section 11-1.50(b) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.50(b) (West 2012)), "[a] person commits criminal sexual abuse if that person is under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who is at least 9 years of age but under 17 years of age." Section 11-0.1 of the Criminal Code (720 ILCS 5/11-0.1 (West 2012)) defines "sexual conduct" as the following:

> "any 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, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused."

¶ 44 Respondent contends the State's evidence was insufficient to prove respondent acted with the purpose of sexual gratification. While a fact finder can infer an adult accused intended sexual gratification, " '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.' " *In re Matthew K.*, 355 Ill. App. 3d 652, 655, 823 N.E.2d 252, 255 (2005) (quoting *In re A.J.H.*, 210 Ill. App. 3d 65, 72, 568 N.E.2d 964, 968 (1991)). Thus, "the issue of a minor's intent of sexual gratification or arousal must be determined on a *case-by-case basis*, and the fact finder must consider all of the evidence, including the minor's age and maturity, before deciding whether such intent can be inferred." (Emphasis added.) *In re Davontay A.*, 2013 IL App (2d) 120347, ¶ 19, 3 N.E.3d 871.

¶ 45 In this case, respondent was 11 years old and A.M. was 13 years old. A.M. testified respondent first touched her breasts and then began licking and kissing the cleavage area

of her breasts. When she turned away from him, he began to rub her buttocks. First, he rubbed them on the outside of her clothing. He later put his hand inside her shorts and made skin-to-skin contact with the cheeks of her buttocks. This all occurred while they were lying in a bed together, with space in between them. The facts surrounding the incident do not indicate accidental or inadvertent touching. Moreover, respondent proceeded from touching over A.M.'s clothes to touching her bare skin, negating any claim of accidental touching.

¶ 46 The circuit court found the groping of the buttocks satisfied the sexual-intent aspect. We agree with the circuit court the touching of the buttocks shows respondent was touching A.M. with a sexual intent rather than just engaging in a playful activity with his cousin. Moreover, the fact he moved from touching A.M. over her clothes to touching her skin also indicates the touching was of a sexual nature. The duration of the touching is also indicative of a sexual intent.

¶ 47 Accordingly, we find the State's evidence was sufficient for the circuit court to find beyond a reasonable doubt respondent touched A.M. with the purpose of sexual gratification.

¶ 48 As with N.M., respondent contends A.M.'s testimony is completely unbelievable. We disagree with respondent. Cameron's testimony supported A.M.'s testimony Daniel was sleeping during the incident. Moreover, Cameron's testimony he was lying on his stomach listening to music on his headphones supports A.M.'s testimony she did not call out to him during the incident because he would not be able to hear her. It is not improbable or unlikely Daniel would keep sleeping, and Cameron would not hear anything while listening to music with headphones during the incident between respondent and A.M. Besides asking respondent to stop, A.M. testified no other noises were made and touching, licking, and kissing are not noisy

activities. The touching could have easily gone on in the bedroom without the other two children being aware of it. The one incredible part of her version of the facts is her statement respondent flipped her over once or twice against her will. The court noted it doubted that testimony but did not find the doubt relevant because force is not an element of the crime. Like N.M., A.M. was consistent about respondent's inappropriate actions of touching, licking, and kissing her.

¶ 49 A.M's testimony was impeached on the collateral matter of how she got Cameron's attention after the incident. She explained she had forgotten that she "jumped" on Cameron after she got out of bed, instead of leaving the room and then returning to get him. We do not find the incredibility of her flipping-over testimony and the impeachment of how she got Cameron's attention after the incident renders the circuit court's finding she was credible against the manifest weight of the evidence.

¶ 50 Accordingly, we find the State's evidence was sufficient for the circuit court to find beyond a reasonable doubt respondent committed criminal sexual abuse against A.M.

¶ 51 C. Fair Adjudicatory Hearing

¶ 52 Respondent also argues he was denied a fair adjudicatory hearing because the trial judge shifted the burden of proof and exhibited bias. Respondent acknowledges he did not preserve this issue for review and requests we review the issue under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). We begin our plain-error analysis by first determining whether any error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010).

¶ 53 1. *Burden of Proof*

¶ 54 As previously stated, the State has the burden of proving beyond a reasonable doubt all of the elements of the substantive offense alleged in the delinquency petition. *Jonathon*

C.B., 2011 IL 107750, ¶ 47, 958 N.E.2d 227. "That burden of proof remains on the State throughout the entire trial and never shifts to the defendant." *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27, 977 N.E.2d 909. Moreover, the respondent maintains the presumption of innocence throughout the trial and does not have to prove his innocence, testify, or present any evidence. *Cameron*, 2012 IL App (3d) 110020, ¶ 27, 977 N.E.2d 909. We presume the circuit court knew the law regarding the burden of proof and applied it properly. *Cameron*, 2012 IL App (3d) 110020, ¶ 28, 977 N.E.2d 909. However, the presumption may be rebutted when the record contains strong affirmative evidence to the contrary. *Cameron*, 2012 IL App (3d) 110020, ¶ 28, 977 N.E.2d 909. Thus, in reviewing a burden-shifting claim, we must determine whether the record contains strong affirmative evidence the circuit court incorrectly allocated the burden of proof to the respondent. *Cameron*, 2012 IL App (3d) 110020, ¶ 28, 977 N.E.2d 909. We note a circuit court's efforts to test, support, or sustain the defense's theories cannot be viewed as improperly diluting the State's burden of proof or improperly shifting that burden to the respondent. *Cameron*, 2012 IL App (3d) 110020, ¶ 28, 977 N.E.2d 909. Moreover, the circuit court is free to comment on the implausibility of the defense's theories, as long as it is clear from the record the circuit court applied the proper burden of proof in finding the respondent guilty. *Cameron*, 2012 IL App (3d) 110020, ¶ 28, 977 N.E.2d 909.

¶ 55 We disagree with respondent the record contains strong affirmative evidence the circuit court shifted the burden of proof. In explaining its ruling, the court noted the State bore the burden to prove the elements of the crimes beyond a reasonable doubt. Moreover, after the court remarked why N.M. would say what she did, the court noted the respondent did not have to establish that. Further, we disagree with respondent the court condemned him for failing to produce evidence regarding the indeterminate medical findings. The court was just shifting from

discussing the State's witnesses' versions of the facts to respondent's version of the facts. Also, after addressing the parties' evidence and commenting on the witnesses' credibility, the court expressly found respondent guilty *beyond a reasonable doubt* of the charges involving N.M.

¶ 56 Accordingly, we find the circuit court did not improperly shift the burden of proof.

¶ 57 2. *Bias*

¶ 58 Respondent further contends he was denied a fair adjudicatory hearing because the trial judge was biased against him. A trial judge has the responsibility of ensuring all persons are provided a fair trial. *People v. Sims*, 192 Ill. 2d 592, 636, 736 N.E.2d 1048, 1071 (2000). "Accordingly, a trial judge must refrain from interjecting opinions, comments or insinuations reflecting bias toward or against any party." *Sims*, 192 Ill. 2d at 636, 736 N.E.2d at 1071. To show a circuit court's bias or prejudice toward a party, the record must demonstrate active personal animosity, hostility, ill will, or distrust toward the respondent, and absent such a showing, a reviewing court will not find actual prejudice that prevented or interfered with a fair trial. *People v. Johnson*, 199 Ill. App. 3d 798, 806, 557 N.E.2d 565, 570 (1990). "A judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality." *Eychaner v. Gross*, 202 Ill. 2d 228, 280, 779 N.E.2d 1115, 1146 (2002). Likewise, a trial judge's allegedly erroneous findings and rulings are insufficient reasons to believe the judge had a personal bias for or against a party. *Eychaner*, 202 Ill. 2d at 280, 779 N.E.2d at 1146. "A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner*, 202 Ill. 2d at 280, 779 N.E.2d at 1146.

¶ 59 After reviewing the circuit court's findings in support of its finding respondent guilty of the allegations in the wardship petition, we disagree with respondent those findings

indicate the court was biased against him. The court was explaining its credibility findings and why the inconsistencies highlighted by respondent did not create a reasonable doubt of his guilt. The fact respondent strongly disagrees with the circuit court's credibility findings does not mean the court was biased against him.

¶ 60 Accordingly, we find respondent did not meet his burden of showing the circuit court was biased against him, and thus respondent has not shown any error. Thus, we do not address the matter of plain error as to both of respondent's claims of burden shifting and bias.

¶ 61 D. Criminal Sexual Abuse Statute

¶ 62 Additionally, respondent argues the criminal sexual abuse statute violates his (1) due-process rights because it is unconstitutionally vague both facially and as applied to him and (2) right to equal protection of the laws. Both of respondent's arguments are based on his assertion that, under the criminal sexual abuse statute, the minors involved could both have been classified as the offender and the victim. He claims the statute provides no guidelines for determining which actor is the offender and which one is the victim.

¶ 63 While respondent did not raise this issue in the circuit court, "a constitutional challenge to a criminal statute can be raised at any time." *In re J.W.*, 204 Ill. 2d 50, 61, 787 N.E.2d 747, 754 (2003). Statutes are presumed constitutional, and the party challenging a statute's constitutionality bears the burden of establishing its invalidity. *J.W.*, 204 Ill. 2d at 62, 787 N.E.2d at 754. We review *de novo* a statute's constitutionality. *J.W.*, 204 Ill. 2d at 62, 787 N.E.2d at 754.

¶ 64 Respondent's underlying premise for all of his constitutional challenges is the minors involved in the sexual conduct can be considered both the offender and the victim under the statute, and that assertion is incorrect. As stated earlier, "[a] person commits criminal sexual

abuse if that person is under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who is at least 9 years of age but under 17 years of age." 720 ILCS 5/11-1.50(b) (West 2012). "Sexual conduct" is defined as the following:

> "any 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, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2012).

"Sexual conduct" describes an intentional act of a sexual nature. *People v. Kolton*, 219 Ill. 2d 353, 369, 848 N.E.2d 950, 959 (2006). The Criminal Code defines "sexual conduct" as "certain 'touching' done for the purpose of sexual gratification or arousal." *Kolton*, 219 Ill. 2d at 369, 848 N.E.2d at 959. Since the type of touching described by the statute "is not inherently sexual and might occur accidentally or inadvertently," the statute requires the touching to be intentional or knowing and " 'for the purpose of sexual gratification or arousal of the victim or the accused' " to constitute criminal sexual abuse. *Kolton*, 219 Ill. 2d at 370, 848 N.E.2d at 959-60 (quoting 720 ILCS 5/12-12(e) (West 2000) (now 720 ILCS 5/11-0.1 (West 2012))). It is the aforementioned *mens rea* requirement that provides the way to distinguish between the victim and the offender under the criminal sexual abuse statute. Accordingly, respondent has failed to meet his burden of showing the invalidity of the criminal sexual abuse statute.

¶ 65 E. Conflict of Interest

¶ 66 Last, respondent asserts the circuit court created a *per se* conflict of interest when it agreed with respondent's retained counsel that she would be both his defense attorney and his guardian *ad litem*. The State disagrees. Whether an attorney labored under a *per se* conflict of interest is a question of law, which this court reviews *de novo*. *People v. Morales*, 209 Ill. 2d 340, 345, 808 N.E.2d 510, 512-13 (2004).

¶ 67 In juvenile-delinquency proceedings, due process and the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq*. (West 2012)) require the juvenile be provided defense counsel, specifically "an attorney whose singular loyalty is to the defense of the juvenile." *People v. Austin M.*, 2012 IL 111194, ¶ 77, 975 N.E.2d 22. On the other hand, no requirement exists for the appointment of a guardian *ad litem* in such cases. *Austin M.*, 2012 IL 111194, ¶ 85, 975 N.E.2d 22. Our supreme court has found a *per se* conflict of interest exists when a minor's counsel in a delinquency proceeding simultaneously *functions* as both defense counsel and guardian *ad litem*. *Austin M.*, 2012 IL 111194, ¶ 86, 975 N.E.2d 22. In *Austin M.*, 2012 IL 111194, ¶¶ 87, 101, 975 N.E.2d 22, the respondent's attorney had not been formally appointed as guardian *ad litem*, but the supreme court still found a *per se* conflict of interest because the attorney "functioned" as a guardian *ad litem*.

¶ 68 In this case, at the first appearance, the circuit court and respondent's counsel agreed respondent's counsel would be both his defense attorney and his guardian *ad litem*. During the proceedings, the court frequently referred to respondent's counsel as his attorney and guardian *ad litem*. Respondent asserts our analysis ends here and he is entitled to a new adjudicatory hearing based on the *per se* conflict of interest. In support of his argument, respondent notes the reason behind the *per se* conflict of interest rule is "that certain associations may have 'subliminal effects' on counsel's performance which are difficult to detect and

demonstrate." *Austin M.*, 2012 IL 111194, ¶ 81, 975 N.E.2d 22 (quoting *People v. Washington*, 101 Ill. 2d 104, 110, 461 N.E.2d 393, 396 (1984)). Thus, when a *per se* conflict is established, the respondent does not have to show the conflict affected the attorney's actual performance to obtain a new adjudicatory hearing. *Austin M.*, 2012 IL 111194, ¶ 81, 975 N.E.2d 22. Additionally, respondent cites another decision by our supreme court, *People v. Hernandez*, 231 Ill. 2d 134, 896 N.E.2d 297 (2008). There, the supreme court explained the very nature of a *per se* conflict rule precludes inquiry into the specific facts of the case. *Hernandez*, 231 Ill. 2d at 150, 896 N.E.2d at 307. The court emphasized "[the attorney's] *status* as [the defendant's] attorney itself dictate[d] application of the *per se* rule." (Emphasis in original.) *Hernandez*, 231 Ill. 2d at 150, 896 N.E.2d at 307. Moreover, respondent notes the supreme court in *Austin M.* examined the record to determine if the respondent's counsel was functioning as a guardian *ad litem* because the court had not expressly appointed counsel to that role. Thus, the only way for the supreme court to have found a *per se* conflict of interest was if the record showed counsel was functioning as a guardian *ad litem*.

