

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-551
v.	:	(C.P.C. No. 09CR-08-5037)
	:	
Thomas R. Tarbay,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 24, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Stewart & Gjostein Co., LPA, and *Thomas A. Gjostein*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Thomas R. Tarbay, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of two counts of importuning in violation of R.C. 2907.07(D)(2). Defendant assigns a single error on appeal:

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION

AND THE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Because sufficient evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

I. Facts and Procedural History

{¶2} An indictment filed on August 21, 2008 charged defendant with three counts of importuning, felonies of the fourth degree, in violation of R.C. 2907.07. All three counts arose out of defendant's on-line chat room conversations with a Franklin County Deputy Sheriff posing as a 13-year-old girl. Count One of the indictment was based on a conversation on November 30, 2008, Count Two was premised on a December 24, 2008 conversation, and Count Three arose from a January 27, 2009 conversation.

{¶3} Defendant waived his right to a jury trial, and the matter was tried to the court beginning on March 30, 2010. The trial court overruled defendant's Crim.R. 29 motion for acquittal at the close of the state's case; defendant presented no evidence. The court concluded defendant was not guilty of Count One, but guilty of both Counts Two and Three. After a presentence investigation, the trial court sentenced defendant to 12 months on each count, to be served concurrently.

II. Assignment of Error

{¶4} Defendant's single assignment of error asserts neither sufficient evidence nor the manifest weight of the evidence supports defendant's convictions for importuning in violation of R.C. 2907.02(D)(2).

{¶5} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of

adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶6} When presented with a manifest weight argument, we weigh the evidence in a limited manner to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley; Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶7} R.C. 2907.07(D)(2) defines importuning and provides that "[n]o person shall solicit another by means of a telecommunication device * * * to engage in sexual activity with the offender when" (1) "the offender is eighteen years of age or older," (2) "[t]he other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age," (3) "the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard," and (4) "the offender is four or more years older than the age the law

enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age." Because defendant previously was convicted of importuning, violation of section R.C. 2907.07(D)(2) is a fourth-degree felony. R.C. 2907.07(F)(3).

{¶8} Solicit means "to seek, to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶68, quoting from Ohio Jury Instructions. "Although importuning requires the soliciting of sexual activity, a charge of importuning does not involve an attempt to engage in the sexual activity that has been solicited." *State v. Andrews*, 171 Ohio App.3d 332, 2007-Ohio-2013, ¶77. "Rather, for the offense of importuning, 'the harm is in the asking.' " *Id.*, quoting *State v. Tarbay*, 157 Ohio App.3d 261, 2004-Ohio-2721, ¶17. The state thus was not required to prove defendant intended to follow through either with actions corresponding to the solicitation or with a plan to meet the child for sexual conduct or activity. *State v. Bolden*, 2d Dist. No. 19943, 2004-Ohio-2315, ¶37; *State v. Weir*, 2d Dist. No. 22052, 2007-Ohio-6671, ¶29. Rather, the crime of importuning is complete when the solicitation occurs. To the extent a defendant progresses beyond solicitation and actually meets with the child, the defendant potentially commits a crime separate from importuning under R.C. 2907.07. See, e.g., R.C. 2907.04(A) (prohibiting unlawful sexual conduct with a minor).

{¶9} According to the state's evidence, Detective Marcus Penwell, a detective with the Franklin County Sheriff's office who worked on the Internet Crimes Against Children Task Force, created a persona whom he dubbed "Jillian Webb" with a screen name of "jilly_bean_2013." The detective entered an Ohio chat room with the screen

name and waited to be contacted. Defendant, using the screen name "ohbirdwatcher," contacted "Jillian" through instant messaging and spoke to her privately in a chat room. From November 2008 to March 2009, defendant and "Jillian" engaged in approximately 45 conversations. Of those, three became the basis for the three-count indictment; the December 24, 2008 and January 27, 2009 conversations are the premise for defendant's convictions.

{¶10} Defendant does not dispute he engaged in telecommunications with an undercover officer in a chat room accessed through Ohio Yahoo! Nor does he contest that the officer portrayed himself as a 13-year-old girl, a fact defendant ascertained in his initial chat with "Jillian." Finally, defendant does not dispute that he was at least four years older than the "girl" with whom he communicated in the chat room, advising "Jillian" in his initial chat with her that he was 54. Instead, the sole dispute is whether defendant solicited her.

{¶11} Although many of the discussions between defendant and "Jillian" involved a variety of topics, defendant generally brought the conversation to the topic of sex. On December 24, 2008, defendant told her he could not talk about some things due to her age; he specifically mentioned sex. "Jillian" responded, "Didn't you kind of already talk about that?" (Tr. 40.) Defendant replied, "Yes, I know." (Tr. 40.) Acknowledging he was "bad," he asked her if she wanted him to be bad. When she responded he was "acting weird," he inquired if she wanted him "to talk sex?" (Tr. 40.)

{¶12} She stated it was "cool," and he asked her to tell him "[l]ike what you've done, what you want to do, what you want to try." (Tr. 41.) She queried whether he meant with him, and defendant responded, "[Y]es, I'd like to know what you want to do with me."

(Tr. 41.) "Jillian" in turn asked him what he would like to do, and he said, "You're so cute. I'm a guy. I like to do guy things." (Tr. 41.) Defendant ultimately inquired if "Jillian" wanted to hug and kiss him. After she stated, "[T]hat stuff is cool," he asked whether she wanted him "to touch" her. (Tr. 42-43.) She inquired where, and he replied, "Your tits and your pussy." (Tr. 43.) When he asked her whether she would want to touch him, she again inquired where; he stated, "Anywhere you wanted to." (Tr. 43.) She then asked him where it felt good, and he replied, "My back, my butt, laugh out loud, my man part." (Tr. 43.)

{¶13} The December 24, 2008 conversation involved defendant's attempt to entice or tempt "Jillian" to engage in the acts defendant described in their chat room conversation. As the trial court properly concluded, defendant's inquiries about whether she wanted to hug and kiss, his questions about whether she wanted him to touch her body parts, as well as the questions directed to the body parts he explicitly mentioned in relation to her touching him, all suggest defendant is trying to lead her toward sexual conduct. *Bolden* at ¶6 (noting evidence regarding the defendant's conviction for importuning included that he "discussed the various sexual acts that he wished to perform" with the persona he encountered in the chat room).

{¶14} The January 27, 2009 chat, which underlies defendant's conviction on the third count of the complaint, began with general banter and then turned sexual. At first, the conversation concerned a dress "Jillian's" cousin gave her. Defendant asked if it was short and told her he loved legs. After some conversation addressing whether Jillian had a boyfriend, defendant inquired whether she would be his girlfriend. They discussed meeting at a park or the movies or a mall, but only when "Jillian" was "ready for it." (Tr. 50.)

{¶15} Later in the conversation, defendant inquired whether "Jillian" ever was horny. She stated she "did a little with her ex," prompting defendant to ask why she "went down on him." (Tr. 51.) After she explained it was because her former boyfriend asked her to, defendant asked her, "So you want to do me?" (Tr. 52.) When she inquired what he meant, he said, "Go down on me." (Tr. 52.) After a brief discussion in which she answered his question affirmatively, he noted she was "ready" and asked her what she would do when he ejaculated. (Tr. 53.) She inquired what he would want her to do, and he advised she could "just pull off so it won't go in your mouth." (Tr. 53.) She replied, "[T]hat's cool." He added, "It might make a mess though." (Tr. 53.) When he stated he was not sure "what we would do then," she asked what he meant; he replied "[w]ith our mess." (Tr. 53.) She said she did not know, but he stated they would need "a towel or something." (Tr. 53-54.) She told him he could bring one, and he agreed he could.

{¶16} Again, sufficient evidence supports the trial court's judgment. In discussing that conversation, the trial court noted defendant talked with "Jillian" about meeting him in the park or going to a movie, the mall, or birding. Defendant advised they did not have to "do anything you're not ready for" but, as the court noted, the statement in itself suggests he wanted her to do something. *Bolden* at ¶37 (concluding the defendant's stating he and the "girl" needed to wait until she turned 16 "does not nullify his ostensibly sincere prior solicitations" that he engage in sexual activity with "her"). From there the conversation led to the more explicit conversation that, as the trial court properly concluded, sounds like he is trying to tempt her and entice her. Indeed, defendant, throughout the chat, directed conversation from general chat about her life to explicit sexual actions about

what each wanted the other to do. The evidence supports defendant's conviction for importuning based on the January 27, 2009 conversation.

{¶17} To the extent defendant contends the conversations reflected a fantasy world with no intent to follow through on the activities discussed, his contention does not undermine his convictions. Whether the actions were consummated is irrelevant to the offense of importuning which is based on solicitation, not consummation. As the Second District explained, even a fantasy world or phone play "can involve the solicitation [R.C. 2907.07(D)(2)] prohibits, whether or not the offender intends to engage in the sexual activity concerned." *Weir* at ¶29.

{¶18} In the final analysis, whether or not defendant intended to follow through with the activities discussed, and even if the conversations reflected a fantasy world, the evidence is sufficient to prove he violated R.C. 2907.07. As the Legislative Service Commission note explains, "The section represents an exception to the general rule that 'just asking' is not a criminal offense. In the case of underage victims, the rationale for the offense is that mere solicitation carries a significant potential for harm because of the immature judgment of adolescents and the risk of adverse consequences from their engaging in sexual activity." Regardless of whether defendant phrased his conversations in an hypothetical verb tense, the nature of the chats, construed in the state's favor, readily allow the trial court to find defendant was soliciting "Jillian" for sexual activity.

{¶19} Defendant presented no case-in-chief to contest the detective's testimony offered on the state's behalf. Although cross-examination highlighted minor inconsistencies, such inconsistencies do not render the judgment against the manifest weight of the evidence. *Raver*. Rather, given the largely undisputed testimony from the

detective, we cannot say the trial court lost its way in concluding the manifest weight of the evidence supports defendant's convictions under Counts Two and Three of the indictment.

{¶20} Accordingly, we overrule defendant's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
