[Cite as *State v. Folk*, 2015-Ohio-1862.]

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

State of Ohio

Appellee

v.

Thomas Folk

Appellant

Court of Appeals Nos. WD-14-001
WD-14-011

Trial Court Nos. 13 CR 223
12 CR 381

DECISION AND JUDGMENT

Decided: May 15, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellee.

Jeremy W. Levy and Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Thomas Folk appeals December 5, 2013 judgments of conviction of the Wood County Court of Common Pleas entered against him in two criminal cases in that court. The cases were tried together to the bench in October 2013 and consolidated on appeal. In Wood County Common Pleas case No. 12 CR 381 (appeal No. WD-14-011),

appellant was convicted of two counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1) and (B), felonies of the second degree, with R.C. 2929.13(F)(6) specifications on each count. In Wood County Common Pleas case No. 13 CR 223 (appeal WD-14-001), appellant was convicted of two additional counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1) and (B) with R.C. 2929.13(F)(6) specifications and one count of possessing criminal tools, in violation of R.C. 2923.24(A) and (C), a felony of the fifth degree.

{¶ 2} Both cases were brought by indictment and the indictments included R.C. 2929.13(F)(6) prior conviction specifications for each of the R.C. 2907.323(A)(1) and (B) counts. In an October 18, 2013 judgment filed in both cases, the court entered guilty verdicts on all five counts and findings with respect to the specifications. With respect to the R.C. 2929.13(F)(6) specifications, the trial court found that appellant was previously convicted of two felonies—pandering sexually oriented matter involving a minor, a violation of R.C. 2907.322(A)(1), a felony of the second degree, and pandering sexually oriented matter involving a minor, a violation of R.C. 2907.322(A)(3), a felony of the fourth degree.

{¶ 3} In the December 3, 2013 judgment, filed in both cases, the trial court sentenced appellant to serve mandatory eight-year terms of imprisonment on the convictions on the four illegal use of a minor in nudity-oriented material or performance counts. The court sentence appellant to serve a 12-month term of imprisonment on the

possessing criminal tools conviction. The court also ordered that the sentences on all counts be served concurrently to one another.

The Case

{¶ 4} The four convictions for illegal use (violations of R.C. 2907.323(A)(1) and (B)) are based on the same two images depicting nude children. One is a photo of three nude children standing in a row and holding plastic drinking cups. The other is a photo of three nude children standing in a row with their hands at their sides. The images were state exhibits Nos. 4 and 5 and were admitted in evidence at trial. The illegal use charges in common pleas case No. 12 CR 381 (appeal No. WD-14-011) relate to images found on appellant's cell phone. The illegal use charges in common pleas case No. 13 CR 223 (appeal No. WD-14-001) relate to images found on a laptop computer.

{¶ 5} Gloria Lehman, appellant's ex-wife, testified at trial that in August 2011, she discovered pictures of naked children on appellant's LG cell phone. Lehman testified that the pictures were of "young children from three to five to prepubescence." At the time, Gloria and appellant were married and resided together. They married in 2003.

{¶ 6} Appellant had a criminal history with respect to child pornography. He pled guilty and was convicted of child pornography charges in 2005. The charges arose after the discovery in 2004 that appellant viewed and downloaded child pornography images to a computer at work at Bowling Green State University ("BGSU"). Appellant was terminated from a 17-year-job at the university as a result. Appellant was also sentenced on April 27, 2005 to serve two years in prison.

{¶ 7} Appellant testified at trial that he was released from imprisonment after serving nine months and placed on probation. Under the terms of probation, however, he was to have no contact with his stepchildren. According to appellant, it was only after about two years of sex offender counseling that he was permitted to reside with the children and thereby return home. Appellant also testified at trial that since he was released from prison, his income from employment has remained less than one-half of what he earned at BGSU.

{¶ 8} Lehman testified at trial that in August 2011, she confronted appellant about the photos of naked children that she found on his cell phone. She testified that appellant responded, saying "well, there used to be a lot worse on there." Lehman did not return the cell phone to appellant. She filed for divorce in March 2012. She gave the cell phone to the Wood County Sheriff's Office in July 2012.

{¶ 9} The Wood County Grand Jury indicted appellant on child pornography charges arising out of images on the cell phone on July 19, 2012. A second indictment followed on May 2, 2013, arising out of images discovered on the laptop computer at appellant's residence.

{¶ 10} Appellant asserts two assignments of error on appeal:

Assignments of Error

1. The State of Ohio failed to provide legally sufficient evidence to sustain a conviction as to all charges against appellant.

2. Appellant's convictions fell against the manifest weight of the evidence.

Sufficiency of the Evidence

{¶ 11} Under assignment of error No. 1, appellant contends that the guilty verdicts are not supported by sufficient evidence. Sufficiency of the evidence is "'that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support a jury verdict as a matter of law.'" *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary 1433 (6 Ed.1990). In *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), the Ohio Supreme Court outlined the analysis required to apply this standard:

> 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.) *Id*. at paragraph two of the syllabus.

{¶ 12} Sufficiency of the evidence is purely a question of law. *Thompkins* at 386. The state can establish the elements of a crime through either direct or circumstantial evidence. *See Jenks* at 272-273; *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, ¶ 15.

{¶ 13} Appellant contends that there is insufficient evidence in the record to establish that he transferred the images of child nudity to support convictions for violation of R.C. 2907.323(A)(1). R.C. 2907.323(A)(1) provides:

> (A) No person shall do any of the following:
>
> (1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or *transfer any material or performance that shows the minor in a state of nudity*, unless * * *."
>
> (Exceptions omitted. Emphasis added.)

{¶ 14} The statute does not define the word "transfer" and appellant argues that the trial court erred in adopting the analysis of the Eighth District Court of Appeals in *State v. Thomas*, 197 Ohio App.3d 176, 2011-Ohio-6073, 966 N.E.2d 939 (8th Dist.) as to the meaning of the word under the statute. In *Thomas*, the court of appeals looked to the ordinary meaning of the word and concluded that transfer of a photograph from a cellphone to a computer constituted a prohibited transfer under the statute:

> In Webster's New Collegiate Dictionary (1977), the first definition listed for "transfer" is "to convey from one person, place, or situation to another." According to the prosecutor's statement of the facts, Thomas

sent the photographs from his Blackberry to his computer. This action falls within the ordinary definition of the word "transfer." See, e.g., *State v. Anderson*, Washington App. No. 03CA3, 2004-Ohio-1033, 2004 WL 413273. *Id*. at ¶ 49.

{¶ 15} Appellant argues, without authority, that the act of downloading child pornography onto a computer is not a transfer under R.C. 2907.323(A)(1). Appellant contends that the General Assembly intended that R.C. 2907.323(A)(1) be used against those who actively create and distribute pictures of nude children to the public. The state argues that prohibited transfers under R.C. 2907.323(A)(1) include downloading of child pornography from file sharing websites on the internet onto a home computer and cell phone.

{¶ 16} We find the analysis of the Eighth District Court of Appeals in *Thomas* persuasive and adopt it. We conclude, applying the ordinary meaning of the word "transfer" to R.C. 2907.323(A)(1), that the statute prohibits conveying images that show a minor in a state of nudity, from one place to another, including conveying an image over the internet to a computer or cellphone and from one device to another.

{¶ 17} Appellant also argues that evidence is lacking to demonstrate that he is the person who downloaded the images to the computer and that others also had access to the home computer during the relevant period. Appellant contends that without such evidence, there is insufficient evidence on which to convict him of either of the two

computer related R.C. 2907.323(A)(1) and (B) charges or on the R.C. 2923.24(A) and (C) possessing criminal tools charge.

{¶ 18} With respect to the possessing criminal tools charge, asserting a violation of R.C. 2923.24(A) and (B) and a felony of the fifth degree, it charged appellant with possession of an HP laptop computer—S/N CNF0333OCS with purpose to use it criminally.

{¶ 19} The elements of R.C. 2923.24(A), possessing criminal tools, are: "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." Appellant contends that evidence is lacking to demonstrate that he is the one who downloaded and viewed the images on the computer and that without such evidence the state cannot prove that appellant had the computer with purpose to use it in a criminal act.

{¶ 20} The state presented evidence at trial that the two images depicting nude children discovered on appellant's cell phone were date stamped August 2, 2011, and that the date indicated when the images were placed on the phone. On that date appellant was still in possession of the cell phone. Subsequently, also in August 2011, appellant and his ex-wife argued after she discovered photographs of nude children on the phone. Gloria Lehman testified that when she confronted appellant concerning the photographs, he stated there "used to be a lot worse on there."

{¶ 21} Terry James, a lieutenant with the Wood County Sheriff's Office testified at trial. Lieutenant James testified that he examined appellant's cell phone after Gloria

Lehman turned it over to the Perrysburg Police Department and after he secured a search warrant to examine the device. On July 12, 2012, James questioned appellant at appellant's residence concerning the cell phone. James testified that appellant knew there was child pornography on his cell phone and that he had undertaken a google search to place it there:

> I asked – I explained to Mr. Folk that I had seen the cellphone and told him that I understood that there was child pornography on it. He stated, "Yes." I asked him how he got it. He said that he Google searched it and for 99 cents you could pay to have it text messaged, the picture test messaged, to your Tracphone®.

{¶ 22} Lieutenant James also testified that appellant admitted to him on July 12, 2012, that the children depicted in the pictures on the cell phone were "probably" around eight years old.

{¶ 23} Detective Patrick Jones is a computer forensic examiner for the city of Perrysburg Police Department. Detective Jones testified at trial that he found thumbnail copies of the same two images (as those found on the cell phone) on the family home computer and that the thumbnails were created by the computer operating system when the images were viewed on the computer. The detective also testified that the images were in a user account on the computer that was not password protected.

{¶ 24} Construing the evidence most favorably to the prosecution, appellant admitted that he secured the identical images found on both the cell phone and the

computer through a google search of the internet at a cost of 99 cents each. He also admitted the images on the cell phone were of children who were probably eight years of age. In our view, identity of the images and the manner of acquisition provide circumstantial evidence of appellant's involvement in transferring the images to both devices.

{¶ 25} The evidence at trial was that appellant had access to the family home computer both prior to and after his ex-wife moved out of the house and that Lieutenant James took possession of the family computer on July 12, 2012, by consent. Appellant's testimony at trial and his employment history demonstrate that he is fully knowledgeable on how to download child pornography over the internet to computers and cellphones and to transfer such images between those devices.

{¶ 26} After viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements on each of the four counts of violation of R.C. 2907.323(A)(1) and (B) and accompanying R.C. 2929.13(F)(6) specifications on each count proven beyond a reasonable doubt. Specifically, with respect to the R.C. 2907.323(A)(1) and (B) counts, appellant secured transfer of the two images of child nudity over the internet to either his cellphone or the family computer and transferred copies of the same images to the other device.

{¶ 27} Proof of the R.C. 2929.13(F)(6) prior conviction specifications was provided at trial by a certified copy of an April 27, 2005 judgment of conviction of appellant for (1) pandering sexually oriented matter involving a minor, a violation of R.C.

2907.322(A)(3), a felony of the second degree, and (2) pandering sexually oriented matter involving a minor, a violation of R.C. 2907.322(A)(3), a felony of the fourth degree.

{¶ 28} We also conclude that any rational trier of fact could also have found the essential elements of the R.C. 2923.24(A) and (C) possessing criminal tools charge beyond a reasonable doubt. Specifically, that appellant was in possession of an HP laptop computer with purpose to use it criminally to commit violations of R.C. 2907.323(A)(1) and (B).

{¶ 29} We find assignment of error No. 1 not well-taken.

{¶ 30} Under assignment of error No. 2, appellant argues that his convictions are against the manifest weight of the evidence. Where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," weighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *Thompkins,* 78 Ohio St.3d. at 387, 678 N.E.2d 541; *State v. Lee,* 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12:

> 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 new trial ordered. *Thompkins* at 387, 678 N.E.2d 541,

quoting with approval, *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶ 31} Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." *Id.* There is "a presumption that the findings of the trier-of-fact were indeed correct." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Fundamental to the analysis is that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 32} Appellant challenges the credibility of testimony of Gloria Lehman, his former wife, pointing to her delay for months before turning the cell phone over to police and Gloria's threat to turn the cell phone over to police in an unsuccessful attempt to secure appellant's agreement to more favorable terms of a divorce.

{¶ 33} Ohio recognizes that a trial judge in a bench trial "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of proffered testimony." *Seasons Coal* at 80. When considering a challenge to a guilty verdict on the basis that the verdict is against the manifest weight of the evidence, "an appellate court generally must defer to the fact-finder's credibility determinations." *State v. Crockett*, 6th Dist. Sandusky No. S-13-016,

2014-Ohio-3512, ¶ 19, citing *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 34.

{¶ 34} Appellant also argues that the evidence of the contents of the cell phone was unreliable because there was a break in the chain of custody of the phone during a period (less than two weeks) that Gloria Lehman had placed the phone with her minister for safekeeping. The minister did not testify at trial.

{¶ 35} The evidence at trial included an admission by appellant to Lieutenant James that his cell phone contained child pornography depicting children probably eight years of age and that appellant had secured the photos over the internet at a cost of 99 cents each.

{¶ 36} We have reviewed the entire record and considered the credibility of witnesses and conflicts in the evidence. We conclude that competent, credible evidence in the record supports the trial court's guilty verdicts. We conclude that the verdicts did not create a miscarriage of justice.

{¶ 37} Accordingly, we find appellant's assignment of error No. 2 not well-taken.

{¶ 38} Justice having been afforded the party complaining, we affirm the judgments of the Wood County Court of Common Pleas and order appellant to pay the costs of this appeal, pursuant to App.R. 24.

Judgments 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

Arlene Singer, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE