

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

STATE OF OHIO,	:	CASE NO. CA2016-04-029
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	10/3/2016
	:	
Z.G.B.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. 15-N000899

David P. Fornshell, Warren County Prosecuting Attorney, Kathryn Horvath, 520 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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**S. POWELL, J.**

{¶ 1} Appellant, Z.G.B., appeals from the decision of the Warren County Court of Common Pleas, Juvenile Division, adjudicating him a delinquent child for having committed an act that if charged as an adult would constitute rape. For the reasons outlined below, we affirm.<sup>1</sup>

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1. Pursuant to Loc.R. 6(A), we hereby sua sponte remove this case from the accelerated calendar for purposes of issuing this opinion.

{¶ 2} On September 17, 2015, a detective with the Springboro Police Department filed a complaint alleging Z.G.B. was a delinquent child for having committed rape in violation of R.C. 2907.02(A)(1)(c), a first-degree felony if committed by an adult. The charge stemmed from allegations Z.G.B. inserted his penis into the mouth of a substantially impaired female while at a party during the early morning hours of September 12, 2015. It is undisputed that alcohol was consumed at this party. At the time of the offense, both Z.G.B. and the victim were 14 years old.

{¶ 3} The matter ultimately proceeded to a two-day adjudication hearing that concluded on January 22, 2016. At this hearing, the juvenile court heard testimony from several witnesses, including the victim herself. Following this hearing, the juvenile court issued a decision adjudicating Z.G.B. a delinquent child. In so holding, the juvenile court found it "clear [that] the victim had a sufficient quantity of vodka and enough of a 'hit' off a bowl of marijuana to render her substantially impaired" when Z.G.B. inserted his penis into her mouth. The juvenile court then issued a dispositional decision wherein it committed Z.G.B. to Mary Haven Youth Center for residential treatment, with a suspended one-year minimum commitment to the Ohio Department of Youth Services.

{¶ 4} Z.G.B. now appeals from his adjudication as a delinquent child, raising two assignments of error for review. For ease of discussion, the two assignments of error will be addressed together.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S ADJUDICATION OF DELINQUENCY FOR COMMITTING RAPE.

{¶ 7} Assignment of Error No. 2:

{¶ 8} APPELLANT'S ADJUDICATION FOR DELINQUENCY-RAPE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 9} In his two assignments of error, Z.G.B. argues his adjudication as a delinquent child was not supported by sufficient evidence and was otherwise against the manifest weight of the evidence. We disagree.

{¶ 10} The standards of review applied in determining whether a juvenile court's finding of delinquency is supported by sufficient evidence or is otherwise against the manifest weight of the evidence are the same standards as applied in adult criminal convictions. *In re I.L.J.F.*, 12th Dist. Butler No. CA2014-12-258, 2015-Ohio-2823, ¶ 24.

{¶ 11} 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 convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Intihar*, 12th Dist. Warren No. CA2015-05-046, 2015-Ohio-5507, ¶ 9. 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. In other words, "the test for sufficiency requires a determination as to whether the state has met its burden of production at trial." *State v. Boles*, 12th Dist. Brown No. CA2012-06-012, 2013-Ohio-5202, ¶ 34, citing *State v. Wilson*, 12th Dist. Warren No. CA2006-01-007, 2007-Ohio-2298, ¶ 33. When evaluating the sufficiency of the evidence, this court must "defer to the trier of fact on questions of credibility and the weight assigned to the evidence." *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 132.

{¶ 12} On the other hand, a manifest weight of the evidence 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." *State v. Barnett*, 12th Dist. Butler No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all

reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the 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. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 34. However, 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. *State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 81. An appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Blair*, 12th Dist. Butler No. CA2014-01-023, 2015-Ohio-818, ¶ 43.

{¶ 13} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Wright*, 12th Dist. Butler No. CA2012-08-152, 2014-Ohio-985, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1987). However, because a finding that an adjudication of delinquency is not against the manifest weight of the evidence necessarily includes a finding on sufficiency, "the determination that a juvenile court's delinquency finding is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency." *In re M.J.C.*, 12th Dist. Butler No. CA2014-05-124, 2015-Ohio-820, ¶ 29, citing *In re N.J.M.*, 12th Dist. Warren No. CA2010-03-026, 2010-Ohio-5526, ¶ 35. Therefore, we begin with an examination of whether Z.G.B.'s adjudication as a delinquent child was supported by the manifest weight of the evidence.

{¶ 14} As noted above, Z.G.B. was adjudicated a delinquent child for having committed rape in violation of R.C. 2907.02(A)(1)(c), a first-degree felony if committed by an adult. Pursuant to that statute,

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when

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\* \* \*

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

{¶ 15} Substantial impairment "must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his [or her] conduct or to control his [or her] conduct." *State v. Zeh*, 31 Ohio St.3d 99, 103-104 (1987). Substantial impairment may be proven by the testimony of persons who had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct. *State v. Bai*, 12th Dist. Butler No. CA2010-05-116, 2011-Ohio-2206, ¶ 54. "A substantial-impairment determination is made on a case-by-case basis, with great deference to the factfinder." *State v. Kilbarger*, 12th Dist. Fayette No. CA2013-04-013, 2014-Ohio-2341, ¶ 11.

{¶ 16} Z.G.B. does not dispute that he engaged in sexual conduct with the victim when he inserted his penis into her mouth.<sup>2</sup> Rather, Z.G.B. argues his adjudication as a delinquent child was not supported by sufficient evidence and was otherwise against the manifest weight of the evidence because there was testimony indicating the victim was not substantially impaired. However, while we agree that the record does contain some testimony calling into question the victim's level of impairment, the record also contains testimony that the victim was so intoxicated that she was "falling," that she "[c]ouldn't really stand by herself" and had

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2. Pursuant to R.C. 2907.01(A), the term "sexual conduct" includes vaginal intercourse, fellatio, cunnilingus, and anal intercourse.

to be held up by Z.G.B., and that she was "slurring her words." There was also testimony that the victim vomited and was still "pretty intoxicated" after Z.G.B. inserted his penis into her mouth. This included testimony that she "couldn't talk" coherently and "couldn't really move by herself." The victim herself even testified that she was intoxicated and that she felt "loose," "dizzy," "tired," and "tipsy" after drinking as much as half a glass of "straight vodka" and smoking marijuana.

{¶ 17} Z.G.B. claims that it was improper for the juvenile court to rely on this testimony in finding the victim was substantially impaired because it came from witnesses who provided inconsistent statements, thereby rendering their testimony completely unreliable. We agree that the testimony provided by these witnesses was not entirely consistent, nor was the victim's testimony wholly consistent with the statements she made to her guidance counselor, the children's advocacy center, and the police. However, when specifically asked about the inconsistencies in her statements, the victim testified that her statements differed because she was trying to avoid getting her friends in trouble for having a party where alcohol was consumed. Although Z.G.B. claims these witnesses "cannot be believed," it is well-established that the juvenile court, as the trier of fact, was free to believe all, part or none of these witnesses' testimony. *In re D.T.W.*, 12th Dist. Butler No. CA2014-09-198, 2015-Ohio-2317, ¶ 37. That is because the responsibility to consider the credibility of witnesses and the weight given to the evidence are primarily matters for the trier of fact to decide.

{¶ 18} While we recognize there are some inconsistencies in the victim's testimony, what this court finds more troubling is Z.G.B.'s attempts to downplay his own statements to the investigating detective that the victim was "really drunk" and generally unresponsive to his advances prior to him inserting his penis into the victim's mouth. The record also contains statements Z.G.B. made to a female friend characterizing the victim as "too drunk" and "drunk [as f\*\*k]." Z.G.B. further stated to this friend that he believed it was unlikely the victim

would press charges against him because she "was drunk so she don't remember s\*\*t."

{¶ 19} Z.G.B. claims these statements were taken out of context since the comments were made in response to the "viscous and ridiculous" rumors that the victim "passed out while [Z.G.B.] was jerking off on her face." However, regardless of what Z.G.B.'s comments were in response to, it is clear based on Z.G.B.'s own statements that he believed the victim was in a highly intoxicated and unresponsive state when he inserted his penis into her mouth, thus establishing that he knew or had reason to believe the victim was substantially impaired. To claim otherwise is simply incorrect and unsupported by the record.

{¶ 20} In a case alleging substantial impairment due to voluntary intoxication, "there can be a fine, fuzzy, and subjective line between intoxication and impairment." *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, ¶ 23 (2d Dist.), quoting *State v. Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, ¶ 18. That is certainly not the case here for the record contains ample evidence to support the juvenile court's decision finding the victim was substantially impaired at the time Z.G.B. inserted his penis into her mouth. Therefore, because this is not one of those extraordinary cases where the evidence presented at trial weighs heavily in favor of acquittal, the juvenile court's decision adjudicating Z.G.B. a delinquent child was not against the manifest weight of the evidence. As a result, we also find sufficient evidence was presented to support the juvenile court's decision. Accordingly, finding no error with the juvenile court's decision, Z.G.B.'s two assignments of error are without merit and overruled.

{¶ 21} Judgment affirmed.

PIPER, P.J., and RINGLAND, J., concur.