

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE:
 Z. B.

C. A. No. 09CA0039-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 200811DQ0905

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

Per Curiam.

{¶1} Appellant, Z.B., appeals from the judgment of the Medina County Court of Common Pleas, Juvenile Division, adjudicating him delinquent. This Court reverses.

I

{¶2} On August 13, 2008, Z.B. and J.J., the victim in this case, were in the Brunswick High School weightlifting room and decided to take a walk together. The walk culminated in Z.B. receiving oral sex from J.J. in the men’s bathroom of the school’s Performing Art Center. According to Z.B., he and J.J. discussed sexual activity before entering the men’s bathroom and J.J. agreed to perform oral sex on him. According to J.J., Z.B. dragged her into the men’s bathroom by the wrist and forced her to perform oral sex. After the incident, J.J. told her friend what had happened, but did not report the incident to anyone else. Near the end of September, J.J. told her boyfriend what had happened and, at his insistence, also told her mother. J.J.’s

mother notified the school, and J.J. was interviewed by police officers from the City of Brunswick.

{¶3} On November 18, 2008, the Medina County Prosecutor filed a complaint against Z.B. alleging one count of rape, in violation of R.C. 2907.02(A)(2). Z.B.’s adjudicatory hearing took place on April 9, 2009. The same day, the court adjudicated Z.B. delinquent and set the matter for disposition. Subsequently, the court held a disposition hearing, issued Z.B.’s disposition, and committed him to the Department of Youth Services.

{¶4} Z.B. now appeals from the court’s judgment and raises one assignment of error for our review.

II

Assignment of Error

“THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JUVENILE COURT’S FINDING AND ADJUDICATION OF DELINQUENCY-RAPE, AND APPELLANT’S ADJUDICATION FOR DELINQUENCY-RAPE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} In his sole assignment of error, Z.B. argues that his adjudication of delinquency for rape is based on insufficient evidence and is against the manifest weight of the evidence. Specifically, he argues that the evidence does not show he purposely compelled J.J. to submit by force or threat of force.

{¶6} When reviewing sufficiency and manifest weight challenges in a juvenile’s appeal from an adjudication of delinquency, “this Court applies the same standard of review as that applied in an adult criminal context.” *In re J.F.*, 9th Dist. No. 24490, 2009-Ohio-1867, at ¶12. In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“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.” *Id.* at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

“In essence, sufficiency is a test of adequacy.” *Thompkins*, 78 Ohio St.3d at 386.

{¶7} R.C. 2907.02(A)(2) provides that “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” Fellatio is a type of sexual conduct. R.C. 2907.01(A). “A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

{¶8} At trial, J.J. testified that she went for a walk with Z.B. on August 13, 2008. J.J.’s friend, T.H., had gotten angry about something. Z.B. approached J.J. in Brunswick High School’s weightlifting room and asked her if she wanted to go for a walk. J.J. and Z.B. walked outside for a short time and then came back inside to walk through the school’s Performing Arts Center. J.J. testified that Z.B. asked her to wait in the hallway while he stepped into the men’s bathroom. Once Z.B. went inside the men’s bathroom, however, he came back out, grabbed J.J. by the wrist, and pulled her inside. Z.B. took J.J. into the handicapped bathroom stall and kissed her “very forcibly.” Z.B. then asked “[s]ex, anal or oral?” J.J. indicated that she did not want to engage in any type of sexual activity. Z.B. nonetheless pulled down his pants, sat down on the toilet, kissed her on the forehead, and pushed her down. J.J. testified that she began performing fellatio on Z.B. At some point, Z.B. also held J.J.’s hair. When she tried to pull away, Z.B. forced her head forward again and made her continue until he ejaculated.

{¶9} This Court has consistently held that “[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration.” *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, at ¶15, quoting *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11. Based on J.J.’s testimony that Z.B. forcibly pulled her down and compelled her to perform fellatio on him, the record contains sufficient evidence that Z.B. committed rape under R.C. 2907.02(A)(2). Thus, to the extent Z.B. argues his adjudication of delinquency is based on insufficient evidence, it is overruled. We next consider whether Z.B.’s adjudication of delinquency is against the manifest weight of the evidence.

{¶10} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust review 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 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. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶11} J.J. testified that she was fourteen when the events of August 13, 2008 occurred. On that day, J.J. was at the Brunswick High School working as a “water girl” for the freshman football team with her friend, T.H. J.J. testified that she and T.H. went to the school’s weightlifting room where they saw Z.B. J.J. stated that she had seen Z.B. around, but did not know him. Z.B. approached J.J., began talking to her, and asked her if she would like to go for a walk. J.J. complied and the two left together. As set forth above, J.J. testified that Z.B. forcibly compelled her to perform fellatio on him in the handicap stall of the men’s bathroom. J.J. stated that she screamed “no” while she was in the hallway at the point where she was being pulled into the bathroom. J.J. testified that she repeatedly yelled “no” several times, so loudly that her voice echoed in the bathroom. After Z.B. ejaculated, he told J.J. he was “proud of [her]” and not to tell anyone what had happened.

{¶12} According to J.J., when she and Z.B. went to leave the men’s bathroom he told her that somebody was outside and she should wait in the bathroom until the hallway was clear. J.J. gave Z.B. her cell phone number so that he could leave on his own and then call her when it was safe for her to come out. J.J.’s phone battery died, however, so she never answered Z.B.’s call. Instead, she waited for a few minutes and then ran from the bathroom. J.J. returned to the weightlifting room, got T.H., and left for home. J.J. testified that she told T.H. what had happened after the two got to J.J.’s house because she was so upset and T.H. wanted to know what was wrong. J.J. further testified that she initially did not tell anyone else about the incident because she “didn’t want to be looked at differently.” J.J. later told her boyfriend what had happened because he noticed how upset J.J. became when Z.B.’s name arose in conversation. J.J. then told her mother about the incident because her boyfriend indicated he would tell J.J.’s

mother if she did not. J.J. affirmatively stated that after the incident she did not call Z.B. She also stated that before the day of the incident, she had not told Z.B. her phone number.

{¶13} T.H. also testified that she and J.J. saw Z.B. in the weightlifting room after football practice on August 13, 2008. T.H. did not know Z.B., but J.J. and Z.B. began talking. T.H. stated that earlier that day J.J. told T.H. that she “kind of like[d]” Z.B. T.H. testified that Z.B. and J.J. told her they were going for a walk, so T.H. stayed in the weightlifting room and waited for J.J. to return. About half an hour later, Z.B. returned alone and told T.H. to call J.J. on her cell phone. T.H. called J.J., but she did not answer. Approximately ten minutes later, J.J. came back into the weightlifting room. T.H. observed that J.J.’s mood “wasn’t that great.” She and T.H. left together and while walking home J.J. started to cry. T.H. asked J.J. if anything was wrong and J.J. told her it was nothing and that she did not feel well. According to T.H., she finally “got [J.J.] to crack and tell [her] what was wrong” when the two were in J.J.’s bedroom. After hearing what occurred, T.H. said she didn’t know what to do, “it was like, ‘Oh, okay.’ I just kind of sat there.” After that T.H. did not say anything to anyone until police interviewed her in September. She stated that she told J.J. that everything would be fine and she stated that she “just told her she should tell her mom; if something was happening let her mom know. She was freaking out.”

{¶14} Z.B. testified that he was in the weightlifting room on August 13, 2008. According to Z.B., he saw J.J. on the football field before he went to the weightlifting room, and she briefly ran over to give him a hug. Subsequently, J.J. entered the weightlifting room with her friend, T.H. Z.B. testified that he and J.J. decided to go for a walk around the school’s Performing Arts Center. As they entered the Performing Arts Center they passed classrooms. Z.B. stated that he observed a teacher in one of the classrooms which is next to the door of the

Performing Arts Center. Z.B. stated that he and J.J. never walked outside, but they did stop at a black leather bench in the Performing Arts Center to sit down and talk for a few minutes. Z.B. testified that they spoke for about 5 to 10 minutes. They initially engaged in casual conversation, but then began talking about sexual activity. Z.B. indicated that neither person actually initiated discussion about sexual activity but it was mutual. Initially, the sexual nature of the conversation was joking but then it started getting “serious” to actually discussing the prospect of engaging in sexual activity.

{¶15} According to Z.B., J.J. agreed to go into the men’s bathroom with him and perform fellatio on him. Z.B. testified that he never forced J.J. to do anything and she never indicated that she did not want to engage in oral sex. While Z.B. was receiving oral sex from J.J., he heard voices in the hallway outside the men’s bathroom and soon recognized them as the voices of the school’s assistant principals. Z.B. asked J.J. what she wanted him to do. J.J. indicated that she did not know. Z.B. then told J.J. that he would leave the men’s bathroom alone and call her on her cell phone when the assistant principals left. J.J. assented. Z.B. and J.J. did not exchange numbers, and Z.B. left and went out to the main entrance of the Performing Arts Center where he could see the principals. Z.B. tried to call J.J. multiple times, but her cell phone went to voicemail. When J.J. attempted to call Z.B. from her cell phone, Z.B. picked up but there was nothing on the other end. Z.B. knew that J.J. had called because his phone displayed J.J.’s name. After waiting approximately 10 to 15 minutes and after multiple attempts to reach J.J., Z.B. concluded that J.J. was not going to answer her phone. Z.B. then went back to the weightlifting room alone and later saw J.J. enter. Z.B. testified that J.J. appeared angry, but that he believed it was because she had to wait in the men’s bathroom by herself for so long.

Nevertheless, Z.B. stated that J.J. came over and gave him a hug before leaving the weightlifting room with T.H.

{¶16} Z.B. argues that his adjudication of delinquency for rape is against the manifest weight of the evidence for several reasons. First, Z.B. argues that there was conflicting evidence as to how well J.J. knew Z.B. before the alleged rape occurred. J.J. testified that before August 13, 2008 she “had seen [Z.B.] around [the weight room], but really hadn’t known him at all.” She admitted that when initially interviewed by the police, she referred to him as a “buddy,” but explained that she calls people she does not know well “buddies” and people she does know well “friends.” J.J. also denied that she told police she and Z.B. were “longtime friends.” Officer William Schuster, the officer who interviewed J.J., reviewed his investigative report and testified that J.J. referred to Z.B. as a “longtime friend[]” when he interviewed her. Further, T.H. had told Officer Schuster that J.J. had told her that J.J. “kind of like[d]” Z.B. According to Z.B., J.J. tried to say that she did not know him very well “to bolster her allegation of rape.”

{¶17} Second, Z.B. argues that there was conflicting evidence as to whether J.J. spoke to him again after the incident. J.J. testified that she did not seek out Z.B. to speak to him after the incident, but that he talked to her on a few occasions. Z.B. testified that J.J. called him later in the evening on August 13, 2008 and in the morning on August 14, 2008. As proof that J.J. called, Z.B. produced cell phone records that showed incoming calls from J.J.’s phone number. Z.B. never answered the incoming calls from J.J.’s number, but argues that J.J. would not have initiated contact on the night of the incident and the following morning if the incident had not been consensual. During her direct examination, J.J. testified that she did not call Z.B.’s cell phone after the incident.

{¶18} Finally, Z.B. argues that the court erred in believing J.J.’s testimony because she: (1) incorrectly told both the police and the court that the incident on August 13, 2008 took place at approximately 5:00 p.m. when it, in fact, took place at approximately 12:30 p.m.; and (2) did not tell school officials and the police about the incident until six weeks after it occurred. According to Z.B., if his encounter with J.J. had been nonconsensual, she would have felt uncomfortable seeing him at school everyday once it began and would have reported him earlier. Z.B. argues that J.J. only told her boyfriend and mother that a rape occurred because she was afraid she would lose her boyfriend if he thought the incident was consensual. He further argues that J.J.’s inability to recall the correct details of the event, such as the time it occurred, demonstrate J.J.’s lack of veracity.

{¶19} We are not convinced that any discrepancy regarding the time that the incident between J.J. and Z.B. occurred was of any real consequence in the analysis of the issues before us. Both parties agreed that the incident took place; the only issue was whether it was consensual. Further, we disagree that J.J.’s failure to report Z.B. at an earlier time, standing alone, would warrant a reversal. It is not uncommon for a victim of sexual abuse to postpone reporting the abuse for any number of reasons, not the least of which are fear and shame. Even so, we are compelled to agree with Z.B. that his adjudication of delinquency is against the manifest weight of the evidence. As set forth below, the record contains other significant discrepancies that this Court cannot ignore.

{¶20} There are several troubling pieces of evidence in the record that cut against a finding of force or threat of force in this case. J.J.’s friend, T.H., testified that J.J. knew Z.B. prior to the incident. Prior to the incident J.J. told T.H. that she “kind of like[d]” Z.B. Also, T.H. stated that on one occasion, J.J. took Z.B.’s cell phone, went through it, and programmed

her number into it. Conversely, J.J. testified that she hardly knew Z.B. on the date of the incident. She, however, referred to him as a long time friend to one officer, and a “buddy” to another. When cross examined at trial about the apparent inconsistency in her characterization of Z.B., J.J. attempted to explain that she described Z.B. as an “ex-buddy” because she refers to people she does not know well as “buddies” and people she does know well as “friends.” This explanation defies logic. It also directly contradicts her statement to Officer Schuster that Z.B. was a “longtime friend[.]” Rather than attempt to explain this characterization, J.J. denied that she made that statement to Officer Schuster. It stands to reason, however, that Officer Schuster had no reason to fabricate this portion of his report. J.J.’s credibility was impeached.

{¶21} At trial, J.J. described being lured into a restroom and sexually assaulted. She alleges that she yelled “no” as Z.B. forced her into performing a sex act. She then described hearing voices outside in the hall that she believed to be administration officials from the school. Had J.J. been yelling “no” so loudly that her voice echoed in the bathroom, it is reasonable to assume that one of the people that Z.B. heard talking in the hallway outside the men’s bathroom would have heard her yell. After hearing the voices, J.J. did not yell or otherwise attempt to gain their attention, although she did not testify that Z.B. prevented her from doing so. Instead, she admittedly joined in a plan with him to wait until the administrators were gone when Z.B. would leave the restroom and then call her when the coast was clear. When she later arrived in the weightlifting room, she did not disclose what had happened to any authority figure.

{¶22} Further, J.J. testified that she did not initiate contact with Z.B. and did not call him before, during, or after the incident. She denied calling him while she was waiting in the bathroom, and further denied that she called him later or the next day. In order to challenge her credibility, Z.B. produced phone records showing nine calls from Z.B. to J.J. after Z.B. left the

bathroom between 12:48 p.m. and 1:02 p.m. Despite J.J.'s denial of having called Z.B., the phone records reflect her having called his cell phone twice during the same time. Later in the evening, Z.B.'s records show calls to his phone from J.J. at 10:09 p.m. He testified that he did not answer, but called her back at 10:10 p.m. The cell phone records support his testimony. On the next morning, the records show a call from J.J. at 9:57 a.m. to Z.B.'s phone. He did not pick up the call. It is difficult to understand why J.J. would call Z.B., on the night of the incident and again the following morning, if the incident between them was nonconsensual. It is also difficult to believe that J.J. would not remember calling Z.B. on two occasions shortly after the incident took place. J.J. admitted that, had the incident occurred as she described, it would not make sense for her to have called Z.B. It is also troubling that despite her insistence that she had not called Z.B., the telephone records directly contradicted J.J.'s testimony, once again impeaching her credibility.

{¶23} Although the length of time J.J. waited to report this incident to the police would not be enough to warrant reversal in and of itself, it is yet another troublesome point that casts doubt upon J.J.'s credibility in light of all of the evidence in this case. Similarly, when J.J. was asked whether, after the incident, she had voluntarily been around Z.B., she said, "voluntarily, no." However, when pressed about a time when she and T.H. were together and T.H. offered to go home with her, and Z.B. was there, she chose to stay with Z.B. rather than leave with T.H.

{¶24} This Court acknowledges that a manifest weight challenge presents an appellate court with a narrow window of review, given the fact that the trier of fact is in the best position to determine the credibility of the witnesses. Yet, when faced with a case such as this, where the only witnesses to an alleged sexual attack were the victim and the accused, and the victim's credibility stands alone as the linchpin of the State's case, this Court cannot ignore its duty to sit

as the “thirteenth juror” and review the evidence with a critical eye. *Thompkins*, 78 Ohio St.3d at 387. When viewed in its entirety, we cannot agree that the State presented the greater amount of credible evidence in this case. In weighing the evidence and all reasonable inferences, we conclude that, “in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the [adjudication of delinquency] must be reversed and a new trial ordered.” *Otten*, 33 Ohio App.3d at 340. J.J.’s testimony contained numerous discrepancies and was simply, at times, not believable. In addition, her testimony was consistently impeached with evidence other than Z.B.’s own testimony. Because the only issue in this case was consent, it was critical to the State’s case that J.J. provide credible testimony. Because she did not do so, Z.B.’s argument that his adjudication of delinquency is against the manifest weight of the evidence has merit. To the extent that Z.B.’s assignment of error presents a manifest weight challenge, it is sustained.

III

{¶25} Z.B.’s sole assignment of error is overruled in part and sustained in part. The judgment of the Medina County Court of Common Pleas, Juvenile Division, is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

WHITMORE, J.
DISSENTS, SAYING:

{¶26} I respectfully dissent as I would affirm the juvenile court’s adjudication of delinquency and conclude that it is not against the manifest weight of the evidence. Although J.J.’s testimony contained discrepancies, the judge, as the trier of fact, could reasonably have attributed these discrepancies to her level of maturity and the stress of the situation. Both J.J. and Z.B. agreed that J.J. performed oral sex on Z.B.; the only issue was whether it was consensual. This Court has repeatedly recognized that it is an error to reverse a decision “on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness’ testimony over the testimony of others.” *State v. Littlejohn*, 9th Dist. No. 24155, 2008-Ohio-6132, at ¶28. Here, the court chose to believe J.J.’s testimony, which was consistent with her friend, T.H.’s, testimony. Because I do not believe this is the “exceptional case in which the evidence weighs heavily against the [adjudication of delinquency],” I would affirm Z.B.’s

adjudication of delinquency. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. As such, I respectfully dissent.

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.