

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2009-CA-0016
	:	
CAROLYN SHUSTAR	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Coshocton Municipal Court Case No. CRB 09 00190 A & B
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JUDGMENT:	Reversed and Final Judgment Entered
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DATE OF JUDGMENT ENTRY:	April 19, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES SKELTON
Assistant Law Director
760 Chestnut Street
Coshocton, Ohio 43812

CORIE ADDY
Burkett & Sanderson, Inc.
21 West Church Street
Suite 201
Newark, Ohio 43055

Hoffman, J.

{¶1} Appellant, Carolyn Shustar, appeals the judgment of the Coshocton Municipal Court convicting her of two counts of furnishing alcohol to an underage person in violation of R.C. 4301.69(A). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant is the mother of Jeremiah Wise, age 19, and Jessica Wise, age 20. Jeremiah and Jessica resided with appellant at 504 King Street in West Lafayette, Ohio. Between the hours of 11:30 p.m. on December 12, 2008, and 12:30 a.m. on December 13, 2008, Appellant furnished alcohol to Jeremiah and Jessica in her home. Jeremiah drank three beers, and Jessica drank one to two beers. Appellant was present in their vicinity during the time they were consuming alcohol. Appellant noticed no signs of intoxication or impairment of either child.

{¶3} At 1:15 a.m. on December 13, 2008, Appellant allowed Jeremiah and Jessica to leave the home to walk a block away to a friend's house. Corporal Morgan Eckelbery came into contact with seven people at the intersection of Fourth Street and King Street, including Jeremiah and Jessica. He did not notice any signs of intoxication or impairment on either of Appellant's children other than the mild odor of an alcoholic beverage on Jeremiah's breath.

{¶4} Appellant was charged on March 17, 2009, with two counts of furnishing alcohol to an underage person in violation of R.C. 4301.69(A). The case proceeded to bench trial in the Coshocton Municipal Court on May 29, 2009, and was tried on stipulated facts. Following the reading of the stipulated facts, the court found Appellant guilty and fined her \$100.00 on each count. Appellant now assigns as error on appeal:

{¶5} “THE CONVICTION OF THE DEFENDANT APPELLANT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE TO SUSTAIN THE SAME.”

{¶6} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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* (1991), 61 Ohio St.3d 251, paragraph two of the syllabus.

{¶7} Appellant was convicted of violating R.C. 4301.69(A):

{¶8} “Except as otherwise provided in this chapter, no person shall sell beer or intoxicating liquor to an underage person, shall buy beer or intoxicating liquor for an underage person, or shall furnish it to an underage person, unless given by a physician in the regular line of the physician’s practice or given for established religious purposes or unless the underage person is supervised by a parent, spouse who is not an underage person, or legal guardian.”

{¶9} Appellant argues the evidence was insufficient to support her convictions because the alcohol was furnished to Jessica and Jeremiah while they were supervised by a parent, namely Appellant. The State argues in order to fall under the exception to the statute, the parent must supervise the child not only while the alcohol is consumed but while the underage person is still under the influence of the alcohol.

{¶10} Prior to September of 2006, the statute excepted a person from liability for furnishing alcohol to a minor if the minor was “accompanied” by a parent. In September of 2006, the statute was amended to provide the child must be “supervised” by a parent. The meaning of “supervise” and whether the requirement of supervision applies merely

to the time the alcohol is furnished or extends to the entire time the child is under the influence of the alcohol appears to be an issue of first impression in the State of Ohio.

{¶11} As pertinent herein, the statute prohibits furnishing alcohol to an underage person unless the underage person is supervised by a parent. We find a rational interpretation of the statute would extend the supervision requirement to the entire time the minor is under the influence of alcohol, not just the time frame the underage person is actually consuming the alcohol.

{¶12} Upon our review of the record sub judice, we find insufficient evidence Appellant failed to supervise Jessica and Jeremiah after she had furnished alcohol to them. The stipulated facts provided that if called to testify at trial, Appellant, Jessica and Jeremiah would each testify Appellant was “present in the home and in their vicinity during the time her children were consuming the alcohol.” Tr. 4, 5. More importantly, there is no evidence demonstrating Jessica and Jeremiah were under the influence of alcohol at the time they were observed on the street by the officer. We conclude Appellant did not violate R.C. 4301.69(A) and there is insufficient evidence to support her conviction.

{¶13} The assignment of error is sustained.

{¶14} The judgment of the Coshocton Municipal Court is reversed. Pursuant to App. R 12(B), we hereby enter final judgment of acquittal.

By: Hoffman, J. and

Gwin, P.J. concur,

Edwards, J. concurs separately

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

EDWARDS, P.J., CONCURRING OPINION

{¶15} I concur in the judgment reversing appellant's conviction and entering a final judgment of acquittal. However, I disagree with the majority's conclusion that a rational interpretation of R.C. 4301.69(A) extends the supervision requirement to the entire time the minor is under the influence of alcohol, not just the time frame the underage person is actually consuming the alcohol.

{¶16} R.C. 4301.69(A) prohibits selling, buying, or furnishing alcohol to an underage person unless one of three exceptions applies: the alcohol is furnished by a physician in the course of his or her practice, the alcohol is given for an established religious purpose, or the child is supervised by a parent. While the majority's conclusion, that the statute's use of the word "supervise" extends to the entire time the minor is under the influence of alcohol, appears to be a logical interpretation of the statute in a case such as this one where the person furnishing the alcohol is the parent, this interpretation is problematic in the case where the person selling or furnishing the alcohol to the minor is not the parent. The person selling or furnishing the alcohol to a child supervised by a parent has no way of knowing or controlling whether the parent supervises the child the entire time the child is under the influence of alcohol. Yet, under the majority's interpretation of the statute, the person who furnished the alcohol would violate the statute if the child was supervised by the parent at the time the alcohol was furnished or sold, but not the entire time the child was under the influence of alcohol. I would decline to adopt such a broad interpretation of the statute.

{¶17} While the implied rationale of excepting the furnisher of alcohol from liability when the child is supervised by a parent is that the parent is accepting

responsibility for the child's use of the alcohol, based on the wording in R.C. 4301.69(A) I would not extend liability to a parent for failing to supervise the entire time the child is under the influence when such liability would not extend to a non-parent who furnished the alcohol.

{¶18} R.C. 4301.69(F) specifically imposes liability on a parent for knowingly allowing a child to violate laws relating to underage drinking: "(F) No parent, spouse who is not an underage person, or legal guardian of a minor shall knowingly permit the minor to violate *this section* or section 4301.63, 4301.633, or 4301.634 of the Revised Code." (Emphasis added). We find that "this section" refers to R.C. 4301.69. R.C. 4301.69(E)(1) prohibits a minor from being under the influence of alcohol in public.

{¶19} Because subsection (F) of the statute specifically sets forth liability to a parent for knowingly permitting a minor to violate R.C. 4301.69(E)(1), appellant could have been charged with knowingly allowing the children to be under the influence of alcohol in public. I do not read subsection (A) to require a parent to supervise the child the entire time the child is under the influence when subsection (F) specifically sets forth parental liability for knowingly allowing the child to engage in certain behaviors after the alcohol has been consumed.

{¶20} My conclusion is further buttressed by the fact that the other exceptions to liability for furnishing alcohol to a minor are when the alcohol is "given by a physician in the regular line of the physician's practice" or "given for established religious purposes." Neither of these exceptions contains any language which would extend liability past the point in time when the alcohol is sold or furnished to the minor child.

{¶21} I would therefore find that R.C. 4301.69(A) excepts a person, including a parent, from liability for furnishing alcohol to a minor if the minor is supervised by a parent at the time the alcohol is sold or furnished.

{¶22} There is no evidence that appellant furnished alcohol to Jessica and Jeremiah when they were not supervised by a parent. The stipulated facts provided that if called to testify at trial, appellant, Jessica and Jeremiah would each testify that appellant was “present in the home and in their vicinity during the time her children were consuming the alcohol.” Tr. 4, 5. I would therefore conclude that appellant did not violate R.C. 4301.69(A) and the judgment is supported by insufficient evidence as a matter of law, and I concur in the judgment reversing the conviction and entering a final judgment of acquittal.

s/ Julie A. Edwards

Judge Julie A. Edwards

JAE/rad/rmn

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CAROLYN SHUSTAR	:	
	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0016

For the reason stated in our accompanying Opinion the judgment of the Coshocton Municipal Court is reversed and final judgment of acquittal is entered. Pursuant to App.R. 12(B), we hereby enter final judgment of acquittal. Costs assessed to Appellee.

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

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS