[Cite as *In re M.S.*, 2009-Ohio-6977.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In the matter of: M.S.

Court of Appeals No. E-09-041

Trial Court No. 2009-JM-105

DECISION AND JUDGMENT

Decided: December 31, 2009

* * * * *

Timothy H. Dempsey, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from the July 13, 2009 judgment of the Erie County Court of Common Pleas, Juvenile Division, which adjudicated appellant, M.S., delinquent for committing the act of sexual imposition and ordered that appellant be

placed on probation with various conditions. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On February 24, 2009, a complaint was filed charging appellant with delinquency in connection with an alleged act of sexual imposition occurring on February 12, 2009, while at school in Castalia, Erie County, Ohio. The case proceeded to an adjudicatory trial where the following evidence was presented.

{¶ 3} The alleged victim testified that she and appellant attend Margaretta High School; she stated that she was 16 and a freshman at the school. The victim testified that on February 12, 2009, at 1:45 p.m., she was in shop class, her last class of the day. Appellant is also in the class.

{¶ 4} The victim testified that at approximately 2:00 p.m., appellant began telling her that she was "hot" and that he wanted to have sex with her in the back of her boyfriend's truck. The victim also testified that appellant made a gesture mimicking oral sex. The victim stated that at the end of class, as the students were leaving the classroom, appellant touched her buttocks with his hand. The victim stated that she turned around and asked appellant what he was doing and he indicated that it was his cell phone (which was in his hand.) Appellant testified that she did not tell the shop teacher about the incident because he appeared busy and she was uncomfortable. The victim testified that appellant's actions made her feel "uncomfortable and kind of scared."

{¶ 5} The victim testified that she told her mother about the incident when she got home from school. The victim's mother called the school that night and went to the

school the next morning. The victim testified that she and appellant met with Assistant Principal Drew Grahl to discuss the incident. According to the victim, appellant denied touching her and stated that he only said: "What's cooking good looking?"

{¶ 6} During cross-examination, the victim agreed with her police statement that appellant had touched her buttocks on two prior occasions. The victim was also questioned regarding witnesses to the incident; Tyler being the main witness.

{¶ 7} The victim testified that on February 13, she gave a statement to the school. The victim agreed with her statement that appellant would not stop saying inappropriate things to her and that Steve (another male in the class) said it too. The victim further stated that Steve and another classmate, Jacob, told her that appellant said that he wanted to "f*** her so f***ing hard."

{¶ 8} Next, classmate Tyler testified. Tyler stated that he witnessed appellant make rude gestures behind the victim, make a rude comment, and hit her buttocks. Tyler stated that appellant told the victim that he wanted to f*** her in the back of her boyfriend's truck. At one point prior to the touching, Tyler heard the victim tell appellant to stop.

{¶ 9} Tyler testified that Mr. Grahl and Castalia Police Detective Shawn Nolan questioned him about the incident. Tyler indicated to both of them that he felt that the incident was not "that big of a deal."

{¶ 10} Classmate Steve testified that he has shop class with appellant and the victim. Steve heard appellant state that he wanted to have sex with the victim; Steve did

not believe that the victim heard those comments. During cross-examination, Steve admitted that he received a verbal warning from Mr. Grahl because he relayed appellant's inappropriate comments to the victim.

{¶ 11} Detective Shawn Nolan testified that that on February 15, 2009, he became aware of the incident after a co-worker received a call from a concerned parent. Detective Nolan testified that he took a statement from the victim. Nolan also interviewed and took a statement from Tyler, appellant, Mr. Grahl, and the shop teacher, Mr. Denman. Detective Nolan testified that appellant denied the allegations but admitted that, at the end of class, he had his cell phone out and it may have "grazed the victim in the buttocks region."

{¶ 12} During cross-examination, Detective Nolan admitted that on February 15, 2009, after questioning some of the individuals involved, he did not feel that the incident warranted charges at that time. Thereafter, Detective Nolan interviewed additional witnesses; Tyler indicted that he witnessed appellant touch the victim's buttocks. After the interviews, the case was forwarded to the prosecutor and, on February 23, 2009, appellant was arrested and charged. The state then rested.

{¶ 13} Appellant first presented the testimony of Assistant Principal Drew Grahl. Mr. Grahl testified that on the morning of February 13, 2009, the victim's parents came to the school and discussed the incident. Mr. Grahl informed them that he would immediately begin an investigation.

{¶ 14} Mr. Grahl testified that he first spoke with the victim's boyfriend to ensure that he would not try and retaliate against appellant. Grahl then spoke with the victim. The victim told Grahl that appellant told her that he wanted to "F" her and "F" her in the back of her boyfriend's truck. According to Grahl, the victim identified multiple witnesses; Grahl questioned the witnesses.

{¶ 15} Mr. Grahl questioned classmate Jacob who indicated that he just heard appellant say to the victim that he liked her; Jacob stated that he just "brushed it off." Classmate Steve stated that he heard appellant say that he wanted to "do" the victim and that appellant made "humping" gestures behind the victim's back. When questioned about the February 12, 2009 incident, Tyler, another name given by the victim, stated to Mr. Grahl that he had no idea what he was talking about.

{¶ 16} Mr. Grahl questioned appellant who admitted that he told the victim that she was pretty and that her boyfriend would be crazy to ever break up with her. At this point, Mr. Grahl felt that "the story wasn't falling into place" so he again questioned the victim. Specifically, Grahl asked the victim what she actually heard appellant say versus what Steve and Jacob told her that appellant said. The victim stated that she heard appellant say that she had a "nice ass" and that she was pretty. The victim acknowledged that Steve and Jacob told her that appellant wanted to "F" her and related comments.

{¶ 17} At that point, Mr. Grahl testified that he asked appellant and the victim to meet with him in order to clarify the events. Mr. Grahl testified that at the meeting the victim first mentioned that appellant touched her buttocks as they were walking out of the

classroom. Appellant denied that it was his hand and stated that it was likely his cell phone that he had flipped open.

{¶ 18} Mr. Grahl testified that he then excused the victim and that appellant asked if he could talk to the victim's father; appellant then spoke with the father on the telephone. Thereafter, Grahl stated that, pursuant to the harassment handbook, he issued verbal warnings to appellant, Jacob, and Steve.

{¶ 19} The next day, Mr. Grahl was informed that the police were investigating the incident. Appellant's father requested that Grahl come to the police station. On Sunday, February 15, 2009, Grahl was questioned by Detective Nolan. After taking Grahl's statement, Detective Nolan indicated that he did not feel that criminal charges were warranted. Nolan stated that he was going to forward the file to the prosecutor's office and they would decide what would happen next.

{¶ 20} During cross-examination, Mr. Grahl agreed that teachers are "mandatory reporters of sexual allegations." Grahl testified that the other boys involved in the incident were very "vague" about the comments that appellant made about or to the victim.

{¶ 21} Shop teacher Gary Denman testified that he did not witness any inappropriate behavior directed at the victim. Further, the victim did not approach him on the day of the incident or the following day to complain. On Sunday, February 15, Mr. Denman was called to the police station where he first learned of the incident. On Monday, February 16, Mr. Denman individually questioned those involved. Denman

stated that the shop class involved was one of the best behaved classes he had ever taught. The trial then concluded.

{¶ 22} On March 20, 2009, the magistrate issued his decision finding appellant delinquent by committing the offense of sexual imposition. Appellant filed objections to the magistrate's decision; on June 4, 2009, the objections were overruled. On July 10, 2009, appellant was sentenced to probation with various conditions. This appeal followed.

{¶ 23} Appellant now raises the following five assignments of error for our review:

{¶ 24} "I. Based on the testimony presented at the adjudication, the facts presented are insufficient to prove that the child committed the offense.

{¶ 25} "II. Based on the evidence presented at the adjudication, the findings of fact and the conclusions of law contained in the Decision are against the manifest weight of the evidence.

{¶ 26} "III. Based on the testimony presented at the adjudication, the facts presented are insufficient to prove that the child committed an element of the offense: specifically, sexual gratification.

{¶ 27} "IV. Based on the testimony presented at the adjudication, the facts presented are insufficient to prove that the child committed an element of the offense; specifically, knowing that the contact was offensive.

{¶ 28} "V. The court and the prosecutor over-stepped their jurisdiction by dealing with conduct that was already dealt with by the school and when the police determined that there was no probable cause to charge or arrest the child."

{¶ 29} Appellant's first four assignments of error are related and will be jointly addressed. Appellant argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We first note that due process affords juveniles the same protections afforded criminal defendants, notwithstanding the civil nature of juvenile proceedings. *In the Matter of: Jesse A.C* . (Dec. 7, 2001), 6th Dist. No. L-01-1271. Accordingly, "we review juvenile delinquency adjudications using the same weight and sufficiency standards that we would use for criminal defendants." Id.

{¶ 30} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-54. Sufficiency of the evidence is purely a question of law. Id. Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction, as a matter of law. Id. The proper analysis 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.'" *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 31} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 32} Appellant was found delinquent for conduct which, if he were an adult, would constitute sexual imposition, in violation of R.C. 2907.06(A)(1). That statute reads:

{¶ 33} "(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:

{¶ 34} "(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard."

{¶ 35} 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."

{¶ 36} Appellant argues that his conviction was not supported by sufficient evidence of the elements of sexual gratification and knowledge or reckless disregard that the contact was offensive. Appellant further contends that any contact between appellant and the victim was accidental.

{¶ 37} As set forth above, at trial the victim testified that appellant told her that she was "hot" and that he wanted to have sex with her in the back of her boyfriend's truck. The victim testified that appellant made a gesture which suggested that he was requesting oral sex from her. The victim further stated that appellant hit her buttocks with his hand. At that point the victim turned around and confronted appellant. Classmate Tyler testified that he observed appellant make "bad" gestures toward the victim and that he saw appellant "pat" the victim's buttocks. Classmate Steve testified that in shop class he heard appellant say that he would like to have sex with the victim; the victim was not present.

{¶ 38} Looking at this evidence in a light most favorable to the prosecution, the state presented sufficient evidence that appellant touched the victim's buttocks, for the purpose of sexual gratification, and did so with reckless disregard of the offensive nature of his conduct.

{¶ 39} Next, we address whether appellant's conviction was supported by the manifest weight of the evidence. Appellant argues that there were inconsistencies in the

witnesses' testimony and that the touch was accidental. Upon review, we agree that the versions of exactly what was said and when varied somewhat. However, the victim's version was corroborated by Tyler; further, classmates Steve and Jacob had heard appellant making inappropriate sexual comments about the victim that same day.

{¶ 40} Based on the foregoing, we find that appellant's conviction for sexual imposition was supported by sufficient evidence and was not against the manifest weight of the evidence. Appellant's first, second, third, and fourth assignments of error are not well-taken.

{¶ 41} In appellant's final assignment of error, he contends that the state "over-stepped" its jurisdiction by charging appellant with a crime where the incident had already been addressed by the school. Appellant has failed to support his position and we can find no precedent to suggest that when a crime is committed in a school it cannot be prosecuted if dealt with internally. Appellant's fifth assignment of error is not well-taken.

{¶ 42} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE