2019 IL App (5th) 160062-U

NO. 5-16-0062

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 15-CF-768
	)	
MICHAEL BROCK,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Overstreet and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed reversible error in convicting defendant of criminal sexual abuse predicated on the use of force which was not a lesser-included offense of aggravated criminal sexual abuse based on age.

¶ 2 Defendant, Michael Brock, was convicted of criminal sexual abuse after a bench trial in the circuit court of St. Clair County, and was sentenced to four years' imprisonment and one year mandatory supervised release. Defendant argues on appeal that the court erred in finding him guilty of criminal sexual abuse based on the use of force as it is not a lesser-included offense of aggravated criminal sexual abuse based on age.

¶ 3 On January 14, 2015, a cell phone was turned in to the Lebanon Police Department. The phone reportedly had been found by a 12-year-old boy in a yard near defendant's residence. The phone allegedly contained a photo of an item that had been stolen from B.A., the victim.

¶ 4 On March 3, the police obtained a search warrant for the phone and found text messages suggesting a sexual relationship between B.A., a minor, and the owner of the phone, defendant. Defendant subsequently was charged with aggravated criminal sexual abuse under section 11-1.60(d) of the Criminal Code of 2012 (720 ILCS 5/11-1.60(d) (West 2014)). The information outlined the offense as "a person 18 years of age or older, knowingly committed an act of sexual penetration *** and the defendant was at least 5 years older than the victim at the time of the penetration." The victim, B.A., initially denied having contact with defendant. Ultimately, B.A. did admit to having had an encounter with defendant.

¶ 5 B.A. testified she was 15 years old during August and September of 2014. She knew defendant because he was a family friend and lived down the block from her house. In late August, she and her younger sister were helping defendant paint the kitchen in his house. B.A. testified that sometime in the afternoon, shortly after her sister left to get something to eat, defendant forced B.A. into defendant's bedroom, pushed her down onto the bed, and raped her. Afterward, B.A. left defendant's house and found her sister. B.A. did not say anything about the rape. B.A. did not have sex again with defendant after that, but continued to have communication with him via text messaging. B.A. thought she had to talk to defendant and be friendly with him or he would hurt B.A. and her

family. At one point, B.A. testified she told defendant she was pregnant in an attempt to scare him away. Defendant's text response was that B.A. needed to have an abortion. The message continued: "This is going to put me in prison for 15 years for raping a minor. Your dad will be the one to press charges on me. I really don't want that."

¶ 6 A certified pediatric nurse practitioner examined B.A. and testified that B.A. did not have any injuries, scarring, or sexually transmitted diseases. B.A.'s hymen was still intact. The nurse practitioner further testified that while a girl's first time having sex would not necessarily break the hymen, an injured or torn hymen was "indicative of penetrating trauma."

¶ 7 Defendant testified he had a barbeque at his house in late August, early September, and his phone went missing at that time. He did not report it missing because it was a prepaid phone without a contract. The boy who found the phone was at the barbeque. Defendant theorized that texts were being exchanged between the victim and another individual. Defendant claimed he never used the phone to text the victim, had never touched her inappropriately, had no sexual contact with her, and thought of her like a little sister.

¶ 8 After "balancing and weighing the conflicting testimony and as much what the evidence doesn't show as what it does," the court concluded it could not find defendant guilty of the original charge of aggravated criminal sexual abuse. The court did, however, find defendant guilty of the lesser offense of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2014)). The court also found that defendant committed an act of

sexual conduct by the use of force or threat of force, and sentenced him to an extended term of four years.

¶ 9 Defendant argues on appeal that his conviction should be vacated because criminal sexual abuse based on the use of force is not a lesser-included offense of aggravated criminal sexual abuse based on a difference in age. Defendant points out that during the opening statements at trial, the State conceded that force was not an element of the offense. Defendant argues he could not have defended against a charge of force without any prior notification, and therefore, believes his due process rights were violated. Defendant asserts that his sentence should be vacated. We agree. Accordingly, we reverse defendant's conviction for criminal sexual abuse.

¶ 10 Both the United States and Illinois Constitutions provide fundamental due process rights to criminal defendants which require courts and prosecutors to inform defendants of the nature of the criminal accusations against them. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. See also *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996). Accordingly, a defendant may not be convicted of an offense he or she has not been charged with committing. See *People v. Clark*, 2016 IL 118845, ¶ 30. A defendant can be convicted of an uncharged offense, however, if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). Whether an offense is a lesser-included offense of the charged crime is an issue of law that is reviewed *de novo*. *People v. Kennebrew*, 2013 IL 113998, ¶ 18; *Kolton*, 219 Ill. 2d at 361.

¶ 11 The first step when deciding whether a defendant has been properly convicted of an uncharged offense is determining whether the offense is "included" in the offense that was charged. *Kolton*, 219 Ill. 2d at 360. The charging instrument approach best serves the purposes of the lesser-included offense doctrine. *Kennebrew*, 2013 IL 113998, ¶ 32; *Kolton*, 219 Ill. 2d at 361. Under this approach, a lesser offense will be included in the charged offense if the factual description of the charged offense describes in a broad way the conduct necessary for the commission of the lesser-included offense, and any elements not explicitly set forth in the indictment can be reasonably inferred therefrom. In other words, a lesser-included offense is one that is composed of some, but not all, of the elements of the greater offense and which does not have any element not included in the greater offense. *People v. Nunez*, 236 Ill. 2d 488, 496 (2010). The lesser offense need not be a necessary part of the greater offense, but the facts alleged in the charging instrument must contain a broad foundation or main outline of the lesser offense. *Kennebrew*, 2013 IL 113998, ¶ 30. Again, the indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations. *People v. Miller*, 238 Ill. 2d 161, 166-67 (2010); *Kolton*, 219 Ill. 2d at 364. "Because the charging instrument provides the parties with a closed set of facts, both sides have notice of all possible lesser-included offenses so that the parties can plan their trial strategies accordingly." *Kolton*, 219 Ill. 2d at 361.

¶ 12 Section 11-1.60(d), the offense with which defendant was charged, states: "A person commits aggravated criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17

years of age and the person is at least 5 years older than the victim." 720 ILCS 5/11-1.60(d) (West 2014). Section 11-1.50(a)(1), the offense with which defendant was convicted of violating, states: "A person commits criminal sexual abuse if that person: (1) commits an act of sexual conduct by the use of force or threat of force." 720 ILCS 5/11-1.50(a)(1) (West 2014). An offense predicated on force cannot be inferred from a strict liability age-based offense because the latter offense is predicated on age alone. Force is not an element of the offense, just as age is not part of the offense of criminal sexual abuse. The trial court here interchanged the statutes with different and incompatible elements.

¶ 13 The State argues that sexual conduct by use of force or threat of force can be inferred from the facts. But, the State also conceded at the very beginning of the trial that force was not an element of the case. Under such circumstances, it was impossible for defendant to know that he was on trial for forcing sexual conduct upon the victim. In fact, defendant did not know until the trial concluded, and the verdict was rendered, that he was being convicted of using force. Criminal sexual abuse is not a lesser-included offense of aggravated criminal sexual abuse in this instance. Again, due process requires that a defendant know what charge he is defending against. The basic issue here is whether defendant knew that the State was charging him with sexual abuse based on force. He did not. While the court found that no penetration occurred here, and consequently acquitted defendant of the charged offense, defendant ultimately was convicted of an offense that was never charged and from which he was not put on notice to defend. Therefore, the trial court violated defendant's due process rights.

Accordingly, defendant's conviction for criminal sexual abuse predicated on force must be reversed.

¶ 14 For the foregoing reasons, we reverse defendant's conviction for criminal sexual abuse.

¶ 15 Reversed.