[Cite as *Toledo v. Ramos*, 2013-Ohio-4526.]

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

City of Toledo/State of Ohio — Court of Appeals No. L-12-1191

Appellee — Trial Court No. CRB-10-18440

v.

Isaias Ramos — **DECISION AND JUDGMENT**

Appellant — Decided: October 11, 2013

* * * * *

David L. Toska, Chief Prosecutor, City of Toledo, and
Sharon D. Gaich, Assistant Prosecutor, for appellee.

Stephen D. Long, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Toledo Municipal Court, which found appellant guilty of two counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, misdemeanors of the first degree. Appellant's conviction stemmed from an ongoing pattern of sexual activity occurring between appellant and his

minor, half-sister. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Isaias Ramos, set forth the following four assignments of error:

1. THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT'S MOTION FOR ACQUITTAL, RENEWED MOTION FOR ACQUITTAL, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S CONVICTION OF DEFENDANT/ APPELLANT FOR TWO COUNTS OF THE CRIME OF UNLAWFUL SEXUAL CONDUCT WITH A MINOR, IN VIOLATION OF R.C. 2907.04(A)(2).

2. THE JURY'S VERDICT FINDING DEFENDANT/ APPELLANT, GUILTY BEYOND A REASONABLE DOUBT OF THE FOR [SIC] TWO COUNTS OF THE CRIME OF UNLAWFUL SEXUAL CONDUCT WITH A MINOR, IN VIOLATION OF R.C. 2907.04, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

3. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOW [SIC] TESTIMONY REGARDING INCIDENTS WHICH ALLEGEDLY OCCURRED IN 2009, WHEN APPELLANT WAS A MINOR, AND INCIDENTS WHICH OCCURRED DURING A PERIOD COVERED BY A DISMISSED COMPLAINT.

4. DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 3} The following undisputed facts are relevant to this appeal. During the course of 2009 and 2010, appellant intermittently resided with his father and half-sister for significant periods of time. Throughout these periods of cohabitation, during which appellant reached the age of majority, appellant and his minor sister began to engage in multiple acts and multiple types of unlawful sexual conduct with one another.

{¶ 4} As the improper relationship evolved and expanded, the siblings engaged in sexual activity on a regular basis ranging from appellant digitally penetrating the victim, appellant performing oral sex upon the victim, and appellant having the victim perform oral sex upon him and masturbate him. Appellant's sister was 13 years of age and appellant was 17 years of age when the events underlying this matter commenced. During the two-year span of time during which these activities were occurring, appellant reached the age of majority.

{¶ 5} Not surprisingly, in the context of what was taking place in the home on a regular basis, appellant's father ultimately became suspicious that some sort of inappropriate sexual activity between his children was taking place. In the fall of 2010, based upon these suspicions, he questioned his daughter. Following an initial denial to her father, the victim confirmed that the suspected sexual activity with appellant was occurring.

{¶ 6} Following the victim's disclosure, the victim's father reported the matter to the Toledo Police Department. Detective Shelli Kilburn of the department's Special Victims Unit investigated the matter. On November 16, 2010, as a result of the investigation, appellant was charged with three counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, misdemeanors of the first degree.

{¶ 7} Approximately one year later, service was attained upon appellant. On December 2, 2011, appellant pled not guilty, was found indigent, and counsel was appointed. On June 19, 2012, one of the three counts was dismissed by the state for evidentiary reasons. On June 25, 2012, the remaining two cases proceeded to jury trial.

{¶ 8} At trial, the victim testified that she and appellant were half-siblings. The victim furnished detailed testimony regarding the unlawful sexual relationship that transpired between herself and appellant. The sexual conduct was occurring regularly during a span of time in 2009 and 2010 except for period of time in late 2009 when appellant had moved out of the family residence. However, in the summer of 2010, appellant moved back into the residence and the sexual activity promptly resumed.

{¶ 9} Notably, the victim's cousin testified that she became aware of the sexual relationship in 2009. The victim disclosed the activity to her female cousin. The cousin did not personally observe the sexual activity. A friend of the victim testified that while she was at the home for a sleepover with the victim, appellant came into the victim's room and told her friend to leave the room so that he could be alone with the victim. Later, appellant crudely stated to the victim's friend, "Can I tap that," and physically

smacked her butt while following her up the stairs. The friend became extremely uncomfortable when in close proximity to appellant, feigned illness, and left the home. Appellant's father, who is also the victim's father, testified that he became suspicious that an inappropriate sexual relationship was occurring between his son and his daughter. He confronted appellant. Appellant denied the activity.

{¶ 10} Detective Kilburn testified that based upon a report of inappropriate sexual activity made by the victim's father upon the victim's disclosure to him, she launched an investigation of the matter. Appellant did not cooperate in the investigation.

{¶ 11} Appellant testified that he did live with his father and half-sister in 2009 but denied living with them in 2010, contrary to the testimony of his father, sister, and the other witnesses. Appellant claimed, without objective evidentiary support, that he had been touring with a band on the East Coast in 2010. Appellant denied any sexual activity with the victim in 2010 or at any point in time. Interestingly, appellant even steadfastly denied ever being present in his father's home during 2010. That testimony also runs directly counter to the testimony of appellant's father, sister, and other witnesses present at the home during that time.

{¶ 12} On June 25, 2012, the jury found appellant guilty of both counts of unlawful sexual conduct with a minor. On July 11, 2012, appellant was sentenced to 180 days of incarceration at the Corrections Center of Northwest Ohio, with 50 of the days suspended on the first count, and 180 days of incarceration with all 180 days suspended

on the second count. Appellant was also placed on two years of active probation. This appeal ensued.

{¶ 13} In the first assignment of error, appellant contends that the trial court erred in denying his Crim.R. 29 motion for acquittal and that the verdict was not supported by sufficient evidence. In support, appellant maintains that the state erred in not directly inquiring of the victim as to whether she and her brother were married. Appellant contends that this resulted in a failure on the marital status element of the offense. We do not concur.

{¶ 14} Pursuant to Crim.R. 29(A), a trial court should grant a judgment of acquittal in cases in which the evidence is insufficient to sustain a conviction of the offense. Crim.R. 29(A) specifically establishes that an acquittal shall be granted, "if the evidence is insufficient to sustain a conviction of such offense or offenses." In reviewing a challenge prefaced upon a denial of a motion for acquittal, an appellate court applies the same test that is applied when reviewing a challenge based upon this efficiency of the evidence. *State v. Hancock*, 6th Dist. Lucas No. L-10-1123, 2011-Ohio-355, ¶ 13, citing *State v. Thompson*, 127 Ohio App.3d 511, 525, 713 N.E.2d 456 (8th Dist.1998).

{¶ 15} It is well-established that when reviewing the sufficiency of the evidence, an appellate court must examine the record of evidence to determine whether, if believed, it would convince the average juror of guilt beyond a reasonable doubt. The relevant inquiry ultimately becomes whether any rational trier of fact could have found the

elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 16} Appellant's first assignment is prefaced upon the notion that the verdict lacked sufficient evidence and, therefore, the motion for acquittal should have been granted. In support, appellant argues that the state fatally failed to explicitly inquire of the victim whether she and her brother were legally married. We are not persuaded.

{¶ 17} We have carefully reviewed the record of evidence. The record encompasses ample testimony from both the victim and her father that she and appellant were siblings. They share the same father. That testimony, in and of itself, can reasonably be construed as demonstrating that appellant and the victim were not, and could not, be legally married, thereby addressing that element of the offense. The verdict was supported by sufficient evidence. The denial of the motion for acquittal was not improper.

{¶ 18} Appellant also argues an evidentiary failure with respect to the dates involved. The record reflects that unlawful sexual activity between appellant and his 14-year-old half-sister was occurring on an intermittent basis during 2010 time frames consistent with those set forth in the complaint. More significantly, appellant concedes that exact dates are not a required element of the offense. We find appellant's first assignment of error not well-taken.

{¶ 19} In the second assignment of error, appellant contends that the verdict was against the manifest weight of the evidence. A manifest weight challenge questions

whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The court of appeals acts as a "thirteenth juror," reviews the record, weighs the evidence and all reasonable inferences, and determines whether in resolving evidentiary conflicts the jury clearly lost its way so as to create a manifest miscarriage of justice so as to warrant the extreme remedy of a reversal. *Id.*

{¶ 20} The record of evidence in this matter reflects ample testimony furnished by the victim, the shared father of victim and appellant, the victim's cousin, the victim's friend, and the investigating detective supporting the conviction. The record is devoid of any evidence indicative that the jury somehow lost its way in weighing all of that evidence favoring conviction against appellant's self-serving contrary testimony. We find appellant's second assignment of error not well-taken.

{¶ 21} In the third assignment of error, appellant asserts that the trial court committed plain error in permitting testimony about the sexual incidents that occurred in 2009, when appellant had not yet reached the age of majority. In order to establish plain error, it must be demonstrated that the alleged error must not only be obvious, but must also be shown to have altered the outcome of the trial. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 62.

{¶ 22} In applying this controlling principle to the instant case, we note that the evidence and testimony pertained to sexual activity between the parties during 2009 and into the fall of 2010. The relevant charging dates, in September 2010, are encompassed by the record of evidence. No evidence has been submitted establishing that but for the

testimony of the prior 2009 sexual activity being allowed, appellant would not have been convicted of the September 2010 unlawful sexual conduct. We find appellant's third assignment of error not well-taken.

{¶ 23} In the fourth assignment of error, appellant asserts that the claimed plain error regarding the 2009 testimony underlying the third assignment of error constitutes therefore also evidence of ineffective assistance of counsel. We need not belabor our consideration of this argument. Given our determination that admission of the 2009 testimony did not constitute plain error, we therefore also find appellant's fourth assignment of error rooted in the same legal premise not well-taken.

{¶ 24} Wherefore, we find that substantial justice has been done in this matter. The judgment of the Toledo Municipal Court is hereby affirmed. Appellant is ordered to pay the cost of this appeal 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