[Cite as *State v. Miley*, 2009-Ohio-4011.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MILTON CLYDE MILEY

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case Nos. 09CA39
09CA40

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Richland County Court of Common Pleas, Case No's. 05CR85H and 07CR163H
JUDGMENT:	Case 09CA39 - Affirmed Case 09CA40 - Reversed
DATE OF JUDGMENT ENTRY:	August 7, 2009

APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
RICHLAND COUNTY, OHIO

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Hoffman, J.

{¶1} Defendant-appellant Milton Clyde Miley appeals his convictions in the Richland County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} The following facts were adduced at trial:

{¶3} Lee Foster was born on September 29, 1986. Scott Foster was born almost three years later on May 28, 1989. Lee Foster and Scott Foster became acquainted with Appellant in the mid-1990's when they visited Appellant's store to sell minnows. When Scott was 11 years-old and Lee was 14 years-old, Appellant offered them $25.00 per week to do remodeling work around his home at 3 Miley Drive. The evidence demonstrates Appellant began remodeling the property in May of 2000. A dumpster was delivered to the property on May 22, 2000, and was picked up on December 31, 2001. A construction permit was issued on July 24, 2000.

{¶4} In the winter of 2000-2001, Appellant offered Scott Foster $50.00 to expose his penis. Scott was 11 years-old at the time of the incident, and agreed to do so for $110.00. Appellant then paid Scott to allow Appellant to perform oral sex on him. Scott testified at trial appellant continued to give him money for engaging in sexual activity, and later provided him with marijuana in exchange for sex. This behavior continued until November, 2004. Scott testified he and Appellant engaged in sexual conduct on hundreds of occasions at Appellant's house, and sometimes in the back of the store. Both Scott and Lee Foster testified they watched pornographic movies with Appellant at his house. Further, the boys testified Appellant would often supply them with alcohol, cigarettes and marijuana.

{¶5} Scott Foster testified, before his thirteenth birthday, the sexual conduct consisted of oral sex. After he turned thirteen, however, Appellant attempted anal penetration on six to ten occasions. He identified a bottle of lotion and several sex toys found in Appellant's home as items used during the encounters.

{¶6} Lee Foster also testified at trial concerning his involvement with Appellant. The first incident occurred in spring or early summer of 2002, before Lee's sixteenth birthday when Appellant performed oral sex on Lee. During the summer of 2002, Lee testified Appellant performed oral sex on him on at least five occasions. The conduct continued until November, 2004.

{¶7} Both Scott and Lee testified relative to sexual encounters referred to as a "triangle" where they would lay on a bed with Appellant and perform oral sex on each other. Scott testified this activity started in 2002, or 2003.

{¶8} On November 15, 2004, Lee Foster told his father, Ed Foster, that Scott Foster was being sexually molested by Appellant. Lee never said anything to his father at that time about being sexually molested himself. Ed Foster reported his son Lee Foster's allegations against Appellant to Richland County Children Services.

{¶9} During the late afternoon and early evening of November 16, 2004, Detective Sergeant Jeff McBride and Matt Keck, a Richland County Children's Services investigator, interviewed Scott Foster and Lee Foster separately, and then together, at their father's home on Washington Street South. Lee and Scott Foster provided descriptions of pornographic videocassettes possessed by Appellant at his home.

{¶10} On November 17, 2004, Sergeant McBride obtained a search warrant for Appellant's house from the Mansfield Municipal Court. Later that same afternoon, Sgt.

McBride and other Richland County Sheriff's Deputies executed the search warrant at Appellant's home at 3 Miley Drive. The items seized by the Sheriff Deputies from Appellant's home included the following:

{¶11} (1) three firearms;

{¶12} (2) twenty-one pornographic VHS videocassettes, all but four of which were found inside a metal cabinet in the Harley-Davidson room of Appellant's home;

{¶13} (3) marijuana weighing a total of 7.413 grams, or approximately one-quarter (1/4) ounce;

{¶14} (4) multiple scales and smoking devices, which Sheriff Deputies believed to be drug paraphernalia;

{¶15} (5) various sex toys, including dildos and vibrators, found inside a bathroom closet;

{¶16} (6) two sheets from Appellant's bed in the master bedroom ; and

{¶17} (7) a blue couch cushion from the living room.

{¶18} As a result of the investigation, the Richland County Grand Jury indicted Appellant on 55 counts, including rape, unlawful sexual conduct with a minor, corrupting another with drugs and disseminating matter harmful to juveniles.

{¶19} On May 20, 2005, a jury returned a verdict of guilty as to all fifty-five (55) counts of the indictment. On May 31, 2005, the trial court sentenced Appellant to a total prison term of thirty-five years. The trial court further classified Appellant a sexual predator under R.C. Chapter 2950. Appellant thereafter filed a timely notice of appeal to this Court.

{¶20} On September 8, 2006, this Court reversed Appellant's conviction and remanded the matter for a new trial finding the trial court erred in admitting evidence of Appellant's prior acts. *State v. Miley,* 2006-Ohio-4670.

{¶21} On February 2, 2007, Appellant filed a motion for change of venue alleging negative pretrial publicity. The trial court overruled the motion on June 20, 2007.

{¶22} On February 8, 2007, the Richland County Grand Jury indicted Appellant on four additional charges alleging recently discovered evidence. On July 30, 2007, Appellant filed a motion to dismiss the 2007 indictment on speedy trial grounds. The trial court overruled the motion, via Judgment Entry of September 21, 2007. The trial court then consolidated the cases and scheduled a trial date for October 8, 2007.

{¶23} Appellant subsequently entered a plea of no contest to two of the additional charges, counts 58 and 59, having weapons under disability.

{¶24} Following a trial to jury, Appellant was convicted on a total 57 counts, and sentenced to thirty-eight years in prison.

{¶25} Appellant now appeals, assigning as error:

{¶26} "I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS COUNTS 58 AND 59 OF THE 2007 INDICTMENT FOR VIOLATION OF HIS SPEEDY TRIAL RIGHTS, WHERE: (1) THOSE ADDITIONAL CHARGES AROSE FROM THE SAME FACTS AND CIRCUMSTANCES AS THE FIFTY-FIVE COUNTS CHARGED IN THE ORIGINAL 2005 INDICTMENT; (2) THE STATE OF OHIO KNEW OF THE UNDERLYING FACTS IN SUPPORT OF COUNTS 58 AND 59 BEFORE ORIGINAL INDICTMENT WAS FILED; AND (3) APPELLANT WAS NOT BROUGHT

TO TRIAL ON THOSE ADDITIONAL CHARGES WITHIN THE SPEEDY TRIAL TIME LIMITATIONS SET FORTH IN R.C. 2945.1 *ET SEQ*.

{¶27} "II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERED [SIC] TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION FOR CHANGE OF VENUE FOR HIS RETRIAL, WHERE (1) THE LOCAL MEDIA COVERAGE OF BOTH HIS FIRST TRIAL AND SUCCESSFUL APPEAL OF HIS CONVICTIONS WAS INFLAMMATORY AND EXTREMELY NEGATIVE TOWARDS APPELLANT AND (2) SAID MEDIA COVERAGE INCLUDED DETAILED INFORMATION ABOUT 'OTHER ACTS' ERRONEOUSLY INTRODUCED DURING THE FIRST TRIAL WHICH DIRECTLY RESULTED IN THIS COURT OF APPEALS' REVERSAL OF APPELLANT'S CONVICTIONS.

{¶28} "III. APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND THE JURY'S VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶29} "IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT BY DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT, WITHOUT AN ORAL HEARING ON SAID MOTION, WHERE THE JURY FOREPERSON FAILED TO DISCLOSE THAT HE HAD PREVIOUSLY MET APPELLANT AND WORKED ON THE PREMISES WHERE THE ALLEGED OFFENSES SUPPOSEDLY TOOK PLACE DURING RELEVANT TIME PERIODS SET FORTH IN THE INDICTMENT AND WAS POTENTIAL WITNESS IN THE CASE."

I

{¶30} In the first assignment of error, Appellant asserts the trial court erred in not dismissing counts 58 and 59 charging having weapons under disability. Specifically, Appellant asserts the trial court violated his speedy trial rights in not dismissing the counts. We agree.

{¶31} Revised Code Section 2945.71 reads:

{¶32} "(C) A person against whom a charge of felony is pending:

{¶33} "(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after the person's arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after the person's arrest if the accused is held in jail in lieu of bail on the pending charge;

{¶34} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

{¶35} "***

{¶36} "(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section."

{¶37} In *State v. Adams* (1989), 43 Ohio St.3d 67, the Ohio Supreme Court held:

{¶38} "[W]hen new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same

statutory limitations period that is applied to the original charge." *State v. Clay* (1983), 9 Ohio App.3d 216, 218, 9 OBR 366, 367, 459 N.E.2d 609, 610. See, also, *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 11, 16 O.O.3d 4, 7, 402 N.E.2d 530, 534."

{¶39} Subsequent to *Adams*, the Supreme Court held in *State v. Parker* (2007), 113 Ohio St.3d 207,

{¶40} "Criminal charges arising out of the same criminal incident and brought simultaneously will always be deemed to have a "common litigation history" for the purposes of establishing incarceration solely on the "pending charge" within the meaning of R.C. 2945.71(E), even if they are prosecuted in separate jurisdictions."

{¶41} In response to Appellant's argument, the State maintains it did not have notice of the facts and circumstances which lead to the additional charges at the time of the original indictment. We find the State is chargeable with constructive (if not actual) knowledge of those facts and circumstances. As stated in the statement of the facts and case, supra, the firearms were seized during the execution of the November 17, 2004 search warrant. The firearms, in and of themselves, are not contraband subject to seizure; therefore, seizure of the firearms indicates the State knew of Appellant's prior convictions. As criminal background checks and LEADS searches universally accompany any criminal investigation, and are material to post-arrest proceedings, i.e. setting bond, initial appearance, arraignment, etc., we find it beyond the pale to suggest the State had no knowledge of Appellant's prior disabling conviction before the date of his original indictment.

{¶42} Upon review, the record indicates Appellant was not timely tried within the speedy trial parameters on the two having weapons under disability charges. Accordingly, Appellant's first assignment of error is sustained.

II.

{¶43} In the second assignment of error, Appellant maintains the trial court erred in denying his motion for change of venue due to negative pretrial publicity.

{¶44} Ohio Criminal Rule 18(B) states:

{¶45} "Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.***"

{¶46} Similarly, R.C. 2901.12(K) reads:

{¶47} "(K) Notwithstanding any other requirement for the place of trial, venue may be changed, upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial otherwise would be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice."

{¶48} Appellant's motion for change of venue cites various local newspaper articles reporting alleged prior incidents of criminal conduct, and referring to Appellant as a "child rapist," "rapist," "child molester," and "molester." Appellant maintains given this local media coverage, it was not possible for Appellant to receive a fair trial in Richland County.

{¶49} Appellant does not demonstrate actual prejudice resulting from the coverage, but presumes the jury would be prejudiced by the same. However, the fact prospective jurors have been exposed to pretrial publicity does not, in and of itself, demonstrate prejudice. *Nebraska Press Assn. v. Stuart* (1976), 427 U.S. 539. Rather, even pervasive, adverse publicity does not inevitably lead to an unfair trial. Id. If the record on voir dire establishes prospective jurors have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and the evidence presented at trial, it is not error to empanel such jurors. *State v. Maurer* (1984), 15 Ohio St.3d 239. A careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality. *State v. Bayless* (1976), 48 Ohio St.2d 73.

{¶50} Upon review of the record, only nine potential jurors indicated some familiarity with newspaper coverage of the case. Of those potential jurors, two were dismissed for cause, and the defense exercised preemptory challenges to remove three others. Of the four remaining jurors who acknowledged some familiarity with the media coverage, all indicated they could disregard what they had read and would give Appellant a fair trial.

{¶51} Accordingly, the trial court did not err in denying Appellant's motion for change of venue, as Appellant has not demonstrated prejudice resulting from the pretrial media coverage.

{¶52} Appellant's second assignment of error is overruled.

III.

{¶53} In the third assignment of error, Appellant asserts his convictions were against the manifest weight and sufficiency of the evidence.

{¶54} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.” *Id.* at paragraph two of the syllabus.

{¶55} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N .E.2d 541 superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N .E.2d 668, citing *State v. Martin* (1983), 20

Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶56} Appellant generally argues his conviction on all fifty-seven counts, specifically the sexual offenses, were dependent on the testimony of both Lee and Scott Foster whom Appellant says were "admitted liars, thieves and drug users, who were both convicted of felony theft offenses in Richland County."

{¶57} Appellant further maintains the State failed to establish Scott Foster was less than thirteen years of age when the alleged sexual conduct occurred. Specifically, Appellant cites Scott Foster's statements to investigators and previous deposition testimony.

{¶58} Again, because the trier of fact is in a better position to observe the witnesses and to weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact, and this Court will not substitute its judgment. Further, Appellant has not demonstrated the trier of fact lost its weigh in resolving the conflicts in the testimony.

{¶59} The record demonstrates Appellant's convictions were based upon competent, credible evidence. Scott Foster testified at trial the first incident of oral sex occurred in 2001, when he was in fifth grade. He further testified the first time Appellant asked him to do something sexual in nature was in the winter of 2000-2001. From 2001 to 2002, Scott testified the sexual activity occurred every weekend at Appellant's house.

Both Scott and Lee Foster testified at trial with regard to the ongoing sexual abuse, and Appellant's offering them money and/or drugs in exchange for the illicit acts.

{¶60} Appellant's general allegation his conviction on all fifty-seven counts is against the manifest weight and sufficiency of the evidence is overruled.

IV.

{¶61} In the final assignment of error, Appellant maintains the trial court erred in denying his motion for new trial based on juror misconduct, without first conducting an oral hearing. Specifically, Appellant maintains the jury foreperson failed to disclose during voir dire or at trial he met Appellant while performing work on the rental house on Appellant's property.

{¶62} Ohio Criminal Rule 33 (A) provides,

{¶63} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶64} "(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

{¶65} "(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;"

{¶66} ***

{¶67} A motion for a new trial pursuant to Criminal Rule 33 is addressed to the sound discretion of the trial court. *State v. Schiebel* (1990), 55 Ohio St.3d 71.

{¶68} In *State v. Kehn* (1977), 50 Ohio St.2d 11, 19, citing *Armleder v. Lieberman* (1877), 33 Ohio St. 77, the Supreme Court stated, "It is a long-standing rule

of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown." More recently in *State v. Hipkins* (1982), 69 Ohio St.2d 80, 83, the Supreme Court of Ohio stated, "A new trial may be granted for the misconduct of the jury where the substantial rights of the defendant have been materially affected." See, also, Crim.R. 33(A); R.C. 2945 .79(A).

{¶69} Appellant maintains the jury foreman engaged in juror misconduct by not disclosing he had worked on Appellant's property on two separate occasions. As a result, Appellant argues the juror was a potential witness.

{¶70} Assuming arguendo the juror should have disclosed the information, Appellant has not demonstrated prejudice as a result of the alleged misconduct. Further, Appellant has not cited any legal authority requiring the trial court conduct an oral hearing prior to denying the Motion.

{¶71} The assignment of error is overruled.

By: Hoffman, J.

Farmer, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MILTON CLYDE MILEY	:	
	:	
Defendant-Appellant	:	Case No. 09CA39

For the reasons stated in our accompanying Memorandum-Opinion, Appellant's convictions on all counts other than Counts 58 and 59 (Weapons Under Disability) are affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MILTON CLYDE MILEY	:	
	:	
Defendant-Appellant	:	Case No. 09CA40

For the reasons stated in our accompanying Memorandum-Opinion, Appellant's convictions on Counts 58 and 59 (Weapons Under Disability) are reversed. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS