[Cite as *In re S.P.*, 2011-Ohio-2687.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: S. P.

A MINOR CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 10-CA-122

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case No. A2010-0095
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 2, 2011

APPEARANCES:

For Appellee	For Appellant
LISA J. MEEHAN 20 South Second Street Fourth Floor Newark, OH 43055	BROOKE M. BURNS 250 East Broad Street Suite 1400 Columbus, OH 43215

Farmer, J.

{¶1} On February 10, 2010, a complaint was filed alleging appellant, S. P., a juvenile, to be delinquent of four counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and one count of attempted gross sexual imposition. Said allegations arose from incidents involving the two children of appellant's mother's boyfriend. Appellant was fifteen at the time of the incidents and the children, D. D. and M. D., were under the age of thirteen.

{¶2} An adjudicatory hearing was held on July 19, 2010. Prior to trial, the state dismissed the attempt count, and at the conclusion of the evidence, the trial court dismissed two of the gross sexual imposition counts. By judgment entry filed same date, the trial court found appellant delinquent of the two remaining counts.

{¶3} A dispositional hearing was held on October 4, 2010. By judgment entry filed same date, the trial court committed appellant to the Ohio Department of Youth services for an indefinite term of a minimum of six months and a maximum period not to exceed age 21 on each count, to be served consecutively.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE JUVENILE COURT ERRED WHEN IT ADJUDICATED S.P. DELINQUENT OF GROSS SEXUAL IMPOSITION WHEN NO EVIDENCE WAS PRESENTED THAT S.P. TOUCHED M.D. FOR THE PURPOSE OF SEXUALLY AROUSING OR GRATIFYING EITHER S.P. OR M.D., AND WHEN D.D. TESTIFIED THAT NO SEXUAL CONTACT OCCURRED BETWEEN HE AND S.P. DURING THE

TIME PERIOD ALLEGED IN THE COMPLAINT. S.P.'S ADJUDICATIONS VIOLATE HIS RIGHT TO DUE PROCESS, AS THEY WERE OBTAINED IN THE ABSENCE OF SUFFICIENT, CREDIBLE, AND COMPETENT EVIDENCE OF EVERY ELEMENT OF GROSS SEXUAL IMPOSITION."

II

{¶6} "THE JUVENILE COURT VIOLATED S.P.'S RIGHT TO DUE PROCESS WHEN IT ADJUDICATED HIM DELINQUENT OF GROSS SEXUAL IMPOSITION WHEN ITS DECISION WAS BASED ON THE INCONSISTENT AND UNRELIABLE TESTIMONY OF M.D. AND D.D."

I, II

{¶7} Appellant challenges the sufficiency and manifest weight of the evidence regarding the trial court's determination of delinquency on two counts of gross sexual imposition.

{¶8} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and

a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶9} The gravamen of appellant's attack on his adjudication for gross sexual imposition regarding M. D. involves the lack of evidence relative to proof of sexual arousal or gratification. As to the adjudication for gross sexual imposition regarding D. D., appellant challenges the failure to prove that the alleged delinquent conduct occurred between May 15, and September 1, 2008.

{¶10} Appellant was adjudicated delinquent on two counts of gross sexual imposition, Counts 1 and 4 of the complaint filed February 10, 2010, which alleged the following:

{¶11} "**COUNT I:** On or about a date from May 15, 2008, through September 1, 2008, in the County of Licking, State of Ohio, S. P., who was 15 years of age at the time, did engage in sexual contact with D. D., DOB: 11/9/97, who was age 11 at the time, who is not the spouse of the offender, when D. D. was under the age of thirteen, whether or not the offender new the age of the other person, to-wit: at 658 Newark Ave., Thornville (Buckeye Lake), Licking County, Ohio, S. P. pulled down D. D.'s pants and placed his penis between the cheeks of D. D.'s buttocks for the purpose of sexual gratification or arousal. The above behavior is in violation of Section 2907.05(A)(4) of the Ohio Revised Code as applied to adults, and in violation of Section 2152.02(F) of the Ohio Revised Code as made applicable to juveniles.

{¶12} "**COUNT IV:** On or about a date from May 15, 2008, through February 1, 2009, in the County of Licking, State of Ohio, or otherwise in a continuing course of conduct, S. P., who was 15 or 16 years of age at the time, did engage in sexual contact with M. D., DOB: 7/19/00, who was age 7 or 8 at the time, who is not the spouse of the offender, when M. D. was under the age of thirteen, whether or not the offender new the age of the other person, to-wit: at 658 Newark Ave., Thornville (Buckeye Lake), Licking County, Ohio, or at 403½ W. Wheeling St., Lancaster, Fairfield County, Ohio, S. P. did touch M. D.'s breast for the purpose of sexual gratification or arousal. The above behavior is in violation of Section 2907.05(A)(4) of the Ohio Revised Code as applied to adults, and in violation of Section 2152.02(F) of the Ohio Revised Code as made applicable to juveniles."

{¶13} We will review the sufficiency and the weight of the evidence collectively. Appellant was found delinquent of gross sexual imposition in violation of R.C. 2907.05(A)(4) which states the following:

{¶14} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶15} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶16} R.C. 2907.01(B) defines "sexual contact" as, "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic

region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶17} Appellant argues no proof of sexual arousal or gratification of either person was presented regarding the allegation involving M. D. M. D. testified that appellant, using both of his hands, squeezed both of her breasts under her clothing. T. at 52-53. M. D. testified the first time appellant touched her, she was sitting on a couch and appellant "was sliding up my leg with his hand and he kept on pulling my legs down when I kept on pulling them back up." T. at 61.

{¶18} Admittedly, there is no direct testimony as to sexual arousal or gratification regarding the touching of M. D.'s breasts. However, this is not unexpected given the fact that M. D. was only 8 years old at the time of the incident. M. D. identified the area of touching as her private area where she did not like to be touched. T. at 50-51.

{¶19} The absence of direct testimony as to sexual arousal or gratification does not defeat a conviction for gross sexual imposition:

{¶20} "First, there is no requirement that there be direct testimony regarding sexual arousal or gratification. *State v. Astley* (1987), 36 Ohio App.3d 247; *State v. Cobb* (1991), 81 Ohio App.3d 179; *In Re Anderson* (1996), 116 Ohio App.3d 441; *State v. Brady* (July 9, 2001), Stark App. No. 2000CA00223, 2001 WL 815574. In the absence of direct testimony regarding sexual arousal or gratification, the trier of fact may infer that appellant was motivated by desires for sexual arousement or gratification from the 'type, nature and circumstances of the contact, along with the personality of the defendant.' *State v. Cobb* (1991), 81 Ohio App.3d at 185; *State v. Brady*, *supra (*citing *Cobb).*" *State v. Gerardi,* Delaware App. No. 01CA-A-07-029, 2002-Ohio-732, at pg. 5.

{¶21} We conclude the surrounding evidence as to sexual arousal or gratification satisfies the requirement. The evidence is clear that appellant touched M. D.'s breasts under her clothing and slightly squeezed them. This incident occurred after appellant had already stroked and rubbed M. D.'s legs. The clear inference from these direct facts is that appellant's purpose was sexual arousal or gratification. We therefore find there was sufficient evidence to establish the offense of gross sexual imposition beyond a reasonable doubt as to Count 4.

{¶22} Next, appellant argues the state failed to establish that the incident involving D. D. occurred between March 15, and September 1, 2008. It is conceded that the evidence as to the time frame is confusing at best. The investigating officer, Lancaster Police Detective Eric Duemmel, testified that the time frame was established by determining the location of the incident (Buckeye Lake) and when D. D.'s father was residing at Buckeye Lake. T. at 102, 110-111. D. D. was certain that the incident occurred at Buckeye Lake when he was visiting his father and appellant was visiting his mother who was his father's girlfriend. T. at 29. D. D.'s father testified he resided at Buckeye Lake in the summer of 2008. T. at 74-75. J. P., the father's girlfriend and appellant's mother, acknowledged that D. D.'s father lived at Buckeye Lake in the summer of 2008. T. at 124.

{¶23} The confusion arose when both attorneys attempted to have D. D. definitively state the year of the incident. When D. D. was testifying on July 19, 2010, he was about to enter the seventh grade. T. at 23. On direct examination, D. D. testified the incident occurred after his fourth grade year, "three" years ago. T. at 30-31. On cross-examination, defense counsel pointed out that if the incident occurred three

years ago, the year would be 2007. T. at 36. Obviously, this is a simple mathematical error. If in July 2010 D. D. was about to enter the seventh grade, he had just finished the sixth grade. The summer after his fourth grade would have been two years ago or 2008, the year when D. D.'s father lived at Buckeye Lake.

{¶24} We conclude from all the evidence, it is clear that the event occurred in the summer of 2008 and the elements of Count 1 have been satisfied beyond a reasonable doubt.

{¶25} Upon review, we find sufficient evidence to find appellant delinquent of two counts of gross sexual imposition, and no manifest miscarriage of justice.

{¶26} Assignments of Error I and II are denied.

{¶27} The judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/sg 517

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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	:	
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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of licking County, Ohio, Juvenile Division is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES