

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	No. 14AP-289
	:	(C.P.C. No. 13JU-08-10972)
D.M.D., Jr.,	:	
	:	(REGULAR CALENDAR)
(Appellant).	:	

D E C I S I O N

Rendered on March 26, 2015

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee State of Ohio.

Yeura R. Venters, Public Defender, and *David L. Strait*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

DORRIAN, J.

{¶ 1} Defendant-appellant, D.M.D., Jr. ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("Franklin County juvenile court"), overruling his objection to a magistrate's decision classifying him as a Tier III sex offender/child-victim offender. For the following reasons, we affirm.

{¶ 2} In January 2013, appellant was charged with rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b). Because the offense was committed in Hillsboro, Ohio, which is located in Highland County, and because appellant was age 16 at the time the offense was committed, the complaint was filed in the Highland County Court of Common Pleas, Juvenile Division ("Highland County juvenile court").

{¶ 3} A trial was conducted on July 26, 2013, before the judge of the Highland County juvenile court. The victim, B.K., testified that she was 11 years old in May 2012. She stated that, as of May 2012, she had been dating appellant for a few months, and that

she communicated with appellant through text messages and other applications on her iPod. B.K. stated that she planned to spend time with appellant on May 12, 2012, at her cousin's home. B.K. told her father that she planned to hang out with her cousin but admitted that she knew her cousin would not be present at the residence.

{¶ 4} B.K. testified that, on May 12, 2012, she went to her cousin's house and that, when she arrived, appellant was the only individual present. She testified that another individual, R.M., later arrived. B.K. stated that they were initially watching television while sitting on the couch but that, at some point, appellant told her to go into one of the bedrooms. B.K. testified that appellant also came into the bedroom and that they were sitting side by side on the bed talking. Appellant then removed her pants and underwear, while B.K. told him to stop. B.K. testified that appellant then licked her vagina. B.K. stated that appellant removed his own shorts and underwear before putting them back on and leaving the room. B.K. testified that, when appellant returned to the bedroom, he had a condom. She testified that appellant then lay down on the bed and pulled her on top of him, placing his penis inside her vagina and moving her up and down. B.K. testified that she told appellant to stop, but he refused. B.K. testified that appellant eventually stopped and they both put their clothes on and went back to the living room. B.K. stated that she remained at her cousin's house for a few hours until her father picked her up.

{¶ 5} B.K.'s father testified that he became concerned about B.K. on May 14, 2012; he confiscated her iPod and made a report to the Highland County Sheriff's Department the following morning. A detective from the Highland County Sheriff's Department testified that he investigated the case and referred B.K. to the Mayerson Center of the Cincinnati Children's Hospital for assessment and treatment. Cecilia Freihofer ("Freihofer"), a forensic interviewer at the Mayerson Center, testified that she interviewed B.K. on May 15, 2012. Freihofer testified that B.K. described the events of May 12, and that, as a result of the interview, Freihofer recommended a medical examination and mental health care. Dr. Elena Duma ("Dr. Duma") testified that she performed a physical examination of B.K. on May 15, 2012. Dr. Duma testified that the examination showed bruising and abrasion in B.K.'s genitals, along with edema of the hymeneal tissue, which was indicative of a recent injury. The state also presented evidence related to text messages retrieved from B.K.'s iPod.

{¶ 6} Appellant testified in his own defense and denied that he had any sexual contact with B.K. on May 12, 2012. He admitted that he and B.K. went into a bedroom for a time after R.M. arrived at the residence but asserted that the purpose was to finish a conversation that they were having and that they only kissed while in the bedroom. Appellant also testified regarding the text messages retrieved from B.K.'s iPod. Appellant's counsel also called as witnesses a forensic biologist and two forensic scientists from the Ohio Bureau of Criminal Investigation, who testified regarding samples taken from B.K. and from her clothing as part of the examination. This testimony established that there was no semen on any of the swabs taken from B.K. or the samples taken from her clothing but that there was amylase present on the samples taken from her underwear. Testing of these samples identified DNA from B.K. and two unidentified males, but concluded that appellant was not a match with either of the male DNA profiles.

{¶ 7} At the end of the trial, the Highland County juvenile court judge found that appellant was guilty of rape of a person less than 13 years of age, in violation of R.C. 2907.02(A)(1)(b). Because appellant resides in Franklin County, the case was transferred to the Franklin County juvenile court for disposition pursuant to Juv.R. 11(A). A magistrate of the Franklin County juvenile court conducted a dispositional hearing and classified appellant as a Tier III sexual offender/child-victim offender. Appellant filed an objection to the magistrate's decision. A judge of the Franklin County juvenile court issued a judgment overruling that objection.

{¶ 8} Appellant appeals from the judgment overruling his objection, assigning three errors for this court's review:

First Assignment of Error

The Juvenile Court erred by failing to use the factors enumerated in R.C. 2152.83 and R.C. 2929.12(C) before making its determination classifying Appellant as a Tier III offender.

Second Assignment of Error

The Juvenile Court erred and deprived Appellant of Due Process rights arising under the United States and Ohio Constitutions by imposing a punitive sanction that extends beyond the age jurisdiction of the court.

Third Assignment of Error

The judgment of the trial court is against the manifest weight of the evidence.

{¶ 9} In his first assignment of error, appellant asserts that the magistrate erred by failing to use the factors listed in R.C. 2152.83(D), which include by reference the factors set forth in R.C. 2929.12(C), before classifying him as a Tier III sex offender/child-victim offender.

{¶ 10} R.C. 2152.83(D) provides that "[i]n making a decision under division (B) of [R.C. 2152.83] as to whether a delinquent child should be classified a juvenile offender registrant, a judge shall consider all relevant factors, including, but not limited to [those listed in R.C. 2152.83(D)(1)-(6)]." R.C. 2152.83(B), which triggers the application of the factors under R.C. 2152.83(D), provides that a court that adjudicates a child to be a delinquent child may conduct a hearing at the time of the disposition or at the time of release from a secure facility for purposes of reviewing the effectiveness of the disposition and any treatment provided in the secure facility and to determine whether the child should be classified a juvenile offender registrant if certain criteria apply. R.C. 2152.83(B)(1). These criteria include that "[t]he child was fourteen or fifteen years of age at the time of committing the offense." R.C. 2152.83(B)(1)(b). In this case, appellant was 16 years old at the time he committed the offense. Thus, by its own terms, R.C. 2152.83(B) does not apply to appellant and, therefore, the magistrate did not err by not explicitly applying the factors set forth in R.C. 2152.83(D).¹ Moreover, we note that the magistrate explained his reasons for classifying appellant as a Tier III offender, and the court adopted the magistrate's decision by overruling appellant's objection to it.

{¶ 11} Accordingly, we overrule appellant's first assignment of error.

{¶ 12} In his second assignment of error, appellant argues that the Franklin County juvenile court violated his due process rights under the United States Constitution and the Ohio Constitution by imposing a sanction that extends beyond the age

¹ Appellant cites the Ohio Attorney General's Guide to Ohio's Sex Offender Registration and Notification Laws in support of his first assignment of error. We note that this guide indicates that, when a juvenile is classified as a juvenile offender registrant but not as a public registry qualified juvenile offender, "[c]ourts may wish to consider the factors listed in R.C. 2152.83(D), but are not required to do so." Ohio Attorney General, *Guide to Ohio's Sex Offender Registration and Notification Laws*, 27 (2009).

jurisdiction of the juvenile court. Appellant asserts that, because the jurisdiction of the juvenile court generally terminates when a child turns 21, imposing a punishment that extends beyond that age is unconstitutional. Appellant cites to the Supreme Court of Ohio's decision in *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, in support of his argument.

{¶ 13} This court previously considered a similar argument in *In re M.C.*, 10th Dist. No. 12AP-618, 2013-Ohio-2109. As explained in *M.C.*, the Supreme Court concluded in *C.P.* that automatic, lifelong registration and notification requirements for juvenile offenders under R.C. 2152.86 imposed an unconstitutional punishment, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *M.C.* at ¶ 79, citing *C.P.* at syllabus. However, in *M.C.*, the defendant was not designated as a sex offender under R.C. 2152.86; rather, he was designated as an offender under the discretionary provisions of R.C. 2152.83. The court explained that the *C.P.* decision was distinguishable because the defendant in *M.C.* was not subject to automatic lifetime reporting and notification requirements. *Id.* at ¶ 80-81. The court concluded that the reporting and registration requirements imposed on the defendant were not unconstitutional. *Id.* at ¶ 82.

{¶ 14} In the present case, as in *M.C.*, appellant was designated as a sex offender/child-victim offender under the discretionary provisions of R.C. 2152.83(A)(1). Pursuant to R.C. 2152.85, appellant will have an opportunity to petition for reclassification or declassification after a period of time designated under that statute. Thus, this case does not involve the type of automatic, lifelong registration and notification found to be unconstitutional in the *C.P.* decision.

{¶ 15} Accordingly, we overrule appellant's second assignment of error.

{¶ 16} In his third assignment of error, appellant argues that the judgment of conviction was against the manifest weight of the evidence. Under the manifest-weight-of-the-evidence standard, an appellate court examines the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25. "In other words, a reviewing court asks whose evidence is more persuasive—the state's or the defendant's?" *Id.* "When a court of appeals reverses a judgment of a trial court on the basis that the

verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, the court must determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created a manifest miscarriage of justice. *Id.* This authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 17} Appellant argues that his conviction was against the manifest weight of the evidence because B.K.'s credibility was questionable. Specifically, appellant argues that B.K. admitted to deceiving her father about whether there would be adult supervision on May 12. He also argues that there were discrepancies between B.K.'s testimony and the statement she gave to Freihofer as part of the examination. Finally, appellant asserts that the absence of his DNA in the samples taken from B.K. and from her clothing further diminishes her credibility.

{¶ 18} "A defendant is not entitled to reversal on manifest weight grounds merely because inconsistent evidence was offered at trial. The trier of fact is free to believe or disbelieve any or all of the testimony presented." *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶ 10. Although this court acts as a "thirteenth juror" when considering the manifest weight of the evidence, "it must also give great deference to the trier of fact's determination on the credibility of the witnesses." *Id.* The judge was present in the courtroom with the witnesses; therefore, he was in the best possible situation to assess the credibility of B.K., appellant, and the other witnesses. *See Ratliff v. Ohio Dept. of Rehab. & Corr.*, 133 Ohio App.3d 304, 309 (10th Dist.1999), citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984) ("[A] reviewing court must be guided by the presumption that the findings of the trial court are correct, as the trial judge 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.")

{¶ 19} In this case, the trial judge found B.K. to be a credible witness, and, after reviewing the evidence, we cannot conclude that the judge clearly lost his way in finding her testimony to be credible. In her description of the events of May 12, B.K. testified that

appellant was not wearing a condom when he initially removed his shorts and underwear and that he left the room and returned with a condom. By contrast, Freihofer testified on cross-examination that, in her interview, B.K. indicated that appellant must have been wearing the condom prior to entering the bedroom and that he did not leave the bedroom during the incident. The trial judge was aware of this alleged inconsistency, and appellant's counsel specifically addressed it in his closing argument. Likewise, B.K. admitted that she deceived her father regarding whether there would be adult supervision on May 12. Once again, appellant's counsel solicited this testimony on cross-examination and raised it in his closing argument. It was within the province of the trial judge, acting as the finder of fact, to take this testimony into consideration in determining B.K.'s credibility. *See State v. Rivera*, 10th Dist. No. 10AP-945, 2012-Ohio-1915, ¶ 44 ("Here, the jury was well aware of the fact that the defense had introduced testimony to contradict the testimony of S.K. It was within the province of the jury to take this into consideration when weighing the evidence in order to determine whether or not it found S.K.'s testimony credible."); *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 17 ("Although discrepancies in the victim's testimony may have impeached Martinez' credibility, the jury nonetheless chose to believe her, and this record presents no basis to set aside the jury's assessment."). In this case, the Highland County juvenile court judge noted in his decision that there were inconsistencies in B.K.'s testimony and still found appellant guilty, concluding that B.K. was an "extremely credible witness." (Tr. at 281-82.)

{¶ 20} With respect to the DNA evidence, B.K. testified that she had showered once and changed clothes two or three times between May 12, when the incident occurred, and May 15, when she was examined and the samples were taken. The Highland County juvenile court judge noted this testimony in explaining his decision. Under these circumstances, the lack of appellant's DNA in the samples taken from B.K. and from her clothing does not necessarily undermine B.K.'s credibility. *See Rivera* at ¶ 45 ("[T]he lack of physical evidence such as DNA and/or fingerprint evidence linking this particular offender to the crime is not fatal to a conviction, given the circumstances at issue here.").

{¶ 21} "[T]he testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42. *See also State v. H.H.*, 10th Dist. No. 10AP-1126, 2011-Ohio-6660, ¶ 27. In this case, however,

there was additional testimony and physical evidence corroborating B.K.'s testimony. Freihofer testified that B.K. reported that appellant forced her to engage in intercourse and that she told appellant she did not want to have intercourse with him. Freihofer also testified that B.K. reported that appellant had oral sex with her. Dr. Duma testified that her physical examination of B.K.'s genitals revealed bruising and abrasion, as well as edema, or swelling, of the lower third of the hymen. Dr. Duma testified that these findings were consistent with a recent injury to the area. The state also presented evidence taken from B.K.'s iPod, including a text message from appellant on May 14, 2012, reading in part, "hey, does your sister know what happened on Saturday?" Although appellant testified that this message merely referred to appellant, B.K., and R.M. being alone without adult supervision, the trial judge could have inferred that appellant was referring to the sexual assault.

{¶ 22} Based on the evidence presented at trial, we cannot conclude that the trial judge clearly lost his way in finding B.K.'s testimony to be credible and in finding appellant guilty of rape. Appellant's conviction was not against the manifest weight of the evidence.

{¶ 23} Accordingly, we overrule appellant's third assignment of error.

{¶ 24} For the foregoing reasons, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

TYACK and KLATT, JJ., concur.
