[Cite as *State v. Morgan*, 2010-Ohio-1720.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-07-029 CA2009-08-033
	:	
- vs -	:	O P I N I O N
	:	4/19/2010
DONIE R. MORGAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2008-2034

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Katherine A. Szudy, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Donie Morgan, appeals his conviction of 33 counts of rape from the Brown County Court of Common Pleas. We affirm.

{¶2} Appellant began dating C.M.'s mother in 2000, and moved in with the family that same year. While at school on November 13, 2007, C.M. became upset during a science class discussion of "sex cells." C.M. was in the sixth grade and two days from her 12th birthday. She started crying and asked her teacher if she could go into the hallway.

C.M. asked her homeroom teacher, whose classroom was across the hall, if she could talk. Visibly upset, C.M. disclosed that appellant "raped her, that it had happened for awhile, and she was sick of it." The school counselor was contacted to provide assistance.

{¶3} Shortly thereafter, Brown County Children's Services was contacted and an investigator from the agency was dispatched to the middle school. During the investigator's initial interview, C.M. disclosed that she had been raped multiple times per week for several years and indicated that she no longer felt safe at home. C.M. and the caseworker, along with another investigator from children's services, went to the residence to speak with C.M.'s mother. After hearing the allegations, C.M. was taken for a physical examination, which revealed injury to her vagina and hymen.

{¶4} Appellant was indicted on 44 counts of rape, the first 17 with the specification that C.M. was less than ten years of age when the crime occurred. During a jury trial, C.M. testified to the alleged instances of rape. She testified regarding three specific instances of rape in November 2007, July 2007, and March 2007. On those dates, C.M. claimed that appellant entered her bedroom while her mother was at work and engaged in vaginal intercourse with her. C.M. further testified that the improper sexual conduct began when she was five years of age. C.M. testified that appellant would play a game called "guess the candy" at least twice a week where he would place his penis in her mouth. This occurred while the family lived on Hoff Avenue. After the family moved to Felicity, appellant began to engage in vaginal intercourse with her, "mainly five times a week." C.M. testified that at the family's second Felicity address, appellant vaginally raped her approximately two times per week. Finally, once the family moved to Dunbar Road, appellant began raping her three to four times each week.

{¶5} The jury found appellant guilty of counts one through seven and their

specifications, and counts 18 through 44. The trial court imposed an aggregate prison term of 95 years to life and classified appellant as a Tier III sexual offender. Appellant timely appeals, raising four assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY CONVICTING DONIE MORGAN BASED UPON MULTIPLE, IDENTICAL, AND UNDIFFERENTIATED COUNTS OF A SINGLE OFFENSE, DENYING HIM DUE PROCESS OF LAW AND VIOLATING THE DOUBLE JEOPARDY CLAUSE. FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; SECTION 10 ARTICLE I, OHIO CONSTITUTION."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT VIOLATED DONIE MORGAN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT ENTRY CONVICTING MR. MORGAN OF COUNTS ONE THROUGH SEVEN; EIGHTEEN THROUGH THIRTY-THREE; THIRTY-FIVE THROUGH THIRTY-EIGHT; AND FORTY THROUGH FORTY-THREE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶10} We will address appellant's first and second assignments of error since he challenges the sufficiency of the indictment and evidence in both. First, relying upon *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, appellant argues that the indictment in this case and his convictions violate the due process and double jeopardy clauses because he was convicted based upon a pattern of conduct, not separate and distinct charges. Appellant argues that C.M. only testified regarding three specific instances of rape. Appellant concedes that sufficient evidence was presented to convict him of those three counts, but the evidence was insufficient to convict him of the remaining counts.

Indictment

{¶11} The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident. *State v. Buehner,* 110 Ohio St.3d 403, 2006-Ohio-4707, ¶7. "An indictment meets constitutional requirements if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *State v. Childs*, 88 Ohio St.3d 558, 564-565, 2000-Ohio-425, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887.

{¶12} The defendant in *Valentine* was indicted on 20 counts of rape and 20 counts of felonious sexual penetration. *Valentine* at 628. Each count was identically worded with no differentiation among the separate charges. Id. Specifically, each rape count alleged that between March 1, 1995 and January 16, 1996, Valentine unlawfully engaged in sexual conduct with his stepdaughter, being under the age of 13 years. Id. at 629. Similarly, each felonious sexual penetration count alleged that between March 1, 1995 and January 16, 1996, Valentine unlawfully inserted his finger into the vaginal or anal cavity of his stepdaughter. The Sixth Circuit noted that "large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements." Id. at 632. "It is well established that, particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity." Id., citing *State v. Daniel* (1994), Ohio App.3d 548, 556.

{¶13} Rather, the due process violation identified in *Valentine* resulted from the use of multiple, identically worded counts of sexual abuse with no specificity regarding the factual offenses allegedly committed. Id. at 632 and 635. "Valentine was prosecuted and

convicted for a generic pattern of abuse rather than for forty separate abusive incidents." Id. at 634. "The trial court acknowledged that the jury would either convict Valentine on all forty counts or acquit him of all forty counts." Id.

{¶14} After review of the indictment, we find no constitutional violation. The indictment in this case did not contain identical, "carbon-copy" counts of rape. Each count in the indictment provided a different time period for each offense. See *State v. Meador*, Warren App. No. CA2008-03-042, 2009-Ohio-2195, ¶12; *State v. Haverland*, Hamilton App. No. C-050119, 2005-Ohio-6997, ¶38. Specifically, each count alleged a one-to-two-month time period when the conduct allegedly occurred. Further, the bill of particulars specified the different addresses where each offense allegedly occurred and the age of the victim. *State v. VanVoorhis*, Logan App. No. 8-07-03, 2008-Ohio-3224, ¶40. Appellant never requested a more specific bill of particulars, nor claimed an alibi defense. Instead, appellant argued at trial that the conduct never occurred. As a result, appellant was not prejudiced by any lack of specific dates. *Meador* at ¶14. See, also, *State v. Crawford*, Richland App. No. 07 CA 116, 2008-Ohio-6260, ¶43. Further, the jury could differentiate between the charges, and did so, finding appellant not guilty of 11 counts. *State v. Heft*, Logan App. No. 8-09-08, 2009-Ohio-5908, ¶54.

SUFFICIENCY

{¶15} In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Lucas,* Tuscarawas App. No. 05AP090063, 2006-Ohio-1675, ¶8; *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Haney,* Clermont App. No. CA2005-07-068,

2006-Ohio-3899, ¶14, quoting *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶16} Appellant was convicted of 33 counts of rape in violation of R.C. 2907.02(A)(1)(b). The statute governing rape provides, "[n]o 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 * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Id.

{¶17} Conceding that the state presented sufficient evidence to support a conviction for three counts of rape, appellant argues the evidence offered by the state was insufficient for the remaining counts. Appellant cites *Valentine* and *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, arguing that the state failed to produce fact-specific evidence for each count of rape.

{¶18} The victim in *Hemphill* testified that when she was 12 or 13 the defendant "would pull my pants down and he would take his private part inside of mine and have sex with me." Id. at ¶80. She testified that he had intercourse with her and touched her breasts 33 times. Id. at ¶83-87. Relying upon *Valentine*, the Eighth District Court of Appeals concluded that the numerical estimate offered was insufficient to convict the defendant of multiple counts of rape because it was "unconnected to individual, distinguishable incidents." Id. at ¶88.

{¶19} We find clear contrasts between the ambiguous, indistinguishable testimony in *Hemphill* and the case at bar. It is well-established that, particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity. *State v. Daniel* (1994), 97 Ohio App.3d 548, 556. This is especially true where the crimes involved a repeated course of

conduct over an extended period of time. *State v. Mundy* (1994), 99 Ohio App.3d 275, 296; *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652, 1987 WL 7153. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Robinette* at *3.

{¶20} This case relates more closely to the evidence presented in another Eighth Appellate District case, *State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129, in which the court explicitly distinguished *Hemphill*. Unlike the victim in *Hemphill*, who testified to 33 unspecified instances of rape, the victim in *Coles* provided definitive timeframes, details and frequency of the abuse. The victim recalled that when the family lived in Lakewood, Coles, her stepfather, would wake her up when he was drunk and her mother was asleep. Id. at ¶39. He would tell her to come into his room, take off her clothes, and have sex with him. Id. The victim testified that the abuse occurred "probably twice a week" for the year she was living in Lakewood. Id. When the family moved to Parma with Coles, the victim testified that the abuse intensified, occurring "almost every day" in the basement, her bedroom, or Coles' bedroom. Id. at ¶40. She said Coles made her have sex with him just like when they lived in Lakewood and usually occurred while her mother was at work or during the night. Id. She became pregnant by Coles and had an abortion. Id. Coles threatened her to "blame it on one of [her] guy friends." Id. Coles then made her have sex with him beginning one week after the abortion and made her have sex with him "a couple times a week" until the family moved to Iowa. Id.

{¶21} The Eighth Appellate District found the victim "was able to put each incident in a time frame by detailing where it happened and which house she was living in. She was also able to place certain offenses within a particular time frame by tying the offenses to her grade in school." Id. at ¶42, citing *State v. Crosky*, Franklin App. No. 06AP-655,

2008-Ohio-145; *State v. Lawwill*, Cuyahoga App. No. 88251, 2007-Ohio-2627. Additionally, the court found that unlike *Valentine* and *Hemphill*, other supporting evidence was submitted to support the victim's testimony. The victim's mother admitted that Coles and the victim were "lovers" and the medical records substantiated an abortion in April 2004. Id. Ultimately, the court concluded that the testimony was sufficient to support Coles' convictions for rape. Id. at ¶46.

{¶22} The victim in *VanVoorhis* was subjected to a similar multi-year pattern of abuse. The victim would visit VanVoorhis in the summer beginning in 1994 when the victim was five years old. 2008-Ohio-3224 at ¶50. The victim testified that, just before he turned six years of age, he would be sleeping on the floor at VanVoorhis' home, VanVoorhis pulled him up to the bed by his arms, and pulled down the victim's pants to fondle him. Id. at ¶51. The victim testified that this occurred every summer he visited his grandmother and VanVoorhis. Id. at ¶52. The victim testified that when he turned ten in 1998, VanVoorhis began to have anal sex with him. Id. at ¶53. After the victim began the fifth grade while living with his father, he visited VanVoorhis more frequently and recalled that the abuse continued under these changed circumstances. Id. The victim specifically testified that oral sex occurred every year from 1994-2003, and that anal sex occurred every year from 1998-2003. Id. at ¶54. The court found that the testimony was corroborated by the recollections of the victim's parents, who both remember the victim spending a significant portion of his free time during all of those years at VanVoorhis' home. Id. The victim specifically recounted that the anal sex occurred less frequently than the oral conduct. Id. at ¶55. However, he testified that both kinds of abuse continued until he was 17 years of age, when he finally asked VanVoorhis to stop. Like the *Coles* court, the Third Appellate District concluded that the evidence was sufficient to support VanVoorhis' convictions. Id. at ¶62.

{¶23} As in *Coles* and *VanVoorhis*, the state presented sufficient evidence to support appellant's convictions. In this case, C.M. testified that appellant began engaging in sexual conduct with her when she was five years of age. Appellant would play a "guess the candy game" with her, wherein he would blindfold her and place his penis inside her mouth. According to C.M., this conduct occurred "twice a week" while the family lived on Hoff Avenue. Once the family moved to Felicity, C.M. testified that appellant began to have vaginal sex with her. According to C.M., appellant would "come in my room when I was sleeping, my mom was gone and stuck his penis in my vagina and do what he wanted to do." She stated that the rape would last for about five minutes and occurred "mainly five times a week." C.M. testified that the intercourse became less frequent, to about three times per week, after appellant got injured by a ladder. Once the family moved to a second home in Felicity, the conduct occurred "maybe like twice a week." Thereafter the family moved to Dunbar Road. At that address, C.M. stated that appellant would put his penis in her vagina "three to four times a week."

{¶24} Like the victim in *Coles*, C.M. placed the repeated instances of abuse in context with her age, her year in school, and the homes in which she resided. C.M.'s testimony was not merely general, ambiguous claims of abuse as in *Hemphill*. Further, the sexual conduct was supported by results of the medical examination, which revealed injury to C.M. As a result, we find appellant's convictions are supported by sufficient evidence.

{¶25} Appellant's first and second assignments of error are overruled.

{¶26} Assignment of Error No. 3:

{¶27} "THE TRIAL COURT VIOLATED DONIE MORGAN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR COUNTS ONE THROUGH SEVEN; EIGHTEEN THROUGH THIRTY-THREE;

THIRTY-FIVE THROUGH THIRTY-EIGHT; AND FORTY THROUGH FORTY-THREE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶28} In his third assignment of error, appellant argues that the 30 unspecific convictions are against the manifest weight of the evidence. Appellant argues that the victim's testimony relating to those counts was "extremely vague" and "neither certain nor reliable."

{¶29} "Unlike a sufficiency of the evidence challenge, a manifest weight challenge 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.*] *Carroll*, [Clermont App. Nos. CA2007-02-030, 2007-03-041, 2007-Ohio-7075] at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing [*State v.*] *Hancock,* [108 Ohio St.3d 57], 2006-Ohio-160 at ¶39. Under a manifest weight challenge, the question is whether, in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Good* at ¶25. This discretionary power would be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Heflin,* Summit App. No. 21655, 2003-Ohio-7181, ¶5." *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶18.

{¶30} The credibility of the victim is a matter for the jury to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. Accordingly, the trier of fact must be given the appropriate deference with regard to credibility issues. *Ardrey v. Ardrey,* Union App. No. 14-03-41, 2004-Ohio-2471, at ¶17. This Court must not substitute its judgment for that of

the trier of fact on the issue of witness credibility unless it is patently clear that the finder of fact lost its way. *State v. Parks,* Van Wert App. No. 15-03-16, 2004-Ohio-4023, at ¶13, citing *State v. Twitty,* Montgomery App. No. 18749, 2002-Ohio-5595, at ¶114.

{¶31} After review of the record, we find no indication that C.M. was unreliable or that the jury clearly lost its way in convicting appellant of the contested rape charges. C.M. testified regarding a seven-year period of continuing and frequent sexual abuse, which was confirmed by a medical examination. C.M.'s testimony relating to the conduct was descriptive and placed within the specific context of where it occurred and the frequency. The case demonstrates that the trier of fact carefully considered the evidence presented, including acquitting appellant on 11 counts. Accordingly, we find that appellant's conviction is not against the manifest weight of the evidence.

{¶32} Appellant's third assignment of error is overruled.

{¶33} Assignment of Error No. 4:

{¶34} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE STATE TO ASK C.M. LEADING QUESTIONS IN REGARDS TO COUNTS ONE THROUGH SEVEN; EIGHTEEN THROUGH THIRTY-THREE; THIRTY-FIVE THROUGH THIRTY-EIGHT; AND FORTY THROUGH FORTY-THREE."

{¶35} In his final assignment of error, appellant argues that the prosecution improperly asked the victim leading questions during direct examination regarding the unspecific counts of rape and the trial court abused its discretion by allowing the questioning in violation of Evid.R. 611(C).

{¶36} "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may

be by leading questions." Evid.R. 611(C).

{¶37} "[I]t is within the trial court's discretion to allow leading questions on direct examination." *State v. Jackson*, 92 Ohio St.3d 436, 449, 2001-Ohio-1266. Absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶38} Furthermore, "Ohio case law has explained that the trial court is to be given latitude in such matters, especially in cases involving children who are the alleged victims of sexual offenses." *State v. Liddle*, Summit App. No. 23287, 2007-Ohio-1820, ¶30, citing *State v. DeBlasis*, Cuyahoga App. No. 81126, 2004-Ohio-2843, ¶44; and *State v. Holt* (1969), 17 Ohio St.2d 81, 83. Leading questions are often permitted in order to pinpoint specific details and times. Id., citing *State v. Madden* (1984), 15 Ohio App.3d 130, 133.

{¶39} After review of the record, we find no abuse of discretion by the trial court in this case. Before asking the leading questions complained of by appellant, C.M. had already described three detailed instances of abuse, as well as two different ways that appellant had abused her: oral and vaginal penetration. Further, the victim had also testified regarding the four locations where the sexual abuse occurred and what type of abuse she suffered at each location. The leading questions were used only to elicit specific dates the sexual acts occurred and the frequency of the acts during each time period.

{¶40} Appellant's fourth assignment of error is overruled.

{¶41} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

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