[Cite as *State v. Faison*, 2015-Ohio-3332.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
KAMAL FAISON	:	Case No. 14-CA-95
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case No. E2014-015
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 10, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. ANDREW STEVENS 20 South Second Street 4th Floor Newark, OH 43055	LEO ROSS 915 South High Street Columbus, OH 43206

Farmer, J.

{¶1} On May 29, 2014, an adult complaint in juvenile court was filed against appellant, Kamal Faison, charging him with two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04. Said counts arose from an incident involving a fifteen year old girl, M.S., and four to five boys. Appellant was the only adult at the time, age eighteen.

{¶2} A bench trial commenced on August 25, 2014. By judgment entry filed August 26, 2014, the trial court found appellant guilty of the two counts. By judgment entry filed September 26, 2014, the trial court sentenced appellant to one hundred eighty days on each count, to be served concurrently.

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

I

{¶4} "APPELLANT'S CONVICTION MUST BE REVERSED FOR THE REASON A COMPLAINT WAS PROSECUTED IN THIS CASE WITHOUT A PROBABLE CAUSE DETERMINATION."

II

{¶5} "THE TRIAL COURT'S FINDINGS THAT APPELLANT ACTED RECKLESSLY WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶6} Appellant claims his conviction must be reversed because the initiating complaint was issued without a probable cause determination. We disagree.

{¶7} At the time of the incident, appellant was eighteen years old. R.C. 2151.43 governs charges against adults in juvenile court and specifically states, "In cases against an adult under sections 2151.01 to 2151.54 of the Revised Code, any person may file an affidavit with the clerk of the juvenile court setting forth briefly, in plain and ordinary language, the charges against the accused who shall be tried thereon."

{¶8} The charging document filed on May 29, 2014 sets forth the charges and is signed by the assistant prosecuting attorney as the complainant as sworn to before the Deputy Clerk. The complaint conforms to R.C. 2151.43. An arrest warrant was not issued, but a notice of hearing dated May 30, 2014 was sent to appellant.

{¶9} Appellant argues the charging document was incomplete and lacked facts that would lead to a probable cause determination. In support, appellant cites a recent decision by the Supreme Court of Ohio, *State v. Hoffman,* 141 Ohio St.3d 428, 2014-Ohio-4795.

{¶10} For the following reasons, we find appellant's arguments not to be well taken.

{¶11} First, appellant never objected to the charging document and the lack of probable cause to the trial court. Therefore, there is no record of the nature of the presentation of the complaint to the Deputy Clerk or any evidence that probable cause was not discussed and determined. As held by the Supreme Court of Ohio in *State v. Childs,* 14 Ohio St.2d 56 (1968), paragraph three of the syllabus:

> It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros,* 170 Ohio St. 471, 166 N.E.2d 379, approved and followed.)

{¶12} An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long,* 53 Ohio St.2d 91 (1978); Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus. We do not find any evidence of plain error regarding the charging document.

{¶13} Secondly, we find *Hoffman, supra,* is inapplicable to this case, as the *Hoffman* facts are different than the facts sub judice. In *Hoffman,* the matter involved an arrest warrant issued without a probable cause determination. A motion to suppress evidence had been filed, so a record existed. The *Hoffman* court at syllabus found despite the lack of a probable cause determination, the good faith exception to the exclusionary rule applied to avoid exclusion of evidence obtained as a result of an invalid arrest warrant:

1. A neutral and detached magistrate or other person authorized under Crim.R. 4(A)(1) must make a probable-cause determination before an arrest warrant can be issued.

2. A complaint or affidavit, offered as a basis for the issuance of an arrest warrant, does not support a finding of probable cause when it merely concludes that the person whose arrest is sought has committed a particular crime.

3. When the police conduct a search in objectively reasonable, good-faith reliance upon binding appellate precedent, the exclusionary rule does not apply.

{¶14} This case does not challenge an arrest warrant, but the validity of the complaint as the charging document, which we find conformed to R.C. 2151.43.

{¶15} Upon review, we find appellant's conviction was not in error as argued herein.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims the trial court's determination that he acted "recklessly' is not supported by the manifest weight of the evidence. We disagree.

{¶18} 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,* 20 Ohio App.3d 172, 175 (1st Dist.1983). 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. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). 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, 418, 1997-Ohio-260.

{¶19} Appellant was convicted of two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) which states: "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is *reckless* in that regard." (Emphasis added.)

{¶20} Pursuant to R.C. 2901.22(C):

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person

disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶21} Appellant argues there was no evidence of his reckless disregard to a known risk, as he and the other boys involved in the incident did not know the victim's age. T. at 139-140, 160, 165, 177. Appellant argues all of the victim's actions were voluntary: entering the premises, providing money for the purchase of alcohol, becoming intoxicated, disrobing, and participating in the sexual conduct.

{¶22} The victim, M.S., testified at the time of trial, she was sixteen years old. T. at 8. At the time of the incident, she was fifteen. *Id.* She stated she and her friend, S.R., went over to S.R.'s uncle's residence. T. at 9. There were a number of boys there. T. at 9-10. She gave money to one of the boys to go purchase alcohol. T. at 10. She drank half a big bottle of "Cobra." T. at 11. She stated appellant and the other boys were also drinking. *Id.* After consuming the alcohol, M.S. became dizzy and went to the back bedroom to lie down on the bed. T. at 13. Appellant and two other boys entered the room and her "clothes started to be taken off." T. at 14. As for the two boys, M.S. testified "then I was giving oral and I was also having someone on top of me at the same time." T. at 15. The two boys finished and left the room. *Id.* Thereafter, appellant engaged in anal intercourse and "normal" vaginal intercourse with her. T. at 16. She left the room with a blanket wrapped around her, and her friends put her in the shower. *Id.* M.S. stated she had seen appellant around "because I used to rollerblade," but had never gone out with him and did not "hang" with him. T. at 21.

{¶23} S.R. testified appellant was present at her uncle's residence when they first arrived. T. at 101. The boys then left to purchase the alcohol. T. at 102. After consuming alcohol with the boys in the same room, M.S. and S.R. went to the back bedroom to sleep, and M.S. said she wanted to have sex with one of the boys, specifically naming one of the boys, not appellant. T. at 103-104. S.R. left the bedroom and went outside with some other girls and they were locked outside. T. at 105-106. S.R. could hear laughing inside. T. at 107. S.R. finally entered the residence and found M.S. in the back bedroom crying and naked. T. at 109. M.S. and S.R. attended the same middle school and appellant had just graduated from Licking Heights High School. T. at 113, 177.

{¶24} Appellant testified one of the boys called him to the back bedroom. T. at 176. When he entered the bedroom, M.S. was already naked and she asked him for sex. *Id.* He did not know how old she was. T. at 177, 182. Appellant engaged in vaginal intercourse with her and if he did "stick it in her butt" it was "completely on accident because it was just a dark room." T. at 181.

{¶25} Appellant admitted to having engaged in sexual conduct with M.S., but argues the trial court erred in the following decision relative to recklessness (T. at 199-200):

> He [appellant] admitted that he did have - - engage in sexual conduct with the - - with this girl. He had a duty to ask. He had a duty to make inquiry of how old this girl was. This girl, in my opinion, doesn't look

like she's 16 or 17 or 18 or 19 or 24 years of age. This looks like a young girl. And he had that duty to inquire. He didn't.

So, while the court does not believe that he knew with certainty that she was only 15 years of age, the Court doesn't have any qualms or any hesitation or reservation in finding beyond a reasonable doubt that this young man was reckless in having sex with her, reckless with regard to determining whether or not she was of age to have consensual sex.

{¶26} Presented to the trial court was State's Exhibit B, a photograph of M.S. taken at the time of the incident. The trial court had its own observation of M.S. a year later. The facts establish appellant was with M.S. and her friend before, during, and after the consumption of alcohol. Appellant had a significant amount of time to observe M.S., her demeanor, and her physical appearance. Appellant freely admitted he took advantage of the situation and the condition of M.S.

{¶27} Upon review, we find the trial court's determination that appellant was reckless in having sexual conduct with M.S. to be supported by the evidence presented.

{¶28} Assignment of Error II is denied.

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

By Farmer, J.

Hoffman, P.J. and

Wises, J. concur.

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