[Cite as *In re M.P.*, 2010-Ohio-2216.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93152

IN RE: M.P.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 08 127647

BEFORE: Jones, J., Gallagher, A.J., and Cooney, J.

RELEASED: May 20, 2010

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, M.P.,[1] appeals his adjudication of delinquent. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, M.P. was charged with one count of rape against five-year-old R.R. After a competency hearing, the trial court found R.R. incompetent to testify. The matter proceeded to trial at which the following evidence was adduced.

{¶ 3} R.R.'s cousin, Shaquille Roberson ("Roberson"), was babysitting R.R. while R.R.'s mother, Luvennia McCoy ("McCoy"), was at work. Around 9 p.m., Roberson went downstairs and saw R.R. in the living room with M.P. R.R. was bent over on the couch with her pants down and her buttocks in the air. M.P. was standing over her with his hand on her waist and his penis exposed. M.P. quickly sat down on the couch and pulled his shirt down over his exposed penis. Roberson testified she grabbed R.R., and the little girl told her that M.P. had put his finger "in there." M.P. told Roberson that the situation "was not how it looked like."

{¶ 4} Roberson called McCoy on her cell phone, and McCoy returned home. McCoy testified that M.P. denied touching R.R. and further stated he told her that "he didn't care what he had done. He don't care about nothing." She

[1] The juveniles referred to herein are referred to by their initials in accordance with this court's established policy regarding non-disclosure of identities in juvenile cases.

also testified that when she asked her daughter why she did not yell, R.R. told her that M.P. told her not to.

{¶ 5} McCoy took R.R. to the hospital. The nurse who performed the medical examination testified that R.R. had a freshly bruised hymen. The nurse testified that a hymen would not bruise on its own and it would have to experience some sort of blunt force trauma that would burst the small capillaries under the skin. The investigating social worker testified that R.R. told her that M.P. touched her "down there."

{¶ 6} M.P. testified that he went into the dark living room with R.R. to watch television and was trying to find the remote to turn on the television. He said that the television "blinked" and he turned around and saw R.R. on the couch with her pants down. He asked her what she was doing, and she said she had to use the bathroom. He testified he turned slightly and that is when Roberson entered the room.

{¶ 7} The trial court adjudicated M.P. delinquent of attempted rape and, at disposition, committed him to the Ohio Department of Youth Services for a minimum of one year, maximum to his twenty-first birthday.

{¶ 8} M.P. appeals, raising the following assignments of error for our review:

> "I. The juvenile court committed plain error and abused its discretion when [it] found [M.P.] delinquent of attempted rape in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and Juvenile Rule 22(B) and Juvenile Rule 29(E) and (F).

"II. The trial court violated [M.P.'s] right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, and Juv.R. 29 (E)(4) when it adjudicated him delinquent of attempted rape absent proof of every element of the charge against him by sufficient, competent, and credible evidence.

"III. [M.P.'s] adjudication and commitment must be reversed and remanded for a new trial because his adjudication is against the manifest weight of the evidence.

"IV. [M.P.] was denied his constitutional right to effective assistance of counsel.

"V. The cumulative effect of errors resulted in the denial of [M.P.'s] right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution."

Alleged Trial Court Errors

{¶ 9} In the first assignment of error, M.P. claims that the trial court erred when it amended the complaint from rape to attempted rape and further claims that the court improperly shifted the burden of proof to him.

{¶ 10} Juv.R. 22(B), states:

{¶ 11} "Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended * * * if the interests of justice require, upon order of the court. A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult."

{¶ 12} In the comment following Juv.R. 22(B), the Supreme Court Rules Advisory Committee has explained: "The revision to Juv.R. 22(B) prohibits the

amendment of a pleading after the commencement or termination of the adjudicatory hearing unless the amendment conforms to the evidence presented and also amounts to a lesser included offense of the crime charged. Because juveniles can be bound over as adults and become subject to the jurisdiction of the criminal division of the common pleas courts, it is important that Juv.R. 22(B) conform with Crim.R. 7(D), which similarly prohibits any amendment which would result in a change in the identity of the crime charged." Juv.R. 22(B) 1994 Staff Note.

{¶ 13} While attempted rape is not a lesser included offense of rape, we do find that the court had authority to amend the charge to the offense of attempted rape. Although many Ohio courts, including this one, have assumed without stating as much that attempted rape is a lesser included offense of rape, we find it important to distinguish between lesser included offenses, inferior degree offenses, and attempt offenses.

{¶ 14} In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, the Ohio Supreme Court noted three types of lesser offenses on which, when supported by the evidence, a jury must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; and (3) lesser included offenses of the indicted offense. Id. at 208. "Each of these groups of offenses is conceptually separate and distinct * * * ." Id.

{¶ 15} In *State v. Aponte*, Cuyahoga App. No. 89727, 2008-Ohio-1264, we stated that "an attempt is conceptually different from a lesser included offense; it is more closely related to an offense of inferior degree."

{¶ 16} The trial court in the case at bar, after hearing all the evidence, amended the rape charge to attempted rape, in violation of R.C. 2907.02(A)(1)(b) and 2923.02. While M.P. argues that there is no amended complaint in the record that alleges that he committed attempted rape, "[a]ttempts, as criminal offenses, arise from R.C. 2923.02 and need not be included within the indictment for the completed offense. Rather, if during the course of trial the defendant presents sufficient evidence that his conduct was unsuccessful in constituting the indicted offense, an instruction to the jury on attempt would be proper." *Deem* at 208. And Juv.R. 22 clearly allows the trial court to amend the complaint to conform to the evidence presented at the adjudication. Therefore, we find no error with the trial court's decision to amend the charge from rape to attempted rape.

{¶ 17} M.P. further asserts that the trial court improperly shifted the burden to him so that he had to prove the "affirmative defense of attempt." To support his proposition, M.P. quotes a portion of the transcript where the court stated that "2923.02(D) expressly makes *attempt* an affirmative defense. The defendant bears the burden of proving an affirmative offense by a preponderance of the evidence." (Emphasis added.)

{¶ 18} In *Aponte*, we stated "R.C. 2923.02(D) expressly makes attempt an affirmative defense, at least when 'the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.' The defendant bears the burden of proving an affirmative defense by a preponderance of the evidence. R.C. 2901.05." Id. at ¶12. Perhaps a more prudent way to explain this concept is to say that R.C. 2923.02(D) provides for the affirmative defense of abandonment as the statute states that "[i]t is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose." Id.

{¶ 19} Either way, it is clear from the context of the court's statements that the court was explaining that M.P. presented no evidence under R.C. 2923.02(D) that he had abandoned his plan to rape R.R. Thus, we do not find that the trial court shifted the burden of proof of M.P.'s guilt to him.

{¶ 20} Therefore, the first assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 21} In the second and third assignments of error, M.P. argues that there was insufficient evidence to support his adjudication and his adjudication was against the manifest weight of the evidence.

{¶ 22} When reviewing sufficiency and manifest weight challenges in a juvenile's appeal from an adjudication of delinquency, "this Court applies the same standard of review as that applied in an adult criminal context." *In re J.F.*, Summit App. No. 24490, 2009-Ohio-1867, at ¶12. In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Furthermore:

{¶ 23} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541.

{¶ 24} "In essence, sufficiency is a test of adequacy." *Thompkins* at 386.

{¶ 25} M.P. was adjudicated delinquent of attempted rape, in violation of R.C. 2907.02(A)(1)(b) and 2923.02, which, when combined, state that no person shall attempt to engage in sexual conduct with another who is not the spouse of the offender when the other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶ 26} The state presented sufficient evidence that M.P. attempted to rape R.R., who was five years old at the time. Roberson testified that she came into the living room and saw M.P. with his penis exposed and R.R. bent over the couch with her underwear pulled down. M.P. had his hand on R.R.'s waist. When Roberson asked R.R. what happened, R.R. told her M.P. put his finger in her "down there." R.R. disclosed the same to her mother, a social worker, and a nurse.

{¶ 27} We next consider whether M.P.'s adjudication of delinquency is against the manifest weight of the evidence. In determining whether a conviction is against the manifest weight of the evidence, an appellate court:

> "[M]ust review 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 trier of fact 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. Otten (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009.

{¶ 28} A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins* at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence

weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 29} M.P. argues that Roberson's testimony was inconsistent and unbelievable. The trial court, as trier of fact in this case, was in the best position to judge witness credibility, and we will not usurp the role of the court in this case. In fact, the trial court in this case stated it was finding M.P. delinquent of attempted rape instead of rape because the court determined that the nurse who testified was probably testifying about a different victim, not R.R.

{¶ 30} We do not find that the conviction was against the manifest weight of the evidence.

{¶ 31} Therefore, the second and third assignments of error are overruled.

Ineffective Assistance of Counsel

{¶ 32} In the fourth assignment of error, M.P. argues that he was denied effective assistance of counsel because trial counsel failed to object to the court's adjudication of delinquency for attempted rape without properly amending the complaint and for failing to object to the court's "improper burden shifting."

{¶ 33} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley*

(1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus.

{¶ 34} Since we have found no error with the court's amendment of the complaint and that the court did not shift the burden of proof to the juvenile defendant, we also find no ineffective assistance of counsel.

{¶ 35} The fourth assignment of error is overruled.

Cumulative Error

{¶ 36} In the fifth assignment of error, M.P. argues that cumulative errors deprived him of a fair trial. In *State v. Garner* (1995), 74 Ohio St.3d 49, 656 N.E.2d 623, the court held that pursuant to the cumulative error doctrine "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

{¶ 37} M.P. cites the alleged errors already discussed and found to be without merit in the previous assignments of error. Therefore, the cumulative error doctrine does not apply and the fifth assignment of error is overruled.

{¶ 38} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution. The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY