Circuit Court for Calvert County
Case No. 04-J-17-000010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 412

September Term, 2017

IN RE L.H.

Eyler, Deborah S.,
Leahy,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 9, 2017

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

The Circuit Court for Calvert County, sitting as a juvenile court, found L.H., the appellant, involved in knowingly possessing and intentionally retaining child pornography, which if committed by an adult would be a violation of Md. Code (2002, 2012 Repl. Vol.), § 11-208(a)(2) of the Criminal Law Article ("CL"). The court placed L.H. on probation.

On appeal, L.H. presents two questions, which we have reworded slightly:

1. Did the juvenile court err in finding L.H. involved in acts constituting a violation of CL section 11-208(a)(2) when she was never charged with that offense?

2. Was the evidence sufficient to support a finding of L.H.'s involvement under CL section 11-208(a)(2)?

We answer the first question in the affirmative and reverse the judgment of the juvenile court. Accordingly, we do not reach the second question.

FACTS AND PROCEEDINGS

On the night of September 16, 2016, a group of high school friends, all minors, were drinking alcohol in the basement of L.H.'s parent's house. L.H. and her friend, R.P., left to walk another friend home and upon returning discovered the two remaining friends engaging in sexual intercourse. L.H. and R.P. found that funny, so R.P. began to video record the two on her phone, unbeknownst to them. R.P. sent the video to a few friends. As one would expect, the video circulated quickly around school the following week.

On September 17, 2016, R.P. sent the video to L.H. via text message. The two girls discussed showing it to L.H.'s mother and to their friend who was in the video, but

they never did. L.H. told the school liaison officer, Detective Andrew Clas, that she had deleted the video when she received it. L.H. also told R.P. on September 20, 2016, via text message, that she had deleted the video.

L.H. was charged as a juvenile as being involved in conduct that constituted a violation of CL section 11-207(a)(4)(i):

> (a) *Prohibited.* — A person may not:
>
> * * *
>
> (4) knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance:
>
> (i) that depicts a minor engaged as a subject in . . . sexual conduct[.]

After the evidence was closed and during rebuttal closing argument, the prosecutor argued for the first time that the juvenile court could find L.H. involved in possession of and intention to retain child pornography in violation of CL section 11-208(a)(2), because that was a lesser included offense of CL section 11-207(a). CL section 11-208(a)(2) provides:

> (a) *Prohibited.* — A person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child under the age of 16 years:
>
> * * *
>
> (2) engaged in sexual conduct[.]

The juvenile court recessed to allow L.H.'s counsel the opportunity to consider this argument. After the break, L.H.'s lawyer argued that CL section 11-208(a)(2) is not a lesser included offense of CL section 11-207(a)(4) because the former contains the element of "intent to retain" whereas the latter does not.

The juvenile court found that L.H. was not involved in a violation of CL section 11-207(a)(4) but that she knowingly possessed and intentionally retained child pornography in violation of CL section 11-208(a)(2). On that basis, L.H. was found to be delinquent and, as noted, was placed on probation. She then noted this timely appeal.

DISCUSSION

Whether one offense is a lesser included offense of another is a legal question. Accordingly, we review the juvenile court's ruling *de novo*. *See In re Malichi W.*, 209 Md. App. 84, 89 (2012) ("Because this is a purely legal issue . . . , we review the juvenile court's decision under a *de novo* standard.") (citing *Davis v. Slater*, 383 Md. 599, 604 (2004)).

L.H. contends that the juvenile court incorrectly found that she was involved under CL section 11-208(a)(2) because she was not charged with that offense and because it is not a lesser included offense of the offense with which she actually was charged. The State agrees.

This Court previously has explained:

> Article 21 of the Maryland Declaration of Rights provides that each person charged with a crime must be informed of the accusation against him. It is fundamental that a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction prescribed by common law or by statute. Specifically, when no crime is charged, a court does not have the power to inquire into the facts, to apply the law, and to impose punishment for an offense.

Stickney v. State, 124 Md. App. 642, 646 (1999) (internal citations and quotations omitted).

In *Hagans v. State*, 316 Md. 429, 447–48 (1989), the Court of Appeals recognized an exception to the general prohibition on convictions for uncharged offenses, adhering to the well-established common law rule "that a defendant, charged with a greater offense, can be convicted of an uncharged lesser included offense[.]" *Hagans* specifically dealt with jury trials and jury instructions regarding uncharged lesser included offenses, but its holding was extended to bench trials in *Smith v. State*, 412 Md. 150, 170 (2009) ("Consistent with *Hagans*, we conclude that a judge, not just a jury, may convict a defendant of an uncharged lesser included offense.").

To determine what constitutes a lesser included offense, Maryland courts apply the "required evidence test" or "elements test." *Williams v. State*, 200 Md. App. 73, 87 (2011) (citing *Hagans*, 316 Md. at 449). Under this test, "[a]ll of the elements of the lesser included offense must be included in the greater offense." *Hagans*, 316 Md. at 449.

In this case, L.H. was charged with violating CL section 11-207(a)(4)(i), which prohibits a person from "knowingly . . . possess[ing] with the intent to distribute any matter, visual representation, or performance . . . that depicts a minor engaged as a subject in . . . sexual conduct[.]" There are three elements to this offense: 1) the offender must knowingly possess certain material, 2) the offender must intend to distribute that material, and 3) the material must be child pornography.

CL section 11-208(a)(2), on the other hand, provides that "[a] person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual

representation showing an actual child under the age of 16 years . . . engaged in sexual conduct." The elements of this offense are: 1) the offender must knowingly possess certain material, 2) the offender must intend *to retain* that material, and 3) the material must be child pornography. The "intentionally retain" element was added to CL section 11-208(a)(2) when the General Assembly amended the statute in 2007. *See* 2007 Maryland Laws Ch. 596 (H.B. 285). Before then, CL section 11-208(a)(2) was simply a possession offense.

Moreover, as the State points out in confessing error, under CL section 11-208(d), "[i]t is an affirmative defense to a charge of violating [CL section 11-208(a)] that the person promptly and in good faith: (1) took reasonable steps to destroy each visual representation; or (2) reported the matter to a law enforcement agency." Not only is the crime L.H. was found to have been involved in not a lesser offense of the crime she was charged with being involved in, she was given no opportunity during the hearing to put on evidence of these affirmative defenses.

For all these reasons, the judgment of juvenile court shall be reversed. We need not address the sufficiency issue as there is no basis for a remand.

JUDGMENT OF THE JUVENILE COURT FINDING APPELLANT INVOLVED AS TO CL SECTION 11-208(a)(2) IS REVERSED. COSTS TO BE PAID BY CALVERT COUNTY.