

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 12, 2012

509699

In the Matter of DEVIN Z.,
Alleged to be a Juvenile
Delinquent.

TIOGA COUNTY ATTORNEY'S OFFICE,
Respondent;

MEMORANDUM AND ORDER

DEVIN Z.,
Appellant.

Calendar Date: November 17, 2011

Before: Peters, J.P., Malone Jr., Stein, Garry and Egan Jr., JJ.

Carman M. Garufi, Binghamton, for appellant.

Christian Root, Tioga County Law Department, Owego, for
respondent.

Peters, J.P.

Appeal from an order of the Family Court of Tioga County (Sgueglia, J.), entered March 9, 2010, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Petitioner commenced this juvenile delinquency proceeding against respondent (born in 1995) based upon allegations that he had engaged in sexual contact with the victim (born in 2000), his cousin, on multiple occasions beginning in 2007. Following a fact-finding hearing, Family Court found that respondent had committed acts which, if committed by an adult, would constitute the crime of course of sexual conduct against a child in the

second degree. Adjudged a juvenile delinquent, respondent was placed on probation for two years. Respondent appeals.¹

Respondent asserts that Family Court's determination was not supported by legally sufficient evidence and was against the weight of the evidence. In that regard, respondent places great emphasis on various inconsistencies in the victim's testimony and contends that her uncorroborated accounts as to what transpired are so implausible that her testimony must be rejected as a matter of law. At the fact-finding hearing, the victim testified that on numerous occasions when she stayed overnight at respondent's home, respondent would enter the bedroom where she and her female cousin, respondent's sister, slept and would touch her vaginal area. The victim explained that, when respondent would see the hall light turn on or hear his parents, he would run out of the room and into his own bedroom. The victim testified further that she did not report respondent's sexual touching, which occurred over a period of more than two years, because she did not want to ruin her relationship with her female cousin.

Although there were discrepancies between the victim's testimony and her prior statement concerning both the number of times respondent had subjected her to sexual contact during the relevant time period and the manner in which respondent effectuated the contact, these inconsistencies were understandable in light of the victim's young age and "did not relate to whether the described sexual touching occurred repeatedly over that period of time" (People v Weber, 25 AD3d 919, 921 [2006], lv denied 6 NY3d 839 [2006]; see People v Beauharnois, 64 AD3d 996, 998-999 [2009], lv denied 13 NY3d 834

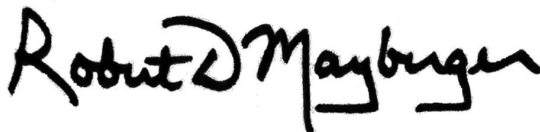
¹ Although respondent filed a notice of appeal from only the fact-finding order, which is not appealable as of right (see Family Ct Act § 1112 [a]; Matter of Barry H., 24 AD3d 1137, 1139 [2005]), we will treat the notice of appeal as an application for leave to appeal and grant the application (see Matter of Jared WW., 56 AD3d 1009, 1010 n [2008]; Matter of Jason FF., 224 AD2d 900, 900 [1996]).

[2009]; People v Nowinski, 36 AD3d 1082, 1084 [2007], lv denied 8 NY3d 989 [2007]; People v Stewart, 20 AD3d 769, 770 [2005]). Furthermore, despite the fact that neither the victim's female cousin nor respondent's mother ever observed respondent in the bedroom with the victim, we cannot conclude that the victim's testimony, when viewed in the context of the other evidence introduced at the hearing, was inherently unbelievable or incredible as a matter of law (see People v Stearns, 72 AD3d 1214, 1216 [2010], lv denied 15 NY3d 778 [2010]; People v Nowinski, 36 AD3d at 1084; People v Weber, 25 AD3d at 921). Viewed in a light most favorable to petitioner (see Matter of Timothy HH., 41 AD3d 913, 914 [2007]), the evidence presented – including the victim's testimony, which Family Court found "totally credible" – was sufficient to sustain the charge. Moreover, after independently weighing and considering the evidence and according deference to Family Court's credibility determinations, we are unpersuaded that the determination was contrary to the weight of the evidence (see People v Bleakley, 69 NY2d 490, 495 [1987]; Matter of Jared WW., 56 AD3d 1009, 1010-1011 [2008]; People v Weber, 25 AD3d at 921; People v Harp, 20 AD3d 672, 673 [2005], lv denied 5 NY3d 852 [2005]).

Malone Jr., Stein, Garry and Egan Jr., JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court