[Cite as *In re K.R.*, 2010-Ohio-455.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: K.R.

ALLEGED DELINQUENT CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 09CA00102

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case Nos. A2009-0205 & A2009-0357

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 9, 2010

APPEARANCES:

For Appellant

JILL M. COCHRAN
21 West Church Street
Suite 201
Newark, OH 43055

For Appellee

RACHEL OKTAVEC
20 South Second Street
4th Floor
Newark, OH 43055

Guardian ad Litem

JACLYN BOWE
35 East Gay Street
Suite 406
Columbus, OH 43215

Farmer, J.

{¶1} On March 30, 2009, a complaint was filed against appellant, K.R., alleging him to be a delinquent juvenile for committing the offenses of burglary in violation of R.C. 2911.12(A)(4), gross sexual imposition in violation of R.C. 2907.05(A)(1), and rape in violation of R.C. 2907.02(A)(2). Said charges arose from an incident involving K.R. and another juvenile, C.H. At the time of the incident, appellant was on probation and was not to have contact with C.H.

{¶2} An adjudicatory hearing was held on June 1, 2009. At the close of the state's case-in-chief, the rape charge was dismissed, and the gross sexual imposition charge was amended to sexual imposition in violation of R.C. 2907.06(A)(1). The trial court adjudicated appellant delinquent for committing burglary and sexual imposition.

{¶3} A dispositional hearing was held on July 17, 2009. By judgment entry filed same date, the trial court committed appellant to the Department of Youth Services for a minimum period of six months and a maximum period not to exceed age twenty-one.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE ADJUDICATION OF DELINQUENCY OF THE JUVENILE-APPELLANT WAS OBTAINED WITHOUT SUFFICIENT EVIDENCE BEING PRESENTED TO ESTABLISH EACH AND EVERY ELEMENT OF THE OFFENSE IN QUESTION."

II

{¶6} "THE ADJUDICATION OF DELINQUENCY OF THE JUVENILE-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I, II

{¶7} Appellant claims his adjudication of delinquency for committing burglary and sexual imposition was against the sufficiency of the evidence, and his adjudication for committing sexual imposition was against the manifest weight of the evidence. We disagree.

{¶8} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶9} Appellant was adjudicated delinquent for committing burglary in violation of R.C. 2911.12(A)(4) which states:

{¶10} "No person, by force, stealth, or deception, shall do any of the following:

{¶11} "(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

{¶12} Appellant was also adjudicated delinquent for committing sexual imposition in violation of R.C. 2907.06(A)(1) which states:

{¶13} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶14} "(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard."

{¶15} As for the burglary offense, appellant argues there was insufficient evidence to prove that he knowingly trespassed into the home of C.H.

{¶16} Criminal trespass is defined in R.C. 2911.21(A) as follows:

{¶17} "(A) No person, without privilege to do so, shall do any of the following:

{¶18} "(1) Knowingly enter or remain on the land or premises of another;

{¶19} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶20} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

{¶21} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either."

{¶22} The trial court specifically found that appellant had trespassed:

{¶23} "While the Court finds that this young girls father and mother were both present on the time and date in question. So, that's not really an issue. The issue is: Did he commit a trespass? Did he commit a criminal trespass? So, we have to look at the statutory definition of criminal trespass, which I believe is defined under Section 2911.21 of the Ohio Revised Code. And there are multiple definitions to criminal trespass. One of them includes the following, 2911.21 (A) (1), knowingly enter, 'No person without privilege to do so shall do any of the following: Knowingly enter or remain on the land or premise of another.' And that's what he did. The question becomes: Did he have privilege to enter upon those premises? And the answer is, no, he did not.

{¶24} "[C.H.] is not capable of giving permission, because there was a court order which prohibited him from being on those premises so long as [C.H.] was there. In addition neither the mother or the father of the young girl, who presumably are the

lease holders or the owners of the property, gave permission. So, a criminal trespass did exist.

{¶25} "We could also follow a different definition. 2911.21, 'Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted certain persons, purposes, modes or hours when the offender knows the offender is in violation of any such restriction.' That could be reasonable reckless in that regard. That could be reasonably inferred by his presence there between the hours of 3:00 and 5:30 in the morning.

{¶26} "If someone entered my house between 3 and 5:30 in the morning, I don't think I need a sign on the door that says, no one is to enter between 3 a.m. and 5:30 a.m.

{¶27} "Or we could rely upon 2911.21 (A) (3), 'Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender.'

{¶28} "Okay. In this particular case it was by the Court. It was a written rule of probation that you weren't supposed to be there. So, with regard to burglary, Count 1, beyond a reasonable doubt. No question." T. at 174-176.

{¶29} Appellant argues the existence of a no-contact order with C.H. was insufficient to find that he entered the premises without privilege. In support of this argument, appellant cites this court to the Supreme Court of Ohio's decision in *State v. Lucas,* 100 Ohio St. 3d 1, 2003-Ohio-4778. We find appellant's reliance on this case to be misplaced. The *Lucas* court at ¶39 acknowledged the protected party could not violate a no-contact order:

{¶30} "The General Assembly has made an invitation by the petitioner for the respondent to violate the terms of a protection order irrelevant to a respondent's guilt. Protection orders are about the behavior of the respondent and nothing else. How or why a respondent finds himself at the petitioner's doorstep is irrelevant. To find appellant guilty of complicity would be to criminalize an irrelevancy."

{¶31} With this dicta, the Supreme Court of Ohio acknowledged the accountability for violating a court's no-contact order lies squarely with the offender.

{¶32} In this case, C.H. testified that around 2:00 or 3:00 a.m., appellant woke her up by "saying my name and he was knocking on the window and starting to open it." T. at 31, 51. Appellant opened the window "just a bit at first" on his own. T. at 32. The two spoke briefly and then C.H. left her bedroom to go to the bathroom. T. at 34-35. When she returned, appellant had entered the bedroom through the window and was sitting on her bed. T. at 36-38. C.H. testified she was shocked to see appellant "after eight months of not talking to him." T. at 34. She did not invite appellant to her home, nor did she give him permission to enter through the window. T. at 34, 36, 85, 88.

{¶33} Although this pattern of nocturnal visits had occurred numerous times when they were dating some eight months prior, C.H. "knew that he shouldn't be there and I shouldn't be seeing him and talking to him" in the early morning hours of March 9, 2009. T. at 38, 63-65. C.H. testified she never invited appellant over to her home, she did not want him in her home, and she never anticipated that he would come in her bedroom. T. at 34, 36, 85, 87.

{¶34} Appellant testified he was merely following the old pattern established when they were dating, and C.H. gave him permission to come in and "then she opened the window the rest of the way." T. at 129, 131-133.

{¶35} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 1997-Ohio-260.

{¶36} Clearly the trial court chose to believe that C.H. did not give appellant permission to enter because he called appellant's testimony "hogwash." T. at 177.

{¶37} Although C.H. concedes that she took no affirmative action to remove appellant from her bedroom, she justified it by stating she knew he was not supposed to be there and she did not want her parents to learn of the past practices of her and appellant. T. at 35-36.

{¶38} Upon review, we find the trial court did not err in determining that appellant was without privilege to be in the home, and there was sufficient evidence to support the adjudication of delinquency for committing burglary.

{¶39} As for the sexual imposition offense, appellant argues there was insufficient evidence to prove that he knew his conduct was offensive to C.H. or that he was reckless in that regard, and the trial court's adjudication of delinquency for committing sexual imposition was against the manifest weight of the evidence.

{¶40} On the sexual imposition offense, the trial court found the following:

{¶41} "With regard to the second count, gross sexual imposition, the Court is going to enter a finding that the young man did in fact commit the offense of sexual imposition, which is a violation of Revised Code 2907.06 (A) (1) of the Ohio Revised Code. Even if the Court didn't believe the testimony of the girl, the Court does believe your testimony that she said no. She said no. She said no. She pushed your hands away and you wouldn't accept no." T. at 176.

{¶42} C.H. testified she repeatedly told appellant she did not want to have sex with him. T. at 39. Appellant started to pull her clothes off, but C.H. pushed him away. T. at 40. Appellant then moved her hands out of the way with his one hand and pulled her shirt down with his other hand. T. at 40-41. Appellant started sucking her breasts. T. at 41. C.H. testified she was "shocked" by his actions. Id. She tried to squirm and move away, and told appellant "to stop, and that I didn't want him to do this, and no and everything like that." T. at 42. As the two struggled, appellant pulled down her pants and digitally penetrated her. T. at 43-45.

{¶43} Appellant admitted to his attempts to get "sexual things" started at least twice by pulling on her shirt. T. at 141-142. Appellant testified he stopped when C.H. said "no." T. at 142. The two spoke for a while and then appellant pulled her pants down to mid-thigh. T. at 144. Appellant stated C.H. pulled her pants back up and told him to stop. Id.

{¶44} As with the burglary offense, the trial court resolved the issue of credibility in C.H.'s favor, finding appellant's testimony to be "hogwash" and not credible. T. at 177. The trial court found appellant to be a "manipulator" and a "conniver." Id.

{¶45} Upon review, we find there was sufficient evidence to support the adjudication of delinquency for committing sexual imposition, and we find no manifest miscarriage of justice.

{¶46} Assignments of Error I and II are denied.

{¶47} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ John W. Wise_____

JUDGES

SGF/sg 0121

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF: K.R.	:	
	:	
ALLEGED DELINQUENT CHILD	:	
	:	JUDGMENT ENTRY
	:	
	:	
	:	CASE NO. 09CA00102

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ John W. Wise_____

JUDGES