

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25474
H/hu

_____AD3d_____

Submitted - September 11, 2009

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2008-11066

DECISION & ORDER

In the Matter of Christian E. (Anonymous), appellant.

(Docket No. D-7780-07)

Steven Banks, New York, N.Y. (Tamara A. Steckler, Raymond Rogers, and Thomas Burrows of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Jane L. Gordon of counsel; James A. Gray, Jr., on the brief), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of disposition of the Family Court, Queens County (Lubow, J.), dated November 18, 2008, which, upon a fact-finding order of the same court dated February 14, 2008, made after a hearing, finding that the appellant had committed acts which, if committed by an adult, would have constituted the crimes of sexual abuse in the second degree and sexual abuse in the third degree, adjudged him to be a juvenile delinquent and placed him on probation for a period of 12 months with the directive, inter alia, that he perform community service.

ORDERED that the appeal from so much of the order of disposition as placed the appellant on probation for a period of 12 months is dismissed as academic, without costs or disbursements, as the period of probation has expired (see Matter of Daniel R., 51 AD3d 933); and it is further,

ORDERED that the order of disposition is reversed insofar as reviewed, on the facts, without costs or disbursements, the fact-finding order is vacated, the petition is dismissed, and the matter is remitted to the Family Court, Queens County, for further proceedings pursuant to Family

December 22, 2009

Page 1.

MATTER OF E. (ANONYMOUS), CHRISTIAN

Court Act § 375.1.

After a fact-finding hearing, the Family Court found that, during a seventh-grade shop class, the appellant committed acts which, if committed by an adult, would have constituted the crimes of sexual abuse in the second degree and sexual abuse in the third degree.

An element of the crimes of sexual abuse in the second and third degrees is that one must subject another person to “sexual contact” (Penal Law §§ 130.55, 130.60). “Sexual contact” is defined as “any touching of the sexual or intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party” (Penal Law § 130.00[3]).

Here, in light of the testimony of a classmate that no part of the appellant’s body was touching the complainant’s body during the subject incident, and in light of the complainant’s testimony that the appellant was not “putting pressure” on her body during the incident, the credible evidence did not support a finding that the appellant touched the complainant’s sexual or intimate parts. Thus, we agree with the appellant that the Family Court’s determination was against the weight of the evidence (*see Matter of Anthony W.*, 51 AD3d 808, 810; *Matter of Jonathan Z.*, 8 AD3d 397, 398; *Matter of Kyle O.*, 205 AD2d 541, 543). Accordingly, we reverse the order of disposition insofar as reviewed, vacate the fact-finding order, and dismiss the juvenile delinquency petition (*see* CPL 470.20[5]).

In light of our determination, we need not reach the appellant’s remaining contentions.

MASTRO, J.P., SANTUCCI, CHAMBERS and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court