

[Cite as *State v. Alsip*, 2010-Ohio-1757.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93105

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT ALSIP

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504804

BEFORE: Gallagher, A.J., Jones, J., and Cooney, J.

RELEASED: April 22, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).
SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Robert Alsip appeals his conviction from the Cuyahoga County Court of Common Pleas for gross sexual imposition. Finding no merit to the arguments set forth, we affirm.

{¶ 2} On December 20, 2007, a Cuyahoga County grand jury indicted Alsip on ten counts, including four counts of rape, four counts of kidnapping, and two counts of gross sexual imposition. Alsip pleaded not guilty to all charges, and a bench trial commenced on March 17, 2009.

{¶ 3} As its first witness, the state called the victim, who was between the ages of four and six at the time of the alleged crimes. The victim, Alsip's stepdaughter, testified that while she and her family were living at her grandparents' house in Middleburg Heights, Ohio, and prior to her family's move to Florida, Alsip rubbed her vaginal region with his fingers and inserted his fingers inside her vagina. She testified this occurred in the bathroom at her grandparents' house. The victim also testified that Alsip attempted to put his penis in her vagina, but that she could not remember when and where that incident occurred. The victim's testimony further revealed that she did not tell anyone at that time what Alsip did to her.

{¶ 4} In fact, a year or more passed between the alleged incidents and the victim's revelations, during which time the family had moved to Florida, and subsequently to Tennessee in 2005, where only then did she confide in her mother about what Alsip had done to her. Her mother's testimony was that she learned of the incident from her daughter only after she told her daughter that Alsip, at the time imprisoned in Florida, may be coming back to live with the family. The victim's mother further testified that she

made an initial call to child services in Tennessee, but decided not to pursue an investigation or take the victim for medical or psychological help.

{¶ 5} Donald Laster, a witness for the defense, testified via videotape in the middle of the state's case. Laster was the caseworker in Tennessee assigned to the victim's case when child and family services received a referral about possible abuse to the victim in November 2005. Laster met with the victim at her school, and during the course of his interview, the victim told him Alsip had not touched her inappropriately. Laster testified that, from his interview with the victim, he closed the case without any determination. Laster, tr. 65,71.¹

{¶ 6} The victim's grandmother, Alsip's mother, testified that some time in 2006, the victim returned to Ohio with her siblings to live with her and her husband. She testified that in 2007, she was contacted by child and family services about possible abuse to the victim based on the victim's disclosure to her friends at school. The grandmother testified she allowed the victim to meet with a caseworker from child services, at which time she learned what the victim said Alsip did to her. She took the victim for counseling once, but did not seek medical help for her because the child resisted. She also refused to allow the victim to speak with the police.

¹ Caseworkers generally determine one of three dispositions with possible victims of sexual abuse: "substantiated" (meaning personal disclosure by the victim and medical evidence corroborating that disclosure); "indicated" (meaning personal disclosure without medical evidence corroborating that disclosure); and "unsubstantiated" (no personal disclosure and no medical evidence of sexual abuse). Collins, tr. 189; see, also, *State v. Matos*, Cuyahoga App. No. 81302, 2003-Ohio-3214.

{¶ 7} Steven Collins, a caseworker with child and family services in Cuyahoga County, testified his interview with the victim revealed she knew the difference between good and bad touches, and she knew the difference between lying and telling the truth. The information he gathered from his interview with the victim led him to conclude that sexual abuse was “indicated.” (Collins, tr. 204). On the basis of this information, Collins contacted the Middleburg Heights police with his report. Eventually the grand jury subpoenaed the victim to testify in the case against Alsip.

{¶ 8} At the close of the state’s case, the state dismissed seven counts of the indictment, leaving one count each of rape, kidnapping, and gross sexual imposition. Defense counsel made a Crim.R. 29 motion for acquittal on the remaining three counts, which the court denied. Alsip did not put on a defense. The court acquitted Alsip of rape and kidnapping, and found Alsip guilty of gross sexual imposition, in violation of R.C. 2907.05(A)(4). The court also acquitted him on the sexually violent predator specification. Alsip was sentenced to four years in prison, to be served concurrent with the term he was then serving in Florida, with any additional time to be served in Ohio. He was also advised of postrelease control, and classified as a tier III offender.

{¶ 9} This appeal followed.

{¶ 10} In his first assignment of error, Alsip argues that the trial court erred by denying his Crim.R. 29 motion for acquittal. Specifically, he argues the state failed to offer sufficient evidence that sexual contact occurred, or evidence of when and where the alleged crime occurred.

{¶ 11} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386. “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. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” (Citations and quotations omitted.) *Id.*

{¶ 12} R.C. 2907.05(A)(4) states: “No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: * * * (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.”

{¶ 13} Sexual contact is defined as “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.” R.C. 2907.01(B).

{¶ 14} The victim’s testimony alone is sufficient to withstand a Crim.R. 29 motion on the charge of gross sexual imposition. The victim was between the ages of four and six when Alsip used his fingers to rub and penetrate her vagina. She described details of the incident, which corresponded with a time she and Alsip were living in the same house. The fact that the victim recanted her story to Laster, whom she met at her school a year or

so later, goes to credibility, not sufficiency, as does the fact that there was a delay in reporting. See *State v. Miller* (Jan. 26, 2001), Montgomery App. No. 18102 (evidence counterbalances “the trier of fact’s natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness”).

{¶ 15} Nonetheless, Alsip argues that the victim’s testimony does not provide an exact date and time the incident allegedly occurred. The same issue was addressed by this court in *State v. Krzywkowski*, Cuyahoga App. No. 80392, 2002-Ohio-4438. Relying on *State v. Sellards* (1987), 17 Ohio St.3d 169, 478 N.E.2d 781, the *Krzywkowski* court stated, “Because the precise date and time of the offense of rape are not essential elements of that crime, a certain degree of inexactitude in averring the date of the offense is not necessarily fatal to its prosecution.” *Id.* Ohio case law firmly holds that “allowances must be made for the inexactitude of children’s memories, or else the defendant becomes virtually immune from prosecution.” See *State v. Barnecut* (1988), 44 Ohio App.3d 149, 542 N.E.2d 353; *Sellards*, *supra*; *State v. Gingell* (1982), 7 Ohio App.3d 364, 455 N.E.2d 1066; *State v. Kinney* (1987), 35 Ohio App.3d 84, 519 N.E.2d 1386.

{¶ 16} Similarly in this case, the precise date and time are not elements of the offense of gross sexual imposition. The state’s bill of particulars set forth an exact location as well as a time period, April 2002 to February 2004, when the incident was alleged to have occurred. The victim was between the ages of four and six, living with Alsip at this address during this time. We find this is sufficient under R.C. 2907.05 and Alsip was not prejudiced by the inexactitude of the dates provided in the bill of particulars.

{¶ 17} Alsip’s first assignment of error is overruled.

{¶ 18} In his second assignment of error, Alsip argues the trial court’s verdict was against the manifest weight of the evidence. Relying on his first assigned error, Alsip claims the court lost its way without the requisite evidence before it to convict.

{¶ 19} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 20} As the trier of fact, the court heard the victim recount how Alsip touched her inappropriately, how his fingers penetrated her vagina, how she was scared to tell anyone about it because she knew how much it would hurt her mother and grandmother. The court also heard how the victim confided in her mother only when she feared Alsip may be reentering her life. The court heard the Cuyahoga County caseworker’s testimony that he found abuse was indicated based on his interview with the victim.

{¶ 21} In reaching its verdict, the court stressed how upsetting it was that the victim’s caregivers impeded the investigation and failed to seek the help she needed. Yet the court weighed the evidence before it and concluded it did not support convictions for rape and kidnapping, but that the state proved beyond a reasonable doubt that sexual contact occurred.

{¶ 22} We do not find that the court's guilty verdict on gross sexual imposition was against the manifest weight of the evidence, given the testimony of the witnesses. Alsip's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR