[Cite as *State v. Paul*, 2012-Ohio-3205.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-026
	:	O P I N I O N
- vs -		7/16/2012
	:	
ZACHARY R. PAUL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 11 CRI 00197

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PIPER, J.

{¶ 1} Defendant-appellant, Zachary R. Paul, appeals his conviction and sentence in the Fayette County Court of Common Pleas for one count of importuning. For the reasons set forth below, we affirm the decision of the trial court.

{¶ 2} An indictment filed on August 26, 2011, charged appellant with one count of importuning, a felony of the fifth degree, in violation of R.C. 2907.07(D)(1). This indictment arose out of appellant's on-line correspondence through the website Facebook, with A.C., a

14-year-old girl. The correspondence between appellant and A.C. detailed sexual acts appellant would perform with her and acts appellant would "teach" her. The investigation into appellant's online activity began when appellant's wife, Brandi Paul, turned several Facebook messages over to the police. As part of the investigation, Patrolman Thomas Queen with the Washington Court House Police Department interviewed appellant. During this interview, appellant admitted to sending these messages to A.C. and acknowledged that he knew she was only 14 years old at the time. Appellant was 20 years old at the time of the offense.

{¶ 3} On October 19, 2011, a jury found appellant guilty of importuning. Appellant was later sentenced by the trial court to a term of one year imprisonment and designated a Tier I sex offender. Appellant now appeals his conviction and sentence, raising three assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT FOUND APPELLANT GUILTY OF IMPORTUNING WITHOUT THE STATE PRESENTING SUFFICIENT EVIDENCE OF THE CRIME.

{¶ 6} Assignment of Error No. 2:

{¶ 7} THE TRIAL COURT ERRED BY CONVICTING APPELLANT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 8} In appellant's first and second assignments of error, he challenges his conviction based on the sufficiency and manifest weight of the evidence. Because such a review requires an evaluation of the same evidence, we will discuss these issues together.

{¶ 9} Manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State*

v. Dixon, 12th Dist. No. CA2007-01-012, 2007-Ohio-5189, ¶ 13. "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." *Id.* at ¶ 13, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 10} While the test for sufficiency focuses on whether the state met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements,* 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Bryant*, 12th Dist. No. CA2011-06-109, 2012-Ohio-678, ¶ 13, citing *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39. However, while appellate review includes the responsibility to consider the credibility of witnesses and 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. Mick*, 12th Dist. No. CA2011-08-017, 2012-Ohio-1598, ¶ 17. Consequently, 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 acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Furthermore, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *Bryant* at ¶ 12, quoting *State v. v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. Thus, a court's determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *Wilson* at ¶ 35.

{¶ 11} Appellant was charged with importuning in violation of R.C. 2907.07, which states:

> (D) No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and * * *:
>
> (1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age * * *.

Sexual activity is defined by R.C. 2907.01(C) and it includes sexual conduct under R.C. 2907.01(A) and sexual contact under R.C. 2907.01(B).[1]

{¶ 12} Appellant does not dispute that he engaged in telecommunications with A.C., a 14-year-old, through Facebook messages or that he was older than 18 at the time the correspondence took place. Appellant only contends that the state failed to provide sufficient evidence that he solicited A.C. to engage in sexual activity.

{¶ 13} Solicit means to "seek, to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear." *State v. Tarbay*, 10th Dist. No. 10AP-551, 2011-Ohio-1389, ¶ 8, quoting *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 68. R.C. 2907.07(D)(1) criminalizes only the solicitation of a minor to engage in illegal sexual activity with an adult. *See State v. Worst*, 12th Dist. No. CA2004-10-270, 2005-Ohio-6550, ¶ 45. Under this offense, the "harm is in the asking." *Worst* at ¶ 45, quoting *State v. Tarbay*, 157 Ohio App.3d 261, 2004-Ohio-2721, ¶ 17 (1st. Dist.). "[T]he importuning statute does not prohibit an adult and child from communicating about sex, nor does it prevent two people, regardless of their

1. Sexual conduct includes: "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A). Sexual contact includes, "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)

age, from talking about sexual activity between a child and an adult." *Id.* Rather, the importuning statute prohibits communication meant to persuade the minor to engage in illegal sex acts. *See Worst* at ¶ 45; *See also State v. Robinson*, 12th Dist. No. CA2008-08-102, 2009-Ohio-3673, ¶ 19.

{¶ 14} At trial, the state offered, as an exhibit, a print out of the on-line communications between appellant and A.C. The victim, A.C., also testified as to the content of these messages. A.C. explained that she met appellant at her adopted mother's wedding in 2002. However, she did not see him again until January 2011 when he came to her home to visit her father and mother. In approximately March 2011, A.C. and appellant began sending Facebook messages to one another. The messages became sexual in nature in the summer of 2011.

{¶ 15} On July 31, 2011, A.C. and appellant exchanged a series of messages. During this conversation, the following exchange took place, which is reproduced here in the common vernacular used in Facebook messaging:

A.C.: i am ready.

* * *

Appellant: ready for wat baby

* * *

A.C.: think about it * * *

Appellant: * * * hat on or off[2]

* * *

A.C.: It will be my number 1

* * *

2. A.C. testified that she later learned that "hat on or off" referred to a condom.

A.C.: will you teach me?

* * *

Appellant: wat all do u want to learn

A.C.: EVERYTHING Cause i've never done anything (Emphasis sic.)

Appellant: u want to learn to suck and how to enjoy anal?

* * *

A.C.: Everything BUT that. (Emphasis sic.)

Appellant: ok the general population thinks that it hurts * * * wen actualy if u have some one to take it slow with u. u can have an amazeing orgasm that u once could never reach

* * *

Appellant: do u want to learn to suck

A.C.: yes but not right away

* * *

Appellant: im gonna go scavenge the kitchen to try to find something to eat

* * *

A.C.: i wish u were here. I would feed you

Appellant: and id eat u for a good long time

{¶ 16} After talking to A.C. about anal sex and learning to "suck," appellant then sent A.C a series of website links and asked, whether "that help[s]," and if she is "gonna try it on [him]."

{¶ 17} A.C. and appellant exchanged messages again on August 2, 2011. In these messages, appellant and A.C. discussed when they could meet. Appellant sent A.C. a message about the time and place A.C. could pick him up. A.C. testified that the two never met that day. Later on August 2, A.C. and appellant exchanged additional messages to

arrange a meeting the following day. During this conversation, the following exchange took place which is again reproduced in the common vernacular used in Facebook messaging:

> Appellant: are u ready for tomorrow
>
> * * *
>
> Appellant: u want me to eat u out some
>
> Appellant: ill be gentle * * *until u get into it and get into it and say harder or faster or deeper
>
> * * *
>
> Appellant: i garente that ull know how to suck a dick, how to ride a cock, how to situate urself, * * * and wat i will need u to learn on ur own is how to play with urself
>
> * * *
>
> Appellant: c u tomorrow

{¶ 18} A.C. testified that appellant never showed up when they planned to meet. The state also presented testimony of Patrolman Queen who interviewed appellant during the investigation. During Queen's testimony, the state offered, as exhibits, a recording of this interview and appellant's written statement. In this interview and in appellant's written statement, appellant admitted to sending these messages to A.C. However, he also corroborated A.C.'s testimony that the two never actually met as a result of their conversations.

{¶ 19} Construing this evidence in a light most favorable to the prosecution, we find no merit to appellant's claim that the state failed to prove appellant solicited or requested A.C. to engage in sexual activity. Any rational trier of fact could have found that appellant's statement that he wanted to "eat A.C. for a good long time [sic]" and his inquiry "u want me to eat u out some [sic][?]" were requests for A.C. to allow appellant to perform cunnilingus, which is expressly stated in R.C. 2907.01(A) and (C) as a form of sexual activity. Moreover,

a trier of fact could have reasonably found that appellant was requesting to engage in intercourse with A.C. when he stated that he would "be gentle," followed by the statement, "until u get into it and get into it and say harder or faster or deeper[.]"

{¶ 20} Although A.C. seemingly initiated the topic of sex by stating that she was "ready," appellant directed the conversation to more explicit topics where specific sex acts were discussed. Particularly, appellant made statements about teaching A.C. how to "enjoy anal" sex and "how to suck." Further, appellant sent A.C. links to websites meant to assist her in how to engage in these acts. The jury could have concluded that these portions of the conversation, along with the instructional websites were meant to tempt and entice A.C. to engage in anal and oral sex with appellant. *State v. Chance*, 12th Dist. No. CA2005-09-373, 2006-Ohio-3622, ¶ 16-24 (finding sufficient evidence to support an importuning conviction where defendant offered to teach the victim about oral sex and how to enhance oral sex). Finally, after sending these links, he inquired, whether she was going to "try it out on [him]?" A rational trier of fact could have found that such an inquiry was a request by appellant for A.C. to engage in both anal and oral sex, which is also expressly stated in R.C. 2907.01(A) and (C) as forms of sexual activity. Accordingly, we find that the prosecution provided sufficient evidence on all the essential elements of importuning, including solicitation.

