

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOSHUA L. KING

Defendant-Appellant

: JUDGES:

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Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Earle E. Wise, Jr., J.

Case No. 18-CA-19

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 17CR00596

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 18, 2019

APPEARANCES:

For Plaintiff-Appellee:

BILL HAYES
LICKING COUNTY PROSECUTOR

HAWKEN FLANAGAN
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant Joshua L. King appeals February 14, 2018 judgment entry of the Licking County Court of Common Pleas finding King guilty of Rape, in violation of R.C. 2907.02(A)(1)(b), and sentencing King to serve a minimum prison term of 15 years and a maximum term of life imprisonment. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

The Allegation

{¶2} N.D., born on August 12, 2009, lives with her grandmother and two brothers. N.D.'s mother lost custody of N.D. and her sons to Grandmother due to Mother's drug usage, but Mother was still involved in N.D.'s life. Mother was in a romantic relationship with Defendant-Appellant Joshua L. King for three years. Based on his relationship with Mother, King was a part of N.D.'s life.

{¶3} In February 2017, N.D. told her aunt that King made N.D. "suck his privates" when she was six years old. Mother confronted King with the allegation and attacked him with a knife, trying to cut his throat. The Newark Police Department responded and began an investigation into N.D.'s allegation. N.D. was taken to the emergency room at Licking Memorial Hospital.

The Investigation

{¶4} N.D. was referred from the emergency room to see Catherine Wohlford, a nurse practitioner trained as a pediatric sexual assault nurse examiner. She also works at Kids Place, a facility that provides medical care for children with suspected physical or sexual abuse. Wohlford assessed N.D. In response to the question of why she was there, N.D. responded that her Mother's boyfriend touched her. When asked what happened,

N.D. said, “In the middle of the night when my mom was sleeping he woke me up and made me suck his private – eww yuck.” (T. 26). N.D. reported that it only happened once. A physical examination did not reveal any physical evidence of sexual abuse. (T. 27). Based on her assessment, Wohlford diagnosed N.D. with child sex abuse and referred N.D. to mental health. (T. 28).

{¶5} N.D. was next seen in February 2017 by Sarah Benedetti, a clinical supervisor and clinician with Mid-Ohio Psychological Services. During her initial assessment, N.D. told Benedetti that Mother’s boyfriend made her suck his privates. (T. 38). N.D. said the incident occurred in 2015. (T. 39). Benedetti observed that N.D. displayed symptoms of trauma, including nightmares about the abuse, intrusive thoughts in her head, fear, anger, nervousness, and self-harming behaviors including trying to cut off her thumb to get the thoughts out of her head. (T. 40). N.D. described to Benedetti multiple times still being able to “feel hair in her mouth.” (T. 40).

{¶6} One of the tools in trauma-focused cognitive behavioral therapy is to create a “trauma narrative” in which the child tells their story. (T. 47). The trauma narrative process starts with the child generally describing themselves and who they are and then the child tells a happy story before the abuse occurred. Next, the child talks about the abuse, what happened after, and then finally the future. (T. 48). The child is continually exposed to the trauma narrative to increase comfort and decrease avoidance of the traumatizing experience. (T. 54). It allows the child to establish control over the incident. (T. 46).

{¶7} Benedetti worked with N.D. to create her trauma narrative. N.D. dictated and Benedetti typed as she spoke. Benedetti prompted her with questions and

clarifications; but because the trauma narrative was not a forensic document, it was not word for word. (T. 48). Chapter Four of N.D.'s trauma narrative, titled "The Bad Stuff," read:

One day when it was summer me and my and Joshua King was staying the night at his brother's. We went to his house. We was eating dinner all together. When it was nighttime he was sleeping in his brother's bed and his brother was not there. I was still watching cartoons in the baby's room on the bed when it was the middle of the night. I was not sleepy at all. And then he went in the room. He had creepy eyes looking very mean. I said I have to use the bathroom – or use the restroom and then he said hurry up. And he came in the bathroom and was staring at me creepy and he said, you will die of slow death. Cause he was trying to make up stuff that would get me creeped out. Then I went back to the bedroom. He said, what did you do with Blaine and Bryant? I said, I did not do nothing. Yes, you did. You played mom and dad with them. I said, that's already over last Halloween. And then he said, tell me the truth. And then he turned off the TV and it was very dark. And then he pulled down his pants and he said, suck my privates. And then I did, and I felt scared. The next morning, I thought my mouth felt like hair. I felt worried and very shy to tell it to my mom around him. That would be scary, but I reminded myself he is not going to do anything or kill me.

(T. 50-51, State's Exhibit 2).

{¶8} Benedetti stated that throughout N.D.'s counseling, N.D.'s retelling of the abuse was never different. (T. 54).

{¶9} After the initial report on January 21, 2017, Detective Steven Vanoy, a detective with the Newark Police Department, investigated N.D.'s allegations of sexual abuse against King. Det. Vanoy worked with Brandi Huffman, a caseworker from Licking County Children Services. Huffman interviewed N.D. on January 30, 2017, which was recorded on audio and video for Det. Vanoy to review. (T. 125). To Huffman, N.D. stated that she remembered the event because her tooth was loose. Several months passed and Det. Vanoy was able to interview N.D.'s family. Det. Vanoy interviewed King on July 3, 2017. During the interview, King repeatedly stated he did not remember the events from the night he allegedly sexually abused N.D. King also stated that he believed N.D. (State's Exhibit 5).

{¶10} As part of his investigation, Det. Vanoy produced records of communications between Mother and King on Facebook. In his communications, King expressed his love for Mother and her children. On February 25, 2017, King stated that he didn't remember the night, but he didn't think N.D. was lying. (T. 217). On June 1, 2017, King stated again that he did not remember anything because he was "as fucked up as you. I don't know after I took the bars * * *." (T. 218). On June 11, 2017, King wrote to Mother that he wasn't lying when he said he did not remember the whole night; but if N.D. said he did it, he did it. (T. 219).

{¶11} Det. Vanoy arrested King on July 5, 2017.

The Trial

{¶12} King was indicted by the Licking County Grand Jury on one count of Rape, a first-degree felony in violation of R.C. 2907.02(A)(1)(b). King was appointed a public defender after he entered a plea of not guilty to the charge.

{¶13} On February 12, 2018, the trial court held a child-witness competency hearing to determine if N.D. was competent to testify. The trial court found N.D. was competent.

{¶14} King waived his right to a jury trial.

{¶15} On February 13, 2018, King's case proceeded to a one-day bench trial. The trial court heard testimony from Catherine Wohlford, Sarah Benedetti, N.D., Det. Vanoy, Mother, and King.

{¶16} N.D. was eight years old at the time of trial and six years old at the time of the incident. She was asked to identify parts of the female and male bodies. She referred to the male genitalia as "balls." (T. 89). When asked whether anyone has shown her a private part, N.D. pointed to King in the courtroom and stated that he showed her his "balls." (T. 93). The prosecutor asked N.D. to tell her the whole story. N.D. testified:

We were going to stay the night at his brother's house, and we did. My mom slept in the adult's room with my little brother and Josh was in there too laying down and I was sleeping in the baby's room watching *Sponge Bob*. I was still awake because I wanted to stay up in the middle of the night. And then he came in and he turned off the light and the TV and he made me suck his balls.

(T. 94). N.D. was further asked:

Q. Okay. So how did his balls get in your mouth?

A. He put it in my mouth.

Q. Okay. And what did it feel like?

A. Hair.

Q. Hair. Did it feel hard, soft, or something else?

A. Soft.

(T. 98).

{¶17} Evidence was presented that N.D. had previously engaged in sexual play with her cousins, for which she had been punished by her family. Benedetti testified that it was normal for children to engage in sexual play if it was with similarly aged children and consensual. (T. 69, 70). N.D. had also revealed that she was in the room with Mother when Mother had sex with a boyfriend. N.D. had pretended to be asleep. Benedetti testified this incident occurred after the sexual abuse. (T. 80). King alleged that N.D. had previously lied about a man standing by her bus stop and grabbing himself. (T. 109). N.D. was instructed by Mother and King that lying was wrong.

{¶18} King testified in his own defense. At trial, King testified that he in fact did remember what happened the night he allegedly sexually abused N.D. (T. 194). Mother, King, and Mother's children were at King's brother's apartment with friends. The children were put to bed and Mother, King, and their friends were drinking and taking Xanax. (T. 184). King and Mother had a threesome with a friend, then went to bed. (T. 185). King denied sexually abusing N.D. that night. He stated he began taking drugs again after the accusation and that was one of the reasons why he admitted to abusing N.D. (T. 188). He also stated that he admitted to abusing N.D. because he loved Mother so much, he

felt Mother would speak to him again if he admitted to the act. (T. 190, 192). He agreed that he lied to Mother and Det. Vanoy when he said he believed N.D. (T. 195). When asked why he kept lying, even after he was arrested for the rape of N.D., King stated that he thought if Mother and her family saw him admitting to the abuse and knew he was lying, someone would step up and tell the truth. (T. 200).

The Verdict

{¶19} The trial court found the State met its burden of proof to establish King committed a violation of R.C. 2907.02(A)(1)(b) and found King guilty.

{¶20} The trial court first noted the inconsistent statements made by King: he told Mother he took responsibility for his actions; he told Det. Vanoy he did not remember abusing N.D. but had no reason to believe that she was lying; and he testified at trial he did not abuse N.D. The second part of the case that was significant for the trial court was N.D.'s testimony as to her experiences when she was ordered to give King oral sex. She stated that she could feel hair in her mouth. The trial court did not believe a seven-year-old child could have fabricated that imagery and repeated it to her therapist. The trial court also noted N.D. told Huffman during her interview that she remembered the event because her tooth was loose. The trial court found again this was a tactile experience that a seven-year-old could not make up. (T. 244-245).

{¶21} Via judgment entry filed February 14, 2018, the trial court sentenced King pursuant to R.C. 2971.03(B)(1)(b) due to the victim being less than ten years of age at the time of the offense. King was sentenced to a minimum prison term of 15 years and a maximum term of life imprisonment. The trial court ordered King to pay costs.

{¶22} It is from this judgment entry King now appeals.

ASSIGNMENTS OF ERROR

{¶23} King raises two Assignments of Error:

{¶24} “I. THE TRIAL COURT VIOLATED JOSHUA KING'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR RAPE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶25} “II. MR. KING WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO MOVE FOR WAIVER OF COSTS AT SENTENCING.”

ANALYSIS

I. Manifest Weight of the Evidence

{¶26} King argues in his first Assignment of Error that his conviction for rape was against the manifest weight of the evidence. We disagree.

{¶27} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury ‘clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.’” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶28} King was found guilty of one count of Rape pursuant to R.C. 2907.02(A)(1)(b), which states:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the person.

{¶29} When it found King guilty of rape, the trial court noted that N.D.'s testimony more credible than King's. King states N.D.'s alleged credibility was undercut by four reasons beyond the inconsistencies in her disclosure of the sexual abuse: (1) N.D.'s acquisition of sexualized knowledge unrelated to King; (2) influence of N.D.'s trauma narrative; (3) the lack of meaning in a "sexual abuse" diagnosis; and (4) N.D.'s admitted past of telling lies involving sexual victimization. The evidence in the record shows these issues were raised and addressed at trial.

{¶30} First, there was evidence that N.D. played "mom and dad" with her similarly-aged cousins. Benedetti addressed the activity, noting it was normative behavior for N.D.'s age, as long as the participants were similarly-aged, and it was consensual. Benedetti also stated N.D. was properly redirected from the behavior. There was also an allegation that N.D. witnessed Mother engage in a sexual act, but that was determined to have occurred after the sexual abuse by King.

{¶31} King next argues N.D.'s trauma narrative was given too great importance because it was written with the assistance of N.D.'s therapist. Benedetti described the trauma narrative as a therapeutic tool, not a forensic document. The evidence at trial

showed that N.D.'s story of King's sexual abuse remained consistent throughout the proceedings. N.D. shared her story with Wohlford, Benedetti, Huffman, and Mother. Their testimony demonstrated N.D.'s story, with minor inconsistencies, remained the same in each telling. The trauma narrative was relevant to demonstrate the consistency in N.D.'s story.

{¶32} Third, King contends Wohlford's diagnosis of N.D. with child sexual abuse should not be given any weight. The record shows the diagnosis, while relevant, was not the determining factor in finding King guilty. When the trial court gave its verdict, it found N.D.'s testimony weighed more than King's testimony.

{¶33} Finally, King states that N.D. was not credible because she once lied about a stranger at the bus stop who grabbed himself. At trial, N.D. was asked about the incident. She acknowledged she had been caught in the lie. She also agreed that Mother and King told her that she could not lie about things like that. (T. 109).

{¶34} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. Franklin No. 01AP-926, 2002-Ohio-2425, 2002 WL 1013033, ¶ 16. We defer to the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), at paragraph one of the syllabus. When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing

before it.” *State v. Pizzulo*, 11th Dist. Trumbull No. 2009-T-0105, 2010-Ohio-2048, 2010 WL 1839440, ¶ 11. Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Id.*

{¶35} In this case, the trial court found N.D.’s testimony to be more credible than King’s. King told Mother and Det. Vanoy that he could not remember the evening, but he believed N.D. At trial, King testified he lied to Mother and Det. Vanoy. He remembered the evening and denied abusing N.D. N.D.’s story remained consistent throughout the entire proceedings, repeating a salient and powerful image the trial court found a six-year-old child should not know: “I thought my mouth felt like hair.”

{¶36} King’s first Assignment of Error is overruled.

{¶37} II. Costs and Ineffective Assistance of Counsel

{¶38} King argues in his second Assignment of Error that trial counsel’s failure to file a motion to waive court costs at sentencing was ineffective assistance of counsel because King had previously been found indigent.

{¶39} In support of the waiver of court costs, King cites *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861. *Springer* conflicts with our decision in *State v. Davis*, 5th Dist. Licking No. 17-CA-55, 2017-Ohio-9445, and the present issue has been accepted for review by the Supreme Court of Ohio upon our certification of a conflict. See *State v. Ramsey*, 5th Dist. Licking No. 17-CA-76, 2018-Ohio-2365, ¶ 46. We held in *Ramsey* that “[u]nless a decision is rendered on the issue to the contrary in the future, this Court will continue to abide by its decision in *Davis*.” *Id.* See also *State v. Somers*,

5th Dist. Muskingum No. CT2018-0013, 2018-Ohio-4625; *State v. Bowen*, 5th Dist. Muskingum No. CT2017-0103, 2018-Ohio-4220.

{¶40} Accordingly, in conformity with *Ramsey*, we hold King was not deprived of the effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Ohio Constitution.

{¶41} King's second Assignment of Error is overruled.

CONCLUSION

{¶42} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Wise, Earle, J., concur.