[Cite as *State v. Russell*, 2010-Ohio-5481.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94163

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY RUSSELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516937

BEFORE: Cooney, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 10, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Timothy Russell ("Russell"), appeals his gross sexual imposition conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In October 2008, Russell was charged in a five-count indictment. Counts 1 and 2 charged him with rape, Counts 3 and 4 charged him with sexual battery, and Count 5 charged him with gross sexual imposition

("GSI").[1] The matter proceed to a jury trial, with the furthermore specifications tried to the bench. At the close of the State's case, the court dismissed Counts 2 and 4 (rape and sexual battery). The jury found him guilty of Count 5 (gross sexual imposition), and the trial court found him guilty of the accompanying furthermore clause. The court sentenced Russell to four years in prison and classified him as a Tier III sexual offender.

{¶ 3} The following evidence was adduced at trial.

{¶ 4} Stephanie Smith ("Stephanie") testified that H.R. is her daughter and Russell is H.R.'s father.[2] Stephanie lived with her mother, Rebecca Zimmer ("Rebecca"), and H.R. in Brooklyn, Ohio from September 2007 to March 2008. During this time, Russell would visit H.R. on the weekends. Sometime toward the end of February 2008, Stephanie and Rebecca left four-year-old H.R. alone with Russell at their Brooklyn home, while they went to the grocery store.

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[1]The rape counts contained furthermore clauses stating that Russell compelled the victim by force, the victim was under the age of ten, and Russell was previously convicted of rape. The sexual battery counts contained a furthermore clause stating that the victim was under the age of 13. The rape and sexual battery charges also included a notice of prior conviction and repeat violent offender and sexually violent predator specifications. The GSI count contained a furthermore clause stating that Russell was previously convicted of rape when the victim was under the age of 13.

[2]The anonymity of the victim is preserved in accordance with this court's guidelines for protecting the identity of sex crimes victims.

{¶ 5} Stephanie testified that, while giving H.R. a bath, H.R. told her that "Daddy touched me. * * * In a place not good." Stephanie confronted Russell, who denied touching H.R. and stated "she's a lying little bitch."

{¶ 6} Stephanie did not immediately inform the police about the incident because she was scared and confused. She thought she was helping H.R. by not forcing her to talk about the incident until she was ready. Stephanie further testified that she went to a funeral in West Virginia in March 2008 with H.R., Rebecca, and Russell. When they returned, H.R. told her that "Daddy has a mushroom in his pants and it tastes bad." After this second disclosure, Stephanie informed the police, and Children and Family Services became involved.

{¶ 7} Rebecca testified that she is Stephanie's mother and H.R.'s grandmother. She testified that when she was giving H.R. a bath, H.R. told her that "Daddy touched me here" and pointed to her vaginal area. Rebecca confronted Russell, who responded that he must have bumped her when they were playing and he was tickling her. Rebecca then told Stephanie about this incident. She further testified that when they returned from their trip to West Virginia for her father's funeral, H.R. told her that Russell touched her vagina and that he made her suck on his mushroom and it tasted bad.

Rebecca further testified that she is schizophrenic and suffers from bipolar disorder.

{¶ 8} The victim, H.R., testified that Russell is her father. She used to live with her mother and grandmother in Brooklyn, Ohio.[3] H.R. testified that Russell is a "bad guy" because he touched her vagina when they were sitting on the couch. H.R. testified that he touched her inside her vagina with his finger, and then apologized for touching her. Stephanie and Rebecca were sleeping in the other room when this happened. She told Stephanie and Rebecca about this incident. H.R. further testified that she went on a trip to West Virginia with Stephanie, Rebecca, Russell, and Uncle Gregory before this incident.

{¶ 9} Dr. Mark Feingold, a pediatrician at MetroHealth Hospital's Alpha Clinic, examined H.R. after receiving a referral from Children and Family Services.[4] H.R. told him that Russell touched her vagina. When he asked her how, she pressed her hand into her vagina. She also told him that when her mother was at the store, she observed Russell's mushroom because they were both lying down naked. Dr. Feingold's examination did not reveal physical evidence of sexual abuse.

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[3]H.R. was six years old at the time of trial.

[4]The Alpha Clinic specializes in evaluating sexually abused children.

{¶ 10} Deana Calcagni ("Calcagni"), a sexual abuse intake worker for the Cuyahoga County Department of Children and Family Services, interviewed Stephanie, Rebecca, and H.R. in March 2008. H.R. identified her vaginal area on the anatomically correct drawings as the area where Russell touched her. H.R. told Calcagni that Russell touched the inside of her vagina at the Brooklyn house while her mother and grandmother were sleeping. H.R. further told Calcagni that she had seen Russell's private area. She described it as a mushroom that has a hole in it.

{¶ 11} Heather Ciogi ("Ciogi"), who also works for the Cuyahoga County Department of Children and Family Services, conducted an investigation in 2009 involving a tip that H.R. was sexually abused by Stephanie's boyfriend, J.P.[5] H.R. was five years old at the time of the interview. H.R. told Ciogi that J.P. was her new and "nice daddy" and that Russell was her "bad daddy." H.R. also told Ciogi that Russell was the only one who ever touched her vaginal area.

{¶ 12} Michael McGrath ("McGrath"), an inmate with a lengthy criminal history, testified that he was housed with Russell in the county jail. Russell told him that he was in jail for raping and molesting his daughter, H.R.

[5]Since J.P. was never charged with a crime involving this referral, we designate him by use of initials only.

