[Cite as *In re J.O.*, 2010-Ohio-4296.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: J. O.,

A MINOR CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 09-CA-0135

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. 2009-0496
JUDGMENT:	Affirmed, in part; Reversed, in part, and remanded
DATE OF JUDGMENT ENTRY:	September 13, 2010

APPEARANCES:

Counsel for the State of Ohio	Counsel for J. O.
KENNETH OSWALT Licking County Prosecutor BY: RACHEL OKTAVEC Assistant Prosecuting Attorney 20 S. Second Street, Fourth Floor Newark, Ohio 43055	SHERYL A. TRZASKA Assistant State Public Defender 250 East Broad Street, Suite 1400 Columbus, Ohio 43215

Hoffman, J.

{¶1} Defendant-appellant J. O., a juvenile, appeals his adjudication in the Licking County Court of Common Pleas, Juvenile Division on one count of attempted rape. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 10, 2009, Appellant's girlfriend, Jessica Moore, resided with Appellant and his mother. Appellant and Moore have a child together. On the date in question, Appellant's mother informed the Newark Police Department a fight had occurred between Appellant and Moore. Moore told the officers Appellant "wanted some sex", and she refused and then he became violent. Moore sustained injuries to her face and arm during the incident, and bruising on her thigh.

{¶3} During a follow-up investigation, Officer Palmisano observed and photographed the bruising on Moore's inner right thigh. Moore testified at trial during the incident both she and Appellant had been drinking. She stated she was lying on the bed while she and Appellant were talking, at which time he put his hand on her leg and on her vaginal area over her clothes. She testified she "kept telling him to move his hand. And I go, I don't want to do nothing." Moore stated Appellant then grabbed her by the face, hit her, removed her underwear, and tried to pull her legs apart while on top of her.

{¶4} On July 27, 2009, the State filed a complaint in the Licking County Court of Common Pleas, Juvenile Division alleging Appellant, a seventeen year-old juvenile, committed vandalism, in violation of R.C. 2909.05(B)(2), a fifth degree felony if

committed by an adult, and attempt to commit rape, in violation of R.C. 2907.02(A)(1) and R.C. 2923.02(A), a second degree felony if committed by an adult.

{¶5} At the adjudication hearing on September 1, 2009, Appellant admitted to the vandalism charge and to three misdemeanor charges in another case pending in Licking County. He further admitted to a probation violation. The trial court accepted the admissions, and the matter proceeded to trial on the charge of attempted rape. Following trial, Appellant was found delinquent for committing attempted rape.

{¶6} At disposition, the trial court committed Appellant to the Ohio Department of Youth Services for a minimum period of six months, maximum of his twenty-first birthday on the vandalism charge, and a minimum period of one year, maximum of his twenty-first birthday for the attempted rape. The court ordered the commitments run consecutively. Finally, the court found Appellant a Tier III juvenile sex offender registrant, but not a public registry qualified juvenile sex offender registrant and not subject to community notification.

{¶7} Appellant now appeals, assigning as error:

{¶8} "I. INSUFFICIENT EVIDENCE SUPPORTED J. O.'S ADJUDICATION OF ATTEMPTED RAPE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, AND JUV.R. 29(E)(4).

{¶9} "II. J. O.'S ADJUDICATION AND COMMITMENT MUST BE REVERSED AND REMANDED FOR A NEW TRIAL BECAUSE HIS ADJUDICATION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶10} "III. THE TRIAL COURT ERRED WHEN IT CLASSIFIED J. AS A JUVENILE OFFENDER REGISTRANT BECAUSE IT DID NOT MAKE THAT DETERMINATION UPON HIS RELEASE FROM A SECURE FACILITY, AS REQUIRED BY R.C. 2152.83(A)(1).

{¶11} "IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT J. O.'S CLASSIFICATION AS A TIER III JUVENILE SEX OFFENDER REGISTRANT WAS OFFENSE-BASED, IN VIOLATION OF R.C. 2950.01(E)-(G).

{¶12} "V. THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO J. O., IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶13} "VI. THE JUVENILE COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO J. O., AS THE LAW VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW. FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION; ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION."

I, II.

{¶14} Appellant's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶15} We apply the same standard of review for weight and sufficiency of the evidence in juvenile delinquency adjudications as for adult criminal defendants. *In the Matter of: Joshua M.,* Ottawa App. No. OT-04-038, 2005-Ohio-3067 at paragraph 29.

{¶16} Our analysis for manifest weight differs from our review for sufficiency of the evidence. *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. A

challenge to the sufficiency of the evidence presents a question of law. *Thompkins* at 387, 678 N.E.2d 541, citations deleted. The proper analysis 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. Williams,* 74 Ohio St 3d 569, 576, 1996-Ohio-91, 446 N.E.2d 444, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶17} While the test for sufficiency requires a determination of whether the State has met its burden of production, a manifest weight challenge questions whether the State has met its burden of persuasion. *Thompkins,* supra, 390. We must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice such that the conviction must be reversed and a new trial ordered. A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶18} Appellant was adjudicated delinquent of attempted rape in violation of R.C.2923.02(A) and R.C. 2907.02(A)(1), which read, respectively:

{¶19} R.C. 2907.02:

{¶20} "(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶21} R.C. § 2923.02:

{¶22} "(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 any of the following applies:

{¶23} "(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

{¶24} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶25} "(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.

{¶26} "(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶27} In order to prove an attempt to commit an offense, the record must show particular conduct directed toward the commission of the offense took place and such conduct, if successful, would constitute or result in the offense. *State v. Powell* (1990), 49 Ohio St.3d 255; *State v. Woods* (1976), 48 Ohio St.2d 127. An attempt occurs when one purposely does anything which is an act "constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Id. Intent to commit a crime does not of itself constitute an attempt, nor does mere preparation. Id.

{¶28} A review of the trial transcript in this matter demonstrates Appellant demanded Moore have sex with him, despite her continued refusal. He undressed himself, straddled her and held her down. His penis was in her pelvic region, and he attempted to pry her legs apart. He grabbed her face asking why she would not have sex with him. After the incident, a bruise was discovered on Moore's thigh as a result of Appellant's attempt to pry her legs apart.

{¶29} Based on the above, we find the evidence demonstrates Appellant took a substantial step toward the commission of the offense of rape. Accordingly, the trial court's finding Appellant delinquent for attempted rape was not against the manifest weight and/or sufficiency of the evidence.

{¶30} The first and second assignments of error are overruled.

III.

{¶31} In the third assignment of error, Appellant asserts the trial court erred in classifying Appellant a juvenile offender registrant when the trial court did not make the determination upon Appellant's release from a secure facility.

{¶32} Ohio Revised Code 2152.83 reads,

{¶33} "(A)(1) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child's release from the secure facility an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

{¶34} "(a) The act for which the child is or was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

{¶35} "(b) The child was sixteen or seventeen years of age at the time of committing the offense.

{¶36} "(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code."

{¶37} Appellant was seventeen years-old at the time he committed the offense, and had not been previously adjudicated delinquent for committing a sexually oriented offense. The trial court conducted Appellant's juvenile sex offender classification hearing at disposition; rather, than upon his release from DYS.

{¶38} In *In re Kristopher W*. (Nov. 19, 2008), Tuscarawas App. No. 2008AP030022, this Court held:

{¶39} "We recognize that subsection (A)(1) is worded differently than subsection (B)(1). The General Assembly uses the word 'shall' in subsection (A)(1) rather than the word 'may.' Thus, although a juvenile court has discretion as to the type of disposition it makes, the court apparently does not have discretion to determine *when* the delinquent child can be adjudicated a sexual predator. If a child is committed to DYS, the legislature has decided that such a determination must wait until the child's release. We recognize that courts must follow a statute's plain language, regardless of the wisdom of the particular statutory provision.' *Id* at paragraph 8.

{¶40} "Based on the foregoing, we find that the trial court erred in classifying appellant as a juvenile offender registrant when it did. Such determination must be made upon appellant's release from a secure facility."

{¶41} In accordance with this Court's holding in *In re Kristopher W*., supra, the trial court erred in classifying Appellant a juvenile registrant offender prior to the time of his release from a secure facility, in violation of R.C. 2152.83(A).

{¶42} Appellant's third assignment of error is sustained.

IV.[1]

{¶43} In the fourth assignment of error, Appellant maintains the trial court abused its discretion in classifying Appellant a Tier III juvenile sex offender registration based upon the offense for which he was charged, in violation of R.C. 2950.01(E)-(G).

{¶44} During the hearing in this matter, the trial court stated:

{¶45} "The Court: Okay. As a Tier 3 juvenile sex offender registrant, that would require a lifetime responsibility of registering in person, or in-person verification every 90 days; however, Mr. Wedemeyer is saying he is not going to recommend that this young man be classified as a public registry qualified juvenile sex offender registrant, and not subject to community notifications.

{¶46} "* * *

{¶47} "The Court: Because of his age, specifically that he was 17 at the time of the commission of this felony sex offense - - correct me if I'm wrong - - the Court has no discretion.

[1] Although we recognize discussion of Appellant's fourth assignment of error is premature given our disposition of the third assignment of error, we choose to address the merits of the argument raised in order to provide the trial court with direction as to the future registration tier classification.

{¶48} "Ms. Bond: That's how the Fifth District is interpreting it, Your Honor. Some districts are holding otherwise. Some districts say that the Court has complete discretion whether to say Tier 1, Tier 2, or Tier 3.

{¶49} "The Court: Okay. But all I'm concerned about is what - -

{¶50} "Ms. Bond: But the Fifth District - -

{¶51} "The Court: - - the law - - what the Fifth District Court of Appeals says I've got to do.

{¶52} "Ms. Bond: That's what - -

{¶53} "The Court: The Fifth District Court of Appeals, because that's who I report to. The Fifth District Court of Appeals says I have no discretion because he's 17 years of age, this is a felony sex offense, so, I've got to classify him as a Tier 3, but I do have discretion as to whether he's a public registry qualified and whether or not subject to community notification."

{¶54} Tr. at 13-16.

{¶55} This Court in its decision of *In the Matter of R.D., Delinquent Child*, 2010-Ohio-2986, addressed the issue raised herein, holding:

{¶56} "First, the juvenile court must determine whether the juvenile sex offender should be designated as a juvenile offender registrant ("JOR") and, therefore, subject to classification and the attendant registration requirements. For certain juvenile sex offenders, the JOR designation is mandatory. See R.C. § 2152.82 (applicable to juvenile sex offenders 14 or older who had previously committed a sexually oriented offense); R.C. § 2152.83(A)(1) (applicable to juvenile offenders 16 or older); and R.C. §

2152.86 (applicable to "serious youthful offenders" who are additionally designated as 'public registry-qualified juvenile offender registrant').

{¶57} "***

{¶58} "Second, the statutory scheme for the juvenile sex offenders requires the juvenile court to conduct a hearing to determine the tier in which to classify the juvenile offender. R.C. § 2152.831(A); R.C. § 2152.83(A)(2).

{¶59} "For example, a Tier III sex offender is defined, in part, as a 'sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender *relative to the offense.'* (Emphasis added.) R.C. § 2950.01(G)(3).

{¶60} "We find, unlike the automatic classification of the adult sex offenders, R.C. § 2152.831(A) explicitly requires the juvenile court to conduct a hearing prior to classifying a delinquent child pursuant to R.C. § 2152.82 or R.C. § 2152.83, 'to determine whether to classify the child a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender.'

{¶61} "This provision would be pointless if the juvenile court's classification determination were merely a ministerial act based solely on the offense that the delinquent child had committed. Thus, we find that the determination of the tier classifications for juveniles must therefore include a discretionary determination by the juvenile court as to the tier classification for the juvenile sex offender.

{¶62} "Our interpretation of the statute as vesting the juvenile court with discretion in classifying the juvenile offenders is likewise shared by several other appellate districts. See *In re G.E.S.,* 9th Dist. No. 24079, 2008-Ohio-4076, ¶ 37 (the statutes vest a juvenile court with full discretion to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender); *In re S.R.P.,* 12th Dist. No. CA2007-11-027, 2009-Ohio-11, ¶ 43 (the appellate court read Senate Bill 10 as giving juvenile courts the discretion to determine which tier level to assign to a delinquent child; regardless of the sexually oriented offense that the child committed, Senate Bill 10 does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism); *In re Adrian R.,* 5th Dist. No. 08-CA-17, 2008-Ohio-6581, ¶ 17; *In re J.M.,* 8th Dist. No. 91800, 2009-Ohio-2880, ¶ 11; *In re C.A. (2009-Ohio-3303)* at ¶ 68."

{¶63} As set forth in the statement of the facts above and in our analysis and disposition of Appellant' third assignment of error, Appellant was seventeen years old at the time the offense was committed. The trial court correctly determined Appellant was a juvenile offender registrant, but then went on to find that because he had been adjudicated delinquent for attempted rape, the court was required to classify him as a Tier III offender as it had no discretion to determine otherwise. The trial court correctly understood it had no discretion as to declaring Appellant a juvenile offender registrant, but erred in believing it had no discretion as to the tier classification, instead finding the tier classification was offense-based. We therefore find a remand is necessary for the trial court to exercise its discretion in this matter.

{¶64} However, if after a proper classification hearing and consideration of the statutory factors, the trial court believes such classification is warranted based on the evidence in this case, it may re-impose such classification on remand.

{¶65} Accordingly, we sustain Appellant's fourth assignment of error.

V, VI.

{¶66} Based upon our analysis and disposition of the third and fourth assigned errors, we find Appellant's fifth and sixth assignments of error to be premature.

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

Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: J. O.,	:	
	:	
A MINOR CHILD	:	
	:	
	:	JUDGMENT ENTRY
	:	
	:	
	:	Case No. 09-CA-0135

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed, in part, reversed, in part, and remanded in accordance with the law and this opinion. Costs waived.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY