[Cite as *In re J. W.*, 2004-Ohio-3404.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

IN THE MATTER OF :

J.W., JR. : C.A. CASE NO. 04CA5

: (Civil Appeal from Common Pleas Court)

. . . . . .

O P I N I O N

Rendered on the 25th day of June, 2004.

. . . . . .

Robert Long, Asst. Pros. Attorney, 201 W. Main Street, Troy, Ohio 45373, Atty. Reg. No. 0066796
Attorney for Plaintiff-Appellee

J. Andrew Wannemacher, Public Defender, Old Courthouse, 210 W. Main Street, Troy, Ohio 45373, Atty. Reg. No. 0061112
Attorney for Defendant-Appellant

. . . . . .

GRADY, J.

{¶1} Defendant, J.W., Jr., appeals from his conviction and sentence as a juvenile for the offense of Importuning, R.C. 2907.07(A).

{¶2} On September 21, 2003, a ten year old boy, the victim in this case, was at a youth football game at a public park in Piqua. When the boy walked to the public lavatory he encountered J.W., a fourteen year old male, and two friends loitering by the men's room door. At trial, the boy testified that J.W. "asked me

if I had a big mouth and I said no. And then he said will you suck my dick." (T. 7).

{¶3} The victim reported J.W.'s statements to his father, who asked the Defendant to leave the park. When J.W. refused, the father called the police and sought the aid of Piqua Police Chief Phillip Potter, who happened to be at the park. Chief Potter confronted the Defendant and a scuffle ensued. The Defendant was arrested and charged with Importuning, R.C. 2907.07(A), Assault, and Resisting Arrest.

{¶4} The Defendant pled guilty to the assault and resisting arrest charges. The Juvenile Division of the court of common pleas held an adjudicatory hearing on the remaining charge of Importuning. After hearing testimony from the victim, his father, and Chief Potter, the court overruled the Defendant's Crim. R. 29 motion for acquittal and found him guilty of importuning. The Defendant appeals from that judgment.

FIRST ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL."

SECOND ASSIGNMENT OF ERROR

{¶6} "THE TRIAL COURT ERRED IN DETERMINING THAT IT WAS THE DEFENDANT'S BURDEN TO PROVE THE DEFENDANT'S INTENT."

THIRD ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED IN ITS DECISION, AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF GUILT TO THE

CHARGE OF IMPORTUNING."

{¶8} **The State presented no evidence to prove that Defendant had uttered the remark that forms the basis of his Importuning conviction except the testimony of the ten-year old victim. Defendant presented no evidence at all. Chief Potter testified that the words "suck my dick" are often employed as a derogatory reference without any actual intent to engage in sex.**

{¶9} **At the conclusion of the evidence the Juvenile Court stated: "The Court is going to find the victim in this case believed he was being solicited for sex. I don't know if that's what Defendant intended, but when the defendant put on no testimony for the court to conclude anything else and * * * there were other witnesses available, the court has no other choice than to conclude that the State has proven the case beyond a reasonable doubt." (T. 58).**

{¶10} **The offense of Importuning of which Defendant was convicted is defined by R.C. 2907.07(A), which states: "No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person." Unlike the version of the offense defined in division (B) of the same section, the reaction or belief of the victim is not an element of an R.C. 2907.07(A) violation.**

{¶11} **Defendant-Appellant seizes on the court's remark that it did not know whether he actually intended to solicit sex, arguing that the court erred in denying his Crim.R. 29 motion and entering a judgment of conviction for Importuning because there**

was not sufficient evidence of his intent, as the court's remark demonstrates.

{¶12} R.C. 2901.21(A) provides that "[e]xcept as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

{¶13} "(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing:

{¶14} "(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

{¶15} Culpable Mental States are defined by R.C. 2901.22(A)-(E). Division (B) of R.C. 2901.21 provides:

{¶16} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

{¶17} "Recklessness" is defined by R.C. 2901.22(C), which states:

{¶18} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result

or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶19} **R.C. 2907.07(A) specifies no degree of culpability. Neither does it plainly indicate a purpose to impose strict criminal liability, except with respect to the perpetrator's knowledge of the victim's age. Therefore, in order to be sufficient to prove criminal liability for an alleged R.C. 2907.07(A) violation, the evidence must demonstrate that the conduct which the alleged solicitation for sex involved was performed recklessly, as that is defined by R.C. 2901.22(C).**

{¶20} **In order to find that the Defendant acted recklessly, the trier of fact must have been able to find, beyond a reasonable doubt, that when the Defendant made the remark to the ten-year old victim the Defendant acted with a perverse disregard that his conduct was likely to cause a certain result. In this instance, that result is a solicitation to engage in oral sex. Whether he actually intended to solicit oral sex or the victim believed that he'd been solicited is immaterial.**

{¶21} **Crim R. 29(A) provides that the trial court "shall order the entry of judgment of acquittal of one or more offenses charged...if the evidence is insufficient to sustain a conviction." "Sufficiency" of the evidence is a test of legal adequacy; whether the evidence is adequate to allow the case to go to the trier-of-fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52.**

{¶22} Our standard of review for a denial of a Crim. R. 29 motion is the same as that for the sufficiency of the evidence. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 264. To reverse a conviction for insufficient evidence, we must find that no rational trier of fact could have found that the evidence proved the material elements of the crime alleged beyond a reasonable doubt. *Thompkins, supra* at 389. We have held that, when reviewing a Crim. R. 29(A) motion, that evidence must be viewed in a light most favorable to the state. *State v. Pulaski* (2003), 154 Ohio App.3d 301, 310, 2003-Ohio-4847.

{¶23} The trial court overruled the defendant's Crim. R. 29(A) motion for acquittal. Viewed in a light most favorable to the prosecution, the victim's testimony about the Defendant's request for oral sex, which the court found "credible and believable," has sufficient probative value for a trier-of-fact to find the Defendant guilty beyond a reasonable doubt. *Pulaski, supra*. A rational trier-of-fact could find the evidence proved the material elements of the crime beyond a reasonable doubt, and the trial court therefore properly denied the Defendant's motion. Defendant's first assignment of error is overruled.

{¶24} R.C. 2901.05(A) provides that "[a] person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution." In his second assignment of error, Defendant argues that the court's statement concerning his failure to present any contrary evidence from other witnesses who

were available indicates that it improperly shifted the burden of proof to him to demonstrate a lack of intent.

{¶25} Absence of evidence is not positive proof, but it can permit inferences that otherwise might be rebutted. The court's statement seems to indicate that, absent evidence that Defendant was not serious, it had no choice except to infer that he meant what he said. That is not shifting the burden of proof. In any event, those considerations are irrelevant to the recklessness standard, which involves the objective facts and circumstances of the accused's conduct. The second assignment of error is overruled.

{¶26} In his third assignment of error, Defendant argues that the evidence was insufficient as a matter of law to prove the alleged offense of Importuning. We previously discussed that standard, as defined by *State v. Thompkins,* in connection with the first assignment of error. We find here, for the same reasons, that the evidence was legally sufficient to support a conviction. The third assignment of error is overruled.

{¶27} The judgment of the trial court will be affirmed.

FAIN, P.J. and WOLFF, J., concur.

Copies mailed to:

Robert Long, Esq.
J. Andrew Wannemacher, Esq.
Hon. Lynnita K.C. Wagner