[Cite as *In re J.J.*, 2012-Ohio-2550.]

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

In re J.J.

Court of Appeals No. E-11-018

Trial Court No. 2010 JF 133

DECISION AND JUDGMENT

Decided: June 8, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecutor, for appellee.

K. Ronald Bailey for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his adjudication of delinquency for rape in the Erie County Court of Common Pleas, Juvenile Division. Because we conclude that the statute under which appellant was adjudicated was not unconstitutionally vague and there was sufficient evidence to establish his guilt, we affirm.

{¶ 2} On May 23, 2010, 18-year-old M.P. and three of her female friends threw a party to celebrate M.P.'s graduation from vocational school. One of M.P.'s friends hosted the affair at her house. The four planned an overnight at the host's house afterward and had set up sleeping arrangements, including an air mattress on the host's living room floor.

{¶ 3} In the garage of the host's house, the four young women were later joined by male friends, including appellant, 16-year-old J.J. They played "beer pong" and consumed beer, vodka and an alcoholic caffeine drink brand named "Four Lokos." According to witnesses, while in the garage, M.P. became inebriated and was observed stumbling and falling off her chair onto the concrete floor. At one point, two of her friends carried her into the house and placed her on the air mattress. According to M.P.'s testimony, being placed on the air mattress is her last memory before, sometime later, awaking in the basement of the house to find herself covered in vomit, her jeans and underpants around her knees. She later noted vaginal bleeding.

{¶ 4} M.P. was taken to a local hospital where she was examined and an evidence kit obtained. The nurse observed bruises consistent with sexual intercourse. She could not determine whether it was consensual, only that it had occurred within 24 to 48 hours prior to examination.

{¶ 5} One of M.P.'s friends testified that once she went to check on M.P. and did not see her on the air mattress. When she looked in the basement, she saw M.P. there

with appellant. Another friend reported opening the basement door later and seeing appellant slip from the couch on which M.P. lay and onto the floor.

{¶ 6} More than one person at the party reported statements by appellant of his sexual interest in M.P. One witness stated that appellant had claimed success in that interest that night. Nonetheless, when police interviewed appellant, he denied having sex with M.P. After DNA results matched appellant to samples from M.P.'s underwear, however, appellant admitted having sex with her, but maintained that it was consensual.

{¶ 7} On November 10, 2010, police filed a delinquency complaint against appellant. Police alleged appellant engaged in sexual conduct with M.P. whose ability to refuse was substantially impaired due to a physical or mental condition. Such conduct is in violation of R.C. 2907.02(A)(1)(c), constituting an act which would be rape, a first degree felony, if performed by an adult. Appellant entered a denial to the allegation and the matter proceeded to an adjudicatory hearing. At the conclusion of the hearing, the court found the allegations true and adjudicated appellant delinquent. The court ordered a social history and sex specific evaluation prior to disposition.

{¶ 8} At the dispositional hearing, the court committed appellant to the legal custody of the Ohio Department of Youth Services for a period of from one year until age 21, held in abeyance pending successful counseling at a juvenile community corrections facility. From this adjudication of delinquency and disposition, appellant now brings this appeal. Appellant sets forth the following four assignments of error:

I. Trial counsel for appellant rendered ineffective assistance of counsel by failing to object to the unconstitutionality of R.C. 2907.02(A)(1)(c) as applied to appellant.

II. R.C. 2907.02(A)(1)(c) is unconstitutional as applied to appellant.

III. The trial court erred in adjudicating appellant as a delinquent child where the verdict is not supported by sufficient weight of the evidence.

IV. The trial court erred in adjudicating appellant as a delinquent child where the verdict is not supported by the manifest weight of the evidence.

I. Constitutionality of Statute

{¶ 9} In his second assignment of error, appellant maintains that R.C. 2907.02(A)(1)(c) is unconstitutional as it is applied to him. In his first assignment of error, appellant insists that his trial attorney provided ineffective assistance of counsel because she failed to raise the unconstitutionality of R.C. 2907.02(A)(1)(c) before the trial court. We shall discuss these assignments of error together.

{¶ 10} Appellant did not raise the issue of the constitutionality of the statute at trial. Constitutional issues apparent at the time of the trial are waived unless brought to the attention of the trial court. *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939, 916 N.E.2d 775, ¶ 14, citing *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. One raising an issue so waived may prevail on appeal only if it constitutes plain

error pursuant to Crim.R. 52(B). "In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges." *State v. Jones*, 6th Dist. No. L-05-1101, 2006-Ohio-2351, ¶ 17. If R.C. 2907.02(A)(1)(c) is unconstitutional, the outcome of appellant's adjudication would have been different because a conviction cannot be predicated on the violation of an unconstitutional statute. *State v. Reynolds*, 148 Ohio App.3d 578, 2002-Ohio-3811, 774 N.E.2d 347, ¶ 8 (2d Dist.).

{¶ 11} Appellant maintains that R.C. 2907.02(A)(1)(c) is unconstitutionally vague as applied to him. The statute, in material part, provides:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:
>
> (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.
>
> * * *
>
> (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.

{¶ 12} In his appellate brief, appellant states that part (a) of R.C. 2907.02(A)(1) prohibits one from administering a drug or intoxicant that "substantially impairs the other person's judgment" to prevent resistance, whereas part (c), appellant asserts,

> * * * does not cover instances where the victim's ability to prevent resistance is impaired by the ingestion of drugs, intoxicants or other controlled substances, but only those instances where the 'other person's ability to resist is substantially impaired because of mental or physical condition or because of advanced age.'
>
> This is extremely important because, despite the fact that R.C. 2907.02(A)(1)(c) has no requirement that the other person's ability to resist is impaired by the ingestion of drugs, intoxicants or other controlled substance, that is precisely what Appellant was adjudicated of as being a delinquent child.

{¶ 13} Appellant's argument seems to be that, because the source of substantial impairment in R.C. 2907.02(A)(1)(a) specifically mentions drugs and intoxicants as the source of a victim's substantial impairment and R.C. 2907.02(A)(1)(c) does not, there may be confusion as to the act which is prohibited.

{¶ 14} Properly enacted statutes are presumed constitutional. The party challenging the statute bears the burden of proof to demonstrate that it is not constitutional. *Id.*, citing *State v. Sinito*, 43 Ohio St.2d 98, 100, 330 N.E.2d 896 (1975).

{¶ 15} A criminal statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment if it fails to contain ascertainable standards of guilt. *State v. Young*, 62 Ohio St.2d 370, 372, 406 N.E.2d 499 (1980), citing *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

> [W]hen a statute is challenged under the due process doctrine of vagueness, a court must determine whether the enactment (1) provides sufficient notice of its proscriptions and (2) contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement. *Perez v. Cleveland*, 78 Ohio St.3d 376, 378, 678 N.E.2d 537 (1997), quoting *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

{¶ 16} There is no ambiguity in the statute. R.C. 2907.01(A)(1)(a) and R.C. 2907.02(A)(1)(c) are discrete offenses. The former prohibits the administration of drugs or intoxicants to prevent resistance to sexual conduct by substantially impairing the victim's judgment. The latter, the one under which appellant was adjudicated delinquent, does not require an accused's active involvement in causing substantial impairment, only that the victim is in such a condition because of mental or physical condition or age and the accused knows or has reasonable cause to believe that the victim's ability to resist or consent is compromised. Voluntary intoxication is a mental or physical condition within the meaning of the statute. *State v. Messer*, 2d Dist. No. 23779, 2011-Ohio-129, ¶ 18; *State v. Freeman*, 8th Dist. No. 95511, 2011-Ohio-2663, ¶ 15; *State v. Hatten*, 186 Ohio

App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 21 (2d Dist.); *State v. Doss*, 8th Dist. No. 88443, 2008-Ohio-449, ¶ 13; *State v. Harmath*, 3d Dist. No. 13-06-20, 2007-Ohio-2993, ¶ 12; *State v. Jones*, 9th Dist. No. 22701, 2006-Ohio-2278, ¶ 23; *In re King*, 8th Dist. No. 79830, 79755, 2002-Ohio-2313, ¶ 24; *State v. Martin*, 12th Dist. No. CA99-09-029, 2000 WL 1145465 (Aug. 14, 2000).

{¶ 17} R.C. 2907.02(A)(1)(c) contains ascertainable standards of guilt, provides sufficient notice of the conduct proscribed and contains sufficient guidelines to avoid arbitrary or discriminatory enforcement. The statute, therefore, is not unconstitutionally vague. Appellant's second assignment of error is not well-taken.

{¶ 18} In his first assignment of error, appellant asserts ineffective assistance of counsel based solely on trial counsel's failure to timely raise unconstitutional vagueness. That assignment too is not well-taken.

II. Sufficiency and Weight of Evidence

{¶ 19} In his third and fourth assignments of error, appellant asserts that there was insufficient evidence to support his adjudication of guilt and that the adjudication was against the manifest weight of the evidence.

{¶ 20} In a criminal context, a verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78

Ohio St.3d 380, 387, 678 N.E.2d 541(1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id*. at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 21} With respect to sufficiency of the evidence, the elements of a violation of R.C. 2901.01(A)(1)(c) are (1) sexual conduct, (2) with one not the offender's spouse, (3) when the other person's ability to resist or consent is substantially impaired by a mental or physical condition, and (4) the offender knows or has reasonable cause believe the other person is substantially impaired by such condition.

{¶ 22} Appellant admitted to sexual conduct with M.P., who is not his spouse. The testimony by the witnesses at the party was that M.P. was literally falling down drunk and had to be carried into the house by her friends. M.P.'s own testimony suggests that she blacked out while on the air mattress and cannot recall how she came to be in the basement or the sexual conduct with appellant. The witnesses at the party testified that appellant was in the garage when M.P. fell off her chair onto the concrete floor and had

to be carried into the house. Appellant testified that he did not notice these events, but this self-serving assertion rings hollow in light of appellant's stated sexual interest in M.P. voiced to others prior to the incident. In any event, this is evidence, if believed, by which a reasonable trier of fact could find, beyond a reasonable doubt, that M.P.'s ability to resist or consent to sexual conduct was substantially impaired and that appellant knew or had reasonable cause to believe that such impairment existed.

{¶ 23} Accordingly, there was sufficient evidence to support appellant's adjudication of guilt under R.C. 2901.01(A)(1)(c). Appellant's third assignment of error is not well-taken.

{¶ 24} With respect to the manifest weight of the evidence, we have carefully reviewed the record, including the transcript of the adjudicatory hearing, and fail to find any suggestion that the court lost its way or that injustice occurred. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 25} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. It is ordered that appellant pay court 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A.Yarbrough, J. _____
CONCUR.
JUDGE

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