[Cite as *In re K.C.*, 2015-Ohio-1613.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: K.C.	:	APPEAL NO. C-140307 TRIAL NO. 13-3740X
	:	
	:	*O P I N I O N.*

Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: April 29, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Appellee State of Ohio,

Raymond T. Faller, Hamilton County Public Defender, and *Gordon C. Magella*, Assistant Public Defender, for Appellant K.C.

Please note: we have removed this case from the accelerated calendar.

MOCK, Judge.

{¶1} Appellant K.C. was adjudicated a delinquent child for conduct, which if committed by an adult would have constituted the offense of gross sexual imposition under R.C. 2907.05(A)(4). She has filed a timely appeal from that adjudication. We find merit in one of her three assignments of error. Consequently, we reverse the juvenile court's judgment and remand the matter for further proceedings.

I. Factual Background

{¶2} The record shows that 12-year-old K.C. and Y.W., the 6-year-old victim, were close. K.C.'s mother was the victim's godmother, and K.C. thought of the victim as her little sister. During Easter weekend in 2012, the victim spent the night at K.C.'s home.

{¶3} That evening, the girls bathed and prepared for bed. K.C. helped the victim put on her pajamas. The girls lay down to sleep in the same bed, although they each had separate covers. The girls started playing around, hitting each other, and at some point, K.C. inserted her finger in the victim's vagina. The victim cried out in pain and yelled for K.C. to stop. K.C. then told the victim not to tell anyone what had happened.

{¶4} Sometime later, the victim's mother took her to the doctor because she had "goop in her underwear." Doctors determined that the victim had a sexually-transmitted disease. The victim later told police about the incident with K.C. But it was undisputed that K.C. did not give the victim the sexually-transmitted disease, and police never determined how the victim got the disease. In an interview with police,

after numerous denials, K.C. eventually admitted to inserting her finger in the victim's vagina.

II. Constitutionality

{¶5} In her first assignment of error, K.C. contends that R.C. 2907.05(A)(4) is unconstitutional as applied to her. She argues that the gross-sexual-imposition statute cannot be constitutionally applied to an alleged offender under the age of 13. This assignment of error is not well taken.

{¶6} A party can challenge a statute as being unconstitutional on its face or as applied to a particular set of facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37; *State v. Campbell*, 1st Dist. Hamilton No. C-120871, 2013-Ohio-5612, ¶ 4. The party contending that a statute is unconstitutional as applied bears the burden to present clear and convincing evidence of a presently existing state of facts that make the statute void when applied to those facts. *Harrold* at ¶ 38; *Campbell* at ¶ 16.

{¶7} K.C. relies upon *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, in which a 12-year-old was found to be delinquent for committing acts that would have constituted a violation of R.C. 2907.02(A)(1)(b) if committed by an adult. R.C. 2907.02(A)(1)(b) criminalizes what is commonly known as "statutory rape." It holds offenders strictly liable for engaging in sexual conduct with children under the age of 13. Force is not an element of the offense, because a child under the age of 13 is legally presumed to be incapable of consenting to sexual conduct. *Id.* at ¶ 13.

{¶8} The Ohio Supreme Court held that R.C. 2907.02(A)(1)(b) was unconstitutional as applied to a child under age 13 who engaged in sexual conduct with another child under 13. *Id.* at syllabus. It reasoned:

> As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

Id. at ¶ 24.

{¶9} The Supreme Court also held that application of the statutory-rape statute violated D.B.'s right to equal protection. It stated that under the plain language of the statute, "every person who engages in sexual conduct with a child under the age of 13 is strictly liable for statutory rape, and the statute must be enforced equally and without regard to the particular circumstances of an individual's situation." *D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶ 30. The court went on to state that because D.B. and the victim were both under the age of 13 at the time of the alleged offense, "they were both members of the class protected by the statute, and both could have been charged under the offense. Application of the statute in this case to a single party violates the Equal Protection Clause's mandate that persons similarly circumstanced shall be treated alike." *Id.*

{¶10} In this case, K.C. was found to be delinquent, not for committing statutory rape, but for committing gross sexual imposition under R.C. 2907.05(A)(4). She argues that the same reasoning applies to gross sexual imposition when both the alleged victim and the alleged perpetrator are under age 13. We disagree.

{¶11} R.C. 2907.05(A)(4) provides that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * if * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." Sexual contact is defined 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." R.C. 2907.01(B).

{¶12} While statutory rape is a strict-liability offense, the Ohio Supreme Court has held that the mens rea of purpose applies to the sexual-contact element of R.C. 2907.05(A)(4). *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, ¶ 23. "The statute requires a specific intent behind the touching—the touching must be intended to achieve sexual arousal or gratification. Since there is a specific intent motivating the touching, it follows that the act of touching must be intentional." *Id.* at ¶ 25.

{¶13} The mens rea element distinguishes gross sexual imposition under R.C. 2907.05(A)(4) from statutory rape. It provides a way to differentiate between the victim and the offender. *See In re K.A.*, 8th Dist. Cuyahoga Nos. 98924 and 99144, 2013-Ohio-2997, ¶ 11; *In re T.A.*, 2d Dist. Champaign Nos. 2011-CA-28 and 2011-CA-35, 2012-Ohio-3174, ¶ 26.

{¶14} There is no arbitrary and discriminatory enforcement against K.C. because she had the purpose of sexually arousing or gratifying either person, while the victim did not. Therefore, R.C. 2907.05(A)(4) is not impermissibly vague as applied to K.C., and it does not violate her right to equal protection. *See K.A.* at ¶ 12; *T.A.* at ¶ 27. We overrule K.C.'s first assignment of error.

III. Miranda Waiver

{¶15} We address K.C's second and third assignments of error out of order. In her third assignment of error, K.C. contends that the juvenile court erred in denying her motion to suppress her statements to the police. She argues that the statements were the result of custodial interrogation and that she did not knowingly, intelligently and voluntarily waive her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This assignment of error is well taken.

{¶16} Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Burton*, 1st Dist. Hamilton No. C-080173, 2009-Ohio-871, ¶ 8.

A. Custodial Interrogation

{¶17} *Miranda* mandates that all individuals who are taken into police custody must be advised of certain constitutional rights. The duty to advise a suspect of his or her *Miranda* rights does not arise until there is a custodial interrogation.

State v. Tucker, 81 Ohio St.3d 431, 435, 692 N.E.2d 171 (1998); *State v. Sheppard*, 1st Dist. Hamilton No. C-000553, 2001 Ohio App. LEXIS 4590, *7 (Oct. 12, 2001). Whether a suspect is in custody is an objective inquiry. *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011).

{¶18} This determination requires two "discrete inquiries": (1) what were the circumstances surrounding the interrogation, and (2) given those circumstances, would a reasonable person have felt that he or she was at liberty to terminate the interrogation and leave. *Id.* "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Id.*, quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

{¶19} In applying this test to juveniles, the United States Supreme Court has stated:

> It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

Id. at 2398-2399.

{¶20} In the specific context of police interrogation, the Court has observed that events that would "leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *J.D.B.*, __ U.S. __, 131 S.Ct. at 2403, 180 L.Ed.2d 310, quoting *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948). Thus, as long as

the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, "its inclusion in the custody analysis is consistent with the objective nature of the test." *J.D.B.* at 2406.

{¶21} K.C. was 12 years old at the time of the interview with the police, and she had no previous experience with the criminal justice system. The evidence did not show that she came to the interview voluntarily. Instead, she was brought by her mother at the detectives' request, which limited her control over events and rendered her presence involuntary. *See In re T.W.*, 3d Dist. Marion No. 9-10-63, 2012-Ohio-2361, ¶ 29; *In re J.S.*, 12th Dist. Clermont No. CA2011-09-067, 2012-Ohio-3534, ¶ 14.

{¶22} Though the room where the detectives conducted the interview was unlocked, it was small, approximately 10x10 or 12x12, and contained a table and three or four chairs. The detectives initially told K.C. and her mother that K.C. was not under arrest, but that she would be going home at the *conclusion* of the interview. *See J.S.* at ¶ 13-14.

{¶23} While K.C.'s mother was present when the detectives read K.C. her *Miranda* rights, and she signed the waiver form, the detectives asked her mother to leave immediately afterward. They then shut the door behind K.C.'s mother, leaving K.C. alone with the two female detectives. One detective sat beside K.C. at the small, rectangular table, and one sat across from her. The detectives did not offer to let her talk to her mother during the interview, which lasted approximately 75 minutes.

{¶24} Based on the totality of the circumstances in this particular case, we cannot hold that a reasonable 12-year-old in K.C.'s position would have felt at liberty to terminate the interrogation and leave. Therefore, we hold that K.C. was in custody for purposes of the *Miranda* analysis. This is not to say that we would reach the

same result in every case involving a 12-year-old. As the Supreme Court noted in *J.D.B,* a child's age will not be "a determinative, or even a significant factor in every case." *J.D.B.*, __ U.S. __, 131 S.Ct. at 2406, 180 L.Ed.2d 310.

B. Waiver of Miranda Rights

{¶25} Because we have determined that K.C. was in custody, we must next determine whether she knowingly, intelligently and voluntarily waived her *Miranda* rights. The state bears the burden to prove by a preponderance of the evidence that the accused made a knowing, voluntary, and intelligent waiver of his or her *Miranda* rights. Courts will not presume a waiver just because the accused responded to the interrogation. *State v. Edwards*, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976); *Burton*, 1st Dist. Hamilton No. C-080173, 2009-Ohio-871, at ¶ 10. We note that R.C. 2933.81(B), which would have shifted the burden to K.C. to show that her statements were not voluntary, does not apply because the interview was not both audibly and visually recorded. *See* R.C. 2933.81(A)(3); *State v. Barker*, 6th Dist. Sandusky No. S-11-053, 2013-Ohio-3091, ¶ 10.

{¶26} Whether a juvenile has knowingly, intelligently, and voluntarily waived her *Miranda* rights may be inferred from the totality of the circumstances surrounding the alleged waiver, including the age, mentality, and prior criminal experience of the accused, the length, intensity, and frequency of interrogation, and the existence of physical deprivation or inducement. *In re Watson*, 47 Ohio St.3d 86, 548 N.E.2d 210 (1989), paragraph one of the syllabus; *State v. Washington*, 1st Dist. Hamilton No. C-130213, 2014-Ohio-4178, ¶ 31. Courts must take special care when evaluating the circumstances of a juvenile's confession. *State v. Harris*, 1st Dist.

Hamilton No. C-050160, 2006-Ohio-716, ¶ 22. "[T]he greatest care must be taken to assure that the admission was voluntary in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." *State v. Evans*, 144 Ohio App.3d 539, 560, 760 N.E.2d 909 (1st Dist.2001), quoting *In re Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

{¶27} K.C. was 12 years old with no previous criminal justice experience. While her age, by itself, does not render the waiver unknowing or involuntary, it is a circumstance to be considered along with her lack of experience with the criminal justice system. *See Washington* at ¶ 33.

{¶28} The record shows that the detectives read K.C. her *Miranda* rights in the presence of her mother. She and her mother both signed a written waiver of those rights. While a signed waiver form is "strong proof" of the validity of the waiver, it is not completely dispositive. *State v. Scott*, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980), paragraph one of the syllabus; *State v. Treadwell*, 1st Dist. Hamilton Nos. C-000497 and C-000521, 2001 Ohio App. LEXIS 1374, *8-9 (Mar. 23, 2001). Nothing in the record shows what K.C.'s mother knew or understood. The record does show that the first time that the detectives explained K.C.'s rights, she said that she did not understand them. After the detectives explained her rights a bit more, she nodded her head when asked if she understood. But the detectives did not delve into the issue further. They never asked her to explain what her understanding was.

{¶29} K.C. presented the testimony of Dr. Drew Barzman, Director of Child and Adolescent Forensic Psychiatry Services at Children's Hospital Medical Center, as an expert in the field of forensic psychiatric assessments. He personally assessed

K.C. and determined that she did not have the capacity to understand her rights or waive them. He stated that she understood some parts of the warnings, but not others. For example, K.C. thought that "the right to remain silent" meant that she could not say anything. He also testified that his testing showed that she was not malingering. This evidence was unrefuted.

{¶30} Further, while the police did not use threats or deprivation to obtain K.C. statements, we cannot ignore the fact that she denied any of the alleged conduct over 30 times before any admission. Every time she denied it, the detectives essentially ignored her denials and kept pressing forward, saying that they knew the abuse had happened and that they believed the victim. While this is a valid interrogation technique, we cannot say that 12-year-old K.C.'s will was not overborne. *See Burton*, 1st Dist. Hamilton No. C-080173, 2009-Ohio-871, at ¶ 11. As the United States Supreme Court stated in *J.D.B.*, "we have observed that children 'generally are less mature and responsible than adults,' * * * that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' * * * that they 'are more vulnerable or susceptible to * * * outside pressures than adults[.]" (Citations omitted.) *J.D.B.* at 2403.

{¶31} We hold that the state failed to meet its burden to show that K.C.'s waiver of her rights was knowing, intelligent, and voluntary. The evidence simply does not show that her decision "not to rely on [her] rights was uncoerced, that [s]he at all times knew [s]he could stand mute and request a lawyer, and that [s]he was aware of the State's intention to use [her] statements to secure a conviction[.]" *See Burton*, 1st Dist. Hamilton No. C-080173, 2009-Ohio-871, at ¶ 11, quoting *State v. Dailey*, 53 Ohio St.3d 88, 91, 559 N.E.2d 459 (1990). Consequently, we sustain

K.C.'s third assignment of error, reverse the trial court's decision denying her motion to suppress, and remand the cause to the trial court for further proceedings.

IV. Sufficiency

{¶32} In her second assignment of error, K.C. contends that the evidence was insufficient to support the adjudication of delinquency. This assignment of error is not rendered moot by our disposition of K.C.'s third assignment of error, because a determination of insufficient evidence would mean a complete failure of proof by the prosecution so that a retrial would be barred by the Double Jeopardy Clause. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997); *State v. Kalejs*, 150 Ohio App.3d 465, 2002-Ohio-6657, 782 N.E.2d 112, ¶ 24 (1st Dist.).

K.C. argues that the state failed to prove that she acted for the purpose of sexually arousing or gratifying either person. *See* R.C. 2907.05(A)(4) and 2907.01(B); *Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, at ¶ 23-25. This court has stated that whether touching is done for the purpose of sexual gratification is a "question of fact to be inferred from the type, nature, and circumstances surrounding the contact." *State v. Roberts*, 1st Dist. Hamilton No. C-040547, 2005-Ohio-6391, ¶ 69, quoting *State v. Daniels*, 1st Dist. Hamilton No. C-020321, 2003-Ohio-1545, ¶ 10.

{¶33} Despite K.C.'s arguments to the contrary, the record shows that the victim was competent to testify and that her testimony was very clear about what K.C. had done to her. Given that K.C. touched the victim while the two were sharing a bed, that K.C. acknowledged being sexually active, and that she told the victim not

to tell anyone, the trier of fact could have reasonably concluded that K.C. was acting for the purpose of sexual gratification.

{¶34} The victim's testimony, if believed, was sufficient to support the adjudication. In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of the witnesses. *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 45.

{¶35} The record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all of the elements of gross sexual imposition under R.C. 2907.05(A)(4). *See In re Washington*, 75 Ohio St.3d 390, 392, 662 N.E.2d 346 (1996); *In re Shad*, 1st Dist. Hamilton Nos. C-080965 and C-081174, 2009-Ohio-3611, ¶ 15. Therefore, the evidence was sufficient to support the adjudication of delinquency, and we overrule K.C.'s second assignment of error.

{¶36} In sum, we reverse the trial court's judgment overruling K.C.'s motion to suppress, and remand the cause to the trial court for further proceedings consistent with law and this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

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HENDON, P. J., and **CUNNINGHAM, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.