STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1586

In the Matter of the Welfare of: J. T. R., Child

Filed July 7, 2009
Affirmed
Connolly, Judge

Watonwan County District Court
File No. 83-JV-07-185

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

LaMar Piper, Watonwan County Attorney, Kevin Lin, Assistant County Attorney, 710 Second Avenue South, St. James, MN 56081 (for respondent)

Melissa Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant argues that the evidence at trial was insufficient to show that he had the requisite intent to aid and abet third-degree criminal sexual conduct or that he was aware that the victim was mentally impaired. Because we conclude that the evidence was sufficient to sustain appellant's delinquency adjudication, we affirm.

FACTS

The facts in this case are largely undisputed. On June 23, 2007, 16-year-old appellant J.T.R. was at a residence with 15-year-old B.J.D. and 17-year-old J.S. At approximately 9:00 p.m., appellant and B.J.D. made a prank phone call to B.P. B.P. is a 23-year-old female who knew appellant through his sister and knew B.J.D. from around town and school. B.P. has been diagnosed with borderline intellectual functioning and has an overall IQ of 74, with a significantly lower verbal IQ. B.P. attended special education classes throughout school, and her overall functional capacity is equivalent to that of a 12-year old.

During their phone conversation, appellant and B.J.D. told B.P. that they were in their 20s and made sexual comments to her. They then asked B.P. if she wanted to go "cruising" with them, and she agreed.

Appellant drove B.J.D. and J.S. to B.P.'s residence to pick up B.P. Appellant drove the car, J.S. was in the front passenger seat, B.J.D. was in the back seat behind J.S., and B.P. was in the back seat behind appellant. Appellant told police that he observed B.J.D. "hitting on" B.P. Later, appellant dared B.P. to perform oral sex on B.J.D. B.P. agreed to the dare and performed oral sex on B.J.D. B.P. testified that while she was performing oral sex on B.J.D., appellant stated that he wanted to touch her breast. She further testified that someone touched her breast but she was not sure if it was B.J.D. or appellant.

Appellant subsequently drove back to J.S.'s sister's residence and informed B.J.D. and J.S. that this is "our secret." After B.J.D. and J.S. had left the vehicle, appellant was

approached by Officer Paul Wegner of the Madelia Police Department. Because B.P. looked uncomfortable and stated that she was missing some money, Officer Wegner further investigated what had occurred that night.

Officer Wegner interviewed appellant, B.P., J.S., and B.J.D., and at some point, it became evident that inappropriate sexual conduct had occurred in the vehicle. Appellant told police that a dare had been made for B.P. to perform oral sex on someone, although he denied making the dare. Appellant further stated that he looked back and saw B.P.'s head going up and down. Appellant informed police that "there was no doubt in his mind" that B.P. had been performing oral sex on B.J.D. Appellant also told Officer Wegner that B.P. was "slow."

Appellant was charged with aiding and abetting third-degree criminal sexual conduct and fourth-degree criminal sexual conduct. Following a court trial, appellant was adjudicated delinquent on the aiding-and-abetting charge, and the fourth-degree criminal-sexual-conduct charge was dismissed. This appeal follows.

D E C I S I O N

Appellant argues that the state's evidence was insufficient to prove that he knew, or had reason to know, that the victim was mentally impaired or that he intended to assist B.J.D. in committing criminal sexual conduct.

> In reviewing a claim of insufficient evidence, this court must ascertain whether given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged. The reviewing court cannot retry the facts, but must view the evidence in a light most favorable to the state and must assume that the jury believed the state's

> witnesses and disbelieved any contradictory evidence. These standards apply to the review of a jury trial as well as a court trial.

In re Welfare of J.G.B., 473 N.W.2d 342, 344-45 (Minn. App. 1991) (citations and quotations omitted).

A. Knowledge of mental impairment

Minn. Stat. § 609.344, subd. 1(d) (2008) provides: "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if. . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Appellant was convicted of aiding and abetting B.J.D. in violation of this statute.

Appellant argues that he did not know, and had no reason to know, that B.P. is mentally impaired. A person is mentally impaired if "as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration." Minn. Stat. § 609.341, subd. 6 (2008).

