[Cite as *State v. Fowler*, 2011-Ohio-717.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94798

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ORLANDO FOWLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528791

BEFORE: Stewart, P.J., Cooney, J., and Keough, J.

RELEASED AND JOURNALIZED: February 17, 2011

ATTORNEY FOR APPELLANT

James E. Valentine
323 Lakeside Avenue, Suite 450
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Carl Sullivan
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Orlando Fowler, appeals from the judgment of the Cuyahoga County Court of Common Pleas, rendered after a jury verdict, finding him guilty of one count of attempted compelling prostitution in violation of R.C. 2907.21(A)(2)(b), and sentencing him to 18 months incarceration. For the reasons stated below, we affirm.

{¶ 2} According to the evidence presented at trial, ten-year-old J.L.[1] was playing basketball with some friends on the basketball courts next to the apartment building where he lived when he was approached by appellant. J.L. testified that when he sat

[1]Similar to the policy of this court to refer to minors in juvenile cases by their initials, we do so here.

down on a bench, appellant came up and said he would pay J.L. $100 to find a "little girl" for appellant to have sex with. Appellant was carrying a blue bag with handles, and he told J.L. that he had candy and condoms for the girl. J.L. said he immediately got up and told some of the older boys who were playing basketball what appellant had said. The boys started chasing appellant, and J.L. ran home and told his mother what had happened.

{¶ 3} Tarajuana Crowell, J.L.'s mother, testified that after J.L. told her what had occurred, she and J.L. left the apartment and followed the crowd that was chasing appellant as he ran toward a McDonalds restaurant nearby. Crowell said she called 911 and reported the incident. She saw the crowd kicking and punching appellant in the McDonalds parking lot. Appellant's dark blue bag was on the ground with candy spilling out. The police responded, and appellant sat on the curb in the parking lot until an ambulance came. Officers questioned Crowell and J.L. about the incident, and Crowell provided a written statement to the police.

{¶ 4} CMHA police officer Ryan Allen testified that he was working with the community policing unit that day and responded to the call of a group of people assaulting a man outside the McDonalds located less than a block away from CMHA's Cedar Estates. When he arrived at the scene, Cleveland police had appellant in custody. Allen testified that candy and condoms were strewn around the parking lot next to where appellant sat. Allen said after appellant was taken to the hospital and placed under arrest, appellant's bag was searched and found to contain $91 in cash, more candy of the kind scattered in the parking lot, and a small bag of marijuana.

{¶ 5} Appellant was subsequently charged, tried, and convicted of attempted compelling prostitution. Appellant timely appeals raising two assigned errors for our review.

{¶ 6} In his first assignment of error, appellant claims that the state's evidence was insufficient to support a conviction for the crime charged. Appellant contends that there was no minor girl, and nobody that he believed to be a minor girl was actually involved. He argues that even if J.L.'s testimony was believed, the evidence showed only that he made an unrealistic and unwise statement to a little boy, not that he attempted to induce a minor girl to have sex with him for money. Finally, he argues that at most, the evidence in the case suggests preparation for an offense and not a substantial step toward commission of the offense. He notes that the $91 he had with him was not enough to pay J.L., much less also pay a girl.

{¶ 7} Appellant was convicted of attempting to compel prostitution in violation of R.C. 2907.21(A)(2)(b), which provides that "no person shall knowingly * * *, induce, procure, encourage, solicit, request, or otherwise facilitate * * * a person the offender believes to be a minor to engage in sexual activity for hire, whether or not the person is a minor." According to the instructions provided to the jury: induced means led by persuasion or conduct; procured means obtained, acquired, introduced, or brought about; facilitate means to help, promote, assist, or aid; for hire means for pay or compensation.

{¶ 8} Pursuant to R.C. 2923.02, a person attempts to commit an offense when he or she engages "in conduct that, if successful, would constitute or result in the offense."

In *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, syllabus, the Ohio Supreme Court stated that criminal attempt occurs when a defendant "purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose."

{¶ 9} The state's evidence shows that appellant planned and prepared to commit the offense charged. Appellant went to a neighborhood away from his home, found an area where children were playing, and carried a book bag containing candy, condoms, and money. Appellant then sought out one of the neighborhood children and offered that child money to help him find a young girl with whom to have sex. Viewing the evidence in a light favorable to the state, the jury could reasonably have found that appellant's actions constituted a substantial step toward inducing, procuring, encouraging, soliciting, requesting, or otherwise facilitating a minor female to engage in sexual activity for hire. Appellant's first assignment of error is overruled.

{¶ 10} In his second assignment of error, appellant argues that he was denied a fair trial due to the trial court's error in admitting inadmissible evidence. Appellant argues that Crowell's testimony relaying what J.L. had told her about the incident constituted impermissible hearsay evidence that the trial court allowed over his objection. He argues that the testimony served no purpose except to bolster J.L.'s testimony.

{¶ 11} A trial court enjoys broad discretion in the admission and exclusion of evidence. That decision will not be reversed absent a clear abuse of discretion that materially prejudices the objecting party. *State v. McCray* (1995), 103 Ohio App.3d 109, 658 N.E.2d 1076.

{¶ 12} Hearsay is an out-of-court statement, offered in evidence to prove the truth of the matter asserted. Evid.R. 802(C). Hearsay statements are generally not admissible. Evid.R. 802. However, when a declarant makes a statement while under the stress of excitement caused by a startling event or condition, that statement may be an admissible "excited utterance," one of the exceptions to the hearsay rule. Evid.R. 803(2); *Potter v. Baker* (1955), 162 Ohio St. 488, 124 N.E.2d 140, at paragraph two of the syllabus.

{¶ 13} For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event. *State v. Brown* (1996), 112 Ohio App.3d 583, 601, 679 N.E.2d 361.

{¶ 14} A review of the record demonstrates that all of the prerequisites were met. Being approached by a stranger and having that stranger offer him money to find a little girl to have sex with was an event startling enough to produce nervous excitement in J.L., a ten-year-old boy. J.L.'s mother's observations of J.L.'s demeanor indicate that he was

still under the stress of the encounter when he told her what had happened. She testified that when J.L. came home from the basketball courts, he was "nervous and scared." She knew something was wrong because "his body language was different" and he called to her to come downstairs "like it was an emergency." Reacting to his demeanor, she "hopped up and ran downstairs." J.L. experienced the startling event. The statements he made to his mother were made almost immediately after the event and were directly related to it. Accordingly, we conclude that J.L.'s statements to his mother were admissible pursuant to Evid.R. 803 as excited utterances.

{¶ 15} Appellant further argues that the trial court erred by reversing its earlier decision and permitting the state to introduce evidence pertaining to the small bag of marijuana found in his bag. Appellant claims this evidence is irrelevant and argues that admitting the evidence prejudiced him by suggesting to the jury that he was a drug user and law breaker.

{¶ 16} The state contends that the marijuana was relevant to the commission of the offense charged in the same way as the money, candy, and condoms also found in the bag were relevant.

{¶ 17} The trial transcript reveals that the court initially determined that the evidence of the marijuana found in appellant's bag would not be admitted. However, upon learning that appellant was on parole at the time of the offense, the court decided that the evidence of the marijuana found in appellant's book bag was admissible to show a violation of appellant's parole if appellant were to take the stand.

{¶ 18} Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. In this case, contrary to the state's contention, there is no indication that the marijuana played any part in the commission of the offense. Therefore, that evidence should not have been admitted.

{¶ 19} Nevertheless, our finding does not mandate reversal because we also find the error was harmless beyond a reasonable doubt. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶78, citing *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. In determining whether an error is harmless beyond a reasonable doubt, we must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., citing *Chapman* at 23; *State v. Madrigal*, 87 Ohio St.3d 378, 388, 2000-Ohio-448, 721 N.E.2d 52.

{¶ 20} In this case, the evidence complained of consisted of testimony that in a search of appellant's book bag after his arrest, in addition to cash, candy, and condoms, a small bag containing 1.41 grams of marijuana was found. There was no testimony suggesting to the jury that appellant was under the influence of marijuana at the time or that he intended to use the marijuana to convince a child to have sex with him. Unlike the money, candy, and condoms that were featured in J.L.'s eyewitness testimony, the only mention of the marijuana was by Officer Allen in the context of what was found during the inventory of appellant's bag after arrest. Additionally, while possession of

any quantity of marijuana is illegal, the possession of such a small amount of marijuana constitutes only a minor misdemeanor. Under these circumstances, and considering the facts of the case, we do not find that there is a reasonable possibility that this evidence contributed to appellant's conviction on the sex offense. Accordingly, the error by the trial court in admitting the contested evidence is harmless and does not warrant reversal. Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
KATHLEEN ANN KEOUGH, J., CONCUR