

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

IN RE: :
K.O. : CASE NO. CA2014-08-111
: OPINION
: 3/2/2015
:
:

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 13-N001186

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PIPER, P.J.

{¶ 1} Appellant, K.O., appeals his adjudication in the Warren County Court of
Common Pleas, Juvenile Division, as a delinquent child for having committed an act that if
charged as an adult would constitute sexual imposition.

{¶ 2} K.O. and A.J., juveniles who attended the same school, were friends who ate
lunch together on a daily basis, often exchanged text messages, and went to Kings Island
together. On several occasions, A.J. sent text messages to K.O. that contained pictures she

considered "racy." On K.O.'s birthday, A.J. sent him a text message including a picture she took of herself in which her shirt is fully unbuttoned and her bra is exposed. A.J. later stated that she felt pressured into sending these pictures to K.O. because he constantly asked her to send them, and she hoped he would stop if she fulfilled his request.

{¶ 3} Two days after A.J. sent K.O. the text message containing the picture of her with her bra exposed, she was sitting at a lunch table with several students in the cafeteria. When the boy sitting next to A.J. left, K.O. moved next to A.J. and then squeezed into the same chair as her. K.O. then placed his hand on A.J.'s thigh, even after she moved her leg away from him. K.O. began rubbing the inside and outside of her thigh, and then put his hand underneath A.J.'s shirt to rub her stomach. K.O. touched A.J.'s breast, and then placed his fingers down A.J.'s pants and into the waistband of her panties, though K.O. did not rub A.J.'s vaginal area.

{¶ 4} After the incident in the cafeteria, A.J. told another student about what had occurred, and that student persuaded A.J. to inform the school's guidance counselor of the incident. The school's assistant principal spoke to K.O. about the incident, and K.O. stated that he had touched A.J. "inappropriately." School officials contacted the police, and Detective Hoelke of the Mason Police Department investigated the matter. K.O. was charged with delinquency for committing sexual imposition, and the matter proceeded to a hearing before a magistrate of the juvenile court.

{¶ 5} During the hearing, A.J. and the school's vice principal testified on behalf of the state, and K.O. called Detective Hoelke as a witness and also testified on his own behalf. After considering the evidence and testimony, the magistrate adjudicated K.O. a delinquent child based upon a violation of Ohio's sexual imposition statute. K.O. then filed objections to the magistrate's adjudication, which were overruled by the juvenile court. The magistrate held a dispositional hearing, and recommended that K.O. be placed on probation with several

conditions and requirements. K.O. did not file objections to the magistrate's disposition and the trial court adopted the recommended disposition in full. K.O. now appeals his adjudication, raising the following assignment of error.

{¶ 6} THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S ADJUDICATION.

{¶ 7} K.O. argues that his adjudication was against the manifest weight of the evidence and was not supported by sufficient evidence.

{¶ 8} The purpose of a delinquency proceeding is to determine if the juvenile is delinquent, i.e., has violated a law that would be a crime if committed by an adult. R.C. 2152.02(F)(1). With the exception of a jury trial, juveniles are entitled to the same procedural safeguards afforded adults in criminal courts. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967). One of those protections requires the state to prove the allegation of delinquency by proof beyond a reasonable doubt. Juv.R. 29(E)(4). Courts have generally relied on criminal principles and relevant case law when analyzing questions in delinquency proceedings. *In re J.D.S.*, 12th Dist. Clermont Nos. CA2013-06-046, CA2013-06-051, 2014-Ohio-77, ¶ 13.

{¶ 9} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. Warren No. CA2006-01-007, 2007-Ohio-2298. "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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 10} A manifest weight challenge examines the inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other.

Wilson, 2007-Ohio-2298.

In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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.

State v. Cummings, 12th Dist. Butler No. CA2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 11} While appellate review includes the responsibility to consider the credibility of witnesses and the weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, 12th Dist. Butler No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶ 12} K.O. was adjudicated a delinquent child for having violated R.C. 2907.06(A)(1), which provides, "no person shall have sexual contact with another * * * when * * * 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." According to R.C. 2907.01(B), sexual contact "means 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."

{¶ 13} During the hearing, the state presented evidence demonstrating that K.O.'s adjudication was not against the manifest weight of the evidence, and was otherwise supported by sufficient evidence. A.J. testified that she and K.O. were friends and that the two often exchanged text messages. A.J. also testified that she felt "pressured" to send K.O.

the "racy" pictures of herself because K.O. "kept asking" for the photographs. A.J. testified that although K.O. requested naked pictures of her, she never sent any pictures in which she was fully unclothed. Despite sending some "racy" pictures, A.J. testified that she never gave K.O. permission to touch her as he did during the incident.

{¶ 14} Specific to the incident in question, A.J. testified that she was sitting at the lunch table and that K.O. came and sat directly next to her in the same seat in which she was sitting. K.O. then placed his hand on A.J.'s thigh and she moved her thigh away from K.O.'s hand. Once A.J. moved away, K.O. placed his hand back on her thigh and began rubbing the inside and outside of her thigh. A.J. testified that her "whole body was tensing up," and that she did not say anything because she "was really scared." K.O. then placed his hand under A.J.'s shirt and started rubbing her stomach. While K.O.'s hand was under A.J.'s shirt, he also touched her breast. K.O. then placed his fingertips into the waistband of the jeans A.J. was wearing, and rubbed his fingertips on the inside of A.J.'s panties as well. After the incident was over, K.O. told A.J. that she was "better than [he] thought."

{¶ 15} A.J. testified that K.O.'s touching was "sexual" in nature, and that K.O. was not trying to tickle her or touch her for any other reason. She also testified that she was "shocked" by K.O.'s touching, and that such touching was unwanted. A.J. testified about going to the guidance counselor after she told a friend about the unwanted touching, and that she later blocked K.O.'s texts so that he could not communicate with her.

{¶ 16} The school's vice principal also testified, and stated that he called K.O. into his office after the incident occurred to discuss what happened. The vice principal stated that when he asked K.O. whether he knew why he was being called into the office, K.O. responded, "I inappropriately touched" A.J. The vice principal asked K.O. to write out his version of events, and K.O.'s written statement also includes K.O.'s statement that he touched A.J. "inappropriately," and that he was willing to accept full blame for the situation.

{¶ 17} The state also showed a video taken by a camera in the school's cafeteria. The video depicts A.J. and K.O. sitting at the lunch table as A.J. stated during her testimony. A.J. can be seen leaning away from K.O., and also putting her head down on the table several times.

{¶ 18} K.O. called Detective Hoelke, who testified that she witnessed A.J.'s interview at the Child Advocacy Center regarding the incident. Detective Hoelke testified that A.J. never said that K.O. had touched her breast or ran his fingertips inside A.J.'s panties. However, Detective Hoelke also testified that she did not observe A.J.'s entire interview at the Child Advocacy Center.

{¶ 19} K.O. testified on his own behalf and stated that he and A.J. sent text messages back and forth, some of which indicated A.J.'s desire to have him touch her and role play. K.O. also testified that during their trip to Kings Island, A.J. would hug him and grab onto him when they were in haunted houses at the amusement park. Given this social history and texting, K.O. testified that he had no reason to believe that A.J. would be offended by his touching her thigh or stomach. However, K.O. admitted on cross-examination that he was not A.J.'s boyfriend, that A.J. had turned down his invitation to enter into a romantic relationship with him, and that A.J. had never asked for or given permission to K.O. on the day of the incident indicating that she would permit such touching.

{¶ 20} Despite the foregoing evidence, K.O. challenges his adjudication for several reasons. K.O. first asserts that he did not make sexual contact with A.J. because he did not touch A.J. for sexual arousal or gratification. However, the testimony indicates that K.O. caressed A.J.'s stomach, breast, and thigh in a sexual manner, and that K.O. enjoyed the touching, telling A.J. afterwards that she was "better than [he] thought" she would be. K.O. also admitted on cross-examination that he was "trying to caress [A.J.] romantically" because he "thought she would like it." As such, this testimony establishes that K.O.'s touching

constituted sexual contact according to R.C. 2907.01(B).

{¶ 21} K.O. next asserts that he did not know that the touching was offensive to A.J. and that he did not proceed recklessly when he touched A.J. on the day of the incident. However, the testimony established that A.J. moved her thigh away from A.J. when he began to touch her, and that her entire body tensed at his touch. These actions would indicate to K.O. that A.J. did not welcome the touching, and that such was offensive to her. Moreover, K.O. never received permission from A.J. for the touching to occur, and K.O. later admitted that he knew the touching was inappropriate. As such, the state presented evidence that K.O.'s touching was offensive or that K.O., at the least, proceeded recklessly on the day of the incident.

{¶ 22} K.O. also argues that A.J. was not a credible witness who should have been believed by the magistrate. K.O. asserts that A.J. was not being honest when she testified that the touching was unpermitted because she sent suggestive text messages to K.O., one with her bra exposed, which indicates that she invited the touching. K.O. also focuses on Detective Hoelke's testimony that A.J. did not tell investigators that K.O. had touched her breast or put his fingers into A.J.'s panties in order to question A.J.'s veracity when recalling the events. However, the trier of fact was in the best position to judge A.J.'s credibility as to why she sent the pictures, what she felt on the day of the incident in regard to K.O.'s touching, and what touching occurred. As such, we will not disturb the lower court's finding that A.J.'s testimony was more credible than K.O.'s in regard to what occurred in the cafeteria that day, and the events leading up to the incident.

{¶ 23} After reviewing the record and considering the evidence in a light most favorable to the prosecution, we find that the juvenile court could have found the essential elements of sexual imposition proven beyond a reasonable doubt. We also find that the juvenile court did not clearly lose its way or create such a manifest miscarriage of justice that

the adjudication must be reversed and a new trial ordered. As such, K.O.'s adjudication is supported by sufficient evidence and is not against the manifest weight of the evidence. K.O.'s single assignment of error is therefore, overruled.

{¶ 24} Judgment affirmed.

HENDRICKSON and M. POWELL, JJ., concur.