Appellant acknowledged that he knew B.P. through his sister and he knew that she was "slow." B.P. also testified that she knew appellant through his sister. J.S. testified that B.P. acted younger than her age. B.J.D. also informed Officer Wegner that he and appellant made the prank phone call to B.P. because she was "kind of slow and had mental issues." At trial, B.P. testified, and the district court acting as the fact-finder could observe first hand, whether she was indeed mentally impaired. This evidence is

sufficient to sustain the district court's finding that appellant had the requisite knowledge of B.P.'s mental impairment.

Appellant, however, argues that the district court should have evaluated what he knew under a "reasonable juvenile" standard, rather than the commonly used "reasonable person" standard. Appellant cites no support indicating that Minnesota courts have approved the use of a "reasonable juvenile" standard in cases involving mentally impaired persons or in criminal-sexual-conduct cases. The court of appeals is an error-correcting court, and because we find no error in the district court's conclusion that appellant had knowledge of B.P.'s mental impairment, we decline to extend the law. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

B. Intent

"A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2008). Although the statute requires "something more than mere inaction or passive acquiescence to impose liability as a principal, a jury may infer the requisite [intent] for a conviction of aiding and abetting when the defendant plays some knowing role in the commission of the crime and takes no steps to thwart its completion." *State v. Pierson*, 530 N.W.2d 784, 788 (Minn. 1995). "Presence, companionship, and conduct before and after an offense are circumstances from which a person's criminal intent may be inferred." *State v. Russell*, 503 N.W.2d 110, 114 (Minn. 1993). Appellant argues that he did not have the requisite

intent to have been adjudicated delinquent for aiding and abetting third-degree criminal sexual conduct. We disagree.

Appellant and B.J.D. made sexual comments to B.P. during a prank phone call on the evening of June 23, 2007. During that conversation they misrepresented their ages and identities. Eventually, they picked up B.P. and drove her out of town. A short time later, appellant heard B.J.D. hitting on B.P. and dared her to "suck" B.J.D. "down there." B.P. then performed oral sex on B.J.D. Appellant stated that he had no doubt that B.P. was performing oral sex on B.J.D. because he looked back and saw her head going up and down. Appellant made no objections to the act. In fact, rather than protesting, calling the police, or asking B.P. to stop, appellant asked B.P. if he could touch her breast. On the way back to B.P.'s residence, appellant informed B.J.D. and J.S. that the events of that night would be their "secret."

These facts, taken in a light most favorable to the state, demonstrate that it was reasonable for the court to find that appellant possessed the requisite intent for aiding and abetting third-degree criminal sexual conduct. Appellant encouraged B.J.D. to engage in the sexual act by daring B.P. to perform oral sex. This constituted a knowing role in the crime, and appellant took no steps to thwart its completion.

Appellant argues that the state had to show "that [appellant] encouraged the principal to take a course of action which he might not otherwise have taken." *Russell*, 503 N.W.2d at 114 (quotation omitted). Appellant's dare, and his obvious approval of the resulting sexual conduct, did just that. J.S. testified that after appellant dared B.P. to perform oral sex, B.J.D. refused and the discussion went back and forth between B.J.D.

and appellant whether or not B.J.D. should do it. Therefore, appellant encouraged B.J.D. to take a course of action which he might not have otherwise taken.

Lastly, appellant contends that "[s]uggesting that someone do something, especially when that suggestion comes in the form of a sophomoric dare, is not the same as advising or counseling someone to do something." Appellant provides no support for this contention, but rather goes on to assert that "[t]he state did not present any evidence that [appellant] told B.P. how to accomplish the act, that he directed or commanded her to do the act, that he forced her to do the act or that he prevented her from leaving." Minnesota law does not require such a showing. In fact, mere companionship and presence may imply intent, and appellant's actions were substantially more knowing than mere companionship and presence: he dared B.P. to engage in the act, witnessed the act taking place without any attempt to thwart the activity, and even tried to participate by asking to touch B.P.'s breast. After the act was completed, he encouraged both the victim and his co-conspirators to remain quiet about it. This evidence was sufficient to demonstrate intent.

Affirmed.