[Cite as *In re W.S.*, 2009-Ohio-5427.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
W.S., DELINQUENT CHILD.	:	**CASE NO. 2009-G-2878**
	:	
	:	
	:	

Appeal from the Geauga County Common Pleas Court, Juvenile Division, Case No. 08 JD 000307.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Matthew J. Greenway*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee State of Ohio).

Robert R. Umholtz, Geauga County Public Defender, and *Paul J. Mooney*, Assistant Public Defender, 211 Main Street, Chardon, OH 44024 (For Appellant W.S.).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, W.S., appeals the judgment of the Geauga County Common Pleas Court, Juvenile Division, denying his motion to suppress and finding him to be a delinquent child based on his violation of the public indecency statute. At issue is whether appellant's admission was voluntary and whether his adjudication was against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} Appellant was initially charged with animal cruelty and public indecency. After entering a plea of not true, he filed a motion to suppress his admission. The trial court held a suppression hearing and subsequently denied the motion. Thereafter, a one-count amended complaint was filed, charging him with public indecency, a misdemeanor of the fourth degree, in violation of R.C. 2907.09(A)(1), if committed by an adult. He pled not true. The case was thereafter tried before the magistrate.

{¶3} A juvenile neighbor testified that on May 23, 2008, in the late afternoon, she was walking by appellant's home on Shaw Road in Auburn Township, when she saw appellant in his front yard. She and appellant are both 16 years old and have been neighbors for seven years. From the road, she saw that appellant was completely naked and having sex with his dog. She saw appellant's buttocks, but did not see his genitals because, she said, the dog was covering them. She walked past appellant's house to a wooded area where she called her friend Maria Miller, who lives next door to appellant.

{¶4} Maria Miller, who is 18 years old, testified the juvenile neighbor called her and said she had just seen appellant having sex with his dog. Maria has known appellant since childhood. The juvenile neighbor told Maria to walk past appellant's house and she would see for herself. As Maria walked down the road, she saw appellant, who was not wearing any clothes, outside in his front yard with his hands on the ground over his dog. Appellant was making motions like he was engaging in sexual intercourse. Maria saw appellant's buttocks and the front of his body, but not his genitals.

{¶5} The juvenile neighbor and Maria then walked to the juvenile neighbor's home, which is two houses down from appellant. The juvenile neighbor lives with her legal guardian Dennis Bergansky, his wife, and their two young sons. Mr. Bergansky is a detective with the Bedford Police Department. The juvenile neighbor called him at work and told him what she had seen.

{¶6} Dennis Bergansky testified he has known appellant for seven years and has a close relationship with him. Appellant visits the Berganskys "all the time," playing with their children, swimming in their pool, and playing video games. Mr. Bergansky takes appellant fishing on his boat. The Berganskys' children call appellant their big brother, and appellant calls Mr. Bergansky "Dennis."

{¶7} Mr. Bergansky testified that when the juvenile neighbor called him, she was upset. She said she saw appellant outside with no clothes on having sex with his dog. Maria's father Bill Miller reported the incident to the Geauga County Sheriff's Office.

{¶8} A few days later, Mr. Bergansky decided to talk to appellant to determine if he had done what had been alleged and, if so, to assist in getting him professional help. He had no intention to arrest or detain him. When appellant was getting off his school bus at his home that afternoon, Mr. Bergansky pulled over in his car. He asked appellant if he could stop by his house to talk to him after he dropped off his books.

{¶9} Shortly thereafter, appellant arrived at the Bergansky house. As a police detective, Mr. Bergansky does not wear a uniform. When appellant came to his house, neither his badge nor his gun was exposed. Mr. Bergansky told appellant what the juvenile neighbor and Maria had claimed to have seen and appellant initially denied it

happened. Mr. Bergansky said that if it happened, he should get professional help. About 15 minutes into the conversation, appellant told Mr. Bergansky he had engaged in sexual activity with his dog, but said it was a "one-time thing." Mr. Bergansky asked him how he ended up outside, and appellant said the dog had moved and he went outside with the dog while he was naked. Mr. Bergansky told appellant this was not appropriate behavior and that he needed to talk to a professional. He said if he ever needed to talk to someone, he could always come to him. Mr. Bergansky said he would have to talk to appellant's father about their discussion. After talking with Mr. Bergansky for about one hour, appellant went home.

{¶10} Appellant testified that at the time in question, he was outside in his backyard playing fetch with his dog. He said he did not have a shirt on, but was wearing his shorts. Appellant said that Mr. Bergansky asked him to come to his house to talk to him, and he did so because he is "really good friends with him." He said that eventually he wanted to go home so he told Mr. Bergansky what he wanted to hear. At the suppression hearing, appellant testified he admitted the allegations to Mr. Bergansky because he wanted to go home.

{¶11} After the trial, the magistrate issued his decision, finding appellant to be a delinquent child based on his violation of the public indecency statute. The trial court adopted the magistrate's decision as the court's order. Appellant was committed to the Portage/Geauga Detention Center for 1-90 days, suspended on condition that he obtain a mental health assessment, perform 24 hours of community service, and comply with the rules of probation. Appellant appeals the judgment of the trial court, asserting two assignments of error. For his first assigned error, appellant alleges:

{¶12} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN DENYING HIS MOTION TO SUPPRESS CONFESSION."

{¶13} Appellant does not contend he was in custody at the time he made his admission to Mr. Bergansky, nor does he argue he was entitled to *Miranda* warnings. Instead, he argues his statement was not voluntary and thus should have been suppressed by the trial court. We do not agree.

{¶14} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶13, citing *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. Id. at 154-155; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶15} Appellant argues that because Mr. Bergansky was acting in his role as a police officer when he questioned him, in order for his statement to be admissible in evidence, it must have been made voluntarily. We note that the trial court did not make a ruling concerning whether Mr. Bergansky was acting as a police officer at the time. The court found that while Mr. Bergansky is a police detective, he was not wearing a uniform or any insignia identifying himself as a police officer when he spoke with

appellant. The court noted, "it is questionable whether Dennis Bergansky was exercising any police authority," but then assumed he was a police officer in determining whether appellant's statement was voluntary. Since the trial court did not find that Mr. Bergansky was acting as police officer at the time, we cannot "review" the court's ruling in this regard because there is no ruling for us to review. We will, however, make the same assumption in analyzing whether appellant's admission was voluntary.

{¶16} As noted above, appellant does not argue his admission was inadmissible because he was not given *Miranda* warnings. Instead, he argues his statement was not voluntary. The two issues – compliance with *Miranda* and the voluntariness of a confession -- are analytically separate inquiries. *State v. Chase* (1978), 55 Ohio St.2d 237, 246. Thus, even without a violation of *Miranda*, a confession is not admissible if it was not voluntary.

{¶17} In *State v. Bumgardner*, 11th Dist. No. 2007-T-0106, 2008-Ohio-1778, this court held:

{¶18} "'As a general proposition, a confession will be deemed voluntary when it stems from a free and unconstrained choice of its maker; on the other hand, a confession will be viewed as involuntary when it is caused by coercive police action.' *State v. Quigley*, 11th Dist. No. 2004-G-2577, 2005-Ohio-5276, ¶34, citing *State v. Worley*, 11th Dist. No. 2001-T-0048, 2002-Ohio-4516. The totality of the circumstances must be considered in determining whether a statement is made voluntarily. *State v. Pohl*, 11th Dist. No. 2004-L-180, 2006-Ohio-200, ¶18, citing *State v. Young*, 11th Dist. No. 2002-A-0093, 2004-Ohio-342. Factors to consider include: 'the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of

interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' Id. at ¶19, citing *Young* at ¶11.

{¶19} "'There must be some evidence of coercion on the part of the police in order to trigger an analysis of the totality of the circumstances.' Id. at ¶20. 'As stated by the United States Supreme Court, "coercive police activity is a necessary predicate to the finding" that a suspect involuntarily waived his *Miranda* rights and voluntarily confessed.' Id., quoting *Colorado v. Connelly* (1986), 479 U.S. 157, 167. 'Absent evidence that "[a suspect's] 'will was overborne and his capacity for self-determination was critically impaired' because of coercive police conduct," a suspect's decision to waive his *Miranda* rights and confess will be deemed to be voluntary.' Id., citing *Colorado v. Spring* (1987), 479 U.S. 564, 574, quoting *Culombe v. Connecticut* (1961), 367 U.S. 568, 602." *Bumgardner*, supra, at ¶59-60.

{¶20} Coercive police conduct includes threats of physical violence, *Arizona v. Fulminante* (1991), 499 U.S. 279; misrepresentations about the law; the suggestion of the possibility of probation; and representations of leniency and benefit, *State v. Arrington* (1984), 14 Ohio App.3d 111.

{¶21} "The test for voluntariness of a confession involves three factors. Threshold to the determination that a confession was 'involuntary' for due process purposes is the requirement that the police 'extorted [the confession] from the accused by means of coercive activity.' See *United States v. Rohrbach*, 813 F.2d 142, 144 (8th Cir. 1987)(citing *** *Connelly*, [supra]). Once it is established that the police activity was objectively coercive, it is necessary to examine petitioner's subjective state of mind to determine whether the 'coercion' in question was sufficient to overbear the will of the

accused. *Rohrbach*, 813 F.2d at 144. Finally, petitioner must prove that his will was overborne because of the coercive police activity in question. If the police misconduct at issue was not the 'crucial motivating factor' behind petitioner's decision to confess, the confession may not be suppressed. See *Connelly*, [supra,] at 520; *Green v. Scully*, 850 F.2d 894, 903-04 (2d Cir. 1988)(where defendant confessed because he was afraid he would harm others and not because of police misconduct, confession not suppressed); *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir. 1988)(despite length of police interrogation, petitioner confessed because he decided to 'get it over with' rather than as a result of coercion; accordingly confession ruled 'voluntary'); *Rohrbach*, 813 F.2d at 145 n. 1 (denying petition for habeas corpus because petitioner did not show any 'causal nexus' between alleged police misconduct and confession)." *McCall v. Dutton* (C.A. 6, 1988), 863 F.2d 454, 459.

{¶22} Based on our review of the record, there is no evidence of any threats, promises, or inducement made by Mr. Bergansky. In the absence of any police coercion resulting in appellant's confession, his admission was voluntarily made. *Pohl*, supra. We observe that the circumstances referenced by appellant in support of his coercion argument, i.e., that he is "good friends" with Mr. Bergansky, that he "felt pressured" to talk to Mr. Bergansky because he "respects" him, and that he "just admitted to it so [he] could go home" do not constitute coercive police conduct. *Scully*, supra; *Hawkins*, supra.

{¶23} Further, the totality of the circumstances supports the trial court's finding that appellant's confession was voluntary. In *In re McDonald*, 11th Dist. No. 2006-L-027, 2007-Ohio-782, this court held the totality-of-the-circumstances test applies to

juvenile confessions. Id. at ¶18. First, while appellant was 16 years old at the time, there is no evidence of any mental impairment from which a court could conclude that he may not have understood the consequences of his statement. We note that "'[a] person who is less than 18 years old is not legally incapable of making a voluntary confession.'" *State v. Carder* (1966), 9 Ohio St.2d 1, 9, quoting *State v. Stewart* (1964), 176 Ohio St. 156. Further, a juvenile can voluntarily make a confession in the absence of his parents. *In re Watson* (1989), 47 Ohio St.3d 86, 89-90.

{¶24} Second, the interview lasted approximately one hour and was not intense by any reasonable standard.

{¶25} Third, there was no evidence of physical deprivation or mistreatment. In fact, just the opposite is true here. The trial court found Mr. Bergansky's relationship to appellant is that of a mentor. The court found appellant spends much time interacting with Mr. Bergansky and his family. Mr. Bergansky testified at the suppression hearing that he cares about appellant and wanted to help him get professional help. They spoke in Mr. Bergansky's driveway and while walking in his yard. Appellant was not restrained or told he could not leave. Mr. Bergansky told appellant if he ever needed to talk to someone, appellant could talk to him. Appellant testified at the suppression hearing that when their conversation ended, he told Mr. Bergansky, "I have to go home and do homework and he said, all right, I'll see you later. And we went our separate ways."

{¶26} Fourth, as noted above, there is no evidence of any threats, promises, suggestions of leniency, or any inducement offered in exchange for appellant's admission.

{¶27} We hold the trial court did not err in finding that appellant's confession was not coerced and that it was voluntarily made.

{¶28} Appellant's first assignment of error is not well taken.

{¶29} For his second assignment of error, appellant contends:

{¶30} "THE DECISION OF THE TRIAL COURT IS CONTRARY TO OHIO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶31} Appellant next challenges the sufficiency and weight of the evidence. There is a fundamental distinction between a challenge to the sufficiency of the evidence and a challenge to the weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are quantitatively and qualitatively different from each other. *State v. Ferguson*, 11th Dist. No. 2007-A-0059, 2008-Ohio-2392, at ¶29, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386. An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence most favorably to the state, the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶32} "In contrast, the weight of the evidence concerns the inclination of the greater amount of credible evidence, offered at trial, to support one side of the issue rather than the other." *Ferguson*, supra, at ¶30, citing *Thompkins*, supra, at 387. If, on weighing the evidence, the trier of fact finds the greater amount of credible evidence sustains the issue that a party seeks to establish, that party will be entitled to his or her verdict. Id. "'Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) Id., quoting Black's Law Dictionary (6th ed. 1990),

1594. Thus, a court reviewing the manifest weight observes 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. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15.

{¶33} "'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.'" *Ferguson*, supra, at ¶31, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Hence, the role of a reviewing court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶52, citing *Thompkin*s, supra, at 390. However, an appellate court must defer to the factual findings of the trier of fact regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶34} When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *Brown*, supra, at ¶53.

{¶35} R.C. 2907.09(A)(1) provides that "[n]o person shall recklessly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not

members of the person's household: [e]xpose the person's private parts ***." The elements of this offense are that the defendant: (1) recklessly (2) exposed his private parts (3) under circumstances in which his conduct was (a) likely to be viewed by others and (b) likely to affront others (4) not members of his household. *Columbus v. Abdalla* (Apr. 30, 1998), 10th Dist. No. 97APC08-973, 1998 Ohio App. LEXIS 1861, *10.

{¶36} Appellant argues the evidence was insufficient to prove he exposed his private parts because, while the juvenile neighbor and Maria testified they saw him naked outside, they did not actually see his private parts. The parties agree and the case law establishes that "private parts" means a person's genitals. *State v. Jetter* (1991), 74 Ohio App.3d 535, 536, fn.1. The trial court found: "At a minimum, the State proved that W.S. was naked in the front yard of his home during the afternoon ***. At least two witnesses, [the juvenile neighbor] and Maria Miller, observed W.S. naked in his yard from the street. Both witnesses testified that they saw W.S.'s backside. Even though neither witness testified that they saw W.S.'s genitals, the Court can reasonably infer that W.S.'s genitals were exposed."

