Circuit Court for Charles County
Case No. C-08-JV-19-000096

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1197

September Term, 2019

IN RE: A.S.

Meredith,
Gould,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 23, 2020

The State filed a delinquency petition in the Circuit Court for Charles County alleging that A.S., appellant, had possessed and distributed child pornography, to wit, a nude photograph of a minor female. Following a hearing, the court, sitting as the juvenile court, found A.S. involved in both crimes and ordered supervised probation. In this appeal, A.S. presents three questions for our review:

1. Was the evidence adduced at the juvenile hearing sufficient to show that the minor depicted in the photograph was engaged in "sexual conduct," as defined by the Maryland statute prohibiting the distribution of child pornography?

2. Did the juvenile court's failure to make a finding as to whether the photographed minor was in a state of "sexual excitement" constitute an implied acquittal on that modality of proving possession of child pornography?

3. Was the evidence adduced at the juvenile hearing sufficient to show that the minor depicted in the photograph was in a state of "sexual excitement," as defined by the Maryland statute prohibiting the possession of child pornography?

For reasons to follow, we hold that the evidence was sufficient to show that the minor depicted in the photograph was engaged in sexual conduct. Accordingly, the evidence was sufficient to sustain the juvenile court's finding of involved as to the allegation that A.S. distributed child pornography. Because that evidence also was sufficient to sustain the juvenile court's finding of involved as to the allegation that A.S. possessed child pornography, we need not address the issues raised in questions 2 and 3. We therefore affirm the judgments of the circuit court.

BACKGROUND

In 2017, a 13-year-old female, E.O., took a nude photograph of herself using the camera on her cellphone. E.O. then sent that photograph to an unidentified individual. A.S. eventually obtained a copy of the photograph, which he later distributed, via text message, to a group of friends who were part of a group chat. Sometime later, the mother of one of the friends discovered the photograph on her son's cellphone and reported it to the police. During the subsequent investigation, the police talked to A.S., who admitted that he had texted the photograph to his friends. The police also searched A.S.'s cellphone and discovered a copy of the photograph.

The State thereafter filed a delinquency petition alleging that A.S. had possessed and distributed child pornography. Specifically, the State alleged that A.S. "did knowingly distribute a matter and visual representation of [E.O.], that depicts a minor engaged as a subject in sexual conduct, in violation of [Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 11-207(a)(4).]" The State further alleged that A.S. "did knowingly possess and intentionally retain a film, photograph, videotape, and visual representation … showing an actual child under the age of 16 years engaged in sexual conduct and in a state of sexual excitement, in violation of [§ 11-208(b) of the Criminal Law Article of the Maryland Code.]"

At A.S.'s adjudicatory hearing, E.O. testified regarding the photograph, which was admitted into evidence. In the photograph, E.O. can be seen holding her cellphone, which was pointed at a mirror (or some other reflective surface) as she took a picture of her

reflection. The image depicted E.O., fully nude, sitting down in front of the reflective surface, with her thighs closed and stretched in front of her such that only the top part of her pubic area can be seen. Her torso is erect, and it looks as if she is either on her knees, sitting down, or sitting on the floor with her legs outstretched. In her left hand is her cellphone, which she is holding up in front of her face, such that part of her face is obstructed by the phone. Her right elbow is tucked below her right shoulder, and her right palm is resting on the right side of her chest, approximately midway between her right shoulder and the nipple of her right breast. The thumb, index finger, and middle finger of her right hand are resting on her right clavicle, while the ring and pinky fingers are spread slightly and positioned below the clavicle. The side of her right palm (below the pinky) sits just above the nipple and outlines the curve of her right breast.

At the conclusion of the evidence, A.S.'s counsel moved for judgment of acquittal, arguing that the State had failed to prove that A.S. had possessed and distributed child pornography. A.S.'s counsel argued that the nude photograph of E.O. did not depict her engaged in "sexual conduct," which was defined under the relevant statutory scheme to include "any touching of the breasts of the female individual." A.S.'s counsel argued that no such "touching" was shown, as the photograph merely depicted E.O. with "one hand holding the phone, the other hand on her shoulder."

The juvenile court ultimately denied the motion and found that E.O. was in fact touching her breast in the photograph. The court thereafter found A.S. involved in possessing and distributing child pornography.

DISCUSSION

A.S. contends, as he did below, that the evidence adduced at trial was insufficient to prove that he possessed and distributed child pornography, *i.e.*, the nude photograph of E.O., because the photograph did not depict E.O. engaged in sexual conduct, *i.e.* touching her breasts. A.S. maintains that the photograph merely shows E.O. "with her hand holding her shoulder or collarbone" and that, although her breasts are exposed in the photograph, "her hand touches no part of them." A.S. contends, therefore, that the juvenile court clearly erred in finding that E.O. was touching her breast in the photograph. A.S. further contends that, because the juvenile court relied solely on that finding to conclude that E.O. was engaged in sexual conduct in the photograph, the evidence was insufficient to establish that essential element of the crimes.

"The test of appellate review of evidentiary sufficiency is whether, 'after 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). "This same standard of review applies in juvenile delinquency cases." *In re Landon G.*, 214 Md. App. 483, 491 (2013) (quoting *In re Timothy F.*, 343 Md. 371, 380 (1996)). Moreover, in a juvenile delinquency matter, we "review any conclusions of law *de novo*, but apply the clearly erroneous standard to findings of fact." *In re Elrich S.*, 416 Md. 15, 30 (2010). "[A] finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Brown v. State*, 234

Md. App. 145, 152 (2017) (citing *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). "The clearly-erroneous standard is a deferential one, giving great weight to the trial court's findings." *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (citing *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000)). In reviewing those findings, the appellate court also must be mindful of the fact that the juvenile court, as the fact-finder, "possesses the ability to choose among differing inferences that might possibly be made from a factual situation[.]" *In re Landon G.*, 214 Md. App. at 491-92 (citing *Bible v. State*, 411 Md. 138, 156 (2009)). Thus, "the appellate court must give deference to all reasonable inferences that the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference." *Id.* (citations and quotations omitted).

As noted, A.S. was alleged to have possessed and distributed child pornography in violation of CL §§ 11-207(a)(4) and 11-208. Section 11-207(a)(4) states, in pertinent part, that a person may not "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 sadomasochistic abuse or sexual conduct[.]" CL § 11-207(a)(4). Section 11-208 states, in pertinent part, 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: (1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement." CL § 11-208(a).[1] The statute defines "sexual conduct" as "(1) human

[1] Effective October 1, 2019, the Maryland General Assembly amended CL § 11-208 to include, in its prohibition of the possession of child pornography, "a computer-generated

masturbation; (2) sexual intercourse; or (3) whether alone or with another individual or animal, any touching of or contact with: (i) the genitals, buttocks, or pubic areas of an individual; or (ii) breasts of a female individual." CL § 11-101(d)[2]; *See also* CL § 11-201(f) ("'Sexual conduct' has the meaning stated in § 11-101 of this title.").

Here, it is undisputed that A.S. possessed and distributed a nude photograph of E.O. It is also undisputed that E.O. was under the age of 16 years when the photograph was taken. The only issue is whether that photograph depicted E.O. engaged in sexual conduct, namely, "any touching of or contact with breasts of a female individual."

We hold that sufficient evidence was adduced to establish that E.O. was touching or making contact with her breasts when the photograph was taken. To begin with, A.S.'s claim that the photograph merely depicted E.O. "holding her shoulder or collarbone" is not supported by the record. Although some of the fingers on E.O.'s right hand can be seen touching her right clavicle, a large portion of her hand can be seen resting on the part of her chest below her right clavicle, with a portion of her palm touching the area above her right nipple near where her right breast begins to curve. That portion of her body can only be described as her "breast,"[3] such that a reasonable factfinder could have concluded that

image that is indistinguishable from an actual and identifiable child under the age of 16 years[.]" 2019 Maryland Laws Ch. 325.

