[Cite as *In re S.J.F.*, 2010-Ohio-5514.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
S. J. F., DELINQUENT CHILD	:	**CASE NO. 2010-G-2960**
	:	

Criminal Appeal from the Geauga County Juvenile Court, Case No. 10 JD 000027.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, Oh 44024 (For Appellee-State of Ohio).

R. Robert Umholtz, Geauga County Public Defender, and *Dawn M. Gargiulo*, Assistant Public Defender, 211 Main Street, Chardon, OH 44024 (For Appellant-S.J.F.).

DIANE V. GRENDELL, J.

{¶1} Appellant, S.J.F., appeals the judgment of the Geauga County Juvenile Court, finding him to be Delinquent by reason of Complicity to Disseminating Matter Harmful to a Juvenile, in violation of R.C. 2907.31(A)(1) and 2923.03(A)(1). For the following reasons, we affirm the decision of the trial court.

{¶2} On January 14, 2010, a complaint was filed alleging S.J.F. to be Delinquent of Disseminating Matter Harmful to a Juvenile, a misdemeanor of the first degree in violation of R.C. 2907.31(A)(1). The complaint was amended on March 12, 2010, still alleging S.J.F. to be Delinquent of the same charge, but changing the facts

alleged in the original complaint. The amended complaint alleged that S.J.F. "pressured a 12 year old girl into sending him a nude photograph of herself."

{¶3} On March 15, 2010, an Adjudication Hearing was held on the Disseminating Matter Harmful to a Juvenile charge.

{¶4} The following events were testified to during the hearing. S.J.F. is a fourteen-year-old male student at West Geauga Middle School ("West Geauga"). On several different days in December of 2009, S.J.F. asked M.K., a twelve-year-old female student at West Geauga, to send a nude picture of herself to his cell phone through a text message. M.K. testified that S.J.F. asked her for a nude picture on "around ten" different occasions. M.K. stated that after these requests, she was afraid that S.J.F. "was getting frustrated with" her. M.K. did send to S.J.F.'s cell phone a text message containing one topless picture of herself.

{¶5} On December 18, 2009, West Geauga Principal, Jim Kish, and Assistant Principal, Ronald Dahlhofer, became aware of allegations that M.K. sent a nude photograph to a classmate through a text message on her cell phone. Chester Township Police Officer Matthew Brickman was called to West Geauga to investigate these allegations. Upon discovering M.K. and S.J.F. were the parties involved, Brickman took possession of their cell phones. He found a topless photograph on M.K.'s cell phone, but did not find the picture on S.J.F.'s cell phone. Brickman testified that S.J.F. told him he had deleted the photograph from his cell phone after forwarding the photograph to his e-mail account.

{¶6} Brickman spoke to S.J.F., who signed a written statement admitting that he asked M.K. to send him nude photographs. In the statement, S.J.F. stated that he

"kept asking" M.K. for the photographs "until she said yes." S.J.F. also stated that he asked for the photographs because he wanted to see M.K. naked.

{¶7} Juvenile Court Judge Charles Henry found the allegations against S.J.F. to be true. The juvenile court imposed a suspended placement in the Detention Center for one to thirty days. The court also imposed 48 hours of community service, required S.J.F. to write an essay discussing what he learned from this incident, and held S.J.F.'s cell phone for ninety days.

{¶8} S.J.F. timely appeals and raises the following assignments of error:

{¶9} "[1.] The evidence before the trial court was insufficient, therefore the court erred by adjudicating the complaint true beyond a reasonable doubt.

{¶10} "[2.] The trial court's adjudication was against the manifest weight of the evidence."

{¶11} "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed.1990) 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. Id.

{¶12} "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." *State v. Jenks* (1991), 61 Ohio St.3d

259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, "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.

{¶13} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the *greater amount of credible evidence*." *Thompkins*, 78 Ohio St.3d at 387 (emphasis sic) (citation omitted). Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, *** weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" Id.

{¶14} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id.,

quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "Where there is conflicting competent and credible evidence regarding the facts of a case, the appellate court will defer to the determination made by the trier of fact." *State v. McCrory*, 11th Dist. No. 2006-P-0017, 2006-Ohio-6348, at ¶37.

{¶15} R.C. 2907.31(A)(1) provides, in part, that "[n]o person, with knowledge of its character or content, shall recklessly *** [d]irectly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile *** any material or performance that is obscene or harmful to juveniles."

{¶16} In order to adjudicate S.J.F. Delinquent of Complicity to Disseminate Matter Harmful to a Juvenile, the State must prove that S.J.F. acted "with the kind of culpability required for the commission of [the] offense." R.C. 2923.03(A). The State must also prove that the individual charged aided in the commission of the target offense. The State here argues that the appellant "solicit[ed] or procure[d] another to commit the offense" of Disseminating Matter Harmful to a Juvenile. R.C. 2923.03(A)(1).

{¶17} Under the first assignment of error, appellant argues that there is insufficient evidence to sustain an adjudication of delinquency because the State did not prove that S.J.F. solicited M.K. to send the nude photograph to his phone. Appellant contends that S.J.F. did not exert sufficient pressure on M.K. such that he solicited the offense.

{¶18} The Ohio Jury Instructions properly define solicit as "to seek, to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, at ¶68 (citation omitted). "'Procure' means 'to get, obtain, induce, bring about, motivate.'" *State v. Rohr-George*, 9th Dist. No. 23019,

2007-Ohio-1264, at ¶13, quoting 4 Ohio Jury Instructions (2004), Section 523.03(6) and (7).

{¶19} Here, the trial court had sufficient evidence to make a determination that S.J.F. solicited M.K. to send the topless photograph to his cell phone. M.K. testified that S.J.F. requested that she send a photograph around ten times before she finally did so. Additionally, S.J.F. himself gave a voluntary statement to police admitting that he requested the photograph from M.K. M.K. also stated that she sent the picture because she was afraid S.J.F. "was getting frustrated" with her. When considering this evidence, a finder of fact could determine that S.J.F. solicited M.K. to send the topless photograph to him.

{¶20} Aside from the conspiracy element, the elements of the crime of Disseminating Harmful Matter to a Juvenile, set forth in R.C. 2907.31(A)(1), are undisputed by appellant. A rational trier of fact, when reviewing the evidence presented, could have determined that both the essential elements of the crime and the elements of complicity were met beyond a reasonable doubt.

{¶21} The first assignment of error is without merit.

{¶22} Under the second assignment of error, appellant asserts that the trial court's adjudication of S.J.F. as Delinquent was improper because it is against the manifest weight of the evidence. Specifically, appellant argues that the State "failed to produce evidence that the alleged matter was harmful to juveniles."

{¶23} The term "harmful to juveniles" as defined in R.C. 2907.01(E) provides: "'Harmful to juveniles' means that quality of any material or performance describing or

representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

{¶24} The material ***, when considered as a whole, appeals to the prurient interest of juveniles in sex.

{¶25} The material *** is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

{¶26} The material ***, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles."

{¶27} Although appellant contends that a topless photograph is not harmful to juveniles, it was not against the manifest weight of the evidence for the trial court to determine that this photograph was harmful.

{¶28} The dissent asserts that the photograph did not appeal to the prurient interest of S.J.F because a prurient interest is one that appeals to a "shameful or morbid interest in sex." However, this standard is used to describe material that is obscene. Here, the material sent to S.J.F depicted a minor, twelve-year-old M.K., which violates R.C. 2907.323(A)(1), stating that no person shall "photograph any minor *** in a state of nudity." In a case involving child pornography the material does not have to be obscene, or appeal to the prurient interest, to be considered harmful. See *State v. Tooley***,** 114 Ohio St.3d 366, 2007-Ohio-3698, at ¶10 (holding that the State can "regulate child pornography without requiring proof that material is obscene"). Therefore, the State did not have to prove that there was a shameful or morbid interest on behalf of S.J.F. in wanting to view the picture of M.K., as the picture depicted a minor.

{¶29} Additionally, allowing a child to view an image of another child topless would be considered offensive by the adult community with respect to what is suitable for juveniles. Clearly, this photograph had no literary, artistic, political, or scientific value. Therefore, it is reasonable to find that this photograph was harmful to juveniles and such a finding is not against the manifest weight of the evidence.

{¶30} Appellant further asserts that the State failed to produce the photograph in question at trial, which prevented the court from making a proper determination as to whether the photograph was harmful.

{¶31} The State does not have to present the harmful material itself at trial. *In re Z.C.*, 2nd Dist. No. 21231, 2006-Ohio-5378, at ¶16. "Evidence of the content of the material can be established through testimony describing the material." *State v. Toth*, 9th Dist. No. 05CA008632, 2006-Ohio-2173, at ¶53.

{¶32} Although the photograph in question was not presented at the adjudicatory hearing, the testimony of Assistant Principal Dahlhofer, Officer Brickman, and M.K. established that the photograph did exist. This testimony also established the content of the photograph. The photograph was described at the hearing by Brickman as "exposed breasts" and by Dahlhofer as a "young lady *** topless."

{¶33} Officer Brickman also testified that S.J.F. informed him that S.J.F. did receive the photograph of M.K. on his cell phone and that he e-mailed the photograph to himself before deleting the photograph from his cell phone. The dissent takes issue with the fact that Officer Brickman did not include this information in his police report. However, the trial court was in the best position to determine the credibility of the

witnesses and whether Brickman was testifying truthfully. Therefore, Brickman's testimony establishes that S.J.F did receive the photograph of M.K.

{¶34} Appellant finally argues that M.K. was not a credible witness due to the fact that she was S.J.F.'s accomplice and that her testimony is unreliable evidence.

{¶35} When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder may believe all, some, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶53. However, the fact that the witness testifying is an accomplice may "make his testimony subject to grave suspicion, and require that it be weighed with great caution." R.C. 2923.03(D).

{¶36} The fact that M.K. may have been the principal offender with S.J.F. as an accomplice does not automatically discredit her testimony. The trier of fact, in this case, the trial judge, was in the best position to determine M.K.'s credibility. Although M.K. was an accomplice, her testimony is still admissible, as long as weighed with caution. There is no evidence here that the judge did not take such caution when evaluating M.K.'s testimony. Additionally, the testimony of Brickman, Dahlhofer, and even the voluntary statement of S.J.F. himself, support the credibility of M.K.'s testimony.

{¶37} After careful review of the entire record, weighing the evidence and all reasonable inferences and considering the credibility of the witnesses, this court cannot conclude that the trial court clearly lost its way when it adjudicated S.J.F. Delinquent of Complicity to Disseminate Matter Harmful to a Juvenile. The judge was in the best

position to evaluate the credibility of the witnesses and give proper weight to their testimony. Therefore, the adjudication of S.J.F. as Delinquent of Complicity to Disseminate Matter Harmful to a Juvenile was not against the manifest weight of the evidence.

{¶38} The second assignment of error is without merit.

{¶39} For the foregoing reasons, the judgment of the Geauga County Juvenile Court adjudicating S.J.F. Delinquent on the charges of Complicity to Disseminating Matter Harmful to a Juvenile, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶40} I would reverse based on the second assignment of error. I believe the weight of the evidence is insufficient to support a finding that S.J.F. was complicit in disseminating material harmful to a juvenile.

{¶41} First, the allegedly offending picture was never introduced into evidence. I agree with the majority that the harmfulness of the material may be established by testimony regarding it, but in this case, Officer Brickman admitted that M.K.'s cell phone, which was seized by the police, was missing. The picture of M.K. was not on S.J.F.'s cell phone. Officer Brickman testified that S.J.F. told the officer he sent the picture to

his e-mail account, then deleted it from the cell phone – but admitted that this would be exactly the sort of information he would have included in the police report. It is not in the report or in S.J.F.'s written statement to the police.

{¶42} It was the state's burden to prove that "[t]he material ***, when considered as a whole, appeals to the prurient interest of juveniles in sex." R.C. 2907.01(E)(1). For purposes of a sufficiency analysis, in which all evidence is construed in the state's favor, I am willing to assume that a topless photo of a presumably post-pubescent girl appeals to the "prurient interest in sex" of a teenage boy. Especially absent a copy of the photo, I think it is impossible to find the same under a manifest weight of the evidence analysis. The Supreme Court of Ohio held the following in *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 116:

{¶43} "A 'prurient' interest is not the same as a candid, normal or healthy interest in sex, rather it is a '"shameful or morbid interest in nudity, sex, or excretion (***) (which) goes substantially beyond customary limits of candor in description or representation of such matters (***)."' *Roth v. United States* [(1957), 354 U.S. 476], at 487, fn. 20 (quoting the definition of the A.L.I. Model Penal Code, Section 207.10(2) [Tent. Draft No. 6, 1957])."

{¶44} In this case, the state introduced no evidence that S.J.F.'s interest in obtaining the photo of M.K. actually appealed to any "shameful" or "morbid" interest he had in sex. Rather, the evidence indicates his interest in the photo stemmed from the "candid, normal or healthy interest" of the average teenage boy in girls. Further, her own testimony indicates M.K. had a sexual interest in S.J.F., though she doubted the

wisdom of having her topless photo available to be shown by him to others, if he so chose.

{¶45} As adults, we must be careful in guiding adolescents as they enter adulthood. This includes appropriate guidance regarding sex. But the state totally failed to prove an essential element of the charge brought against S.J.F. Consequently, I respectfully dissent.