¶ 69 The State disagrees, arguing that, based on *Austin M.*, the designation given to counsel by the circuit court does not relieve the reviewing court of the responsibility to examine how counsel functioned. It notes the supreme court defined the question as "whether [the respondent's] attorney misperceived the role of defense counsel in juvenile delinquency proceedings to be some type of hybrid 'best interests' representation and, based on that misperception, provided something other than the zealous representation to which [the respondent] was entitled." *Austin M.*, 2012 IL 111194, ¶ 88, 975 N.E.2d 22.

¶ 70 While we recognize the supreme court's language in *Hernandez*, delinquency proceedings are not criminal proceedings. *In re W.C.*, 167 Ill. 2d 307, 320, 657 N.E.2d 908, 915

(1995). In *Austin M.*, 2012 IL 111194, ¶ 66, 975 N.E.2d 22, which involved a delinquency proceeding, our supreme court did not rely on counsel's *status* or the label used to describe counsel in analyzing whether a *per se* conflict existed. If status and label were the only part of the analysis, then the supreme court would not have found a *per se* conflict in *Austin M*. Instead, the supreme court examined the record to see how counsel functioned in the respondent's case. *Austin M.*, 2012 IL 111194, ¶ 87, 975 N.E.2d 22. Accordingly, we agree with the State that we must examine how counsel *functioned*. In examining function, we are not looking for prejudice or an actual conflict. See *Austin M.*, 2012 IL 111194, ¶ 81, 975 N.E.2d 22.

¶ 71 A defense counsel is a dedicated and zealous advocate that holds the State to its burden of proving the juvenile committed the alleged offense beyond a reasonable doubt. *Austin M.*, 2012 IL 111194, ¶ 86, 975 N.E.2d 22. Moreover, a defense counsel's singular loyalty is to the defense of the juvenile. *Austin M.*, 2012 IL 111194, ¶ 77, 975 N.E.2d 22. Unlike a defense attorney, a guardian *ad litem* owes a duty to the court and to society. *Austin M.*, 2012 IL 111194, ¶ 85, 975 N.E.2d 22. Thus, "[a] guardian *ad litem* need not zealously pursue acquittal if he does not believe acquittal would be in the best interests of the minor or society." *Austin M.*, 2012 IL 111194, ¶ 85, 975 N.E.2d 22. Moreover, in some instances, "the [guardian *ad litem*] must act in the role of a concerned parent, which is often in opposition to the position of defense counsel." *Austin M.*, 2012 IL 111194, ¶ 85, 975 N.E.2d 22.

¶ 72 Here, respondent points to one instance in which his counsel argued a matter was in respondent's best interests, and that was during respondent's dispositional hearing. At the dispositional hearing in delinquency proceedings, the court must determine whether it is in the best interests of the minor or the public that the minor be made a ward of the court, and, if the minor is to be made a ward of the court, the court shall determine the proper disposition best

serving the interests of the minor and the public. 705 ILCS 405/5-705(1) (West 2012). Thus, a defense counsel's reference to a minor's best interests during a sentencing hearing would be appropriate. See *Austin M.*, 2012 IL 111194, ¶ 100, 975 N.E.2d 22 (noting "[t]he time for 'best interests' considerations is at the disposition phase"). Accordingly, an attorney's use of the term "best interests" during a dispositional hearing does not indicate the attorney was functioning as a guardian *ad litem*. We agree with the State that respondent's counsel did not make any arguments during the adjudicatory phase of the proceedings that the attorney believed were in respondent's best interests as opposed to his defense. The record shows respondent's counsel's singular loyalty was to respondent's defense. Moreover, we note respondent's father was involved in these proceedings, and thus respondent's counsel did not have to play the role of a concerned parent.

¶ 73 Accordingly, we find respondent's counsel was not functioning as a guardian *ad litem* in this case, and thus no *per se* conflict of interest existed.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm the Woodford County circuit court's judgment.

¶ 76 Affirmed.