McGrath testified that Russell told him: "[that he molested H.R.] [t]wice on the couch, once in the tub, once in the bed. How he undressed [H.R.] and ate [her] out, stuck his fingers inside of her ass and numerous things about how he ejaculated in her mouth and everything."

{¶ 13} McGrath testified that Russell was very interested in children's television shows with children in them. Russell would become physically aroused when he would tell McGrath about the things he did to H.R. Russell also told him that Stephanie would not be a good witness in this case because she is a drug addict, and Rebecca would not make a good witness because she is bipolar. McGrath further testified that he received no benefit for his testimony.

{¶ 14} Brooklyn police detective, Joseph Tenhunfeld, testified that he met with Stephanie and H.R. to discuss the matter. H.R. told him that Russell touched her vaginal area.

{¶ 15} Russell now appeals, raising three assignments of error, which shall be discussed together where appropriate.

Sufficiency and Manifest Weight of the Evidence

{¶ 16} In the first and second assignments of error, he challenges the sufficiency and manifest weight of the evidence of his GSI conviction.

{¶ 17} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency of the evidence:

> "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[t]he 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.' *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."

{¶ 18} The Ohio Supreme Court has restated the criminal manifest weight standard and explained how it differs from the sufficiency standard in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25:

> "The criminal manifest-weight-of-the-evidence standard was explained in [*Thompkins*, in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387,

678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 19} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 20} In the instant case, Russell was convicted of GSI under R.C. 2907.05(A)(4), which provides that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." 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).

{¶ 21} Russell argues that there is no physical evidence corroborating H.R.'s testimony. He refers to Dr. Feingold's testimony that his physical examination did not reveal sexual abuse. Physical corroboration, however, is not required to sustain a GSI conviction under R.C. 2907.05(A)(4). Rather,

R.C. 2907.05(C)(2)(a) mandates the imposition of a prison sentence when evidence other than the victim's testimony is admitted in corroboration of the offense. Thus, this argument lacks merit.

{¶ 22} Russell further argues that the State failed to prove that he committed GSI because H.R. had the time frame wrong as to when the abuse occurred. H.R. testified that the incident occurred after they returned from West Virginia, while Stephanie and Rebecca both testified that H.R. told them that Russell touched her inappropriately before they traveled to West Virginia. This difference is insignificant.

{¶ 23} Although H.R.'s testimony regarding when the abuse occurred differed from her mother's and grandmother's testimony, her testimony regarding the abuse was clear. H.R. testified that Russell touched her vagina when they were at the Brooklyn house. She told her mother and grandmother about the incident before their trip to West Virginia. H.R. also told this to Dr. Feingold, two Children and Family Services workers, and Detective Tenhunfeld.

{¶ 24} Russell also attacks the credibility of other witnesses, claiming that Stephanie is a drug addict, Rebecca suffers from a myriad of mental health issues, and McGrath is "a jailhouse snitch." However, McGrath's testimony further corroborated H.R.'s testimony. McGrath stated that he

received no benefit for his testimony. He testified that Russell admitted to him that he molested H.R. and would become physically aroused when he told McGrath about the things he did to H.R. McGrath also knew that Stephanie is a drug addict and Rebecca is bipolar.

{¶ 25} The jury heard all the testimony and found Russell guilty of having sexual contact with H.R., who was under age 13. When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. The court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co.*

{¶ 26} Based on the aforementioned facts and circumstances, we find that there was sufficient evidence to support Russell's GSI conviction. We further find that the jury did not lose its way and create a manifest injustice in convicting Russell.

{¶ 27} Thus, the first and second assignments of error are overruled.

{¶ 28} In the third assignment of error, Russell argues that the trial court erred when it ordered the jury to further deliberate after it had already reached a verdict. As a result, he claims that he should have been convicted of a fourth degree felony GSI and not a third degree felony.

{¶ 29} In the instant case, the trial court announced that the jury found Russell guilty of GSI in violation of R.C. 2907.05(A)(4). However, the court then realized that the jury verdict form did not include the additional finding that H.R. was under the age of 13.[6] The court called the jury back and instructed the jury to decide whether H.R. was less than 13 years of age. When the jury returned again, it found that H.R. was less than 13 years of age.

{¶ 30} In *State v. Williams* (Nov. 29, 1984), Cuyahoga App. No. 48209, this court addressed an analogous situation where the trial court omitted a firearm specification for the defendant's voluntary manslaughter charge. The court noted the omission when the jury found the defendant guilty of voluntary manslaughter and sent the jury to deliberate with an amended

[6]The jury instructions on this count did include that H.R. was under 13 years old at the time of the sexual contact.

verdict form concerning the firearm specification. When the jury returned, they found that the defendant did have a gun when he committed the offense.

{¶ 31} The *Williams* court found that the jury ultimately received an appropriate verdict form, noting that "[a]lthough the court should have included the firearm specification with the verdict form for each offense, defendant suffered no prejudice from the abnormal procedure. Before they are discharged, jurors should be allowed to amend their verdict when justice so requires. *Ekleberry v. Sanford* (1943), 73 Ohio App. 571[, 57 N.E.2d 270]."

{¶ 32} Just as in *Williams*, the trial court in the instant case did not accept the jury's initial verdict but gave the jury an appropriate verdict form. The jury deliberated and returned its verdict properly. The jury did not separate during this process, and no person had the opportunity to affect the jury's deliberations.

{¶ 33} Thus, the third assignment of error is overruled.

{¶ 34} Accordingly, judgment is 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.

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COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR