[Cite as *State v. Brooks*, 2010-Ohio-2446.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91730

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HUGH BROOKS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505227

BEFORE: Dyke, J., McMonagle, P.J., and Stewart, J.

RELEASED: June 3, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} This case is before this court on remand from the Ohio Supreme Court. The Ohio Supreme Court reversed our determination that improperly admitted hearsay evidence should be excluded from an evaluation of the sufficiency of the evidence to support defendant-appellant's convictions for gross sexual imposition and kidnapping. *State v. Brooks,* 124 Ohio St.3d 99, 2009-Ohio-6409, 919 N.E.2d 211. The Ohio Supreme Court therefore remanded the case for us to apply *State v. Brewer,* 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, in which the Court held that in determining if the state has presented sufficient evidence to support a conviction, an appellate court should consider all the evidence presented by the state in its case in chief, not just the properly admitted evidence. Thus, we now consider the first, second, and third assignments of error, which challenge the sufficiency of the evidence supporting the convictions, with regard to all the evidence presented at trial, including the improperly admitted evidence. As the evidence as a whole, including the improperly admitted evidence, was sufficient to support the jury's verdict, we reverse and remand for a new trial.

{¶ 2} In our previous decision we outlined the evidence presented at trial as follows:

{¶ 3} "The mother testified that defendant is her former boyfriend and that A.B. is her son. Paternal grandmother has custody of A.B. and, at the time of the events at issue, the mother and defendant lived in the upstairs of a house and maternal grandmother lived downstairs.

{¶ 4} “Because the upstairs bathroom is not functional, the mother, defendant, and A.B. used the downstairs bathroom, the door to which did not have a lock. The mother further testified that she sometimes bathed A.B. by putting him in the bath with her.

{¶ 5} “On Thursday, November 1, 2007, paternal grandmother dropped A.B. off for a weekend visit with his mother. The following day, A.B.'s mother was scheduled to take a placement test at Cuyahoga Community College. She had a migraine and asked defendant and the maternal grandmother to watch A.B. so she could take a nap. When she awoke hours later, A.B. was dressed in play clothes and no longer wearing pajamas.

{¶ 6} “The maternal grandmother testified that she awoke from a nap and heard water running in the bathroom. She next heard A.B. tearfully saying ‘no, no, no, no, no.’ Maternal grandmother knocked on the unlocked door and asked what was going on. Defendant replied, ‘we're taking a bath, mama.’ About a minute later, A.B. walked out of the bathroom wrapped in a towel and defendant followed, wearing jeans, a shirt, no shoes or socks. Defendant's hair was wet, a wet towel was hanging in the bathroom, and toys were in the tub. Defendant, A.B., and his mother left the apartment a few minutes later.

{¶ 7} “That night, the mother and A.B. stayed with a friend and slept on an air mattress. When they awoke, A.B. had diaper rash so she gave him a bath. When they returned home on Monday morning, the owner of the apartment complained that the mother had not paid her rent, and ordered her to leave. The

police were summoned and were present when the paternal grandmother arrived to pick up A.B.

{¶ 8} "The paternal grandmother testified that A.B. was upset and thought that the maternal grandmother had to go to jail. A.B. later complained of a headache, did not have an appetite, and screamed during the night. The following morning, the paternal grandmother took A.B. to the emergency room at St. John West Shore Hospital. According to the paternal grandmother, A.B. winced in pain when the doctor examined his shoulder area and the doctor determined that those muscles were tense.

{¶ 9} "The paternal grandmother subsequently spoke to her son and to the maternal grandmother. As a result of this communication, the paternal grandmother picked A.B. up from daycare and questioned him as to whether he had taken a bath with defendant and whether defendant had touched him. According to the paternal grandmother, A.B. said that he had taken a bath with defendant and that defendant touched him on the 'butt' and 'pee pee' and made him touch the defendant's 'butt.'

{¶ 10} "The paternal grandmother took A.B. back to the St. John West Shore emergency room. Hospital personnel instructed her to take him to Fairview Hospital. She then informed a nurse at Fairview of what A.B. had said about the defendant. She admitted that A.B. had no redness or soreness anywhere on his body at this time. She further admitted on cross-examination that in her police statement, she additionally reported that A.B. had said that his

mother was present during the inappropriate touching and that defendant touched his mother on her 'butt.' The paternal grandmother additionally admitted to telling the police that A.B. told a nurse that a 'snake licked and kissed his belly and down there at his mommy's house.' The nursing notes indicate only that A.B. was asked to point out his belly button and he said 'it's a snake. It kisses me on my belly.' There is no mention of licking or 'down there.' Later, the paternal grandmother informed the police that '[s]ince the time I've made this report, [A.B.] says he was not touched in a bathroom, but a room. His mother was not there.'

{¶ 11} "Nurse Nanci Hedberg testified that A.B. was brought in for suspected child abuse from six days earlier and that behavioral changes were reported per the paternal grandmother. Physical findings were normal. Nurse Hedberg further testified that during the examination, she asked A.B. where his belly button was and he stated, 'it's a snake. It kisses me on my belly.' He did not answer her questions regarding the snake, then changed the subject. The written report likewise states that A.B. said that the 'snake kisses me on my belly,' and did not, as the paternal grandmother had maintained, indicate that he said that it kissed or licked him 'down there.'

{¶ 12} "Lorain County Children Services Social Worker, Amy Houk, testified that she interviewed A.B. at the Child Advocacy Center in Lorain. In the videotaped interview, she showed him anatomical drawings and talked to him about who can and cannot touch his body. According to this witness, A.B. was

not comfortable talking about these subjects and repeatedly stated that no one had improperly touched him. Houk then interviewed A.B. at the paternal grandmother's house. During this interview, A.B. said 'the monster touched his pee pee and butt' and that the monster lived at his mother's house. Houk also observed the police interrogation of the defendant. At the close of her investigation, Houk reported that there was 'indicated sexual abuse * * * but there is no evidence to back it up.'

{¶ 13} "Detective Kirkwood testified that he interviewed the defendant on November 15, 2007. According to this witness, at the start of the interview and before the detective began his questioning, defendant stated that A.B. sees monsters in the toilet and that is why he soils his pants. Det. Kirkwood stated that soiling can be indicative of abuse and that he found the remark to be unusual. Defendant also referred to A.B.'s mother as his fiancé, but he acknowledged that he had not actually asked her to marry him. Defendant admitted that he had taken two baths with A.B. During the first, the mother was bathing A.B. and defendant walked into the room. At this time, A.B. asked defendant to get into the tub, the mother agreed, and remained in the room the entire time. During the second instance, which the maternal grandmother overheard, defendant stated that he washed A.B. with a sponge, and did not inappropriately touch him. The detective noted that defendant was nervous and shaking. Defendant denied being sexually abused as a child but stated that his father had abused a brother." *State v. Brooks,* Cuyahoga App. No. 91730,

2009-Ohio-3286.

{¶ 14} In our previous opinion, we concluded that the trial court erred in permitting admission of the child's hearsay statement to his grandmother. We held that such statements were inadmissible pursuant to Evid.R. 803(4), statements made for the purposes of medical diagnosis or treatment, and were inadmissible pursuant to Evid.R. 803(2), excited utterances. We then concluded that absent this improper evidence, there was insufficient evidence to support the convictions for gross sexual imposition and kidnapping. We held that the trial court erred in denying the motion for acquittal and we reversed and remanded the matter to the trial court to vacate defendant's convictions.

{¶ 15} In accordance with the Supreme Court's remand of this matter, we note that, in evaluating the sufficiency of the evidence to support appellant's conviction, we must consider all of the testimony that was before the trial court, whether or not it was properly admitted. *State v. Brewer,* supra. The *Brewer* Court further held that "'where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.'" Id., quoting *Lockhart v. Nelson* (1988), 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265.

{¶ 16} The standard for a Crim.R. 29 motion is virtually identical to that employed in testing the sufficiency of the evidence. *State v. Turner,* Franklin App. No. 04AP-364, 2004-Ohio-6609. In *State v. Jenks* (1991), 61 Ohio St.3d

259, 574 N.E.2d 492, paragraph two of the syllabus, the Supreme Court of Ohio held as follows:

{¶ 17} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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."

{¶ 18} Gross sexual imposition, as it relates to victims under 13 years old, is defined in R.C. 2907.05(A) as "[n]o person shall have sexual contact with another * * * whether or not the offender knows the age of that person." R.C. 2907.01(B) defines "sexual contact," in general, as a touching of an erogenous zone, for purpose of arousing or gratifying either person.

{¶ 19} Kidnapping, as it relates to victims under the age of 13, is defined in R.C. 2905.01(A)(2) and (4) as follows: "No person * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, * * * [t]o facilitate the commission of any felony * * * [or][t]o engage in sexual activity * * *."

{¶ 20} We have concluded that improper hearsay evidence was admitted in this matter. For purposes of evaluating the sufficiency of the evidence, however, we note that if believed, all of the testimony that was before the trial court,

whether or not it was properly admitted, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The evidence, including the improperly admitted hearsay, is sufficient to establish that defendant had sexual contact with A.B. in violation of R.C. 2907.05(A), in connection with the bath incident in which defendant reportedly touched A.B. on the “butt” and “pee pee” and made A.B. touch the defendant's “butt.” The evidence, including the improperly admitted hearsay, is also sufficient to establish that defendant removed A.B. from the place where he was found, or restrained the liberty of A.B. by placing him in the bathroom and giving him a bath, in order to facilitate the commission of any felony, or to engage in sexual activity. Accordingly, the Double Jeopardy Clause does not preclude retrial of the charges and this matter must therefore be remanded for a new trial.

Reversed and remanded.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
MELODY J. STEWART, J., CONCUR