{¶ 21} In support of his claim that his conviction was against the manifest weight of the evidence, appellant argues that there was no evidence either he or A.C. actually intended to meet and engage in the discussed sex acts. However, this does not undermine his conviction. Whether the acts discussed were consummated is irrelevant to the offense of importuning. *See State v.* Tarbay, 10th Dist. No. 10AP-551, 2011-Ohio-1389, ¶ 8; *State v. Bolden*, 2nd Dist. No. 19943, 2004-Ohio-2315, ¶ 37. Rather, the harm is in the asking or soliciting of sexual activity. *Worst* at ¶ 45. If such acts would have occurred between A.C. and appellant, then the appellant would have committed a crime separate from importuning,

such as unlawful sexual conduct with a minor pursuant to R.C. 2907.04(A).[3]

{¶ 22} Appellant also argues that his conviction was against the manifest weight of the evidence because the conversations between A.C. and appellant were meant as a joke. Appellant presented no case-in-chief to contest the testimony of A.C.. Rather, he relied upon his written statement to the police explaining that he engaged in the conversations with A.C. as a joke intended to infuriate his wife. The jury had appellant's written statement and heard testimony from his wife that they were indeed fighting at the time she turned over the messages to police. The jury was then free to believe or disbelieve appellant's defense that the conversations were nothing but a joke. Based on the evidence presented at trial, we cannot say that the jury clearly lost its way or created such a manifest miscarriage of justice that appellant's conviction for importuning must be reversed and a new trial ordered.

{¶ 23} Having found that the conviction was supported by sufficient evidence and that such conviction was not against the manifest weight of the evidence, appellant's first and second assignments of error are overruled.

{¶ 24} Assignment of Error No. 3:

{¶ 25} [THE] TRIAL COURT ERRED BY SENTENCING APPELLANT TO [NON-MINIMAL] SENTENCE BASED UPON FACTORS IN O.R.C. 2929.12(C).

{¶ 26} In his third assignment of error, appellant asserts that the trial erred when it sentenced him to a term of one year imprisonment.

{¶ 27} In reviewing felony sentences, appellate courts must apply a two-step test. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, the appellate court must "examine the sentencing court's compliance with all applicable rules and statutes in imposing

3. "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

the sentence to determine whether the sentence is clearly and convincingly contrary to law." *State v. Wiggins,* 12th Dist. No. CA2009-09-119, 2010-Ohio-5959, ¶ 7, citing *Kalish* at ¶ 4. "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott,* 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10, citing *Kalish* at ¶ 18. If the sentence satisfies the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Haddix*, 12th Dist. CA2011-07-075, 2012-Ohio-2687, quoting *Kalish* at ¶ 4. "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Kalish* at ¶ 19. As to sentencing, a trial court does not abuse its discretion as long as careful and substantial deliberation is given to the relevant statutory considerations. *State v. Bishop*, 12th Dist. CA2010-08-054, 2011-Ohio-3429, ¶ 15.

{¶ 28} The trial court sentenced appellant to one year imprisonment for the importuning charge, a fifth-degree felony. Although this was the maximum sentence allowed, it still fell within the applicable statutory range according to R.C. 2929.14. Moreover, the trial court's judgment entry of sentence and the sentencing transcript clearly indicate that the court considered the purposes and principles of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12. The trial court also advised appellant of the applicable postrelease control issues. Therefore, the sentence was not contrary to law.

{¶ 29} In arguing the trial court erred when it determined his sentence, appellant takes issue with the court's weighing of the statutory factors listed in R.C. 2929.12(C). Appellant argues that the trial court failed to properly weigh the "less serious" factors contained in R.C. 2929.12(C). Appellant contends that the evidence presented at trial suggested that the victim, A.C., initiated and facilitated the conversations that led to appellant's importuning

charge. Appellant also argues that these facts suggest that he acted under A.C.'s "strong provocation" when committing the offense. However, the fact that the trial court chose to weigh the various sentencing factors differently than how appellant would have weighed them is not sufficient to establish an abuse of discretion. *State v. Kirchoff*, 12th Dist. Nos. CA2010-12-104 and CA2010-12-105, 2011-Ohio-4718, ¶ 13. As noted above, the trial court made it clear in the sentencing entry that it considered the principles and purposes of sentencing and balanced the seriousness and recidivism factors of the relevant statutes.

{¶ 30} Additionally, the record demonstrates that the trial court gave careful and substantial deliberation to the circumstances and factors of the case. At the sentencing hearing, the judge noted the seriousness factors which included the psychological damage done to the child and appellant's use of his relationship with the victim and her family to facilitate the offense. The judge also found that recidivism is more likely in this case as appellant had an extensive prior criminal history and he was on community control for domestic violence when this offense occurred. Furthermore, the judge noted on the record, that appellant had no genuine remorse. When appellant had the opportunity to speak on his own behalf, he denied being involved. Appellant stated: "I never sent these messages, Your Honor."

{¶ 31} After reviewing the record, we cannot say that the trial court abused its discretion in sentencing appellant. As such, appellant's final assignment of error is overruled.

{¶ 32} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.