SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0026-15T1

STATE OF NEW JERSEY
IN THE INTEREST OF
A.T.,

A Juvenile.

Submitted January 19, 2017 – Decided March 1, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FJ-16-296-14.

Joseph E. Krakora, Public Defender, attorney for appellant A.T. (William Welaj, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent State of New Jersey (Christopher W. Hsieh, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a bench trial, A.T., a juvenile, appeals from a June 11, 2014 delinquency adjudication for committing acts, which if committed by an adult would constitute first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a); conspiracy to commit

aggravated sexual assault, N.J.S.A. 2C:5-2; and criminal restraint, N.J.S.A. 2C:13-2(a). We affirm.

We discern the following facts from the record. On June 22, 2013, two brothers, Ca and Ch, went to a bank parking lot to skateboard. Several older boys were already skateboarding in the parking lot, including A.T., C.N., D.V., H.B., and K.H.

When Ca fell off his skateboard, A.T. grabbed Ca and pinned him down. Ca was unable to get free from A.T.'s hold. Ca testified C.N. pulled Ch's pants and underwear down; however, A.T. testified Ch pulled his own pants down. Someone then forced Ca's mouth open and someone held his head in place. Ca testified C.N. put one hand on Ch's neck and one hand on Ch's penis and pushed him towards Ca, forcing Ch's penis into Ca's mouth. A.T. testified he let go when Ch's pants came down, as he thought "they were just kidding around." A.T. testified he held Ca for "like five seconds or less."

Ca testified when A.T. let go of him, he got up. Ca and D.V. played in the parking lot for about five minutes. At some point, K.H. chased after Ca and knocked him over. Ca then left and went to D.V.'s house to get some water to clean his face after falling in mulch. Ca later returned to the parking lot and saw his skateboard had been broken. Ch told Ca that A.T. had broken his skateboard.

Ca and Ch's mother, E.L., testified Ch came home "nervous" and "upset." Ch told E.L. Ca was "forced to suck his wiener." When E.L. asked Ch more questions, Ch began to "shut down" and did not talk about it. Ca came home shortly thereafter and "looked very upset." His eyes were watery, and his cheeks were red. Ca told his mother A.T. pinned him to the ground and C.N. "stuck [Ch's] wiener . . . in his mouth." E.L. testified Ca has been less cheerful since the incident, he is angry all the time, and he no longer goes outside to play with friends.

E.L. discussed the incident with family members but did not alert the police. However, at Ca's school on Monday after the incident, the principle spoke to Ca and asked him questions about what happened. A police detective spoke with E.L. that day. On July 1, 2013, Ca and Ch were interviewed by a detective from the County Prosecutor's Office.

A.T. was charged via a Juvenile Delinquency Complaint with three sexual assault charges: aggravated sexual assault, in violation of N.J.S.A. 2C:14-2(a)(5); conspiracy to commit aggravated sexual assault, in violation of N.J.S.A. 2C:5-2, and criminal restraint, in violation of N.J.S.A. 2C:13-2(a). The bench trial was held on April 25, May 7, and May 9, 2014. The Family Part judge issued an opinion adjudicating A.T. guilty of all three counts on May 21, 2014. On June 11, 2014, the Family

Part judge imposed a three-year, suspended sentence at the State Home for Boys, along with three years of probation, sex specific counselling, and all relevant parts of Megan's Law. This appeal followed.

On appeal, A.T. raises the following issues:

> POINT I: THERE WAS INSUFFICIENT EVIDENCE IN THE TRIAL RECORD TO SUPPORT THE TRIAL COURT'S CONCLUSION THE JUVENILE WAS GUILTY OF ANY OF THE THREE CHARGES AGAINST HIM
>
> > A. THE TRIAL COURT ERRED IN CONCLUDING THE STATE HAD ESTABLISHED A.T.'S GUILT OF AGGRAVATED SEXUAL ASSAULT ARISING OUT OF COUNT I BEYOND A REASONABLE DOUBT
> >
> > B. THE TRIAL COURT ERRED IN CONCLUDING THE STATE HAD ESTABLISHED A.T.'S GUILT ON CONSPIRACY TO COMMIT AGGRAVATED SEXUAL ASSAULT ARISING OUT OF COUNT II BEYOND A REASONABLE DOUBT
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> > C. THE TRIAL COURT ERRED IN CONCLUDING THE STATE HAD ESTABLISHED A.T.'S GUILT OF CRIMINAL RESTRAINT ARISING OUT OF COUNT III BEYOND A REASONABLE DOUBT

We exercise a limited scope of review over a trial judge's findings of fact. State v. Locurto, 157 N.J. 463, 471 (1999); State v. Johnson, 42 N.J. 146, 161 (1964). We give due regard to the trial judge's credibility determinations based upon the opportunity of the trial judge to see and hear the witnesses. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We do not substitute our own assessment of the evidence for that of the

trial judge. See State v. Minitee, 210 N.J. 307, 317 (2012) (citing Johnson, supra, 42 N.J. at 162). Our task is complete upon determining there is sufficient credible evidence in the record to support the trial court's factual findings. Cesare, supra, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

A.T. argues there was insufficient evidence to support the conclusion he committed conduct amounting to aggravated sexual assault. We disagree.

A person has committed sexual assault "if he commits an act of sexual penetration with another person" and the "actor is aided or abetted by one or more other persons and the actor uses physical force or coercion." N.J.S.A. 2C:14-2(a)(5). Sexual penetration is defined as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction." N.J.S.A. 2C:14-1(c). Further, "[t]he depth of insertion shall not be relevant as to the question of commission of the crime." Ibid.

A.T. asserts Ca's testimony "defied logic and credibility" and was not plausible because Ca's testimony waivered on whether he saw C.N. pull Ch's pants down. A.T. also asserts because Ca stayed in the area five minutes after the incident, it undercut

his credibility, as does E.L.'s failure to immediately report the incident to the police. A.T. also claims D.V.'s testimony was inconsistent, rending the testimony useless.

The judge found Ca's testimony credible based on his ability to understand the difference between lying and telling the truth, his age appropriate language, and his demeanor. The judge found "no meaningful discrepancies" in his testimony. Whether Ch or C.N. pulled Ch's pants down is not a discrepancy tending to absolve A.T. of guilt. The testimony established A.T. held Ca down and participated in the sexual assault. Further, the judge found E.L.'s credible testimony corroborated Ca's testimony. D.V.'s trial testimony was self-contradictory at times, when compared to his initial police statement, but the judge found the inconsistencies did not involve significant issues, and the testimony unfavorable to A.T. had other indicia of reliability.

The judge's determinations were well supported by evidence and testimony in the record. Ca's account was corroborated by other testimony the judge found plausible. It is irrelevant that E.L. did not immediately call the police, as the investigation began within two days. That Ca remained in the parking lot for a few minutes after the incident is also irrelevant. Sufficient credible evidence in the record supports the judge's determination A.T. committed aggravated sexual assault.

A.T. also argues there was insufficient evidence to support the conspiracy charge. N.J.S.A. 2C:5-2(a) provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> 1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> 2) Agrees to aid such other person or persons in the planning or commission of such crime or an attempt or solicitation to commit such crime.

The complaint charged A.T. with:

> conspir[ing] with another to commit sexual assault by, with the purpose of promoting or facilitating commission of sexual assa[u]lt, agreeing with A.T., D.V., and H.B. that defendant would aid them in the planning or commission of such crim[e] or attempt or solicitation to commit such crime [] and in pursuance of this agreement, defendant committed an overt act of aggravated aexual (sic) assault specifically by restraining [Ca].

The charge should have included C.N. instead of A.T. as co-conspirator with D.V. and H.B. A.T. argues because the conspiracy count did not name C.N., and A.T. was being charged with conspiring with C.N., the State did not prove guilt beyond a reasonable doubt. We disagree.

Adequate notice to the defendant to prepare his defense is the key to determine if the indictment is sufficient. State In re W.E.C., 81 N.J. 442, 447-48 (1979). In W.E.C., the Court allowed an amendment to a juvenile complaint changing the charge against the juvenile where the juvenile was not "misled . . . to his prejudice." Id. at 449. "[T]he end sought is fair notice and neither a failure to cite nor a miscitation will be fatal if the juvenile is not misled to his prejudice." State In re J.M., 57 N.J. 442, 445 (1971) (quoting State In re A.R., 57 N.J. 71, 73 (1970)).

Here, the court did not err by finding the juvenile committed conspiracy. Although the conspiracy count misidentified C.N., the complaint charged A.T. with conspiracy to commit sexual assault, provided the correct statute citation, and A.T. was able to prepare a defense against the charge. The two juveniles were tried together, resulting in one written decision for all of their charges. A.T. has not established he was prejudiced.

Next, A.T. argues the evidence did not satisfy the elements of the conspiracy. He contends the court's inference A.T. and C.N. agreed prior thereto to demean Ca did not meet the criminal standard of proof beyond a reasonable doubt. He asserts, the "only possible inference was that their conduct was neither

contemplated nor planned prior thereto" but was "spontaneous in nature."

When an individual is charged with conspiracy to commit a first- or second-degree crime, the State does not have to prove an overt act was committed. State v. Scherzer, 301 N.J. Super. 363, 401 (App. Div. 1997) (citing N.J.S.A. 2C:5-2(d)). The question is "whether a reasonable jury, viewing the State's evidence in its most favorable light, could find beyond a reasonable doubt that defendants, acting with a purposeful state of mind, agreed to commit, attempted to commit, or aided in the commission of an aggravated sexual assault." Ibid.

Here, the judge relied on testimony that both C.N. and A.T. bullied Ca throughout the day of the incident. The bullying of Ca, as well as the "joint actions of C.N. and A.T. in restraining Ca and forcing Ch's penis in Ca's mouth," supports a determination the juveniles agreed to "act together to demean Ca in front of the others" by "forcing [Ca's] brother's penis into his mouth." It was not an unreasonable inference based upon the record.

We also reject A.T.'s argument the trial court erred in finding him guilty of criminal restraint. An individual commits criminal restraint when he or she knowingly "[r]estrains another unlawfully in circumstances exposing the other to risk of serious bodily injury." N.J.S.A. 2C:13-2(a). Bodily injury is defined

as "physical pain, illness or any impairment of physical condition," N.J.S.A. 2C:11-1(a), while serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." N.J.S.A. 2C:11-1(b).

"Knowingly" applies to each part of subsection a, meaning the individual "knows the restraint is unlawful, and knows that the restraint is under circumstances exposing the victim to serious bodily injury." State v. Worthy, 329 N.J. Super. 109, 114 (App. Div. 2000). The risk of serious bodily injury is sufficient to satisfy the statute. N.J.S.A. 2C:13-2(a).

The juvenile claims there was no risk of serious bodily injury present and the trial judge did not specify how such a risk existed under the circumstances. While the trial judge did not specify the particular risks of injury, there is sufficient credible evidence in the record to support the judge's finding the juvenile's actions put Ca at risk for serious bodily injury. Bodily injury is defined as "physical pain, illness or any impairment of physical condition." N.J.S.A. 2C:11-1(a). "Not much is required to show bodily injury. For example, the stinging sensation caused by a slap is adequate to support an assault." N.B. v. T.B., 297 N.J. Super. 35, 43 (App. Div. 1997).

Here, all the elements of N.J.S.A. 2C:13-2(a) have been met. There is no dispute the juvenile restrained Ca. Ca was forcibly held down on pavement by A.T. while C.N. forced Ch to put his penis into his brother's mouth; therefore, these actions could have caused serious bodily injury. We therefore find the trial judge did not err in finding A.T. guilty of criminal restraint.

Affirmed.