[Cite as *State v. Rojas*, 2012-Ohio-1967.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-683 (C.P.C. No. 10CR-12-7040)
Romie L. Rojas,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 3, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Romie L. Rojas, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Romie L. Rojas, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶ 2} On December 3, 2010, a Franklin County Grand Jury indicted appellant with four counts of rape in violation of R.C. 2907.02 and four counts of gross sexual imposition in violation of R.C. 2907.05. The alleged victim of the offenses was appellant's girlfriend's daughter, who was under 13-years old at the time. Appellant proceeded to a jury trial. The state presented testimony from the alleged victim detailing appellant's conduct. The state also presented testimony from two professionals who saw the victim at a hospital. They both testified about information related by the victim during an interview at the hospital describing appellant's conduct. Two detectives with the

Columbus Police Department also testified about their interviews with appellant. One detective testified that appellant admitted to sexual conduct with the victim. During another of the interviews that was played to the jury, appellant admitted to a number of instances of sexual conduct with the victim.

{¶ 3} At trial, however, appellant denied ever touching the victim. He testified that he only admitted to the conduct because he felt pressured to do so by the police and because of personal matters in his life. The jury obviously rejected appellant's denials and found him guilty as indicted.

{¶ 4} Appellant appealed to this court. Appellant's appellate counsel, however, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) stating that she could find no meritorious issues for appellate review, and has moved to withdraw as counsel. We notified appellant of his appellate counsel's representations and afforded him ample time to file a pro se brief. Appellant filed such a brief. This case is now before us for our independent review of the record to decide whether the case is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75 (1988); *In re D.M.C.*, 10th Dist. No. 09AP-484, 2009-Ohio-6667, ¶ 10.

{¶ 5} Appellate counsel identified two possible appellate claims of ineffective assistance of counsel before concluding they were not meritorious: (1) was trial counsel ineffective for failing to object to the mention of a polygraph during the trial, and (2) was trial counsel ineffective for failing to move for acquittal pursuant to Crim.R. 29 at the close of the defense's case-in-chief. Additionally, appellant's pro se brief claimed that his convictions were not supported by sufficient evidence and were also against the manifest weight of the evidence.[1] For ease of analysis, we address appellant's pro se issue first.

Appellant's Second Potential Error — Sufficiency and Manifest Weight of the Evidence

{¶ 6} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, quoting *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. " '[T]hus, a

[1] The state requests that this court strike appellant's pro se brief because it was not timely filed. Appellant has also filed a motion to raise an additional potential issue on appeal not raised in his brief. We deny both motions.

determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.' " *Id.* In that regard, we first examine whether appellant's convictions are supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

{¶ 7} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179 ¶ 12.

{¶ 8} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 55. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 9} The jury found appellant guilty of multiple counts of rape and gross sexual imposition. In order to find him guilty of rape in this case, the state had to prove beyond a reasonable doubt that appellant engaged in sexual conduct with the victim, who was not

his spouse, and who was under 13-years old. R.C. 2907.02(A)(1)(b). Similarly, in order to find him guilty of gross sexual imposition in this case, the state had to prove beyond a reasonable doubt that appellant engaged in sexual contact with the victim, who was not his spouse, and who was under 13-years old. R.C. 2907.05(A)(4). The primary difference between the two crimes is that rape involves "sexual conduct" while gross sexual imposition implicates "sexual contact." Both phrases are defined in R.C. 2907.01:

> (A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
>
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

{¶ 10} In this case, the state alleged that appellant committed rape by engaging in vaginal intercourse, digital vaginal intercourse, fellatio, and cunnilingus with the victim. The victim, age 15 at the time of the trial, testified that appellant touched her private parts with his hands and also put his fingers and penis inside her private part. The hospital professional who talked with the victim testified that the victim told her that appellant had touched her private part with his hand and that he put his fingers and private part inside her private part. (Tr. 79.) A physical examination of the victim indicated that the condition of the hymen was consistent with penetration that the victim described. (Tr. 151.)

{¶ 11} Finally, appellant admitted to Les Gloege, a member of the Columbus Police Department, that he touched the victim's private parts and put his penis inside her. (Tr. 99-101.) In a subsequent interview with the police that was played to the jury, appellant admitted to multiple instances of sexual conduct with the victim in which, in total, he committed each type of sexual conduct alleged by the state: vaginal intercourse, digital vaginal intercourse, fellatio, and cunnilingus. (Tr. 246-62.) He also admitted to multiple instances of sexual contact, such as kissing and touching the victim.

{¶ 12} The victim's testimony, the testimony from the hospital professionals who interviewed the victim, the physical evidence, and appellant's own confessions to sexual conduct and contact with the victim provide credible evidence of appellant's guilt in this case. Appellant, however, argues that his convictions are against the manifest weight of the evidence because the victim's testimony was inconsistent. We disagree. A criminal defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Thompson*, 10th Dist. No. 08AP-22, 2008-Ohio-4551, ¶ 20-21. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and to determine whether the witnesses' testimony is credible and what weight to give to any alleged inconsistencies. *Id*., citing *Columbus v. Dials,* 10th Dist. No. 04AP-1099, 2005-Ohio-6305, ¶ 73. Appellant also notes that the victim was not clear as to when the offenses took place. However, this court has noted that young children do not have the temporal memory of an adult and often have problems remembering times. *In re Muth*, 10th Dist. No. 05AP-392, 2006-Ohio-1164, ¶ 8. Thus, it is not uncommon for children to have distorted time frame, and such failure would not necessarily render a conviction against the manifest weight of the evidence. *State v. Johnson*, 2d Dist. No. 2001-CA-14 (Feb. 15, 2002). Additionally, while appellant denied touching the victim at trial, it was within the province of the jury to disbelieve his denial and believe the state's witnesses and appellant's own earlier confessions to the police. *State v. Jackson*, 10th Dist. No. 06AP-1267, 2008-Ohio-1277, ¶ 15. The jury did not lose its way and create such a manifest miscarriage of justice that appellant's convictions must be reversed.

{¶ 13} Appellant's convictions are not against the manifest weight of the evidence. This conclusion is also dispositive of appellant's claim that his convictions were not supported by sufficient evidence. *Gravely* at ¶ 50.

Appellant's First Potential Error —Ineffective Assistance of Counsel

{¶ 14} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136,

143 (1989), quoting *Strickland* at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 15} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 16} Appellant first contends that his trial counsel was ineffective for failing to object to the mention of a polygraph during the trial. During a police interview that was played to the jury, appellant mentioned that "[b]ecause just like I was telling the guy at the – at the polygraph test, I said the incident." (Tr. 227.) Appellant claims that trial counsel acted deficiently by not obtaining the redaction of that comment from the recording and that the mere mention of a polygraph test prejudiced him. We disagree.

{¶ 17} Assuming trial counsel should have requested the redaction of the comment, we cannot say that the failure was prejudicial. This court has considered the following factors to determine whether the introduction of testimony regarding a polygraph examination is prejudicial: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *State v. Rowe*, 68 Ohio App.3d 595 (10th Dist.1990); *State v. Searles*, 5th Dist. No. 02 CA 4, 2003-Ohio-3498, ¶ 85-86. Here, while appellant did not object or request a cautionary instruction to the comment, the reference was an incidental, one-time reference to a polygraph test. The comment did not indicate whether appellant actually took a test and, if so, the results of the test. The comment also was not used to bolster a witness's credibility. We also note the overwhelming evidence of appellant's guilt. *See State v. Pruitt*, 8th Dist. No. 88208, 2007-Ohio-2497, ¶ 47 (no

prejudice from isolated comment regarding polygraph test where evidence against defendant was overwhelming).

{¶ 18} Appellant also complains about trial counsel's failure to move for a judgment of acquittal after his case-in-chief. As we have already determined, however, the state presented sufficient evidence to support his convictions. Therefore, appellant cannot demonstrate prejudice from trial counsel's failure, because the Crim.R. 29 motion would not have been successful. *State v. Burton*, 4th Dist. No. 06CA2892, 2007-Ohio-2320, ¶ 37; *State v. Messer-Tomak*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶ 32.

{¶ 19} After our independent review of the record, we are unable to find any non-frivolous issues for appeal, and we agree that the issues raised in appellant's *Anders* brief and his own pro se brief are not meritorious. Accordingly, we find no error in the trial court's judgment of conviction and sentence. *State v. Hinkle*, 10th Dist. No. 07AP-911, 2008-Ohio-4002, ¶ 12. We grant appellate counsel's motion to withdraw. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed;
appellant's counsel's motion to withdraw is granted;
appellee's motion to strike is denied;
appellant's pro se motion to raise an additional issue on appeal denied.

BROWN, P.J., and BRYANT, J., concur.