

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Bryan E.,)
)
State of Nebraska,)
)
Appellee,)
)
v.)
)
Bryan E.,)
)
Appellant.)

No. A-13-0216

**MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL**

FILED

SEP 13 2013

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

INBODY, Chief Judge.

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

INTRODUCTION

Bryan E., born in 1999, appeals the order of the Scotts Bluff County Court, sitting as a juvenile court, adjudicating him as a child within the meaning of Neb. Rev. Stat. § 43-247(2) (Reissue 2008). Bryan alleges that there was insufficient evidence to support the juvenile court's determination that he committed the offense of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 2008). Because we conclude that the evidence is sufficient to establish beyond a reasonable doubt that Bryan subjected the victim in this case to sexual penetration without her consent, we affirm.

STATEMENT OF FACTS

On September 6, 2012, the State filed a juvenile court petition alleging that Bryan was a child within the meaning of §



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43-247(2) for, on or about July 23, 2012, unlawfully subjecting the victim, J.C., who was 7 years old at the time of the alleged incident, to sexual penetration without consent.

At the adjudication hearing, J.C. testified to the events leading to the juvenile petition. J.C. explained that late in the summer of 2012, she had been swimming at the pool in Mitchell, Nebraska, with her older sister. J.C. was floating in the water on a basketball and met Bryan while in the pool. J.C. identified Bryan in the court room. J.C. testified that Bryan offered to take her to get some candy, but lied and instead took her through the girls' bathroom to the "green hill." J.C. testified that Bryan made her go with him because he grabbed her by her hand and pulled her out, and that she did not want to go with him. J.C. explained that Bryan told her to lie down on the grass and Bryan began kissing her all over. J.C. testified that Bryan "pulled his pants down and he put his wiener in my pee-pee." J.C. explained to the court what and where her "pee-pee" was and identified it as the vaginal area. J.C. also testified that Bryan kissed her on her cheeks, mouth and tongue, but later indicated that he also kissed her on her "pee-pee" but did not say that before because it was a "bad word." J.C. testified that Bryan asked her to marry him and she told him no, in addition to telling him "[t]hat's naughty. Don't do it again. We're gonna (sic) get in trouble by [the pool manager,] Mrs. Hernandez."

The State then called D.E., a 13-year-old boy, who testified that on that same day, he was at the Mitchell swimming pool and reported to police that he saw two people laying down in the grass and that he saw "the little boy pull down the little girl's swimming suit." D.E. said that he did not know the boy, but that he remembered what he looked like and identified him as Bryan in the court room.

Another 14-year-old boy, S.E., also testified to being at the Mitchell pool and that he saw a boy on the side of the pool on the hill pulling his pants up and also identified that boy as Bryan. G.S. was similarly at the pool and saw a boy on top of a girl with his pants down. G.S. testified that the boy jumped up and started pulling his pants up and he and his friends went to tell the pool manager. G.S. also identified the boy on top of the girl as Bryan.

Vanessa Hernandez testified that she is the Mitchell pool manager and on one occasion late in the summer of 2012, J.C.'s sister came to her worried because she could not find J.C. Hernandez testified that she went to look for J.C. and observed J.C. and Bryan walking into the pool area. Hernandez questioned Bryan who indicated that he and J.C. had been talking about "cartoons and toys and stuff like that."

The juvenile court made specific findings of fact that J.C., who was 7 years old at the time, was swimming at the pool

with her sister when she floated by an older boy, Bryan. The court found that the exact date of the incident was not established, but that the evidence established close to the end of summer 2012, a week or so before school started. Bryan asked J.C. if she wanted to go get some candy or a treat and she went with Bryan, even though her mother had warned her to not go with strangers. Instead, Bryan took her to a "green hill" outside of the pool where he began kissing her on her mouth, cheeks, and stomach. The juvenile court found that Bryan pulled off the bottom of her "swim trunks" and kissed her on the "pee pee," and then proceeded to remove his swim trunks and penetrate her with his penis. The juvenile court found that there was no physical evidence of the assault and J.C. had no pain, but indicated that she could feel his "soft skin" inside of her. The juvenile court found that J.C. had directed Bryan to stop. The juvenile court indicated that J.C.'s testimony was credible and supported by the testimony of three other witnesses.

The juvenile court determined that the State had proven, beyond a reasonable doubt, the elements of first degree sexual assault, specifically that J.C. was led from the pool by Bryan by deception and by force when he grabbed her by the hand, that J.C. had directed Bryan to stop, and that the evidence presented by J.C. indicated that Bryan had penetrated J.C. by both placing his penis inside of her and through cunnilingus. The juvenile

court scheduled the case for a predisposition investigation and ordered Bryan to complete a psychological evaluation.

ASSIGNMENT OF ERROR

Bryan assigns that the State provided insufficient evidence to adjudicate him for first degree sexual assault without the consent of the victim.

STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

ANALYSIS

Bryan argues that the evidence was insufficient to adjudicate him as a child within the meaning of § 43-247(2) on the basis of first degree sexual assault. Bryan's arguments focus on the credibility of J.C.'s testimony.

When an adjudication is based upon § 43-247(1), (2), (3)(b), or (4), the allegations must be proved beyond a reasonable doubt. Neb. Rev. Stat. § 43-279(2) (Reissue 2008). Although an adjudication is not a criminal proceeding, we take guidance from the criminal laws of this state. *In re Interest of Adrian B.*, 11 Neb. App. 656, 658 N.W.2d 722 (2003).

The county court found that the exact date of the incident had not been established, although the evidence was sufficient

to prove that it had happened late in the summer of 2012, and given the "on or about" language in the information, the evidence of the incident occurring late in the summer was sufficient to establish the date of the offense.

Charging an individual with the commission of a crime anytime within the statute of limitations is sufficient. See *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). The evidence adduced at trial alleged that the specific acts of first degree sexual assault occurred only in one incident. The witnesses, both minors and adults, testified that the incident took place late in the summer before school. We agree that this evidence is sufficient for purposes of the date charged within the State's information.

Section 28-319(1) provides, in relevant part, that "[a]ny person who subjects another person to sexual penetration (a) without the consent of the victim, [or] (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree."

Bryan asserts that J.C.'s version of the events is not credible because of inconsistencies in her testimony, her age, a lack of physical evidence, and because she failed to seek out any help during the incident. Bryan apparently does not dispute that there was a sexual encounter; but rather that it was sexual

contact and not penetration. We disagree with all of those assertions.

The elements set forth in the sexual assault statute do not require the victim to present physical evidence, nor does the statute require the victim to seek out assistance. As to Bryan's arguments regarding J.C.'s credibility and penetration, we are mindful that, although an appellate court is required to reach a conclusion independent of the juvenile court's findings, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

In this case, the juvenile court found that J.C.'s testimony was credible and it accepted her version of the facts. J.C., who was 7 years old at the time of the incident, testified that Bryan made her go with him to the hill, that he made her lay down in the grass, that she did not want to go with him, and that when he was kissing and touching her she told him to stop and never to do it again. J.C. testified that Bryan kissed her on her pee-pee and also put his wiener in her pee-pee, and that she could feel his soft skin inside of her. Witnesses testified to seeing Bryan on top of a little girl and also pulling up his swim trunks after getting off of her. This evidence is

sufficient to establish that Bryan subjected J.C. to sexual penetration without her consent.

CONCLUSION

Based upon our de novo review, we conclude that the State adduced sufficient evidence to support the adjudication. Therefore, we affirm the order of the juvenile court.

AFFIRMED.