{¶37} In *State v. Butler* (Sep. 8, 1975), 1st Dist. No. C-74622, 1975 Ohio App. LEXIS 7269, the court held:

{¶38} "***[T]he *** evidence of Butler's total nudity *** permitted the trier of fact to draw the inference that where one's entire backside is exposed, so are his genitalia. To accept appellant's position that said genitalia may, in fact, have been covered would require us to accept the possibility that Butler was wearing, for example, a figleaf *** or other obscurely attached device capable of concealing his frontside without involving his backside. In the absence of any evidence even remotely suggesting that such possibly

might, in fact, have occurred, we hold *** the inference of Butler's having exposed his 'private parts' was sufficient to prove his guilt beyond a reasonable doubt." Id. at *4.

{¶39} Because the state's witnesses testified that appellant was outside in his front yard in the late afternoon completely naked, the trial court as the trier of fact could reasonably infer that appellant's genitals were exposed. We therefore hold the trial court did not err in finding the state presented sufficient evidence to prove that appellant exposed his private parts.

{¶40} We also note that under the statute, the state does not have to prove that anyone actually saw the conduct, as long as the conduct was *likely* to be viewed by others. *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, appeal denied at 98 Ohio St.3d 1540, 2003-Ohio-1946. In *Henry*, the Seventh District held that where the defendant was caught on video surveillance equipment masturbating in an open area of a restroom at a public rest stop, evidence of such conduct was sufficient to prove the behavior was likely to be viewed by others, although no person actually saw it. Id. at ¶57. The court further held: "[T]he statute does not require anyone to view the behavior so long as it would be likely that the behavior would be viewed." Id. at ¶58. We hold the trial court did not err in finding sufficient evidence was presented to prove appellant exposed his private parts under circumstances in which his conduct was likely to be viewed by others.

{¶41} Appellant next argues that the juvenile neighbor's failure to identify appellant in court is significant in considering the weight of the evidence. However, this is another sufficiency argument since identification must be proven in every criminal case, *State v. Irby*, 7th Dist. No. 03 MA 54, 2004-Ohio-5929, at ¶17, and appellant

argues the state failed to prove it. However, an in-court identification is not required in criminal cases. *Irby*, supra, at ¶16. Further, identity may be proven by direct or circumstantial evidence. Id. at ¶21, citing *State v. Scott* (1965), 3 Ohio App.2d 239, 244-245. The record reveals that appellant was sufficiently identified as the perpetrator of the crime. At trial the magistrate addressed appellant in the courtroom by name, and asked him if he understood the charges in the complaint. The juvenile neighbor, Maria, and Mr. Bergansky testified that they have known appellant for years. There is no question that these witnesses were talking about appellant, and that they were in a position to know his identity. Further, appellant testified concerning his conduct with respect to the allegations in the complaint. It does not escape our attention that the state asked for leave to recall the juvenile neighbor to identify appellant, and the magistrate sustained appellant's objection to this request. Finally, Geauga County Sheriff's Deputy Gregory Borden testified that W.S. was in the courtroom. Based on the record evidence, the state presented sufficient evidence of appellant's identity.

{¶42} Finally, appellant argues that because he has had arguments in the past with the juvenile neighbor, the trial court should not have believed her testimony. However, as the trier of fact, the trial court was free to consider these spats as having little or no bearing on her credibility. Moreover, we note that Maria's testimony mirrored that of the juvenile neighbor, and that appellant testified his relationship with Maria is good. Further, Mr. Bergansky, who is a close friend and mentor to appellant, testified that appellant admitted the allegations of the juvenile neighbor were true. The trial court was in the best position to determine witness credibility. In finding that appellant violated the public indecency statute, the trial court obviously chose to believe the

juvenile neighbor, Maria, and Mr. Bergansky and to discredit appellant's version of events. After thoroughly reviewing the record, we cannot say the court clearly lost its way and created a manifest miscarriage of justice. We therefore hold that the trial court's decision was not against the manifest weight of the evidence.

{¶43} Appellant's second assignment of error is not well taken.

{¶44} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Geauga County Common Pleas Court, Juvenile Division, is affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.