[2] Effective October 1, 2019, the Maryland General Assembly amended the statutory definition of "sexual conduct" to include "lascivious exhibition of the genitals or pubic area of any person." 2019 Maryland Laws Ch. 325.

[3] *See* https://pathology.jhu.edu/breast/overview ("Anatomically, the adult breast sits atop the pectoralis muscle (the 'pec' chest muscle), which is atop the ribcage. The breast

the photograph depicted E.O. engaged in sexual conduct. At the very least, we cannot say that the juvenile court was clearly erroneous in making that finding. Thus, the evidence adduced at trial was sufficient to sustain the juvenile court's findings of involved as to the allegations that A.S. possessed and distributed child pornography in violation of CL §§ 11-207 and 11-208.

In his questions presented, A.S. raises two additional arguments, each of which concerns the alternative modality of the allegation that he possessed child pornography, namely, that he possessed a picture of an actual child under the age of 16 years "in a state of sexual excitement." First, A.S. claims that the juvenile court's failure to make a finding as to whether the photograph depicted E.O. in a state of sexual excitement constituted an "implied acquittal" as to that modality of the crime. Second, A.S. claims that, even if there was no implied acquittal, the evidence was insufficient to show that the photograph depicted E.O. in a state of sexual excitement.

We need not address either of A.S.'s claims. The statute that A.S. was alleged to have violated, CL § 11-208, specifies multiple ways, or modalities, in which the offense of possession of child pornography may be committed. *See* CL § 11-208(a) (proscribing the possession of a visual representation showing a child under the age of 16 years: "(1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; *or* (3) in a state of sexual excitement") (emphasis added). In its delinquency petition, the State properly alleged, in a single count, that A.S. had committed two of those statutory

tissue extends horizontally [] from the edge of the sternum … out to the midaxillary line (the center of the axilla, or underarm).") (last visited June 16, 2020).

modalities; specifically, the State alleged that A.S. had possessed a photograph depicting E.O. both engaged in sexual conduct *and* in a state of sexual excitement. *See Tapscott v. State*, 106 Md. App. 109, 135 (1995) ("When a statute creates an offense and specifies several different . . . means by which it may be committed, an indictment . . . may properly allege the offense in one count by charging the accused in conjunctive terms with doing any or all of the . . . means specified in the statute."). In such a situation, the alleged offense "may be established by proof of *any one* of the acts." *State v. Hunt*, 49 Md. App. 355, 359 (1981) (emphasis added). In other words, as A.S. readily admits, "to establish possession of child pornography, the State needed to prove one of two modalities: that the minor in the photo was engaged in sexual conduct, § 11-208(a)(2), or was in a state of sexual excitement, § 11-208(a)(3)." And, as discussed above, the State proved the first modality, *i.e.*, that E.O. was engaged in sexual conduct, which was sufficient to sustain the juvenile court's finding of involved as to that count. *See Cortez v. State*, 104 Md. App. 358, 361-62 (1995) (noting that "a 'multi-purpose' offense, *i.e.*, an offense having alternative elements, . . . may be committed in two or more different ways, *any one of which is sufficient for a conviction*") (citations and quotations omitted) (emphasis added). Accordingly, even if we were to agree with A.S.'s arguments that he was "acquitted" and/or that the evidence was insufficient as to the second modality of the offense of possession of child pornography, the evidence would nevertheless be sufficient to sustain the juvenile court's findings of involved as to that offense. In short, because we sustain on the first issue, A.S.'s remaining issues are moot and need not be addressed. *See Tempel v. Murphy*,

202 Md. App. 1, 16 (2011) ("The test for mootness is whether a case presents a controversy between the parties for which the court can fashion an effective remedy.").

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.