[Cite as *State v. Cokes*, 2015-Ohio-619.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26223
	:	
v.	:	T.C. NO. 13CR2283
	:	
PAUL E. COKES, JR.	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___20th___ day of ____February____, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Paul E. Cokes, Jr. appeals his conviction and sentence for one count of rape of a child under ten years of age, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Cokes filed a timely notice of appeal with

this Court on May 14, 2014.

{¶ 2} The incident which forms the basis for the instant appeal occurred on June 11, 2013, when Cokes offered to babysit the two minor children of his friend, F.W., a part-time student who attended classes twice a week in the mornings. F.W. testified that normally she would ask her downstairs neighbor, A.D., to watch her children, D.W., the victim, and six-year old D.M. D.W. was seven years old at the time that the offense was committed. On the day in question, however, Cokes offered to babysit the minor children and take them to the park while F.W. was attending class. F.W. accepted Cokes' offer and told him to pick up the children at A.D.'s apartment on the morning of June 11, 2013. A.D. was six months pregnant at the time.

{¶ 3} A.D. testified that F.W. dropped off D.W. and D.M. at her apartment at approximately 7:00 a.m. on the morning of June 11, 2013. Cokes subsequently arrived at approximately 8:53 a.m. to pick up the children. D.W. testified that Cokes took her and D.M. to his apartment in Trotwood, Ohio. We note that throughout her testimony, D.W. referred to Cokes by his first name, "Paul." Once at his apartment, Cokes provided the children with something to eat and drink. D.W. testified that while she and D.M. were eating, Cokes "accidentally" spilled some liquid on her clothes. Cokes told D.W. to take her clothes off so that he could wash them. D.W. testified that Cokes gave her one of his shirts to wear while he washed and dried her clothes. At this point, D.W. testified that she was only wearing Cokes' shirt and her panties.

{¶ 4} Cokes told D.W. to go into his room and watch television while he attended to her dirty clothes. D.W. testified that she observed both men's and women's clothing in Cokes' room. While D.W. was sitting on the bed watching television, Cokes entered the

room, pulled down his pants, and got in bed with her. D.W. testified that Cokes then pulled down her panties, climbed on top of her, and put his "wink wink" inside her "front." During her testimony at trial, D.W. referred to her vagina as her "front" and Cokes' penis as a "wink wink." D.W. testified that Cokes began to move his "wink wink" around which made her "front" hurt. When D.W. began to cry during the sexual assault, Cokes told her to be quiet and tied a bra around her mouth in order to quiet her. When the sexual assault was over, D.W. noticed that her "front" was bleeding. Cokes took D.W. in the bathroom and tried to clean her up with some hand sanitizer. During the entire time that the assault was occurring, D.M. was sitting in the front room of Cokes' apartment watching television.

{¶ 5} After D.W.'s clothes were dried, Cokes took her and D.M. to the residence of his friend, "Rich." Cokes and Rich left the apartment, and D.W. testified that she and D.M. watched movies with other children while being babysat by an unnamed adult female. Shortly thereafter, Cokes returned to Rich's apartment and took D.W. and D.M. to a nearby park. D.W. testified that while she enjoyed playing at the park, her "front" began to hurt again when she used the park restroom.

{¶ 6} After leaving the park, Cokes took D.W. and D.M. home. F.W. was present when Cokes returned with the children. D.W. testified that as they were entering the apartment, Cokes told her not to tell her mother what happened. F.W. testified that when Cokes returned home with her children, she heard him ask D.W., "You promise not to tell?" F.W., however, thought nothing of it at the time. D.W. testified that she wanted to tell F.W. what Cokes did to her, but she was afraid that she would get into trouble. While she was unaware that D.W. had been sexually assaulted by Cokes, F.W. testified that she

noticed that over the next few days, D.W. began acting very self-conscious during bath time, constantly trying to cover herself up while in her mother's presence. F.W. testified that D.W. had never previously acted in that manner. F.W. also noticed on another occasion that D.W. was bleeding after using the restroom. F.W. initially thought that D.W. was beginning to menstruate, as she had begun to menstruate at an early age.

{¶ 7} On June 18, 2013, however, D.W. finally told F.W. that Cokes had sexually assaulted her. F.W. immediately took D.W. to Dayton Children's Hospital where she was examined by Doctor Kevin Johnson. Dr. Johnson testified that the results of his genital examination of D.W. were "abnormal." Specifically, Dr. Johnson testified that D.W. suffered from abrasions to the ring of tissue that surrounds the inlet of the vaginal canal and hymen. Dr. Johnson further testified that D.W.'s injuries were "acute," having been inflicted within the last week, and were consistent with penile-vaginal penetration.

{¶ 8} Interview with Trotwood Police

{¶ 9} On June 20, 2013, Trotwood Police Detective Natalie Watson interviewed Cokes regarding D.W.'s allegations. Initially, Cokes acknowledged that he babysat D.W. and D.M. on June 11, 2013. Cokes then changed his story, claiming that he had never been alone with F.W.'s children. Cokes also told Det. Watson that he always declines when F.W. asks him to take her kids to the park. At that point, Det. Watson informed Cokes that she had video footage of him picking the kids up from F.W.'s apartment complex. Det. Watson testified that there was not actually any video footage of Cokes at F.W.'s apartment complex. Det. Watson testified that she often attempts to deceive suspects during interviews who she believes are lying. Cokes changed his story again, admitting that he had picked F.W.'s children up from "a pregnant woman's" apartment at

around 9:00 a.m. on June 11, 2013, took them to the store to buy snacks, and then dropped them off at Rich's house. As previously mentioned, A.D. was six months pregnant when the offense occurred. Cokes and Rich then left for a short period of time. Cokes stated that he returned, picked up D.W. and D.M., and took them to the park.

{¶ 10} Det. Watson also questioned Cokes regarding D.W.'s clothes getting wet. Cokes told Watson that D.W. had spilled juice on herself at the park. Cokes stated that he sent D.W. into the restroom so that she could clean herself. Det. Watson then informed Cokes that D.W. recently suffered injuries to her vagina. Det. Watson also informed Cokes that the crime lab was going to begin comparing foreign DNA samples which had been discovered when the doctor examined D.W. In truth, there was no foreign DNA discovered during D.W.'s examination. Because of the week long delay between the sexual assault and D.W.'s reporting of the incident, a rape kit was not performed on D.W.

{¶ 11} Cokes, however, changed his story again, claiming that he had actually gone into the restroom with D.W. and attempted to help her clean herself. Cokes stated that, once in the restroom, he told D.W. to take her clothes off because they were wet. Cokes stated that he wet a paper towel and began wiping D.W. off when he noticed that her vagina was bleeding. Cokes stated that he wiped D.W.'s vagina where he saw blood and "told her to stick either a tissue or paper towel up in there and she would be good." We note that Dr. Johnson testified that the injuries to D.W.'s vagina were not consistent with someone vigorously wiping the vaginal area with a paper towel.

{¶ 12} In an attempt to explain how his DNA might be present as a result of D.W.'s genital examination, Cokes told Det. Watson that he once left a used condom at D.W.'s

apartment from a random occasion when he purportedly had sex with an unidentified woman while he was at F.W.'s apartment. Cokes told Det. Watson that apparently D.W. must have found it and picked it up.

{¶ 13} Cokes was arrested approximately one month after he was interviewed by Det. Watson. We note that when the police went to serve the arrest warrant on Cokes at his apartment, he was taken into custody only after he attempted to climb out of the back window of the building and flee from the police.

{¶ 14} Cokes' Trial Testimony

{¶ 15} At trial, Cokes presented an alibi defense. Specifically, Cokes testified that while he did, in fact, take D.W. and D.M. to the park, the trip did not occur on June 11, 2013, as argued by the State. Moreover, Cokes testified that he never took D.W. and D.M. to his apartment and that he never had any sexual contact with D.W. Cokes maintained his story that D.W. spilled juice on herself at the park and he innocently wiped her vagina with a paper towel because he saw blood when she was cleaning herself. Cokes further testified that when he asked D.W. not to tell F.W. what happened upon returning from the park, he was referring to D.W. accidentally spilling juice on herself at the park.

{¶ 16} Ultimately, the jury found Cokes guilty of rape as charged in the indictment. The trial court sentenced Cokes to a prison term of fifteen years to life, and he was classified a Tier III sex offender.

{¶ 17} It is from this judgment that Cokes now appeals.

{¶ 18} Because they are interrelated, Cokes' first and second assignments of error will be discussed together as follows:

{¶ 19} "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 RAPE AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶ 20} "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 RAPE AS THAT VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 21} In his first assignment, Cokes argues that insufficient evidence was adduced at trial to sustain his conviction for rape. In his second assignment, Cokes contends that his conviction for rape is against the manifest weight of the evidence.

{¶ 22} Although the State does not raise the issue, we note that Cokes did not renew his Crim. R. 29 motion for acquittal at the close of all the evidence in his jury trial. Here, Cokes moved for acquittal at the close of the State's case-in-chief, the trial court denied the motion, and Cokes then presented the testimony of three witnesses for the defense. After resting, Cokes did not renew the Crim. R. 29 motion for acquittal. Cokes has therefore failed to preserve his insufficiency argument by not renewing it at the close of evidence. *See State v. Zimpfer*, 2d Dist. Montgomery No. 26062, 2014-Ohio-4401, ¶ 42 (appellant preserved his insufficiency argument by making an unsuccessful Crim. R. 29 motion for acquittal at the close of evidence at trial). It is generally accepted in Ohio that if counsel fails to make *and* renew a Crim. R. 29 motion during a jury trial, the issue of

sufficiency is waived on appeal. *State v. Beesler*, 11th Dist. Ashtabula No. 2002-A-0001, 2003-Ohio-2815, ¶ 23. However, even if Cokes had renewed his Crim. R. 29 motion, we conclude that his argument that his conviction for rape was based upon insufficient evidence lacks merit.

{¶ 23} "Reviewing the denial of a Crim. R. 29 motion *** requires an appellate court to use the same standard as is used to review a sufficiency of the evidence claim." *State v. Witcher*, 6th Dist. Lucas No. L-06-1039, 2007-Ohio-3960. "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.' " (Citations omitted). *State v. Crowley*, 2d Dist. Clark No. 2007 CA 99, 2008-Ohio-4636, ¶ 12.

{¶ 24} "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046, 837 N.E.2d 315. "A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Id*.

{¶ 25} 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*, 10 Ohio St.2d 230, 231, 227

N.E.2d 212 (1967). "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*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997).

{¶ 26} 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*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510 (Oct. 24, 1997).

{¶ 27} Cokes was found guilty of rape in violation of R.C. 2907.02(A)(1)(b), which provides:

> (A)(1) No 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 any of the following applies:
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the person.[1]

{¶ 28} As previously discussed, D.W., who was seven years old at the time of the sexual assault, testified that Cokes took her and her brother, D.M., to his apartment on the morning of June 11, 2013. D.W. further testified that Cokes spilled some liquid on her

[1]Cokes' indictment contains a specification that D.W. was less than ten years of age at the time of the offense.

and told her to take off her shirt and pants so that they could dry. While D.W. was sitting on Cokes' bed wearing only a borrowed shirt and panties, he came into the room took off his pants and got into bed with her. D.W. testified that Cokes then pulled her panties down, climbed on top of her, and placed his penis in her vagina. When Cokes began moving his penis around, D.W. testified that she started crying because it hurt. D.W. testified that Cokes wrapped a bra around her mouth in order to keep her quiet. When Cokes was finished, D.W. testified that her "front" was bleeding.

{¶ 29} Additionally, F.W. testified that she observed that D.W.'s vagina was bleeding on the day after the assault occurred. F.W. also testified that she overheard Cokes ask D.W. "not to tell" when he dropped her off at her apartment. Although he testified that he was only referring to D.W. spilling juice on herself, Cokes acknowledged that he asked her "not to tell" her mother. Moreover, Dr. Johnson testified that D.W. suffered from abrasions to the ring of tissue that surrounds the inlet of the vaginal canal and hymen. Dr. Johnson further testified that D.W.'s injuries were "acute," having been inflicted within the last week, and were consistent with penile-vaginal penetration. Dr. Johnson specifically testified that the injuries to D.W.'s vagina were not consistent with someone vigorously wiping the vaginal area with a paper towel. Dr. Johnson's testimony directly contradicted Cokes' testimony that he merely wiped D.W.'s vagina in the park restroom with a paper towel because he saw blood when she was cleaning herself.

{¶ 30} Construing the evidence presented in a light most favorable to the State, as we must, we conclude that a rational trier of fact could find all of the essential elements of the crime of rape to have been proven beyond a reasonable doubt, including that D.W. was under the age of ten when the rape occurred. Cokes' rape conviction is therefore

supported by legally sufficient evidence.

{¶ 31} Finally, Cokes' conviction is not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony were matters for the jury to resolve. The jury did not lose its way simply because it chose to believe the testimony of the victim, D.W., who testified at length regarding Cokes compelling her to submit to penile rape in the bedroom of his apartment. While it is true that D.W. could not identify Cokes in court as the individual who raped her, she testified that she had always known him to wear glasses. Cokes was not wearing glasses during trial, and it had been approximately ten months since D.W. had seen him. Moreover, A.D. positively identified Cokes as the person who picked up D.W. and D.M. from her apartment on the morning of June 11, 2013. F.W. also positively identified Cokes as the person who dropped off D.W. and D.M. at her apartment that same afternoon. Cokes himself admitted that he was the person who picked up D.W. and D.M. from A.D.'s apartment and took them to the park. Cokes also acknowledged telling D.W. "not to tell what happened."

{¶ 32} In support of his argument that the evidence was insufficient on the issue of his identity, Cokes cites *State v. Willis*, 10th Dist. Franklin No. 80AP-598, 1980 WL 353899 (Dec. 31, 1980). In *Willis*, the victim of a robbery affirmatively testified that the defendant was *not* one of the two persons who robbed her. The court held that the fact that the defendant was later located in a vehicle with the two individuals that the victim identified as the robbers did not constitute circumstantial evidence sufficient to sustain the defendant's conviction for robbery. *Willis* is clearly distinguishable from the instant case. While D.W. was unable to make an in-court identification of Cokes, she did not testify that

Cokes was not the individual who raped her. Rather, the jury could reasonably conclude that D.W. was unable to recognize Cokes because he was not wearing the glasses she was accustomed to seeing him wear. Unlike the robbery victim in *Willis*, at no time did D.W. testify that Cokes was not the man who raped her.

{¶ 33} We note that Cokes presented an alibi defense at trial. Specifically, Cokes testified while he did, in fact, take D.W. and D.M. to the park, the trip did not occur on June 11, 2013, as argued by the State. Moreover, Cokes testified that he never took D.W. and D.M. to his apartment and that he never had any sexual contact with D.W. The jury, however, was free to disbelieve Cokes' testimony, which it apparently did. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against conviction, or that a manifest miscarriage of justice has occurred.

{¶ 34} Cokes' first and second assignments of error are overruled.

{¶ 35} Both of Cokes' assignments of error having been overruled, the judgment of the trial court is affirmed.

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HALL, J. and WELBAUM, J., concur.

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