

[Cite as *State v. Misconin*, 2010-Ohio-4475.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93429

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL G. MISCONIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511357

BEFORE: Boyle, J., Gallagher, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: September 23, 2010

ATTORNEYS FOR APPELLANT

Russell S. Bensing
David L. Grant
1350 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: T. Allan Regas
Nick Giegerich
Assistant County Prosecutors
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Michael Misconin, appeals his conviction, raising the following two assignments of error:

{¶ 2} “[I.] The verdict of the jury was against the manifest weight of the evidence, and was not supported by sufficient evidence.

{¶ 3} “[II.] The trial court erred to the prejudice of defendant by admitting as substantive evidence an out-of-court statement made by a witness.”

{¶ 4} We find no error and affirm.

Procedural History

{¶ 5} The Cuyahoga County Grand Jury returned a seven count indictment against Misconin for the following charges: four counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1); two counts of disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(1); and one count of possession of criminal tools, in violation of R.C. 2923.24. The allegations giving rise to the indictment were that Misconin, between May 2007 and July 2007, committed the acts of sexual imposition against his two stepsons; three acts against his then 15-year-old stepson, J.M., and one against his then 14-year-old stepson, R.M., and played pornographic movies for them to watch.

{¶ 6} Misconin pleaded not guilty to the charges, and the matter proceeded to a jury trial. At the conclusion of the state's case, the trial court granted Misconin's Crim.R. 29 motion for acquittal as to one of the counts of gross sexual imposition against J.M. As for the remaining counts, the jury ultimately acquitted Misconin of all the counts except one count of sexual imposition against R.M. The trial court subsequently sentenced Misconin to 14 months in prison.

{¶ 7} The following evidence was presented at trial related to the conviction on the single count of sexual imposition.

{¶ 8} R.M. testified that: “[Misconin] touched me inappropriately. * * * He touched my penis. * * * [H]e grabbed me and made me ejaculate.” He explained the incident in more detail as follows:

{¶ 9} “I was just laying down next to him [watching television], and he brought something up about pornography, and he pulled down my pants. * * * I froze. * * * I was scared and nervous.” R.M. further testified that he told Misconin to stop but that Misconin continued until R.M. ejaculated. Misconin then “cleaned up the mess” and R.M. got up and left, without saying anything.

{¶ 10} According to R.M., his mother and brother were asleep upstairs while this was going on in the basement. Following the incident, R.M. told Misconin that he had to tell their mother what happened. Upon learning what happened, their mother kicked Misconin out of the house and called the police.

{¶ 11} R.M. also testified that, immediately following the incident, Misconin had told him not to tell anyone. He further testified that he saw Misconin “briefly touch” his brother but “not to the point where he touched me.”

{¶ 12} R.M.’s testimony was also corroborated by his mother’s testimony. She testified that Misconin had called her at work and told her that he needed to speak with her when she got home. Once home, Misconin, who appeared nervous to the mother, told her that “he came home to find [R.M.] getting off * * * [a]nd that he joined in.” She described “joined in, as in [Misconin] was physically touching [R.M.] as to stroke him back and forth.”

{¶ 13} Misconin testified on his own behalf and denied R.M.’s allegations. He explained the incident as follows:

{¶ 14} “[R.M.] * * * had a blanket, and he laid next to me on that couch. * * * After about ten minutes, I noticed the blanking [sic] moving in an area it shouldn’t have been moving and I got very concerned. I pulled the blanket down, and he had his pecker out. And just as I hit him, the kid ejaculated. I scolded him for it, that this was inappropriate.” On cross-examination, he testified that he “pushed that blanket down” and, in doing so, his “hand grazed right across [R.M.’s] private parts.” According to Misconin, the incident “was an honest mistake.”

Sufficiency and Weight of the Evidence

{¶ 15} In his first assignment of error, Misconin challenges his conviction as being unsupported by sufficient evidence and against the manifest weight of the evidence.

{¶ 16} An appellate court’s function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. “In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. 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 273.

{¶ 17} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins*, supra, at 390. When a defendant asserts that a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* at 387.

{¶ 18} Misconin contends that R.M.'s testimony was plagued with inconsistencies that rendered it wholly unreliable and therefore insufficient to support the conviction. We disagree. Construing R.M.'s and his mother's testimony in a light most favorable to the state, we find that any rational trier of fact could have found Misconin guilty beyond a reasonable doubt on the charge of gross sexual imposition.

{¶ 19} We likewise cannot say that the jury "clearly lost its way" by convicting Misconin of a single charge of gross sexual imposition. To the contrary, the jury carefully considered all the evidence and where Misconin

presented credible, conflicting evidence, the jury disregarded the state's evidence. Notably, the jury acquitted him of all the charges except for one. And the fact that the jury found some of R.M.'s testimony inconsistent or unbelievable, i.e., testimony related to Misconin showing pornographic movies, R.M.'s downloading of pornography, or Misconin touching J.M., does not preclude the jury from believing R.M.'s other testimony. A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. See *State v. Gaughan*, 8th Dist. No. 90523, 2009-Ohio-955. The trier of fact is free to believe or disbelieve all or any of a witness's testimony. See *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶9. Here, the jury obviously found R.M.'s testimony as to the single incident more credible than Misconin's — a determination entitled to deference on appeal. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212 (the determination of weight and credibility of the evidence is for the trier of fact).

{¶ 20} Accordingly, based on our review of the record, we find sufficient evidence to support the conviction and that such conviction is supported by the weight of the evidence. The first assignment of error is overruled.

Admission of Written Statement as an Exhibit

{¶ 21} In his second assignment of error, Misconin argues that the trial court erred in admitting R.M.'s written statement as an exhibit for the jury to review in violation of Evid.R. 612, which provides in relevant part:

{¶ 22} “Except as otherwise provided in criminal proceedings by Rules 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure, if a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.”

{¶ 23} Misconin contends that the admission of the exhibit directly contravened Evid.R. 612 because the state was not the adverse party entitled to offer the statement as an exhibit. But the record reveals that Misconin stipulated to the admission of the statement and therefore any error arising out of the stipulation would be invited error. See *State v. Folk* (1991), 74 Ohio App.3d 468, 471, 599 N.E.2d 334 (a defendant is bound as to all matters of fact and law concerned in a stipulation reached with the state); *State v. Large*, 3d Dist. No. 2006CA00359, 2007-Ohio-4685 (error related to a defendant’s stipulation is invited error). He cannot now complain seeking to undo that error and any prejudice it may have caused him. *State v. Kniep* (1993), 87 Ohio App.3d 681, 686, 622 N.E.2d 1138.

{¶ 24} Misconin argues that he only stipulated to avoid the other unlawful alternative, i.e., having the statement read aloud to the jury, and therefore should

not be bound by his stipulation. The record reflects that Misconin, on recross-examination, questioned R.M. repeatedly as to the contents of his statements to the police, implying that the statement contained material omissions and inconsistencies. However, as noted by the trial court, regardless of whether the defense was attempting to impeach or refresh R.M.'s recollection, the defense's questioning had exceeded the scope of redirect examination and R.M.'s answers had not been inconsistent. Based on the confusion created by the defense on redirect examination regarding the contents of R.M.'s statements, the trial court determined that it would only be fair to allow the statements read out loud. Under these facts, we cannot say that the trial court's initial ruling to allow the statement to be read out loud would have been an abuse of discretion.

{¶ 25} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR