[Cite as *State v. Silverman*, 2010-Ohio-6489.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22097
v.	:	T.C. NO. 2006 CR 2816
DORON C. SILVERMAN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 29th day of December, 2010.

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DONOVAN, J.

{¶ 1} This matter was remanded to this Court from the Supreme Court of Ohio on December 22, 2009, with instructions to consider Doron Silverman's remaining three assignments of error in his direct appeal, which was filed on March 22, 2007. On February 15, 2008, this Court had determined that the trial court, in Doron Silverman's trial on two

counts of rape and one count of gross sexual imposition, erred in admitting statements made by the deceased four year old victim, M.S., Doron's son, in the absence of a determination of the child's competence. We remanded the matter to the trial court for further proceedings, and the facts of this matter were set forth in detail in our decision. We also determined that the trial court did not err in overruling Doron's motion to suppress, and that it did not err in failing to grant a change of venue. We further found that Doron's remaining three assigned errors, IV, V, and VI, were rendered moot by our decision reversing and remanding the matter due to the admission of M.S.'s statements. Thereafter, the Supreme Court reversed our decision regarding the admission of M.S.'s statements, and Doron filed a Motion asking this Court to Rule upon Appellant's Assignments of Error IV, V, and VI, which we declined to do absent a remand from the Ohio Supreme Court. Doron then filed a Motion to Clarify the Court Judgment with the Supreme Court, and the Supreme Court granted the motion and remanded the matter to this court with instructions to consider Silverman's IV, V and VI assignments of error. We do so here.

{¶ 2} Doron's fourth assigned error is as follows:

{¶ 3} "THE TRIAL COURT ERRED IN DESIGNATING APPELLANT AS A SEXUAL PREDATOR AND A HABITUAL SEXUAL OFFENDER."

{¶ 4} Pursuant to the statutory scheme in effect at the time of Doron's trial, a habitual sex offender is a person who is convicted of or pleads guilty to a sexually oriented offense and who previously has been convicted of or pleaded guilty to one or more sexually oriented offenses. R.C. 2950.01(B)(1) and (2)(a). In order to classify Doron as a sexual predator, the trial court was required to determine, by clear and convincing evidence, that he had been

convicted of or pled guilty to a sexually oriented offense and "is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E); *State v. Van Lieu* (Nov. 22, 2000), Montgomery App. No. 18278. "A clear and convincing standard of proof 'will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' (Citation omitted). This standard requires more than a preponderance of the evidence, but less than the level of certainty required for beyond a reasonable doubt." *Van Lieu*.

{¶ 5} The trial court was also required to consider the factors set forth in the former R.C. 2950.09(B)(3) to adjudicate Doron a sexual predator. Those factors are:

{¶ 6} "(a) The offender's * * * age;

{¶ 7} "(b) The offender's * * * prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;

{¶ 8} "(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;

{¶ 9} "(d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;

{¶ 10} "(e) Whether the offender * * * used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

{¶ 11} "(f) If the offender * * * previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sexual offenders;

{¶ 12} "(g) Any mental illness or mental disability of the offender * * * ;

{¶ 13} "(h) The nature of the offender's * * * sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

{¶ 14} "(i) Whether the offender * * * , during the commission of the sexually oriented offense for which sentence is to be imposed, displayed cruelty or made one or more threats of cruelty;

{¶ 15} "(j) Any additional behavioral characteristics that contribute to the offender's * * * conduct."

{¶ 16} In adjudicating Doron's status, the trial court reasoned:

{¶ 17} ""With regard to the Defendant's age, the Defendant is * * * 26, and the age of 30 seems to be the upper limit for the high risk. So, he is at a slightly higher risk of re-offending because he is in the lower age group." The court further considered that Doron had a juvenile record in Indiana "for a prior [sexual] offense with a victim of five years old," and that "having a previous victim is an indication of higher risk." The court indicated that it was unknown whether Doron received or completed treatment for the juvenile matter. The court considered that the victim herein, like the previous victim, was four years old. The court noted that drug or alcohol abuse, or mental illness or disability was not indicated. The court found that "the Defendant's own statements that his work at Chuck E. Cheese gives him disturbing sexual thoughts means * * * that he is at higher risk." The court quoted the case of *State v. Van Lieu* (Nov. 22, 2000), Montgomery App.No. 18278, wherein

this court noted, "[t]he overwhelming statistical evidence support[s] the high potential of recidivism among sex offenders whose crimes involve the exploitation of young children. The age of the victim is probative because it serves as a telling indicator of the depths of the offender's inability to refrain from such illegal conduct. The sexual molestation of young children, aside from its categorization as criminal conduct in every civilized society with a cognizable criminal code, is widely viewed as one of the most if not the most reprehensible crimes in our society. Any offender disregarding this universal legal and moral reprobation demonstrates such a lack of restraint that the risk of recidivism must be viewed as considerable."

{¶ 18} Having thoroughly reviewed the record, we find that the trial court properly addressed all of the evidence presented at the hearing and applied the relevant factors in adjudicating Doron's status. We agree with the trial court that there was clear and convincing evidence to find Doron to be a sexual predator and a habitual sex offender. Accordingly, Doron's fourth assigned error is overruled.

{¶ 19} Doron's fifth assigned error is as follows:

{¶ 20} "THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE CHARGED OFFENSES, AND THE JURY'S GUILTY VERDICT AMOUNTS TO A MANIFEST MISCARRIAGE OF JUSTICE."

{¶ 21} According to Doron, the trial court erred in admitting the victim's hearsay statements, and the State "failed to present evidence that Silverman committed a crime absent these unreliable and uncontested statements." Further, Doron contends that the

verdicts of not guilty on the rape charges and the verdict of guilty on the gross sexual imposition charge are inconsistent in that the gross sexual imposition charge "resulted from alleged acts of fellatio," and the "jury found Appellant not guilty of this act."

{¶ 22} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing 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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, * * * ." *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005-Ohio-6046, ¶ 70.

{¶ 23} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 24} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the

manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 25} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 26} R.C. 2907.05(A)(4) proscribes gross sexual imposition and provides, "No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶ 27} " * * *

{¶ 28} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 29} "'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." R.C. 2907.01(B).

{¶ 30} R.C. 2907.02(A)(1)(b) proscribes rape and provides: "No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:

{¶ 31} "* * *

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

{¶ 33} "'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 or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶ 34} Batya Silverman, Doron's sister, testified that while M.S. was visiting her home in Indianapolis, Indiana, M.S. told her that Doron had put M.S.'s penis in his mouth, and that M.S. had licked Doron's penis, and the Supreme Court of Ohio has determined that those statements were admissible. Detective Robert Bell, of the West Carrollton Police Department, testified that he interviewed Doron in the course of his investigation regarding the sexual abuse of M.S. Doron told Bell that he had had his mouth on M.S.'s penis during "family bath time" two or three times. Doron told Bell when he and M.S. bathed together, M.S. "would use Doron as a jungle gym" in the bathtub. Bell testified, "Doron said, ['']when I had [M.S.'s] penis in my mouth, I spit it out.['] And he said, ['']but I continued to fondle [M.S.'s] penis to see if he would get an erection.['] I asked - - I looked at Doron, I said, ['']did he get an erection.['] He said, ['']yes, and that was the last time I ever wanted to see him naked or give him a bath ever again because I'd always get those thoughts in my head of [M.S.] getting an erection.'

{¶ 35} "I told Doron that I was concerned about him working for Chuck E. Cheese.

And Doron said, [‘]yeah, it really pisses me off seeing those young girls wearing next to nothing and I begin to get those thoughts in my head.’ ”

{¶ 36} Doron wrote a statement after his interview with Bell, which Bell read into evidence. The statement provided, “About six months ago, during a bath with my son, he was climbing on me and his penis came into my mouth, and I sat him back in the water. I started to wonder if he could get an erection. So I fondled him a bit, and when * * * he started to get hard, I stopped and got very mad with myself and swore that it would never happen again.

{¶ 37} “I haven’t since bathed with him or even seen him naked. I have distanced myself from the kids and seeing a counselor [sic], and am also in the process of switching jobs, doing everything I can with limited resources to correct any issues I may have. This incident was the first and the only time that I have ever done anything with any child and admitted [sic] to only to get help for myself.”

{¶ 38} At trial, Doron denied ever sexually abusing M.S., and he testified that the officers coerced his confession.

{¶ 39} The jury was free to reject Doron’s denial of guilt and to accept Batya Silverman’s testimony that M.S. told her that Doron had abused him, as well as Bell’s testimony regarding Doron’s oral and written statements. We disagree with Silverman that all “evidence came from the same testimony of the same acts,” namely fellatio or sexual conduct, such that a “finding of sexual contact and not sexual conduct lacks reason.” Doron told Bell that he deliberatly fondled M.S.’s penis until M.S. “started to get hard.” In other words, Doron stated, and the jury believed, that he engaged in sexual contact with M.S.

{¶ 40} Having thoroughly reviewed the entire record, we conclude that sufficient evidence exists to support Doron's conviction for gross sexual imposition, and that Doron's conviction is not against the manifest weight of the evidence. Doron's fifth assigned error is overruled.

{¶ 41} Doron's sixth assignment of error is as follows:

{¶ 42} "APPELLANT'S SENTENCE IS INCONSISTENT WITH SENTENCES OF SIMILAR OFFENDERS, A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT DEMEAN THE SERIOUSNESS OF THE OFFENSE AND IMPACT OF THE VICTIM AND CONSECUTIVE SENTENCES ARE NOT JUSTIFIED."

{¶ 43} The trial court sentenced Doron, without objection, to a term of five years, the maximum sentence for a felony of the third degree. R.C. 2929.14(A)(3). The court also imposed a term of post-release control of five years. Prior to imposing sentence, the court stated, "Normally, somebody who has not been previously convicted and sent to prison would have the benefit of the least available sentence if they were to be sent to prison. However, in this case, knowing that there is a prior offense, although it was a juvenile offense, and the nature of this particular offense, the Court would find that it would demean the seriousness of the offense to sentence the Defendant to the least available" term.

{¶ 44} According to Doron, his counsel was ineffective for failing to object the maximum sentence. "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled

to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.*" *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 45} "'The party claiming that a sentence is inconsistent with sentences given in other cases bears the burden of providing the court with sentences imposed for similar crimes by similar offenders which [sic] validate the claim of inconsistency.' (Citation omitted). To show that his sentence is inconsistent, that is, contrary to law within the meaning of R.C. 2929.11(B), [the defendant] must show that 'the trial court failed to properly consider the factors and guidelines contained in the statutes, or that substantially similar offenders, committing substantially similar offenses, and having substantially similar records, behavior and circumstances, received grossly disproportionate sentences.'" (citations omitted). *State v. Webb*, Darke App. No. 08-CA-1745, ¶ 30.

{¶ 46} We note that no record was made regarding "similar offenders" and "similar offenses." Our review of the record establishes that defense counsel advocated to the court at length that Doron should be designated a sexually oriented offender and receive probation and treatment instead of incarceration. Doron's sentence is not contrary to law, and he has failed to demonstrate that a reasonable probability exists that he would have received a shorter prison term had defense counsel objected to the sentence imposed. Thus, defense counsel's performance was not rendered ineffective by his failure to object to the sentence

imposed by the trial court.

{¶ 47} There being no merit to Doron's sixth assigned error, it is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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