

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

R.G.

DELINQUENT CHILD

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 08-CA-121

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Juvenile Division,
Case No. A2008-0292

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 5, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor

BY: KIMBERLY A. MCCARTY
Assistant Prosecuting Attorney
20 S. Second Street, Fourth Floor
Newark, Ohio 43055

ANDREW SANDERSON
Burkett & Sanderson, Inc.
21 West Church Street
Suite 201
Newark, Ohio 43055

Hoffman, P.J.

{¶1} Appellant R.G. appeals the August 11, 2008 Judgment Entry entered by the Licking County Court of Common Pleas, Juvenile Division, which adjudicated him delinquent by reason of having committed rape. Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 8, 2008, a Complaint was filed in the Licking County Court of Common Pleas, Juvenile Division, alleging Appellant was delinquent by reason of committing two counts of rape, first degree felonies if committed by an adult; one count of gross sexual imposition, a fourth degree felony if committed by an adult; and one count of underage consumption, a first degree misdemeanor if committed by an adult. Appellant appeared before the trial court on April 25, 2008, and entered pleas of denial to the charges. The trial court placed Appellant on house arrest, and scheduled the matter for an adjudicatory hearing. After several continuances, the adjudicatory hearing commenced on August 11, 2008. Prior to the presentation of testimony, Appellant entered an admission to the charge of underage consumption. The State then presented testimony on the remaining counts.

{¶3} The victim, A.B., who was fourteen years old at the time of the incident, testified Appellant is her brother's friend. On the evening of December 20, 2007, A.B., her brother, and two friends, E.T. and A.P., walked to Stephanie Able's house. Able, A.B., and A.P. left and went to a nearby liquor store to purchase alcohol. A.B. testified she drank for two or three hours that evening, including two Bacardis and "six or so shots" of vodka. She recalled feeling dizzy and out of it, and had trouble walking.

During the evening, A.B.'s brother, Appellant, and another individual smoked marijuana. A.B. stated she herself did not smoke any marijuana.

{¶4} A.B. testified Appellant asked her to take a walk with him. A.B. acknowledged she was intoxicated at that point, and felt sick, dizzy, and "really bad". A.B. and Appellant walked outside and sat down on a set of steps. The two sat and talked for a time. Appellant asked A.B. if she wanted to walk down to a nearby field, and she agreed. When they were in the field, Appellant pushed A.B., causing her to fall on her back. Appellant laid on top of A.B., holding her hands and above her head. Appellant touched her breasts under her clothes, and penetrated her vagina with his finger. A.B. stated she just laid there because she did not have the strength to move. Appellant removed A.B.'s pants and underwear, and penetrated her vagina with his penis. Appellant told A.B. they had to stop because her brother might arrive. When Appellant stood up, A.B. ran toward the house. She saw her brother, stopped for a moment, and then continued into the house. A.B. was crying the entire time. Once inside the house, she repeatedly stated, "I told him, 'No'."

{¶5} On cross-examination, A.B. testified she had told the police Appellant had put his arm around her while they were sitting on the steps and asked her if she wanted to kiss. A.B. stated she declined, telling Appellant she had a boyfriend. A.B. conceded she was able to walk outside to the steps and to the field on her own, but added she was stumbling. A.B. testified, although she saw her brother and a friend outside the house, she was unable to yell to them because she felt like she was "dreaming, fading in and out". A.B. acknowledged she was able to tell Appellant "no" several times during the incident.

{¶6} Robert Huffman, a detective with the Newark Police Department specializing in sex crimes and child abuse, testified he was contacted by Officer Corrie Tyson and asked to investigate a possible sexual assault involving Appellant and A.B. Det. Huffman instructed Officer Tyson to try to locate the actual crime scene with the assistance of the victim. After doing so, Officer Tyson brought A.B. and her mother to the Kid's Place. Det. Huffman arrived at Kid's Place and interviewed A.B.'s mother and A.B. Det. Huffman stated A.B. underwent an examination at Kid's Place.

{¶7} After speaking with A.B. as well as the other young adults who were at the party, Det. Huffman met with Appellant on February 7, 2008. Appellant gave the detective his account of the evening of December 20, 2007. Appellant stated he was at Stephanie Able's apartment earlier in the evening, and had left prior to the arrival of the others. Appellant went to another friend's house where he drank one beer. He returned to Able's apartment and drank seven or eight shots of vodka. Appellant described himself as very intoxicated. Appellant told Det. Huffman everyone at the party was intoxicated, including A.B. At some point during the evening, Appellant and A.B. went outside to get some fresh air. Once outside, he and A.B. began to kiss and touch each other. They decided to go to a more private location where they continued to kiss and touch each other. According to Appellant, A.B. touched his penis, and he touched her vaginal area, trying to get her ready to have sex. They each lowered their pants to their ankles and he attempted to place his penis in her vagina, but was unsuccessful. Eventually, they stopped and went their separate ways.

{¶8} M.B., A.B.'s brother, testified he, A.B., and two of her friends went to Stephanie Able's house on the evening of December 20, 2007. A.B. and the other girls

left to go to the store. M.B. and Appellant stayed at Able's residence. A.B. and the others returned with alcohol at approximately 10:30pm. M.B. recalled seeing his sister and Appellant talking. He described the interaction between A.B. and Appellant as "just friends". At some point during the evening, A.B. told her brother she needed some air, and she and Appellant went for a walk. The two were gone for awhile so M.B. went outside to look for them. He found A.B. and Appellant sitting in front of the house two doors down from Able's residence. M.B. noticed his sister was crying and was "really upset". When he approached, A.B. turned around and ran into Able's house. Appellant stood up and told M.B. nothing happened. M.B. returned to Able's house where he found his sister "freaking out and crying". He heard A.B. say, "I said, 'Stop'. I said, 'No.' He just kept going." After listening to his sister, M.B. chased down Appellant and asked him what happened, but Appellant would not answer him.

{19} E.T., A.B.'s friend, was also at the party on December 20, 2007. She stated she and the others arrived at Able's house at approximately 9:30pm. After a period of time, they asked Able if they were allowed to drink. E.T. recalled they left and went to A.P.'s house to get money. They purchased \$37.00 worth of alcohol, including two cases of Bacardi, two bottles of vodka, and some beer. Upon their return to Able's house, everyone started drinking. E.T. testified she saw A.B. drinking, and noted A.B. drank "more alcohol than I've probably ever seen her drink before." E.T. described A.B. as intoxicated, stumbling as she walked and slurring her speech. E.T. learned A.B. and Appellant had left. When A.B. returned, she ran into the kitchen and "just started balling her eyes out." When asked what was wrong, A.B. kept saying she told him "No". E.T. noticed A.B. had mud on her back and leaves in her hair. At 3:00am, A.B. was still

upset and crying when she told E.T. Appellant had raped her. When E.T. had confronted Appellant earlier that evening, Appellant told her nothing had happened.

{¶10} A.P., another of A.B.'s friends, also testified about the party on the evening of December 20, 2007. She recalled Stephanie Able took A.B., E.T., and her to a drive-thru where they purchased approximately \$40.00 worth of alcohol. When they returned to Able's house, the group began doing shots of vodka. A.P. believed A.B. was the most intoxicated of the group. At some point during the evening, Able's boyfriend arrived and he, A.B.'s brother, and Appellant smoked marijuana. A.P. saw A.B. leave the house. When A.B. returned, she was upset and crying. A.P. noticed A.B. had leaves in her hair and on her clothing. She believed A.B. was still intoxicated because she was stumbling when she returned to the house.

{¶11} Stephanie Able testified she purchased the alcohol which was consumed at her residence on the evening of December 20, 2007. During the evening, A.B. stated she did not feel well and needed some air. Able asked Appellant to take A.B. her for a walk. Because A.B. and Appellant had been gone for a period of time, Able and M.B. walked outside to the front of the residence to look for them. Able returned to the house and found A.B., crying. Able took A.B. outside and tried to talk to her, but A.B. covered her face and would not speak. On cross-examination, Able noted, although A.B. was crying, Able did not see any tears. Able stated A.B. did not appear to be upset. Able recalled when she came back into the house A.B. was "throwing a tantrum", and saying, "I said, 'No', I said, 'No'." According to Able, A.B. was not slurring her speech and had no problem walking.

{¶12} Kelly Morrison, a pediatric nurse practitioner with Licking Memorial Health Professionals, testified she works at Kid's Place, which is a center owned by Licking Memorial Hospital for the evaluation of children who have disclosed physical or sexual abuse. Morrison examined A.B. on December 21, 2007. A.B. indicated she had pain in her right wrist, explaining she had fallen during the incident with Appellant the previous evening. A.B. proceeded to describe the incident, stating Appellant touched her underneath her t-shirt and bra, pulled down her underwear, and touched her vagina with his fingers and penis. During the course of the exam, A.B. also disclosed Appellant had licked her abdomen and breasts. A.B. told Morrison she did not believe Appellant ejaculated. Morrison conducted a complete medical assessment and collected a rape kit. Morrison's physical examination of A.B. revealed a small abrasion on the area below her vagina as well as a small notch in her hymen. Morrison stated A.B.'s physical exam was consistent with her history and her disclosure of vaginal intercourse.

{¶13} A.M., a high school senior, testified on Appellant's behalf. A.M. and A.B. were in drama class together during the 2007-2008 academic year. One day in January, 2008, A.B. told A.M. she and Appellant almost had sex, but did not because they were too drunk. A.M. gave her opinion A.B. has a reputation for lying a lot and not being very truthful. A.M. recalled A.B. subsequently stated Appellant had raped her. When A.M. questioned A.B. about her original comment, A.B. denied ever making the statement.

{¶14} J.M., one of A.B.'s classmates, also testified on Appellant's behalf. J.M. recalled, one day in drama class sometime after winter break in January, 2008, A.B.

commented she and Appellant were at a party and had or attempted to have sex. J.M. later learned A.B. was telling people Appellant had raped her.

{¶15} Appellant testified he knew A.B. from school, and had been friends with her brother for several years. Appellant arrived at Able's house when A.B. and the others were on their way out to get alcohol. Appellant recalled he drank two beers and at least eight shots of vodka. Appellant acknowledged he was sick that evening. Appellant observed A.B. drinking and described her as tipsy or buzzed, but not "smashed". A.B. was able to walk on her own and was able to carry on a conversation.

{¶16} At some point during the evening, Able asked Appellant to go outside with A.B. The two walked a short distance and sat down. He and A.B. talked for about ten minutes and then started to kiss. After approximately five minutes of kissing, Appellant and A.B. walked to the side yard of a neighboring house. Appellant and A.B. began to kiss and started to touch one another. The two laid down and eventually undid their pants. Appellant stated he was unable to obtain an erection because he was too drunk. Appellant stated he did not place his penis or fingers inside A.B. Appellant noted A.B. never told him to stop and never said, "No". When Appellant saw A.B.'s brother and two girls exit the house, he told A.B. they needed to put their clothes on so the others would not see them. A.B. and Appellant walked back to Able's house, and he asked A.B. if she wanted to go out. A.B. responded, "No", telling him she had a boyfriend. Appellant stated his jaw dropped when she told him and was adamant he never would have had any type of sexual encounter with A.B. if he had known she had a boyfriend. When Appellant and A.B. returned to Able's house, A.B.'s brother and his own brother were waiting outside for them. A.B.'s brother yelled at Appellant and A.B. because they were

going to be late getting home and their mother would be mad. A.B. and her brother went inside Able's house. Appellant and his brother headed up the street toward their house. At the conclusion of his direct testimony, Appellant reiterated A.B. never told him to stop and never gave him the impression she was not participating voluntarily.

{¶17} After hearing the evidence, the trial court adjudicated Appellant delinquent on Count 2 (rape), but found the State had not proved its case beyond a reasonable doubt as to Count 1 (rape), and Count 3 (gross sexual imposition). The trial court dismissed Counts 1 and 3 of the Complaint. The trial court ordered the probation department complete a pre-dispositional report, and Appellant undergo a Juv.R. 32 mental health evaluation. At the dispositional hearing, the trial court committed Appellant to the Department of Youth Services for a term of not less than one year. The trial court also classified Appellant as a Tier III juvenile sex offender.

{¶18} It is from the rape conviction as set forth in Count 2 of the Complaint Appellant appeals, raising as his sole assignment of error:

{¶19} "I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I

{¶20} Herein, Appellant challenges the trial court's finding of delinquency as against the manifest weight of the evidence.

{¶21} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 judgment

must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 super ceded by constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶22} Appellant was charged with violating R.C. 2907.02(A)(1)(c), as applied to adults, and in violation of R.C. 2152 .02(F) as made applicable to juveniles.

{¶23} R.C. 2907.02(A)(1)(c) reads:

{¶24} “(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶25} “ * * *

{¶26} “(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.”

{¶27} Appellant maintains there was ample evidence demonstrating the victim was not substantially impaired from alcohol at the time she and Appellant engaged in sexual activity.

{¶28} The Ohio Supreme Court has held “substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct.” *State v. Zeh* (1987), 31 Ohio St.3d 99, 509 N.E.2d 414. “Substantial impairment” need not be proven by expert medical testimony; it may be proven by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct.” *State v. Brady*, Cuyahoga App. No. 87854, 2007-Ohio-3333.

{¶29} At the adjudicatory hearing, the victim testified she drank alcohol for approximately two or three hours on the night of the incident. She recalled she had two Bacardis and six shots of vodka. When asked the affect the alcohol had on her, the victim stated she was “really dizzy at times” and felt like she was “dreaming, * * * like going in and out of it.” Tr. at 167. She acknowledged she had trouble walking and was stumbling a lot. Two of the victim's friends testified as to the amount of alcohol the victim drank that evening. Both witnesses stated the victim was intoxicated, stumbling as she walked and slurring her speech. The victim's brother testified, although his sister was not intoxicated to the point of passing out or vomiting, she was getting pretty loud, screaming, and hollering. Able described the victim as “out of control”. Additionally, the witnesses testified, when the victim returned to Able's house, she was very upset and crying. The victim repeatedly stated she told him, “no.” Appellant, on the other hand,

did not believe the victim was intoxicated as he did not notice if she was having trouble walking or talking. Appellant contends the victim did not ask or tell him to stop in any manner.

{¶30} Although the victim and Appellant presented different accounts of the incidents, we find there is ample evidence the victim was impaired at the time as well as ample evidence the victim and Appellant engaged in sexual conduct. The trial court was in the best position to assess the credibility of the witnesses, and this Court must defer to the trial court's decision. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180. The trial court as the trier-of-fact was free to accept or reject any or all the testimony of the witnesses. We find the trial court's adjudication of Appellant as delinquent is not against the manifest weight of the evidence.

{¶31} Appellant's sole assignment of error is overruled.

{¶32} The judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

