[Cite as *State v. W.R.*, 2015-Ohio-739.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-487 (C.P.C. No. 13CR-3327)
v.	:	(REGULAR CALENDAR)
[W.R.],	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 3, 2015

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, W.R., appeals from the judgment entry of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of sexual battery and one count of unlawful sexual conduct with a minor. Because sufficient evidence and the manifest weight of the evidence support W.R.'s convictions we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed June 21, 2013, the State of Ohio, plaintiff-appellee, charged W.R. with one count of rape, in violation of R.C. 2907.02, a felony of the first degree, one count of sexual battery, in violation of R.C. 2907.03, a felony of the third degree, and one count of unlawful sexual conduct with a minor, in violation of R.C.

2907.04, a felony of the third degree. The charges related to the events of June 11, 2013 and involved the same victim, D.A. W.R. entered a plea of not guilty to all charges, and the parties proceeded to a jury trial.

{¶ 3} According to the evidence at trial, D.A. testified that W.R. was visiting family in Twinsburg, Ohio on June 9, 2013. When he left to return home he invited D.A., his 15-year-old cousin, to come with him to Columbus where he lived with his girlfriend and her two children. D.A. agreed and they drove to Columbus on the evening of June 11, 2013. D.A. went outside to smoke around 10:00 p.m. that evening and W.R. joined her. He offered her "fire water," a strong alcoholic beverage, which she drank. (Tr. Vol. I, 26.) He then gave her a marijuana joint. After she took one "hit," she began vomiting and could not walk, talk or see clearly. (Tr. Vol. I, 28.) W.R. walked D.A. to the side of the house where she continued to vomit. He then slammed her to the concrete patio on her back. She saw W.R. on top of her, realized her pants were down, and felt like something was touching her "private." (Tr. Vol. I, 31-32.)

{¶ 4} The evidence also included three separate occasions on which W.R. confessed to having sex with D.A. on the night of June 11, 2013. D.A. testified she confronted W.R. the next day and he confessed to having sex with her. When Detective Timothy Elkins interviewed W.R., W.R. admitted having sex with D.A. While in custody, W.R. also admitted to his girlfriend on the telephone that he had sexual intercourse with D.A.

{¶ 5} Following deliberations, the jury returned a not guilty verdict on the rape charge and guilty verdicts on the sexual battery and unlawful sexual conduct with a minor charges. At a May 16, 2014 sentencing hearing, the trial court merged the sexual battery and unlawful sexual conduct with a minor counts and imposed a sentence of three years imprisonment. The trial court journalized its entry on May 20, 2014. W.R. timely appeals.

II. Assignment of Error

{¶ 6} Appellant assigns the following error for our review:

> [1.] The trial court erred and deprived appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article One Section Ten of the Ohio Constitution by finding him guilty of sexual

> battery and unlawful sexual conduct with a minor as those verdicts were not supported by sufficient evidence and were also against the manifest weight of the evidence.

{¶ 7} In his sole assignment of error, appellant argues his convictions for sexual battery and unlawful sexual conduct with a minor were not supported by sufficient evidence and were against the manifest weight of the evidence. We disagree.

A. Sufficiency of the Evidence

{¶ 8} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id*. The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 9} Defining the offense of sexual battery, R.C. 2907.03 states, in relevant part, that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired." R.C. 2907.03(A)(2). Similarly, unlawful sexual conduct with a minor is defined as engaging in "sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard." R.C. 2907.04(A). Pursuant to R.C. 2907.01, sexual conduct means "vaginal intercourse between a male and female; * * * and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A)(1).

{¶ 10} Here, the victim testified W.R. served her "fire water" and gave her marijuana. She explained that after finishing the drink, she "hit" the blunt and began vomiting. After walking to the side of the building and continuing to vomit near some tire stacks, the victim testified that W.R. slammed her on her back on the concrete padding

next to the tires. She saw W.R. on top of her, realized her pants were down, and felt like something was touching her private.

{¶ 11} W.R. does not argue the events did not occur. Instead, W.R. argues the state failed to prove the victim was not the spouse of the defendant as required in R.C. 2907.03 and 2907.04. However, this court has determined that "a showing that the alleged victim was not the spouse of the offender at the time of the alleged offense is not an element to be proved in establishing the commission of the offense. Rather, it is a defense, commonly referred to as the 'marital privilege,' 'marital defense' or 'spousal exemption,' which a defendant may raise in certain legislatively prescribed circumstances involving alleged sexual misconduct." *State v. Stricker*, 10th Dist. No. 03AP-746, 2004-Ohio-3557, ¶ 17, citing *State v. Rittenhour*, 112 Ohio App.3d 219, 221 (3d Dist.1996).

{¶ 12} Although *Stricker* involved only a sexual battery conviction, this court's analysis that a showing of whether the victim and offender are spouses is not an element of the crime but is a defense also applies, by logical extension, to a conviction for unlawful sexual conduct with a minor. Both statutes use the same "not the spouse of the offender" language. Both charges are sex offenses in violation of R.C. Chapter 2907, and both use the same definition of sexual conduct contained in R.C. 2907.01(A)(1). Further, both statutes contemplate the harm stemming from the victim's inability to properly consent to the activity. Thus, we reiterate our holding in *Stricker* that a showing that the victim was not the spouse of the offender is not an element to prove in establishing the commission of the offense, and we apply it more generally to the sexual assault offenses contained in R.C. Chapter 2907, including unlawful sexual conduct with a minor.

{¶ 13} Because we conclude there was sufficient evidence to sustain both W.R.'s sexual battery and unlawful sexual conduct with a minor convictions, we must next determine whether those convictions are nonetheless against the manifest weight of the evidence.

B. Manifest Weight of the Evidence

{¶ 14} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "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." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Thus, the jury may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 15} An appellate court considering a manifest weight challenge "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." *State v. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 16} W.R. combines his sufficiency of the evidence and manifest weight arguments. W.R. asserts the jury clearly lost its way because the state failed to prove that the victim was not his spouse under both the sexual battery and unlawful sexual conduct with a minor charges. As explained above, whether the victim is the spouse of the offender is a defense, not an element of the crime the state is required to prove. *See Stricker* at ¶ 17.

{¶ 17} In light of the evidence discussed above, as well as the record in its entirety, we do not find the jury clearly lost its way in concluding W.R. committed the offenses of sexual battery and unlawful sexual conduct with a minor. Having concluded that both the sufficiency and manifest weight of the evidence support W.R.'s convictions of sexual battery and unlawful sexual conduct with a minor, we overrule W.R.'s sole assignment of error.

III. Disposition

{¶ 18} Based on the foregoing reasons, the sufficiency of the evidence and the manifest weight of the evidence support W.R.'s convictions. Having overruled W.R.'s assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and BROGAN, JJ., concur.

BROGAN, J., retired of the second appellate district, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).