[Cite as *State v. Smith*, 2012-Ohio-401.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0037**
- vs -	:	
MONTY L. SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 10 CRB 02371.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Stephen C. Lawson, 250 South Chestnut Street, #17, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Monty L. Smith, appeals his conviction for Criminal Child Enticement, following a trial in the Portage County Municipal Court, Ravenna Division. The issue to be decided by this court is whether a conviction for Criminal Child Enticement is supported by the evidence when a defendant asks a child to come with him while grabbing her arm. For the following reasons, we affirm the decision of the court below.

{¶2} On September 1, 2010, Smith was charged with Criminal Child Enticement, a misdemeanor of the first degree, pursuant to R.C. 2905.05(A).

{¶3} The matter proceeded to a bench trial, held on January 27, 2011, and March 31, 2011. The following testimony was presented at trial.

{¶4} On August 31, 2010, B.J., a twelve year old girl, and her friend, B.P., also twelve, walked to the Sparkle Market in Ravenna, Ohio, to buy a newspaper for B.J.'s parents. B.J. explained that after exiting Sparkle, a man she did not recognize, but later identified in court as Smith, approached her on the sidewalk. B.J. testified that Smith "grabbed [her] arm," stated "shut up and don't talk" and told her "just to come with him." B.J. "yanked her arm away from him" and he walked away. B.J. felt that Smith was "aggressive" and had grabbed her "kind of hard." She thought that Smith "was going to take [her]" and was scared. After Smith walked away, B.J. saw him enter Sparkle, exit a few minutes later, and enter a blue car. While Smith was inside of the store, B.J. used B.P.'s cell phone to call her father, who arrived at Sparkle, confronted Smith, and then took her to the police station to make a report. In a statement given to the police, B.J. stated that Smith grabbed her twice. During her testimony, B.J. could not recall if Smith had grabbed her once or twice.

{¶5} B.P. testified that while she was walking with B.J. outside of the Sparkle, she saw Smith grab B.J.'s arm and heard him say "not to talk and [to] come with him."

{¶6} Keith Jones, B.J.'s father, received a call from B.J. regarding the incident that occurred at Sparkle, and arrived there within ten minutes. Jones testified that when he arrived, B.J. pointed to the man who had grabbed her arm, located inside of a blue Honda in the Sparkle parking lot. Jones recognized the man as Smith, whom he had

known for several years. Jones and Smith began yelling at each other and the driver of the blue car then drove away.

{¶7} Officer Kevin Lafferty, who interviewed B.J. after the incident, described her as "quite animated and hysterical and excited about the whole ordeal." He did not observe any marks on her arms, although he would expect to with the way she described being grabbed.

{¶8} Officer Lafferty also testified regarding a security video presented as evidence, which showed a blue Honda Accord in the parking lot near Sparkle on the date of the incident. Officer Lafferty described the car as being parked in the opposite direction of Sparkle, and having a sign obstructing the view of the sidewalk, so that an individual in the car would have had difficulty seeing a confrontation taking place. He also explained that Smith was known by the police to drive around in a blue Honda.

{¶9} Smith testified that he was at Sparkle on August 31, and saw several teenagers outside of the store. Smith walked by two boys, one wearing a team's football shirt, and joked with the boy about whether the team would win an upcoming game. Smith stated that he went into the store, purchased beer and cigarettes, left the store, made another joke to the boy, and then got inside a car and left. He stated that he did not talk to or encounter B.J., her father, or any young girl while at Sparkle.

{¶10} Amy Ballas, Smith's girlfriend, was at Sparkle with Smith but remained in the driver's seat of the car while Smith went inside the store. She stated that no confrontation occurred and she did not hear or see Smith speak with anyone on the sidewalk. She admitted that, in a written statement given to Officer Lafferty, she stated that she heard someone yell at Smith while they were driving away.

{¶11} On April 21, 2011, the trial court found Smith guilty of Criminal Child Enticement, a misdemeanor of the first degree, pursuant to R.C. 2905.05(A). The court ordered Smith to pay a $1,000 fine and sentenced him to 180 days in jail, with credit for 2 days served. The court suspended $900 of the fine and thirty days of jail, provided Smith complied with certain conditions set forth in the Judgment Entry. Smith was found to be a Tier I child victim offender.

{¶12} Smith timely appeals and raises the following assignment of error:

{¶13} "The verdict of the trial court in finding the appellant guilty of enticing a child is against the manifest weight and the sufficiency of the evidence."

{¶14} The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Crim.R. 29(A). "'[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, 678 N.E.2d 541 (1997), 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 trier of fact to decide regarding each element of the offense. *Id.*

{¶15} "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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In reviewing the sufficiency of the

evidence to support a criminal conviction, "[t]he 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.*

{¶16} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the greater amount of credible evidence." (Citation omitted) (emphasis deleted.) *Thompkins* at 387. 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, 865 N.E.2d 1264, ¶ 25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.*

{¶17} 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*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 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 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. 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*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶18} In order to convict Smith of Criminal Child Enticement, the State had to prove, beyond a reasonable doubt, that Smith, "by any means and without privilege to do so," did "knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany [him] in any manner." R.C. 2905.05(A). The State was also required to prove that: "(1) [t]he actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity," and "(2) [t]he actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education." *Id.*

{¶19} Regarding the sufficiency of the evidence, there was sufficient evidence in the record that Smith asked, without privilege, a child under fourteen years of age to accompany him. The testimony of both B.J. and B.P. established that Smith asked B.J., a twelve year old child, to "come with him" and to not say anything, while grabbing her arm. From these facts, Smith can be found to have acted knowingly to solicit B.J. to accompany him, as a request to "come with him" is presumed to elicit such a response from B.J. *See State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978) (knowledge can be ascertained from the surrounding facts and circumstances of the case).

{¶20} There was also no evidence presented supporting the conclusion that Smith had permission or authority to take B.J. anywhere. Smith himself testified that he did not know B.J. and had not seen her at any point prior to the incident. Jones, B.J.'s father, stated that Smith did not have his or his wife's permission to accompany B.J. or take her away from Sparkle.

{¶21} Smith argues that, even had he asked B.J. to "come with him," such a request does not rise to the level of soliciting, coaxing, luring, or enticing. However, this court has found that such a request is sufficient to satisfy the solicitation portion of R.C. 2905.05. "The common, ordinary meaning of the word 'solicit' encompasses 'merely asking.'" *State v. Carle*, 11th Dist. No. 2007-A-0008, 2007-Ohio-5376, ¶ 17; *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, 888 N.E.2d 1121, ¶ 16 (2nd Dist.); *Compare* Black's Law Dictionary (8th Ed.2004) 1427 (soliciting is "[t]he act or an instance of requesting or seeking to obtain something; a request or petition"). Requesting that B.J. "come with" Smith is sufficient to sustain a conviction, especially when coupled with physically grabbing B.J. *See State v. Marzolf*, 9th Dist. No. 24459, 2009-Ohio-3001, ¶ 13-15 (a conviction for Child Enticement was supported by the evidence when it was shown that the defendant "grabbed a child * * * at the park and told the child: 'Come with me. Come talk in private.'").

{¶22} In addition, although Smith asserts that nothing was offered to B.J. or presented to her for her consideration, "there is no statutory requirement that there be an offer of something to entice--whether inappropriate, like alcohol or money, or appropriate, like an offer of help." *State v. Brown*, 183 Ohio App.3d 643, 2009-Ohio-4314, 918 N.E.2d 201, ¶ 10 (2nd Dist.).

{¶23} Regarding the manifest weight of the evidence, we find that there is there is competent, credible evidence to support the trial court's verdict. In addition to the testimony of the two girls that Smith asked B.J. to come with him and grabbed her arm, the testimony of Jones and Officer Lafferty established that B.J. was upset and scared after the incident. Moreover, the video evidence, as well as the testimony of Jones and Smith, established that both Smith and the car he frequently rode in were at Sparkle on

the date of the incident. Ballas' testimony regarding her written statement established that someone yelled "Monty, you will get what you deserve" at Smith, establishing that a confrontation occurred.

{¶24} Although Smith argues that both his and Ballas' testimony established he did not talk to B.J. at Sparkle, the determination as to whether this testimony was credible is a question for the finder of fact. "It is well-settled that when assessing the credibility of witnesses, '[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.'" (Citations omitted.) *State v. Griesmar*, 11th Dist. No. 2009-L-061, 2010-Ohio-824, 2010 Ohio App. LEXIS 699, ¶ 55. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Id.* "If the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict." (Citation omitted.) *State v. Grayson*, 11th Dist. No. 2006-L-153, 2007-Ohio-1772, ¶ 31

{¶25} In the present case, there was conflicting testimony as to whether Smith talked to B.J. The issue of which witnesses told the truth about the events that occurred on August 31 is an issue for the factfinder to determine. *See State v. Hall*, 11th Dist. No. 2005-A-0007, 2006-Ohio-1446, ¶ 31 (when a "trier of fact chose to believe appellee's witnesses over appellant's testimony," the verdict is not against the manifest weight of the evidence). Moreover, there was evidence to support a finding that Ballas was not credible, as Officer Lafferty testified that Ballas' view of the incident was likely obstructed, and Ballas' testimony was discredited when her written statement conflicted with her testimony as to the confrontation that occurred in the parking lot.

{¶26} Finally, Smith asserts that his conviction was against the weight of the evidence because Officer Lafferty testified that the video showing Smith's car in the parking lot was taken between 5:03 and 5:56 p.m., but B.J. testified that she was at Sparkle around 4:00 p.m.

{¶27} We note that B.J. initially testified that she remembered the incident occurring in the "late afternoon." Only after defense counsel asked if it occurred at "4:00" or "around that time" did B.J. respond "yeah." From the testimony, it appeared that B.J. did not clearly remember the time of the incident. Even if the times given were not completely consistent, the State was not required to prove the exact time the incident occurred, especially in light of the other evidence presented. The testimony of Lafferty and B.J., as well as other witnesses, placed Smith and the blue Honda at Sparkle near the same time on the date of the incident, and established that Smith solicited B.J. to accompany him. Such evidence supports a conviction for Criminal Child Enticement.

{¶28} Based on the foregoing, the Judgment of the Portage County Municipal Court, Ravenna Division, finding Smith guilty of Criminal Child Enticement, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.