

[Cite as *State v. Hess*, 2010-Ohio-3692.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN W. HESS, JR.

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 2009 CA 0016

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Morrow County Court of
Common Pleas, Case No. 09-CR-0019

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 29, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

CHARLES HOWLAND
Morrow County Prosecutor

WILLIAM T. CRAMER
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BY: JOCELYN STEFANCIN
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Hoffman, J.

{¶1} Defendant-appellant John W. Hess, Jr. appeals his conviction entered by the Morrow County Court of Common Pleas on one count of gross sexual imposition and one count of dissemination of material harmful to juveniles. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 27, 2009, Appellant was indicted by the Morrow County Grand Jury on one count of gross sexual imposition and one count of disseminating material harmful to juveniles. Appellant was accused of showing a sexually-explicit movie to his four year old great-nephew and having sexual contact with the boy. Appellant admitted to letting the boy touch his penis, but denied touching the boy himself.

{¶3} On September 22, 2009, Appellant was found guilty by a jury of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree, and disseminating matter harmful to juveniles, in violation of R.C 2907.31(A)(1), a first degree misdemeanor. The trial court classified Appellant a Tier III sex offender.

{¶4} Via Judgment Entry of December 17, 2009, the trial court sentenced Appellant to four years in prison on the gross sexual imposition charge with one year mandatory and ordered Appellant serve six months in jail and pay a fine of \$1,000 on the dissemination charge.

{¶5} Appellant now appeals his conviction, assigning as error:

{¶6} "I. APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT IMPROPERLY PERMITTED THE

PROSECUTION TO BOLSTER THE CHILD-VICTIM'S TESTIMONY WITH PRIOR CONSISTENT STATEMENTS."

{¶7} "II. APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE CONVICTION FOR DISSEMINATING MATTER HARMFUL TO JUVENILES WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶8} In the first assignment of error, Appellant maintains the trial court erred in allowing the State to introduce statements made by the child victim as prior consistent statements.

{¶9} At trial, the child's mother testified relative to prior statements the child made to her about the night he spent with Appellant. Specifically, the child told her he and Appellant had watched a movie and Appellant had touched him inappropriately.

{¶10} At trial, the child testified with regard to the incident in question:

{¶11} "Q. And where was Aunt Connie while you were at the house with Uncle John?

{¶12} "A. In the living room.

{¶13} "Q. She was in the living room. And did mommy leave you there to spend the night?

{¶14} "A. Yeah.

{¶15} "Q. Yeah. And what room did you sleep in, [T.]?

{¶16} "A. The bedroom.

{¶17} "Q. And who slept in the bedroom with you, [T.]?

{¶18} "A. John.

{¶19} “* * *

{¶20} “Okay. Did you watch any movies with people?

{¶21} “A. Yes.

{¶22} “Q. Okay. And were there boys or girls in the movie?

{¶23} “A. Boys and one girl.

{¶24} “Q. Boys and one girl?

{¶25} “A. Uh-huh.

{¶26} “* * *

{¶27} “Q. Okay. And what do you remember the two boys and the girl doing in that movie?

{¶28} “A. This girl was all alone and then she called these boys in. And there was like twins and they came over and the girl, right, she was sucking the dick, the thing I mean.

{¶29} “Q. Okay. She was sucking on them. What part of the body was the girl sucking on?

{¶30} “A. The thingy.

{¶31} “Q. The thing. The boys’ thing, okay. You used another word a little bit ago that you described it with, do you sometimes call it by that other name, too? No?

{¶32} “A. I keep getting mixed up with it.

{¶33} “Q. Okay. Now, where was Uncle John when you were watching this movie?

{¶34} “A. In the bed with me.

{¶35} “Q. So the two of you were laying in the bed watching the movie?

{¶36} "A. Yes.

{¶37} "Q. And when you saw this part of the movie, what did you do, [T.]?

{¶38} "A. I closed my eyes.

{¶39} "Q. Okay. What did Uncle John say for you to do?

{¶40} "A. Open them, but I didn't open them.

{¶41} "Q. You didn't open them. Okay. Why did you close your eyes, [T.]?

{¶42} "A. Because I knew it was going to be bad.

{¶43} "Q. You knew it was going to be bad. Did the boys and girl have clothes on, [T.]? I didn't hear your answer?

{¶44} "A. The girl did but not the boys.

{¶45} "Q. Okay. So the boys didn't have any clothes on, okay. Now, after you and Uncle John watched this movie, [T.], did anything else happen with Uncle John?

{¶46} "A. No.

{¶47} "Q. Do you remember Uncle John asking you anything?

{¶48} "A. No.

{¶49} "Q. Now [T.], do you remember being in the bathroom with Uncle John?

{¶50} "A. No.

{¶51} "Q. Do you know the difference between good touches and bad touches?

{¶52} "A. Yes.

{¶53} "Q. And what is a good touch, [T.], a touch to your forehead? Okay. Would mom giving you a hug be a good touch?

{¶54} "A. Yes.

{¶55} "Q. You are smiling yes, okay. And what would be bad touches, [T.]?

{¶156} "A. Between your legs would be a bad touch.

{¶157} "Q. Okay. So somebody touching you between your legs would be a bad touch. Did anybody touch you between your legs, [T.]?

{¶158} "A. John.

{¶159} "Q. Your Uncle John did. And did that happen when you were at the house with Uncle John that night?

{¶160} "A. Yes.

{¶161} "Q. And did you say anything to Uncle John when he touched you between your legs?

{¶162} "A. I told him to stop it.

{¶163} "Q. And what did Uncle John do?

{¶164} "A. He stopped.

{¶165} "Q. He stopped. Okay. Now, when Uncle John was touching you between the legs, [T.], was Uncle John laying on the bed or where was he?

{¶166} "A. He was laying on the bed.

{¶167} "Q. And what kind of clothes did Uncle John have?

{¶168} "A. None.

{¶169} "Q. He didn't have any on?

{¶170} "A. No.

{¶171} "Q. Okay. And [T.], did you see Uncle John's thing, his private part between his legs?

{¶172} "A. No.

{¶173} "Q. You didn't see it.

{¶74} "A. No.

{¶75} "Q. Did Uncle John ever ask you to touch him in any way?

{¶76} "A. No.

{¶77} "Q. Did your Uncle John touch anybody else besides you that day?

{¶78} "A. No.

{¶79} "Q. What about himself?

{¶80} "A. Yes.

{¶81} "Q. So he was touching himself?

{¶82} "A. He told me to touch myself and he touched hisself [sic].

{¶83} "Q. Where did Uncle John touch himself?

{¶84} "A. Between the legs.

{¶85} "Q. Between the legs?

{¶86} "A. Yes.

{¶87} "Q. Okay. And did you see anything about Uncle John's body that changed when he was touching himself?

{¶88} "A. No.

{¶89} "Q. What about Uncle John's private, did you see that?

{¶90} "A. No.

{¶91} "Q. Could you tell if that had changed in any way?

{¶92} "A. No.

{¶93} "Q. You couldn't tell?

{¶94} "A. No, it didn't change.

{¶95} "Q. It didn't change. Okay. Did you ever touch Uncle John's private part?

{¶96} "A. No.

{¶97} "Q. How many times did Uncle John touch you [T.]?

{¶98} "A. Only one.

{¶99} "Q. Only once?

{¶100} "A. Yes.

{¶101} "Q. Now, after Uncle John had touched you and you asked him to stop, did you go to sleep at Uncle John's house?

{¶102} "A. Yes.

{¶103} "Q. Okay. And did he say anything to you about the touching?

{¶104} "A. No.

{¶105} "Q. Did you tell anybody about the touching?

{¶106} "A. Yes.

{¶107} "Q. Who did you tell?

{¶108} "A. My Aunt Connie.

{¶109} "Q. When did you tell Aunt Connie?

{¶110} "A. When it was - - when the movie was over.

{¶111} "Q. Okay. And did you ever tell mommy about it?

{¶112} "A. Yes.

{¶113} "Q. And when did you tell mommy about it?

{¶114} "A. A long time ago, very long time ago.

{¶115} "Q. A long time ago from today?

{¶116} "A. Yes.

{¶117} "Q. This happened a long time ago, didn't it, [T.]?

{¶118} “A. Yes.”

{¶119} Tr. at 35-43

{¶120} The child’s mother testified at trial as to the child’s statements to her regarding the incident. The following exchange took place at trial during the testimony of the child’s mother:

{¶121} “Q. And for what reason did you make a report with the sheriff’s office?

{¶122} “A. The fact that he had made a statement that they had a secret kept eating at me and so the very next weekend on the way to take his dad to work again, I was in the car alone with [T.]. We was on our way back. No, I was going to pick him up, I’m sorry, pick him up from work. Me and [T.] were alone.

{¶123} “Q. Picking up your husband?

{¶124} “A. Yes. Me and [T.] were alone - -

{¶125} “Q. Okay.

{¶126} “A. - - in the car and I said, [T.], tell me you and Uncle John’s secret. He sat there real quiet for a minute. Didn’t answer me at first. And I said [T.], you know, tell mommy your secret. He says, I can’t mommy. You will hate me. You and daddy will hate me. I said, we would never hate you and I automatically knew there was cause for alarm. He put his head down and I kept on asking him and finally he had told me that Uncle John and him had watched a movie and he was - - he give [sic] me great detail about the movie.

{¶127} “Mr. Clark: Your Honor, I’m going to object.

{¶128} “The Court: There is an objection and I take it this is based on hearsay?

{¶129} “Mr. Clark: Hearsay.

{¶130} “The Court: And the response to that is there an exception to the hearsay rule and/or a different rule that you are presenting this for?”

{¶131} “Ms. Stefancin: Your Honor, I would only be presenting it for purposes of prior consistent statement of the minor child. There was some question by Mr. Clark when the child was testifying about whether or not he relayed everything that had happened. And what he told his mom shortly after the incident happened would be a prior consistent statement with his testimony here in Court today.”

{¶132} “The Court: Mr. Clark.”

{¶133} “Mr. Clark: Your Honor, obviously she’s - - if she is reporting it for the truth of what was said there has been no decision by this Court prior to this time to admit any hearsay statements of the minor child in this kind of case and she is offering it for the truth of what is going to be said.”

{¶134} “The Court: Can we come up here for a second?”

{¶135} (Thereupon, the following proceedings took place out of the presence of the jury.)

{¶136} “The Court: My thought is at this point there is two things going on. Number one, for hearsay purposes. I don’t know that it was intended to be for the truth of the matter asserted and I can give them a limiting instruction on that. Prior inconsistent or the prior consistent statement based on what you said is a little bit questionable in my mind because I don’t think he said what you thought he was going to say totally. That’s a concern that I have if you get into that.”

{¶137} “Mr. Stefancin: No. No, I think that Mr. Clark, as my recollection is concerned, on cross-examination testified or cross-examination of [T.] was that he was

attacking [T's.] veracity or ability to recall. What he told his mom about the movie and about Uncle John touching him is consistent with his testimony here today.

{¶138} “The Court: Okay. All right. But my concern was it going to go beyond - -

{¶139} “Ms. Stefancin: No.

{¶140} “The Court: - - Uncle John touching him and him touching Uncle John because that’s what I heard in the opening and I was concerned if it was going to get into that that is not consistent. That is inconsistent.

{¶141} “Ms. Stefancin: No, that’s not - - that’s something that Detective Hall will bring up from his interview with Mr. Hess.

{¶142} “The Court: I heard the tape. So if that comes in it comes in. Okay. I think it is proper and the reason I believe it is proper is for two reasons. I don’t think it is hearsay because it is not coming in for the truth of the matter asserted. She didn’t know if it was true or not. This is what she reacted to. Is it prejudicial? I don’t think so. I think it’s probative value on the consistency of his prior statements is proper for the law and under the law for the jury to hear this. So I’m going to overrule the objection on those bases.

{¶143} “* * *

{¶144} “Q. What did he tell you about?

{¶145} “A. He told me that him and Uncle John had watched a movie and I said, what kind of movie? He said it was a bad movie. And I asked him what happened in the movie and he said that there was a girl and two guys and that he referred to his private area as his tallywacker. He said that the two men stuck their tallywacker into the woman’s mouth and her rear end. And he had told me, I said, is that all that happened,

[T.]? Did he touch you? And he got real quiet. Put his head down again and I said, honey, you need to tell me. You didn't do anything wrong, but mommy needs to know exactly what happened. I said, did he touch you? He shook his head yes."

{¶146} Tr. at 56-60.

{¶147} Detective Stoney Hall testified at trial with regard to his interview of Appellant regarding the incident:

{¶148} "Q. During the course of your interview with the defendant, did he at any point make any statements which corroborated what [T.] had told you?

{¶149} "A. Yes, he did, several.

{¶150} "Q. What statement did the defendant make?

{¶151} "A. He had stated that they did watch a movie and actually gave me the name of the movie they watched.

{¶152} "Q. What was the name the defendant provided to you?

{¶153} "A. Dragon, I'm having a brain stump here, sorry. It is something, dragon something.

{¶154} "Q. Was it Snap Dragon?

{¶155} "A. That was it, Snap Dragon.

{¶156} "Q. And was the defendant able to recall what type of movie Snap Dragon was?

{¶157} "A. Yes, he had said it was about a female who would lure gentlemen in, have sex with them and then would have a razor blade in her mouth and would slit their throats with the razor blade.

{¶158} "Q. And he watched this movie with [T.] who was four?

{¶159} “A. That is correct.

{¶160} “Q. Did you have the opportunity to recover this movie from the defendant?

{¶161} “A. No, I did not.

{¶162} “Q. Did the defendant tell you in what room he and [T.] were located in the home when they watched this movie?

{¶163} “A. In his bedroom.

{¶164} “Q. Did the defendant make any other statements to you that day?

{¶165} “A. Yes, he did. He advised me that he had went into the bathroom and he was using the bathroom and that [T.] had come in and said something to him about the private area, about the penis area, and he initially told [T.] to get out. [T.] had came back said something else, again, about the penis area. And he said at that point he allowed [T.] to touch his penis.”

{¶166} Tr. at 77-78

{¶167} Evid R. 801(D) reads:

{¶168} “(D) **Statements which are not hearsay.** A statement is not hearsay if:

{¶169} “(1) **Prior statement by witness.** The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one

of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.”

{¶170} Appellant maintains the testimony is hearsay as it is not offered to rebut a change of recent fabrication or improper influence or motive¹ and was prejudicial in that Appellant never admitted to engaging in sexual contact with the child or causing the child to engage in sexual contact with him.

{¶171} Appellant was convicted of gross sexual imposition, in violation of R.C. 2907.05, which reads:

{¶172} “(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶173} “***

{¶174} “(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶175} “***

{¶176} “(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

{¶177} “(C) Whoever violates this section is guilty of gross sexual imposition.”

¹ Evid.R. 801 (D)(1)(c) is not applicable as identification of Appellant was not in dispute.

{¶178} We find the testimony at issue is hearsay as it was not offered to rebut a charge of recent fabrication or undue influence or motive; therefore, error. However, in light of Appellant's admission to allowing the child to engage in sexual contact with him, Appellant has not demonstrated prejudice as a result of the testimony, and we find the error harmless. Accordingly, the first assignment of error is overruled.

II.

{¶179} In the second assignment of error, Appellant maintains his conviction for dissemination of material harmful to juveniles is not supported by the evidence.

{¶180} R.C. 2907.31 reads:

{¶181} "(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

{¶182} "(1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

{¶183} "(2) Directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

{¶184} "(3) While in the physical proximity of the juvenile or law enforcement officer posing as a juvenile, allow any juvenile or law enforcement officer posing as a juvenile to review or peruse any material or view any live performance that is harmful to juveniles.***"

{¶185} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. “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.” *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶186} Appellant asserts the statute requires the material be “considered as a whole,” but the movie at issue was never provided to jury. Rather, the jury merely heard a description of one scene from the victim and a one sentence synopsis from Appellant. Therefore, the testimonial descriptions were inadequate to permit the jury to assess the movie as a whole.

{¶187} Upon review of the statute, R.C. 2907.31 does not require the material be presented at trial. *State v. Toth* (9th Dist.) No. 05CA008632, 2006-Ohio-2173. Rather, we must view the evidence in light most favorable to the prosecution. As set forth in the testimonial evidence cited in our analysis and disposition of Appellant’s first assignment of error, the child victim described the movie as sexual in nature and obscene. Appellant provided a similar description in his custodial interview. Accordingly, a rational trier of fact could have found the essential elements of the crime proven beyond by a reasonable doubt.

{¶188} The second assignment of error is overruled.

{¶189} Appellant's conviction in the Morrow County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

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

s/ Julie A. Edwards _____
HON. JULIE A. EDWARDS

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

