[Cite as *In re J.S.*, 2012-Ohio-3534.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN THE MATTER OF:	:	
J.S.	:	CASE NO. CA2011-09-067
	:	O P I N I O N 8/6/2012
	:	
	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2009JA47465

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for appellee

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HENDRICKSON, J.

{¶ 1} Appellant, J.S., appeals his adjudication as a delinquent child by the Clermont County Court of Common Pleas, Juvenile Division.

{¶ 2} On December 17, 2009, Detective John Pavia of the Union Township Police Department filed a delinquency complaint with the juvenile court alleging appellant had committed an act which would be rape, a violation of R.C. 2907.02(A)(1)(b), if committed by an adult.

{¶ 3} Prior to his adjudication hearing, appellant moved to suppress statements he

made to Pavia during an interview on November 16, 2009. The juvenile court denied the motion, finding appellant was not entitled to *Miranda* warnings and that the statements were voluntary.

{¶ 4} On May 11, 2011, appellant was adjudicated as delinquent after a hearing. The juvenile court imposed a 90-day term of detention, suspended, and a one-year commitment to the Department of Youth Services, suspended. Appellant was placed on community control. Appellant timely appeals, raising the following two assignments of error:

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT VIOLATED J.S.'S RIGHT TO DUE PROCESS WHEN IT ADMITTED INTO EVIDENCE THE VIDEO TAPE OF J.S.'S CUSTODIAL STATEMENTS TO THE POLICE, WHICH WERE OBTAINED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION AND R.C. 2151.352.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT ERRED IN ADJUDICATING J.S. A DELINQUENT CHILD FOR THE OFFENSE OF RAPE AS THERE WAS INSUFFICIENT EVIDENCE AND THE ADJUDICATION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 9} In his first assignment of error, appellant contends that the juvenile court erred by admitting evidence in violation of appellant's constitutional rights. Specifically, appellant argues that his statements to Pavia should have been suppressed because he was never advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). In addition, appellant maintains that his statements were not made voluntarily and that he was denied the right to counsel in violation of R.C. 2151.352.

{¶ 10} An appellate court's review of a motion to suppress presents a mixed question of law and fact. *In re N.J.M.*, 12th Dist. No. CA2010-03-026, 2010-Ohio-5526, ¶ 8; *State v.*

Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id*.; *Burnside* at ¶ 8. Consequently, an appellate court "may not disturb a trial court's decision on a motion to suppress where it is supported by substantial, credible evidence." *In re Howard*, 119 Ohio App.3d 33, 42 (12th Dist.1997). "Accepting these facts as true, the appellate court must then independently determine, without deference to the trial court, whether the court has applied the appropriate legal standard." *In re N.J.M.* at ¶ 8; *In re Howard* at 42.

{¶ 11} A police officer is not required to administer *Miranda* warnings to every person whom they question. *In re N.J.M.* at ¶ 9; *State v. Biros*, 78 Ohio St.3d 426, 440, 1997-Ohio-204. "[T]he duty to advise a suspect of constitutional rights pursuant to *Miranda* * * * arises only when questioning by law enforcement rises to the level of a custodial interrogation." *Id*.; *In re J.B.,* 12th Dist. No. CA2004-09-226, 2005-Ohio-7029, ¶ 53. *Miranda* defines custodial interrogation as any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

{¶ 12} Determining whether a person is in custody for purposes of *Miranda* warnings hinges, first, upon the circumstances surrounding the questioning and, second, given those circumstances, on a determination of whether a reasonable person would have felt that he was not at liberty to terminate the interview and leave. *In re N.J.M.* at ¶ 10; *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶ 27. "Once the factual circumstances surrounding the interrogation are reconstructed, the court must apply an objective test to resolve the ultimate inquiry of whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id*., citing *Hoffner* at ¶ 27 (internal quotations omitted). In instances where a suspect has not been formally arrested, "the restraint on the

subject's freedom of movement must be significant in order to constitute custody." *In re J.B.* at ¶ 53 (internal quotations omitted); *State v. Coleman*, 12th Dist. No. CA2001-10-241, 2002-Ohio-2068, ¶ 23. Finally, in cases involving a juvenile, the juvenile suspect's age may be analyzed as part of the court's determination on whether a custodial interrogation occurred. *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394, 2406 (2011).

{¶ 13} The juvenile court denied appellant's motion to suppress, in part, because the court found that appellant was not in custody at the time he made his statements to Pavia. Appellant argues that the juvenile court was incorrect because, although appellant was not under formal arrest when interviewed, his freedom was nevertheless restrained due to the following reasons: (1) he was 13 years old; (2) his father was told by police to bring appellant to the police station for questioning; (3) his father was not permitted to accompany him during the interview; and (4) he was not informed that he could leave at any time but only that he would be allowed to go home with his father after the interview.

{¶ 14} After a careful review of the record, we find that appellant was in custody, for the purposes of *Miranda*, when he gave his statements to Pavia. First, there is no evidence in the record that appellant voluntarily went to the police station. Rather, his father was instructed by police officers to follow them to the Union Township Police Department so that appellant could be questioned. Second, appellant was only 13 at the time of the interview and, consequently, there was a likelihood that appellant was unaware of his rights, including the right to be silent or request a lawyer. Third, although Pavia testified at the adjudication hearing that he informed appellant he was not under arrest, the videotape of the interview reveals that no such statement was made. Rather, Pavia stated only that appellant would be returning home after the interview, implying at times that the interview would end once appellant finally told the truth. Further, Pavia never told appellant that he had the right to end the interview at any time.

{¶ 15} Based upon these factors, we find that appellant was in custody during the interview and, therefore, Pavia had a duty to advise appellant of his *Miranda* rights. Because these warnings were necessary and not provided, the juvenile court erred in denying appellant's motion to suppress based on a *Miranda* violation.

{¶ 16} As we have found that appellant was in custody at the time of his statements to Pavia, appellant's arguments regarding the voluntariness of his statements and the implication of R.C. 2151.352 need not be addressed. However, we must now determine whether the error of the juvenile court in overruling appellant's motion to suppress was prejudicial or harmless.

{¶ 17} The Ohio Constitution "entitles a criminal defendant to a fair trial, not a perfect one." *State v. Williams*, 38 Ohio St.3d 346, 349 (1988). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id*.; *United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980-81 (1983). An error in the admission of evidence is harmless beyond a reasonable doubt "if there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Bayless*, 48 Ohio St.2d 73, 106 (1976), vacated as to death penalty, 438 U.S. 911 (1978).

{¶ 18} If committed by an adult, a violation of R.C. 2907.02(A)(1)(b) requires proof that appellant "engage[d] in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." *See In re N.J.M.*, 2010-Ohio-5526 at ¶ 36. Sexual conduct includes "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." R.C. 2907.01(A). "Penetration, however slight, is sufficient to complete vaginal or anal intercourse." *Id*.

{¶ 19} In this case, the only evidence presented at the hearing was the statements of

appellant and the testimony of Amanda Burton, the owner of the apartment where the incident took place. Burton testified that appellant, Burton's daughter, and the victim, H.S., were all in an upstairs bedroom at Burton's apartment on the evening of November 15, 2009. When Burton heard a door close upstairs, which was against house rules, Burton and several other adults called up the stairs to get appellant's attention. Concerned when appellant did not respond, Burton went upstairs to check on the children and found H.S. standing with her panties and pantyhose pulled down to her boots. Appellant was next to H.S. with his hands and mouth around H.S.'s vaginal area. Burton further testified that, when questioned about what happened, H.S. stated that appellant "touched her boo-boo" and pointed toward her vaginal area.

{¶ 20} As Burton's testimony did not reveal any evidence of vaginal penetration, a reasonable possibility exists that the admission of appellant's statements to Pavia contributed to appellant's delinquency adjudication. Therefore, we cannot say that the error in admitting this evidence was harmless. Accordingly, we sustain appellant's first assignment of error and must reverse his adjudication and remand the case for further proceedings.

{¶ 21} In his second assignment of error, appellant argues that his delinquency adjudication was based on insufficient evidence and is against the manifest weight of the evidence. Specifically, appellant argues that Burton was not a credible witness, as her story regarding whether H.S. was sitting or standing and whether appellant's hands and/or mouth were actually touching H.S. changed prior to the adjudication hearing.

{¶ 22} Our holding in the previous assignment of error does not render the issue of sufficiency moot, since the state's failure to present legally sufficient evidence would bar a retrial. *See State v. Sheppard*, 144 Ohio App.3d 135, 144 (1st Dist.2001); *State v. Thompkins*, 78 Ohio St.3d 380, 386-87 (1997). However, as the case has been remanded for other reasons, the issue of whether appellant's adjudication was against the manifest

weight of evidence is moot and shall not be addressed. *See id*.; App.R. 12(A)(1)(c).

{¶ 23} The standard of review applied in determining whether a juvenile court's finding of delinquency is supported by sufficient evidence is the same standard applied in adult criminal convictions. *See In re J.A.S*., 12th Dist. No. CA2007-04-046, 2007-Ohio-6746, ¶ 11; *In re P.G*., 12th Dist. No. CA2006-05-009, 2007-Ohio-3716, ¶ 13-14. When reviewing the sufficiency of the evidence underlying a criminal conviction, the function of an appellate court is "to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *Id*.; *In re P.G.* at ¶ 13.

{¶ 24} Although there were inconsistencies in statements Burton made to the police prior to her testimony, our review of the record, when viewed in a light most favorable to the prosecution, reveals that the testimony at the hearing could have convinced a rational trier of fact that appellant committed the act of rape upon H.S. Consequently, the evidence was sufficient, if believed by the trier of fact, to support appellant's delinquency adjudication. Therefore, appellant's second assignment of error regarding sufficiency is overruled.

{¶ 25} The judgment of the Clermont County Court of Common Pleas, Juvenile Division, is reversed, in part, and the cause is remanded for further proceedings in accordance with this opinion.

{¶ 26} Judgment reversed and remanded.

POWELL, P.J., concurs.

PIPER, J., concurs separately.

PIPER, J., concurring separately.

{¶ 27} I write separately to further expound upon my reasoning for concurring with the majority opinion. A parent is not entitled by law to be present during the custodial interrogation of his child. *In re Watson*, 47 Ohio St.3d 86 (1989). However, the Ohio Supreme Court has reminded law enforcement of the importance that needs to be given to evaluating the characteristics of a young person in determining the child's understanding of constitutional rights and the relinquishment of such rights. *Id*. These characteristics 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 90. *See also J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394 (2011).

{¶ 28} The state asserts that the questioning was not an "in-custody" situation and that the defendant had voluntary control over his questioning. Yet, the setting of the circumstances suggests otherwise.

{¶ 29} The police exercised control over the situation, not appellant or his parent on the premises. While not a requirement that a parent be present during an interview, the police deprived the parent a specific request to sit with his son. In my opinion, this denial did nothing to alleviate concerns as to whether appellant's statement was voluntary or whether his statement was the product of something other than an "in-custody" interrogation.

{¶ 30} As to the analysis of whether there was sufficient evidence, it is difficult to say which pieces of evidence the trial court as the fact finder may or may not have relied upon. While we remand the case so that the evidence can be weighed accordingly, our decision today acknowledges that there was evidence produced to sufficiently carry the burden of proof if that evidence is ultimately deemed by the trial court as the fact finder to be

competent, credible evidence.