[Cite as *State v. Dotson*, 2013-Ohio-1831.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1166

Appellee — Trial Court No. CR0201101112

v.

Gerald Dotson — **DECISION AND JUDGMENT**

Appellant — Decided: May 3, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Bruce J. Sorg and Brenda J. Majdalani, Assistant Prosecuting Attorneys, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from a judgment of conviction entered by the Lucas County Court of Common Pleas after a jury found Gerald Dotson guilty of unlawful sexual conduct with a minor. Dotson challenges the verdict on both sufficiency and manifest weight grounds, and also claims his trial lawyer rendered ineffective assistance of counsel. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶ 2} On January 20, 2011, Gerald Dotson was indicted on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), a felony of the third degree. A jury trial was held and testimony revealed the following facts.

{¶ 3} On May 20, 2010, 14-year-old L.A. went fishing with his great-grandmother, Christen Dotson. After fishing, L.A. accompanied Mrs. Dotson to the home she shared with her husband, appellant Gerald Dotson. After dinner, Mrs. Dotson retired to her bedroom. L.A. stayed in the living room with then 63-year-old appellant to watch television.

{¶ 4} Mrs. Dotson testified that while she was lying in bed she could hear L.A. laughing and talking with her husband. She grew concerned when the laughing and talking ceased. Mrs. Dotson got out of bed and walked into the living room. She was angered by what she saw. Mrs. Dotson explained:

> A I seen [L.A.] on the floor and [appellant] was[standing] up with his pants down in the front.
>
> Q How was [appellant] standing?
>
> A * * * He was standing up straight with his pants pulled out.
>
> * * *
>
> Q And was he facing you? Was his back to you or something else?
>
> A No, he had his back to me.
>
> Q And what did you see [L.A.] doing?

A [L.A.] was on the floor in the front of him kneeling down on the floor with his head inside [appellant's] leg.

Q Okay. Did you see what was happening?

A No. I couldn't tell really what was happening but I know [appellant] had his pants down and [L.A.] was leaning over his front and [L.A.] seen me come out of the bedroom and then he went back on the couch and that made [appellant] look around.

Mrs. Dotson explained that she yelled at her husband and ordered L.A. to gather his things. She then drove L.A. to his home and relayed what she witnessed to L.A.'s mother, T.A.

{¶ 5} L.A.'s testimony mirrored that of Mrs. Dotson with one exception. L.A. testified that after his great-grandmother retired to the bedroom, appellant went into the bedroom and "grabb[ed] something." When appellant came back to the living room, he placed a handgun on his lap and instructed L.A. to "bend over." The boy refused. Appellant stood up and pulled down his pants. L.A. explained, "he got in front of me and then he put the handgun to my head and said suck it and I did, but it lasted no more than a minute because right when I did it [Mrs. Dotson] came out and then they started to get into a little argument after that."

{¶ 6} When L.A.'s mother testified, she relayed to the jury what both Mrs. Dotson and L.A. had told her about the event in question. She knew appellant's conduct was illegal but did not immediately call the police. She did, however, call the police after she

drove to Mrs. Dotson's home and saw appellant on the front porch with a gun. After reporting the incident, L.A.'s mother drove her son to the hospital.

{¶ 7} While at the hospital, L.A. met with Toledo Police Sergeant John Rose. Sergeant Rose explained that when he arrived at the hospital, L.A. was cooperative and chewing a piece of gum. He described L.A.'s demeanor as "fidgety" and "chatty." The sergeant testified that L.A. had reported to him that appellant had threatened L.A. with a .38 caliber revolver. L.A. had also reported to the sergeant that this was not the first time there had been some sort of sexual contact between the boy and appellant. The sergeant indicated that while a rifle was recovered from the crime scene, no handgun was ever found.

{¶ 8} After L.A. was questioned by Sergeant Rose, he was examined by a Sexual Assault Nurse Examiner ("SANE"). The SANE testified that when she initially met L.A., he was "calm but somewhat fidgety" and that he "[s]eemed to be redirecting a few times which isn't uncommon for kids of his age." According to the SANE, L.A. claimed appellant pointed a pistol at his head and made L.A. perform oral sex on him. The SANE indicated that she questioned L.A. about any prior history, but that her notes indicated "[p]atient discloses no previous evidence of sexual assault." The SANE orally swabbed L.A.'s mouth for evidentiary purposes even though L.A. had indicated that appellant did not ejaculate.

{¶ 9} Sarah Glass, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation, testified that she performed DNA analysis on evidence

collected from L.A.'s mouth at the hospital. Ms. Glass found no semen. She testified that chewing gum could wash away any traces of semen that might have been present.

{¶ 10} On the witness stand, appellant admitted he sat on the couch watching television with L.A. on the night in question. He testified:

> Q * * * How long were you sitting there watching TV for?
>
> A For a little while, then I realized that the next day was trash day. So I get up and there is a bottle of Frank's Hot Sauce, you know, down on the floor. I picked it up and I go to put it on the table in the dining room * * *.
>
> Q Okay.
>
> A And I put it on the table and while my back is turned towards [Mrs. Dotson] she says, oh, I caught you. I said, caught me what, you know.
>
> Q Then what happened?
>
> A She told [L.A] get his stuff and get in the truck, you know. So next thing I know they left. I continue to collect all the garbage * * *.

Appellant denied having any sexual contact with the victim.

{¶ 11} After hearing the evidence, the jury returned a guilty verdict. The trial court sentenced appellant to serve three years in prison. We granted appellant leave to file a delayed appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 12} Appellant Dotson sets forth two assignments of error, the first of which provides:

> Trial counsel was ineffective and prejudiced Defendant/Appellant's right to a fair trial as guaranteed by the U.S. and Ohio Constitutions.

{¶ 13} To establish a claim for ineffective assistance of counsel, appellant "must show (1) deficient performance by counsel, i.e. ,performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus.

{¶ 14} Under this assignment of error, appellant first argues trial counsel was ineffective in allowing hearsay to be admitted. Appellant fails to point to specific instances of hearsay in the transcript, but asserts that trial counsel "should have objected to any testimony by [T.A.] regarding the incident that occurred because it was all hearsay."

{¶ 15} The Supreme Court of Ohio has held that "the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 103, citing *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831. An appellant must also "show that a

reasonable probability exists that the outcome of his trial would have been different had counsel done so." *Id.* at ¶ 108.

{¶ 16} Our review of the transcript confirms trial counsel did not object when T.A. relayed to the jury how she learned, second hand, of the alleged unlawful sexual conduct. Specifically, T.A. indicated that on the evening in question, she heard a horn blow outside her home. When she looked out the window she saw L.A. getting out of Mrs. Dotson's truck. When T.A. went outside to speak with Mrs. Dotson she found her distraught and upset. T.A. further testified:

> A We let [L.A.] walk from the car and I set in the truck, closed the door she said, well, I don't know how to tell you this, but I'm just going to tell you and I'm like what? And she said I caught [L.A] – I caught [L.A.] and [appellant] in the front room and [L.A.] was giving [appellant] head.
>
> Q I know it's not easy. After hearing that, what if anything did you do?
>
> A I lost it. I got out of the car, I went in the house and I approached my son. I asked him what happened, you know, I asked him – I said Granny just told me that you was sucking Grandpa's thing and he said, Mamma, he made me. He had a gun in his pocket * * *.

After explaining how she found out about the events of the evening, T.A. testified that she drove to [L.A.]'s father's house to let him know what happened. Then, she drove to

the home of appellant, saw appellant with a gun on the porch, and called the police. After she made a statement to the police, T.A. drove L.A. to the hospital.

{¶ 17} The state argues that T.A.'s statements were not hearsay because they were offered not for the truth of the matter asserted, but to explain her subsequent actions.

{¶ 18} "Hearsay" is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Generally, hearsay is inadmissible unless it falls within a recognized exception. *See* Evid.R. 802. "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980).

{¶ 19} Whether or not trial counsel erred by failing to objecting to T.A.'s statement, appellant failed to show that a reasonable probability exists that the outcome of the trial would have been different had counsel done so. Appellant's first argument under this assignment of error is not well-taken.

{¶ 20} Appellant's second argument under this assignment of error is that trial counsel was ineffective because "trial counsel never followed up with the disposition of his client's case and never filed the Notice of Appeal for his client to preserve the appeals."

{¶ 21} During the trial court's February 22, 2011, sentencing hearing, the court indicated that it had received a letter from appellant "requesting the ability to appeal." In

response to appellant's inquiry, the court orally appointed Nicole Khoury to serve as appellate counsel. Due to a clerical error, the appointment was omitted from the journal entry and appellate counsel did not receive notice of her appointment. On April 3, 2012, appellant sent a letter to the court inquiring about his appeal. On June 19, 2012, the trial court journalized an entry acknowledging its error and appointing appellate counsel for purposes of this appeal. Thereafter, appellate counsel filed and was granted a motion for leave to file a delayed appeal.

{¶ 22} Trial counsel did not err by failing to "follow-up" with appellant's case or by failing to file a notice of appeal because his obligation to represent appellant ended when appellate counsel was appointed by the trial court. Further, trial counsel's omission did not prejudice appellant as this court allowed appellate counsel to pursue a delayed appeal. Appellant's second argument under this assignment of error is not well-taken.

{¶ 23} For the reasons set forth above, appellant's first assignment of error is found not well-taken.

SECOND ASSIGNMENT OF ERROR

{¶ 24} In his second assignment of error, appellant asserts:

> Mr. Dotson's conviction was not supported by Sufficiently Credible Evidence and was against the Manifest Weight of the Evidence.

{¶ 25} Claims involving the sufficiency and weight of the evidence "are conceptually distinct and invoke disparate standards of appellate review." *State v. Cronin*, 6th Dist. No. S-09-032, 2010-Ohio-4717, ¶ 23.

Sufficiency of the Evidence

{¶ 26} In reviewing a sufficiency of the evidence claim, we are required 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by state constitutional amendment on other grounds* as stated in *State v. Smith*, 80 Ohio St.3d 89, 102, fn. 4, 684 N.E.2d 668 (1997).

{¶ 27} "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781. 61 L.Ed.2d 560 (1979).

{¶ 28} The grand jury indicted Gerald Dotson for unlawful sexual conduct with a minor under R.C. 2907.04(A). That section provides that "[n]o person who is eighteen years of age or older shall engage 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). "Sexual conduct" includes fellatio. R.C. 2907.01(A).

{¶ 29} In reviewing the sufficiency of the evidence, we must consider the evidence in a light most favorable to the prosecution. *Jenks* at paragraph two of the syllabus. L.A. testified that his great-grandmother's 63-year-old husband forced L.A. to

engage in oral sex. At the time, appellant knew L.A. was 14 years old. Further, Mrs. Dotson testified that when she walked into the living room, appellant's pants were down and L.A. was kneeling down on the floor with his head inside appellant's leg. Viewing the evidence in a light most favorable to the state, we conclude there was sufficient evidence to support appellant's conviction.

Manifest Weight of the Evidence

{¶ 30} The Ohio Supreme Court has summarized the standard for reversal for manifest weight of the evidence as follows:

> 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541(1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 31} "In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state. Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins*, 78 Ohio St.3d at 388. Reversal on manifest weight grounds is reserved for

"the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin* at 175.

{¶ 32} Here, Dotson argues neither the victim nor appellant's wife were credible as witnesses. While on the witness stand, L.A. denied ever having any prior sexual contact with appellant. Yet, when questioned at the hospital by Sergeant Rose, L.A. indicated that there had been prior sexual contact between L.A. and appellant. L.A. told his mother, the SANE and Sergeant Rose that appellant threatened him with a handgun. Yet, when the police searched the premises they found only a rifle. Appellant questions Mrs. Dotson's credibility because she admitted to having two different identities with two social security numbers and two different birthdates.

{¶ 33} While a reviewing court considers the credibility of the witnesses in a weight of the evidence review, "that review must nevertheless be tempered by the principle that weight and credibility are primarily for the trier of fact." *State v. Kash*, 1st Dist. No. CA2002-10-247, 2004-Ohio-415, ¶ 25, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is in the best position to "view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Kash* at ¶ 25, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "The jury may believe all that a witness has said, or part or none of it." *Barker v. Century Ins. Group*, 10th Dist. No. 06AP-377, 2007-Ohio-2729, ¶ 14, quoting *In re D.F.*, 2d Dist. No. 06AP-1052, 2007-Ohio-617, ¶ 26.

{¶ 34} After reviewing the record, we cannot say that the trial court clearly lost its way or that the verdict was a manifest miscarriage of justice. Appellant was 63 years old and L.A. was 14 years old at the time of the incident. Appellant knew the victim's age. L.A. testified he performed fellatio on appellant. This testimony, if believed, was enough to convict appellant of unlawful sexual conduct with a minor. "In sex offense cases, Ohio courts have consistently held that a victim's testimony need not be corroborated in order to support a conviction." *State v. Jones*, 12th Dist. No. CA2012-03-049, 2013-Ohio-150, ¶ 21 (citations omitted). Although there were inconsistencies in the evidence as to whether appellant threatened the victim with a gun and whether there had been previous sexual contact between appellant and the victim, these inconsistencies did not render the victim's testimony so incredible as to deny belief. Because witness credibility was primarily for the trial court to determine, we find that the verdict was not against the manifest weight of the evidence.

{¶ 35} Pursuant to the above, appellant's second assignment of error is found not well-taken.

{¶ 36} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE