[Cite as *In re D.B.*, 2009-Ohio-6841.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: D.B.,

A MINOR CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 2009 CA 00024

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Juvenile Divison, Case No. A2007-559
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 22, 2009

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Appellant D.B., a minor, appeals the February 6, 2009 Judgment Entry of the Licking County Court of Common Pleas, Juvenile Division, adjudicating him delinquent of five counts of rape, in violation of R.C. 2907.02(A)(1)(b). Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 1, 2007, the Licking County Prosecutor's Office filed a complaint in the Licking County Court of Common Pleas, Juvenile Division, alleging D.B., a minor child age twelve, committed ten counts of rape from July 1, 2007, through July 30, 2007, in violation of R.C. 2907.02 (A)(1)(b). The counts alleged D.B. engaged in sexual acts with A.W., age twelve, and M.G., age eleven. The three were close friends, attending the same school and playing on the same sports teams. At some point, D.B. and M.G. engaged in oral and anal sex with video games sometimes being exchanged in conjunction with the sexual activity. When D.B.'s father learned of the behavior, he contacted Licking County Children's Services ("LCCS") to obtain counseling for his son. LCCS in turn contacted the sheriff's department.

{¶3} As part of the investigation, sheriff's deputies conducted two separate interviews with D.B. The first occurred in D.B.'s bedroom. The second occurred at the sheriff's office, ending in D.B.'s immediate arrest.

{¶4} The State subsequently amended the complaint dismissing one count of rape against A.W., and amending the remaining rape counts to allege rape with force and consensual sexual conduct in the alternative.

{¶5} At trial, following the presentation of the State's evidence, Appellant made a motion to dismiss pursuant to Juvenile Rule 29. The trial court granted the motion, in part, and denied the motion, in part. As a result, Counts 3, 4, 5, and 6 were dismissed for lack of sufficient evidence, and the case proceeded as to Counts 2, 7, and 9 as to consensual sex as there was insufficient evidence of force. Counts 1 and 8 remained the same.

{¶6} Following closing argument, Appellant moved the trial court to amend the rape counts to unruly child with an order for intensive counseling.

{¶7} The magistrate adjudicated D.B. delinquent for committing five counts of rape, in violation of R.C. 2907.02(A)(1)(b), each a felony of the first degree if committed by an adult. The magistrate found the State did not prove force in connection with the counts; rather, the sexual conduct was consensual.

{¶8} The magistrate suspended D.B.'s commitment to the Department of Youth Services for a minimum of five years to age 21, placing D.B. on house arrest and indefinite probation. The trial court adopted and approved the magistrate's decision.

{¶9} On appeal, D.B. assigns as error:

{¶10} "I. THE TRIAL COURT ERRED IN NOT FINDING R.C. 2907.02 (A)(1)(B) UNCONSTITUTIONAL. APPLICATION OF THIS STATUTE TO D.B.'S CASE VIOLATES HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE UNITED STATES CONSTITUTION ARTICLE I, SECTIONS 2, 10 AND 16.

{¶11} "II. THE JUVENILE COURT ABUSED ITS DISCRETION WHEN IT ADJUDICATED D.B., A TWELVE YEAR OLD CHILD, DELINQUENT FOR RAPE FOR

CONSENSUAL SEXUAL CONDUCT WITH AN 11 YEAR OLD CHILD. R.C. 2152.01; R.C. 2152.16(A)(1)(c); JUV. R. 9.

{¶12} "III. THE JUVENILE COURT ERRED WHEN IT OVERRULED D.B.'S MOTION TO SUPPRESS FINDING THAT D.B. WAS NOT IN CUSTODY WHEN HE WAS QUESTIONED IN HIS BEDROOM BY LAW ENFORCEMENT AND LATER INTERROGATED AT THE SHERIFF'S OFFICE."

I.

{¶13} In the first assignment of error, Appellant maintains R.C. 2907.02(A)(1)(b) is unconstitutional in its application to the case sub judice. Specifically, Appellant argues the statute fails to establish clear guidelines regarding the prosecution of children under the age of thirteen resulting in arbitrary and discriminatory enforcement of the law, and the statute criminalizes consensual sexual experimentation between two children under the age of thirteen, despite both being a member of the same class the statute is designed to protect.

{¶14} R.C. 2907.02(A)(1)(b) reads:

{¶15} "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶16} "***

{¶17} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶18} In *In re: Hamrick* (Sept. 29, 1988), Franklin App. No. 87-AP-1154, the Tenth District Court of Appeals addressed the constitutional challenge raised herein:

{¶19} "The statute specifically identifies 'all persons' as a class who are criminally liable under this provision. There are no exceptions. There is no indication considering the effective date of the statute as well as subsequent amendments that the General Assembly did not intend to prohibit such conduct. The offense is definitely stated, emphasizing the protection of the victim.

{¶20} "***

{¶21} "When an enactment is challenged on the basis of alleged vagueness, an appellate court must apply reasonable presumptions, interpretations and constructions which will render the statute constitutionally definite. See *State v. Dorso* (1983), 4 Ohio St.3d 60.

{¶22} "Applying R.C. 2907.02(A)(1)(b) against that standard, the statute is sufficiently defined, thereby establishing an ascertainable standard of guilt. Moreover, there is no indication that defendant is being punished as an innocent. See *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156. Thus, defendant under the terms of the statute was presented with a specific prohibition which gives " * * * a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *." *United States v. Harris* (1954), 347 U.S. 612, 617. Further, although a juvenile court may make different orders of dispositions under R.C. 2151.353, 2151.354, and 2151.355, that is not indicative of arbitrary enforcement. In any event, the statute is not void for vagueness and thus constitutionally impermissible." For the same result see also, *In re: Bowers*, (Feb. 6, 1998), Greene App. No. 97-CA-57.

{¶23} Pursuant to the above authority, we find the trial court did not err in finding the statute constitutional as applied in the case sub judice, and the first assignment of error is overruled.

II.

{¶24} In the second assignment of error, Appellant asserts the trial court abused its discretion in adjudicating D.B. delinquent for rape for engaging in sexual conduct with an 11 year-old child.

{¶25} The term "abuse of discretion" connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion involves far more than a difference of opinion. In order to have an abuse in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will, but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *State v. Jenkins* (1984), 15 Ohio St.3d 164.

{¶26} In the case sub judice, D.B. was charged with violating R.C. 2907.02(A)(1)(b). The statute does not include an element of force.

{¶27} In *In re: Callahan*, Ashland App. No. 02COA023, 2002-Ohio-5484, this Court held R.C. 2907.02 (A)(1)(b) prohibiting sexual conduct with a person under the age of thirteen is a strict liability offense, and thus, a fifteen year-old minor who engaged in a consensual sexual encounter with an eleven year-old girl violated the statute. The court held consent is not a defense to a violation of the statute where the victim is under the age of thirteen.

{¶28} Based upon the above, the trial court did not abuse its discretion in adjudicating D.B. delinquent for rape when the conduct was consensual and the victim was close to his own age.

{¶29} The second assignment of error is overruled.

III.

{¶30} In the third assignment of error, Appellant maintains the trial court erred in denying D.B.'s motion to suppress statements made during interviews with law enforcement officers, as the statements were made in violation of D.B.'s constitutional rights.

{¶31} Constitutional rights, such as the right to counsel and the Fifth Amendment privilege against self-incrimination are applicable to juveniles. *In re Gault* (1967), 387 U.S. 1. Statements resulting from custodial interrogations are admissible only after showing procedural safeguards have been exercised. *Miranda v. Arizona* (1966), 382 U.S. 436. Additionally, the United States Supreme Court has emphasized admissions and confessions of juveniles require special attention. *Haley v. Ohio* (1948), 332 U.S. 596. Indeed, "[w]aiver by minors must be scrutinized closely since the validity of the waiver is affected by the factors of age, emotional stability, and emotional capacity." *In re Smalley* (1989), 62 Ohio App.3d 435.

{¶32} D.B. was interviewed by the Licking County Sheriff's Department on two separate occasions. The first interview was conducted at D.B.'s home, in his bedroom. After learning of the sexual encounters, D.B.'s father contacted Licking County Children's Services and Franklin County Children's Services in an effort to obtain

counseling for his son. The matter was then referred to the Sheriff's Department. In an effort to obtain help for their child, D.B.'s parents allowed Deputy Berryhill into their home to speak with D.B. Deputy Berryhill encouraged D.B.'s parents to not be present in the bedroom during questioning.

{¶33} Deputy Berryhill told D.B. she had spoke with his parents, and they were fine with him talking to her about what happened. D.B. became very upset during the interview. Deputy Berryhill told D.B. "everything was going to be ok" and he should just tell her what happened. At no time did the deputy inform D.B. or his parents of his constitutional rights, including Miranda warnings, or of any potential criminal charges. Rather, Deputy Berryhill informed the parents it was her understanding the sex acts were consensual, and they would all sit down together at the Sheriff's office to discuss what happened.

{¶34} The subsequent interview occurred at the Sheriff's Department. The deputies took D.B. to a separate room to be interviewed with another adult from Children's Services. D.B.'s parents were not asked permission to interview their child, nor were they invited into the room. Again, D.B. was not informed of his constitutional rights, or of the potential for criminal charges. The interview lasted for 55 minutes, and was not tape recorded. D.B. again became emotional and uncomfortable when questioned by the adults. Immediately after the interview, D.B. was arrested and taken into detention.

{¶35} The trial court overruled D.B.'s motion to suppress statements made during the interviews, finding D.B. was not in custody during either interview.

{¶36} In *Miranda v. Arizona* (1966), 384 U.S. 436, the United States Supreme Court held police officers have a duty to advise a suspect of his rights when their questioning rises to the level of a custodial interrogation. A person is "in custody" only if, under the totality of the circumstances, a reasonable person in the same situation would feel he was not free to leave. In order for a statement made by the accused to be admitted into evidence, the prosecution must prove the accused affected a voluntary knowing and intelligent waiver of his Fifth Amendment right against self-incrimination. In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *State v. Wood* 2007-Ohio-1027.

{¶37} The determination as to whether a custodial interrogation has occurred, requiring *Miranda* warnings, requires an inquiry into how a reasonable person in the suspect's position would have understood the situation, and the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest. *State v. Biros,* 78 Ohio St.3d 426, 440, 1997-Ohio-204, 678 N.E.2d 891. For *Miranda* purposes, interrogation has been defined as "not only express questioning, but also any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect." An "incriminating response" is any response, whether inculpatory or exculpatory, that the prosecution may seek to

introduce at trial. Id. at fn. 5. *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297.

{¶38} Because custodial interrogation is inherently coercive, incriminating statements, which are the product of such questioning, are not admissible unless *Miranda* warnings precede the questioning. *State v. Parish*, 2006-Ohio-2677.

{¶39} In the case sub judice, D.B. was twelve years-old, and had no prior criminal experience. His parents called Licking County Children's Services in an attempt to obtain help for their child. Neither D.B. nor his parents were informed of the potential for criminal charges, or of his Miranda rights. D.B. was initially interviewed in his own home, in his bedroom. The deputy informed D.B. his parents wanted him to talk to her about what happened. Accordingly, it is reasonable to assume D.B. believed he was not free to leave.

{¶40} Subsequently, D.B. was interviewed at the Sheriff's Department, and again was not afforded his Miranda warning, nor was he or his parents advised of the potential for criminal charges. D.B.'s parents were not invited into the interview, and were again under the assumption the parties were meeting to discuss what happened in hopes of obtaining help for their son.

{¶41} We find, under these circumstances, a twelve year-old boy like D.B. would not believe he was free to leave the Sheriff's Department during the interview, especially when his parents brought him to the office. *In re R.H.* 2008-Ohio-773. D.B. had no prior criminal experience, the interviews were conducted without his parents present, and D.B. was under the impression his parents wanted him to talk to the police.

Under the totality of the circumstances, we find both interviews were custodial and D.B.'s statements during the interviews should have been suppressed.

{¶42} We now proceed to determine whether the trial court's error affected a substantial right. An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, the constitutional error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 681.

{¶43} Even if the trial court erred in excluding the appellant's statements from evidence during trial, we must review the exclusion of this evidence under the plain error standard of Crim. R. 52(A). The United States Supreme Court has held that coerced confessions can be subjected to harmless error analysis. *Arizona v. Fulminante* (1991), 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302; *State v. Edgell* (1972), 30 Ohio St.2d 103, 283 N.E.2d 145 at para. 3 of the syllabus.

{¶44} This Court reviewed the harmless error analysis in *State v. Ahmed,* Stark App. No. 00049, 2008-Ohio-389. In *Ahmed,* we noted, Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded."(Emphasis added.) Thus, Crim. R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed. 2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant. In *U.S. v. Dominguez Benitez* (June 14, 2004), 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d

157, the Court defined the prejudice prong of the plain error analysis. “It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante,* 499 U.S. 279, 309-310 (1991) (giving examples). “Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as ‘error that affects substantial rights,’ used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States,* 328 U.S. 750 (1946). To affect “substantial rights,” see 28 U.S.C. § 2111, an error must have “substantial and injurious effect or influence in determining the ... verdict.” *Kotteakos,* supra, at 776.”124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240. See, also, *State v. Fisher,* 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called “[t]rial error” is “error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante,* 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302. *Ahmed*, supra at ¶ 23.

{¶45} Upon our review of the record, we find the admission of Appellant’s statements did not affect the outcome of the trial as overwhelming evidence of D.B.’s guilt was presented. The evidence against D.B. included the testimony of both A.W. and M.G. In addition, D.B.’s father testified D.B. admitted to him the sexual activity had occurred. Accordingly, the evidence of Appellant's guilt introduced at trial was such that

there is no reasonable possibility he would have been found not guilty even if his custodial statements to the police had not been introduced at trial.

{¶46} The third assignment of error is overruled.

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

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: D.B.,	:	
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A MINOR CHILD	:	
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	:	JUDGMENT ENTRY
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	:	Case No. 2009 CA 00024

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS