[Cite as *In re T.T.*, 2010-Ohio-5649.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

In the Matter of: T.T.

Court of Appeals No. H-09-030

Trial Court No. JUV 2009 00413

DECISION AND JUDGMENT

Decided: November 19, 2010

* * * * *

Thomas J. Stoll, for appellant.

Russell Leffler, Huron County Prosecuting Attorney, and
Dina Shenker, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, T.T., appeals his delinquency adjudication in the above-captioned case. The adjudication was based on T.T.'s commission of an assault, in violation of R.C. 2903.13(A). For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} The adjudicatory hearing in this matter was held on November 2, 2009, at which time evidence of the following was adduced. The victim, H.T., who was a teenager, and appellant, who was also a teenager, had dated for a period of four years. During the course of their relationship, H.T. and appellant would break up and get back together every few months. On or about August 28, 2009, H.T. and appellant broke up, once again. Later that day, H.T. went to the home of appellant's friend, L.S., to speak to appellant.

{¶ 3} Evidence of the events that took place after H.T. arrived at L.S.'s residence is conflicting. H.T.'s version of events, as testified to at the adjudicatory hearing, is as follows. She arrived at L.S.'s residence and saw appellant's truck parked in the driveway. Appellant came outside, and she and appellant got inside of appellant's truck, where they began to argue. At one point during the argument, appellant slammed H.T.'s head on the truck window, and then punched her in the mouth. H.T. began to cry and yelled at appellant to take her home. Appellant told her that he could not take her home until she was calm and no longer crying. In addition, he asked her not to tell anybody what had happened, because he was already in trouble for something else and he did not want to get into any more trouble than he was already in. H.T. told him that she would not tell, and when she stopped crying, appellant took her home.

{¶ 4} When H.T. arrived at home, her mother asked her what happened. H.T. answered that she and appellant had broken up. She did not tell her mother that appellant

hit her, because appellant had asked her not to. She testified that she did as appellant asked, because, at that time, she still wanted to "be with him."

{¶ 5} Later that evening, H.T. went to a football game, where she told her friend, T.B., about the incident with appellant. In addition, she showed T.B. the resulting injuries, which included a swollen lip and scratches on her neck.

{¶ 6} H.T. eventually told her mother about what had happened with appellant. She recalled that she told her mother some four days after the incident.

{¶ 7} R.T., H.T.'s mother, testified that on August 28, 2009, she saw her daughter come home after "talking" to appellant and noticed that H.T. had a scratch on her neck and a fat lip. R.T. asked H.T. whether appellant had inflicted the injuries, and H.T. told her that he had not. According to R.T., some two weeks later, H.T. told her that appellant had, in fact, caused the injuries. R.T. testified that she told police officers about the incident when they came to her residence on September 14, 2009, to speak with H.T. about another, unrelated, incident.

{¶ 8} H.T.'s friend, T.B., testified that she went to a football game with H.T., and that when they arrived at the game, H.T. showed R.T. her lip and the scratch on her neck. She stated that could see that H.T.'s lip was swollen, and that when H.T. lifted it up, she could see that it was "busted." T.B. testified that H.T. told her that she and appellant had gotten into a "really big fight" and that he "backhanded her or something like that," and hit her in the mouth. T.B. further stated that H.T. had instructed her not to tell anyone else what had happened.

{¶ 9} Officer Coleman Lowe of the Greenwich Police Department testified that on September 19, 2009, he was conducting an investigation of an unrelated complaint involving H.T., and that the investigation took him to H.T.'s residence, where H.T.'s mother, R.T., told Officer Lowe about the August 28, 2009 incident. Officer Lowe testified that after speaking with H.T. about the incident, he went to the residence of appellant's friend, L.S. Officer Lowe asked L.S. if "he had seen or heard anything that happened on the 28th in his driveway," and L.S. answered simply, "No." Officer Lowe then went to speak with appellant, who told him that he had an argument with H.T. in L.S.'s driveway after H.T. came up to L.S.'s front door, beat on the door, and then honked the horn on appellant's truck. Appellant's statement to Officer Lowe was that he and H.T. first "had a conversation," and then she left his truck.

{¶ 10} After hearing all of the evidence, the judge found that the complaint allegations were proven beyond a reasonable doubt and ordered that appellant was adjudicated delinquent for having committed assault, in violation of R.C. 2903.13(A). Appellant timely appealed the trial court's determination, raising the following assignments of error:

{¶ 11} "I. THE TRIAL COURT'S ADJUDICATION OF DELINQUENCY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 12} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PERMITTING AND CONSIDERING EVIDENCE OF OTHER BAD ACTS CONTRARY TO EVID. R. 404.

{¶ 13} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN LIMITING CROSS-EXAMINATION."

{¶ 14} We begin with appellant's first assignment of error, wherein he argues that his delinquency adjudication was against the manifest weight of the evidence. We recognize, in conducting this analysis, that due process affords juveniles the identical protections that are afforded criminal defendants. *In the Matter of: Jesse A.C.* (Dec. 7, 2001), 6th Dist. No. L-01-1271. Thus, we review manifest weight challenges involving juvenile delinquency adjudications using the same standard that we would use for criminal defendants. Id.

{¶ 15} In making a manifest weight determination, an appeals court sits as a "thirteenth juror" and, after "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-54. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 16} Appellant was found delinquent for conduct which, if he were an adult, would constitute assault, in violation of R.C. 2903.13(A). R.C. 2903.13(A) relevantly provides:

{¶ 17} "No person shall knowingly cause or attempt to cause physical harm to another * * * ."

{¶ 18} Appellant argues that there were inconsistencies in the witnesses' testimony concerning the precise manner that H.T. was injured. While H.T. testified that appellant "grabbed" her head and slammed it on the truck window and punched her in the mouth, H.T.'s friend, T.B. testified that she recalled H.T. telling her that appellant had "backhanded her or something like that."

{¶ 19} In addition, H.T.'s mother, R.T., testified, on direct examination, that H.T. told her that H.T.'s face had been "thrown into the steering wheel." On redirect examination, however, R.T. testified that she really was not sure whether H.T. told her that she was thrown against the steering wheel or thrown up against the window.

{¶ 20} We find that although the versions of exactly how H.T. was injured vary somewhat, they are not materially inconsistent. In reaching this conclusion, we are mindful that although T.B. and R.T. did testify about what H.T. told them had happened during the argument, they were eyewitnesses only to the resulting injuries, and not to the incident itself.

{¶ 21} Appellant argues that there were also inconsistencies in the witnesses' testimony concerning exactly what happened when H.T. arrived home on the day of the incident. That is, H.T. initially testified that she was face to face with her mother when she got home and spoke to her. She subsequently stated that she was in the bathroom and that her mother was "across the room," and thus, presumably, not "face to face" with her.

In addition, H.T. stated that her mother was not able to see her lip; however, testimony by H.T.'s mother indicated that she did, in fact, see an injury to H.T.'s lip.

{¶ 22} In the opinion of this court, these inconsistencies are minor, reconcilable, and, ultimately, not of any fundamental importance in this case. In both versions, H.T. and her mother could reasonably be determined to be in each other's view, to one extent or another.

{¶ 23} Upon our review of the record, we cannot say that the judge clearly lost his way or created such a manifest miscarriage of justice that appellant's adjudication of delinquency based on the offense of assault should be reversed. As the adjudication was not against the weight of the evidence, appellant's first assignment of error is found not well-taken.

{¶ 24} Appellant argues in his second assignment of error that the trial court erred and abused its discretion in permitting and considering evidence of other bad acts contrary to Evid.R. 404. Evid.R. 404(B) permits evidence of other crimes, wrongs or acts if such evidence is used for the purpose of establishing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B); see, also, *State v. Tate*, 8th Dist. No. 82344, 2003-Ohio-6856, ¶ 24.

{¶ 25} Specifically, appellant objects to the fact that, at several points during the adjudicatory hearing, the prosecution elicited testimony concerning the past history of the relationship between appellant and H.T. Included in this testimony was evidence that

appellant and H.T. would frequently argue, that appellant had been unkind to H.T. in the past, and that he had called her names and sent her threatening text messages.

{¶ 26} Testimony is proper, under Evid.R. 404(B), where it establishes the immediate background for an incident, including the relationship between parties and any tension that may have existed between them. See *State v. Tate*, supra, at ¶ 25; see, also, *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 178 (holding that testimony concerning the defendant's complaints about the victim and his unhappiness with their relationship was relevant in establishing the defendant's motive and intent and was allowed under Evid.R. 404(B).) Accordingly we find that it was not error for the court to admit the challenged testimony under Evid.R. 404(B).

{¶ 27} Moreover, even assuming that admission of such evidence was in error, the trial court made clear, both during the taking of testimony and after, that it would not construe evidence of other bad acts as being any indication of whether appellant had committed the subject assault. The law is well-settled that a trial judge, as the fact finder, is presumed to distinguish and eliminate from consideration any irrelevant or prejudicial evidence, and, instead, to rely only upon that evidence that is probative and admissible. *State v. Parker*, 6th Dist. No. S-01-028, 2002-Ohio-2688, ¶ 20, citing *State v. Fox* (1994), 69 Ohio St.3d 183, 189 ("judges are presumed in a bench trial to rely only upon relevant, material and competent evidence").

{¶ 28} For the foregoing reasons, appellant's second assignment of error is found not well-taken.

{¶ 29} Finally, appellant argues, in his third assignment of error, that the trial court erred and abused its discretion in limiting cross-examination on three separate occasions during the hearing.

{¶ 30} First, appellant objects to his questioning having been limited during the following cross-examination exchange with H.T.:

{¶ 31} "Q: Okay. And were you two face to face?

{¶ 32} "A: Yes.

{¶ 33} "Q: And how long did you talk to your mom?

{¶ 34} "A: Uhm, just for about not even five minutes.

{¶ 35} "Q: Okay. and were you two face to face?

{¶ 36} "A: Yes.

{¶ 37} "Q: Okay. She could see all your injuries.

{¶ 38} "A: Yes.

{¶ 39} "Q: She didn't take you to the hospital?

{¶ 40} "A: She asked me what they were and I lied. She didn't -- she saw my neck is all she saw.

{¶ 41} "Q: Oh, she wasn't able to see your lip?

{¶ 42} "A: No.

{¶ 43} "Q: And you were standing face to face talking to her?

{¶ 44} "A: I was in the bathroom. She was in -- she was across the room.

{¶ 45} "Q: Okay. You didn't see your mother at all face to face?

{¶ 46} "PROSECUTOR: Your Honor, this question has been asked and answered.

{¶ 47} "COURT: Sustained."

{¶ 48} Appellant argues that defense counsel asked the question repeatedly as a means of impeaching the state's witness, whose answers, appellant further argues, were not consistent as to whether H.T. encountered her mother face to face. To the extent that impeaching the witness was, in fact, the idea behind the repeated questioning, defense counsel's point concerning the alleged inconsistency is clearly made in the record. Thus, appellant was not unfairly prejudiced by the judge's ruling.

{¶ 49} In addition, Evid.R. 611(A) relevantly provides:

{¶ 50} "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

{¶ 51} The trial court, in limiting defense counsel's cross-examination of H.T. on the grounds that the question had already been asked and answered was entirely appropriate under Evid.R. 611(A).

{¶ 52} Next, appellant complains that the trial court erred in limiting his cross-examination of H.T.'s mother, R.T., when, after R.T. had stated no less than four times in the previous page of testimony that she learned the cause of H.T.'s injuries some two weeks after the incident, defense counsel asked, "Okay. And that's two weeks later after some charges have been filed against her?" The prosecutor objected, saying, "Your

Honor, I believe this two weeks later has been asked and answered." The court responded, "Yeah, sustained. I've heard this numerous times now."

{¶ 53} Appellant argues that had the question been allowed, it would have shown a "motive for the change in the story from nothing happened to an assault." Again, to the extent that this was defense counsel's intent, the point was already established in the record with the first four answers. The same answer, given one more time, would not have enhanced appellant's case in any way. The trial court, in sustaining the prosecutor's objection, acted properly, pursuant to Evid.R. 611(A).

{¶ 54} Finally, appellant argues that defense counsel was improperly stopped from asking H.T.'s friend, T.B., for a second time during cross-examination whether she was sure that H.T. was backhanded (rather than slammed into a windshield, window or steering wheel, or rather than punched). The prosecutor objected, saying that the question had been asked and answered, and the court sustained the objection. According to appellant, the question, had it been allowed, would have demonstrated that the details of T.B.'s statement concerning the version of events that she had given differed from the other accounts. Once again, this point had already been made; repeating the question and answer would not have aided appellant's case in any meaningful way. In sustaining the prosecutor's objection, the trial court acted properly and in conformity with Evid.R. 611(A). Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 55} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE