[Cite as *State v. May*, 2010-Ohio-5841.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94075

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GLEN MAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-519564 and 524278

BEFORE: Celebrezze, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: December 2, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Glen May, appeals his convictions for rape of a child under 13, rape, several counts of gross sexual imposition, and disseminating material harmful to a minor. He claims his convictions were unsupported by sufficient evidence and are against the manifest weight of the evidence, that he was denied a fair trial by improper testimony, and that the trial court did not properly inform him of postrelease control. After a thorough review of the record and apposite law, we affirm in part, reverse in part, and remand for resentencing.

{¶ 2} Prior to 2007, appellant moved in with his then girlfriend, R.W.[1] and her three children. R.W.'s eldest daughter, D.L., had just turned 12 in the fall of 2007. She described an incident where appellant invited her into his bedroom and made her watch a pornographic movie. He instructed her to mimic the people in the video by placing her mouth on his penis. He grabbed her hair and made her go back and forth on his penis. D.L. testified that this episode ended with appellant ejaculating on her face.

{¶ 3} D.L. described the next incident, which took place in the winter of 2007, where appellant attempted to engage in anal sex with her while she was washing dishes. She testified that appellant "tried to stick his private part in me but it didn't go." After the incident was over, D.L. went to the bathroom and cleaned blood from her rectum.

{¶ 4} After moving to a new apartment on Central Avenue, D.L. had a sleepover with her close friend, S.B. (age 13), during the winter of 2007-2008. D.L. testified that appellant made her "suck his private part," then asked her to get S.B. to do the same. D.L. and S.B. both testified that the two went down to the kitchen and that appellant made S.B. place her mouth on his penis. S.B. also testified that appellant put his penis in her vagina. The girls differ as to the location in the house where S.B. performed oral sex and

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[1]Pursuant to this court's established policy, the identity of the minor victim is shielded; therefore, she and her family members are referred to only by their initials.

whether D.L. encouraged S.B. to do it, as S.B. testified. D.L. testified to a second sleepover where appellant made the two girls touch and lick each other's breasts while he watched. According to D.L., appellant also put his mouth on the girls' breasts, and orally penetrated the girls' vaginas. S.B. testified that these acts occurred, but that it was not during a sleepover. She testified that there was only one sleepover where appellant performed sexual acts on her, but that there were two separate incidents where appellant inappropriately touched the girls.

{¶ 5} In April 2008, D.L.'s behavior and grades in school caused R.W. and appellant to discipline her. During the ensuing argument, D.L. blurted out that appellant had been molesting her. D.L. also told her cousin Kayla and her teachers, Ms. Reynolds and Ms. McMillan. D.L.'s teachers reported the allegations to the appropriate authorities, and the Cuyahoga County Department of Children and Family Services ("CCDCFS") became involved.

{¶ 6} After an investigation by the Cleveland Metropolitan Housing Authority ("CMHA") police, the Cleveland police, and CCDCFS, appellant was indicted in two criminal cases, which were consolidated for trial. Appellant faced charges of rape involving a child under the age of 13, rape, gross sexual imposition, kidnapping, and disseminating matter harmful to juveniles.[2]

[2]Appellant was also charged and found guilty of three counts of kidnapping, but those counts merged with the underlying rape charges at sentencing.

Trial concluded with a finding of guilt on all counts, and appellant was sentenced to a total of 25 years to life in prison.

{¶ 7} Appellant appeals assigning four errors for review.[3]

Law and Analysis

Sufficiency and Manifest Weight

{¶ 8} In his first and second arguments, appellant claims his convictions are based on insufficient evidence and that they are against the manifest weight of the evidence.

{¶ 9} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 10} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

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[3] Appellant's assignments of error are included in the appendix to this opinion.

{¶ 11} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia*, supra.

{¶ 12} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 13} The First District, in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight, stating:

{¶ 14} "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 a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at paragraph three of the syllabus, citing *Tibbs v. Florida*, supra.

{¶ 15} In the criminal case brought against appellant involving D.L., he was charged with kidnapping, rape of a child under 13, three counts of gross sexual imposition, and disseminating matter harmful to juveniles. In the case involving S.B., he was charged with two counts of rape, two counts of gross sexual imposition, and two counts of kidnapping.

{¶ 16} R.C. 2907.02(A)(1)(b) states that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." The minimum sentence for such a crime is 25 years to life in prison. R.C. 2971.03(A)(3)(d)(i). Testimony was adduced satisfying all the required elements necessary to sustain a conviction of rape. R.C. 2907.01(A) defines "sexual conduct" to

include "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex[.]"

{¶ 17} D.L. testified that appellant made her place her mouth on his penis and then, using her hair, made her go back and forth over it. This constitutes an act of rape and a restraint of liberty sufficient for kidnapping.[4] D.L. also testified that she had just turned 12 a short time before the incident. Therefore, all the required elements of appellant's first rape and kidnapping convictions were supported by evidence before the court.

{¶ 18} Appellant was also convicted of the rape of S.B., in violation of R.C. 2907.02(A)(2), which prohibits sexual conduct where one "purposely compels the other person to submit by force or threat of force." The Ohio Supreme Court has recognized that "'[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.'" *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304, quoting *State v.*

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[4]Kidnapping, as defined in R.C. 2905.01(A), states: "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall * * * restrain the liberty of the other person, for any of the following purposes:

"* * *

"(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

Etheridge (1987), 319 N.C. 34, 47, 352 S.E.2d 673. This reasoning was extended beyond the parental context to uphold a conviction for rape where no overt force was proven. See *State v. Dye*, 82 Ohio St.3d 323, 1998-Ohio-234, 695 N.E.2d 763.

{¶ 19} The Ninth District has used this determination of force where the victim of sexual abuse was 13 years old and the perpetrator "occupied a position with respect to the child that allowed him to be able to exert force by subtle and psychological means: he was a trusted family friend, he was bigger and older than the child, and was in charge of the child during the visits at defendant's home." *State v. Musgrave* (Dec. 3, 1998), Summit App. No. 18260. This court found this analysis persuasive in applying such a relaxed standard in *State v. Milam*, Cuyahoga App. No. 86268, 2006-Ohio-4742.

{¶ 20} D.L. and S.B. both testified that they complied with appellant's demands for sex because they were afraid of what would happen if they refused. S.B. testified she was crying and that D.L. told her "that it was going to happen anyway, so for [S.B.] to do it just to get it over with." Although the two never testified that appellant threatened them, he occupied a parental relationship with D.L., and S.B. was in his care and supervision when the sexual acts occurred. S.B. was 13 years old and appellant was much older, larger, and stronger. S.B. testified that appellant removed her jeans and underwear and that she was crying. Sufficient evidence of force

existed for a reasonable trier of fact to conclude that appellant used force or threat of force to rape S.B. This evidence also sufficiently showed that appellant restrained S.B.'s liberty to engage in sexual activity against her will to sustain a kidnapping conviction.

{¶ 21} Appellant was also convicted of several counts of gross sexual imposition under R.C. 2907.05(A)(1) and (A)(4), which state:

{¶ 22} "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:

{¶ 23} "(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶ 24} "* * *

{¶ 25} "(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."

{¶ 26} D.L. testified appellant tried to put his penis into her rectum. She also testified that she was 12 years old at the time. D.L. and S.B. both testified that appellant made them touch each other's breasts and that he touched their breasts. Therefore, a reasonable trier of fact could examine this evidence and conclude that appellant committed gross sexual imposition.

{¶ 27} Finally, appellant was convicted of disseminating matter harmful to juveniles. R.C. 2907.31(A)(1) prohibits one to: "[d]irectly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles[.]"

{¶ 28} D.L. testified that appellant made her watch a pornographic movie where the actors were completely naked and engaging in various sex acts.

{¶ 29} Appellant's convictions for rape, gross sexual imposition, and disseminating matter harmful to juveniles are supported by direct testimony of two victims. Viewing this evidence in a light favorable to the state, each element necessary to sustain the convictions is satisfied.

{¶ 30} Appellant also argues that his convictions are against the manifest weight of the evidence. He argues that the victims' testimony is contradictory and incredible.

{¶ 31} It is true that, at times, the girls' testimony differs in some respects, but each girl's testimony, as elucidated above, was clear that appellant molested her. Appellant's own actions after being arrested also provide corroboration for their testimony. While in jail awaiting trial, appellant attempted to obtain a letter from D.L. recanting her earlier

statements. Phone conversations between appellant, R.W., and others were recorded by prison officials and played for the jury. Appellant tried to convince R.W. to do whatever was necessary to get D.L. to state that she made it all up. This included bribes, corporal punishment, and verbal abuse. Appellant also stated that he had already apologized to D.L. The testimony of the victims as well as appellant's audio statements lead us to the conclusion that no manifest miscarriage of justice occurred in this case. Appellant's first and second assignments of error are overruled.

Improper Testimony

{¶ 32} In his third assignment of error, appellant argues that he was denied a fair trial when a social worker made improper comments while testifying. Appellant argues a CCDCFS social worker, Derrick Lockett, inappropriately encroached upon the jury's role as the arbiter of credibility.

{¶ 33} In his testimony, Lockett described a conversation he had with appellant about the allegations of sexual assault lodged against him. Lockett testified that appellant did not make eye contact during the portion of their conversation dealing with the allegations. The state then asked if Lockett found that disturbing. Lockett answered that he did.

{¶ 34} Appellant relies on *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, where the Ohio Supreme Court held that it was improper for an expert to testify about the veracity of allegations made by a child victim who

would not be testifying at trial. We review a trial court's decision to admit lay witness opinion testimony under an abuse of discretion standard. *City of Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113, 539 N.E.2d 140. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 35} In this case, Lockett did not initially express any opinion about the veracity of appellant's statements. The Tenth District has held that "[b]ecause [a social worker's] testimony did not include any expressions of opinion as to whether [the victim] was telling the truth, her testimony regarding [the victim's] statements did not violate *Boston*, and any attempt to exclude the testimony on that basis would not have been successful." *State v. Cashin*, Franklin App. No. 09AP-367, 2009-Ohio-6419, ¶20. See, also, *State v. Dixon*, Richland App. No. 03 CA 75, 2004-Ohio-3940, ¶21 ("[The nurse] was being questioned at the time concerning the girl victim's demeanor and affect during her examination, such as her poor eye contact. * * * Appellant herein provides no authority that the questioning at issue was the equivalent of an opinion as to veracity, as analyzed in *Boston*.").

{¶ 36} "Under Evid.R. 701, a lay witness can testify about their perceptions when the testimony is to determine a fact at issue." *State v. Croom* (Jan. 18, 1996), Cuyahoga App. No. 67135. "Consistent with Evid.R.

701, a lay witness may testify about another's demeanor or emotional state if the testimony is based upon personal observations and first-hand perceptions." *State v. Bolling*, Montgomery App. No. 20225, 2005-Ohio-2509, ¶11, citing *State v. Kovac*, 150 Ohio App.3d 676, 691, 2002-Ohio-6784, 782 N.E.2d 1185.

{¶ 37} Lockett was asked about appellant's demeanor during a conversation regarding the allegations lodged against appellant. This was a fact in issue at trial and one, under Evid.R. 701, that Lockett could properly testify about. However, further questioning by the prosecutor inquiring if Lockett found that to be disturbing was improper because it sought a response commenting on appellant's veracity. The trial court should have sustained appellant's objection, but it did not. Although it was improper testimony, it was one isolated error and does not rise to the level of reversible error.

{¶ 38} The trial court did not abuse its discretion in admitting the demeanor testimony. Also, excluding this single improper question regarding Lockett's reaction would not have changed the outcome of the trial. Therefore, appellant's third assignment of error is overruled.

Postrelease Control

{¶ 39} In appellant's final assignment of error, he argues that the trial court did not properly inform him of postrelease control at sentencing.

{¶ 40} The trial court informed appellant that "he will be on post-release control for mandatory 5 years. Failure to comply with the terms and conditions of PRC could result in further administrative life, and additional 12 and-one-half years, or new criminal charges[.]"

{¶ 41} Postrelease control is a "'period of supervision by the adult parol authority after a prisoner's release from imprisonment * * *.'" *Woods v. Telb*, 89 Ohio St.3d 504, 509, 2000-Ohio-171, 733 N.E.2d 1103, quoting R.C. 2967.01(N). The trial court must inform a defendant at his sentencing hearing that postrelease control is a part of his sentence. Id. at 513.

{¶ 42} The trial court informed appellant that postrelease control was mandatory for five years. It also informed appellant that should he violate postrelease control, he could receive an additional penalty up to 12 and-one-half years, but never informed him what that penalty could consist of. The language used, "further administrative life[,]" is unclear and the court did not specify that additional prison time could be imposed.

{¶ 43} The General Assembly provided courts with a mechanism to correct errors regarding the imposition of postrelease control. R.C. 2929.191 allows a trial court to forgo the traditional remedy of a de novo sentencing hearing by correcting the journal entry and informing defendant that postrelease control is a part of his sentence. See *State v. Singleton*, 124 Ohio

St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. However, due to the following issue, a de novo sentencing hearing is required.

Allied Offenses

{¶ 44} At sentencing, appellant objected to being sentenced for both rape and kidnapping because they were allied offenses. The state conceded and suggested that the court merge the offenses into the respective rape convictions. The court indicated that it would dismiss the two kidnapping counts in CR-524278 and the one in CR-519564. The court did dismiss Counts 5 and 6 in CR-524278, but it failed to do so in CR-519564. The journal entry memorializing appellant's sentence in CR-519564 indicates appellant is to serve a ten-year sentence for kidnapping with a sexual motivation specification.

{¶ 45} The Ohio Supreme Court has held that failure to merge allied offenses for sentencing constitutes plain error and must be reversed on appeal. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31-32.

{¶ 46} R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one."

{¶ 47} Here, the trial court proceeded incorrectly in dismissing the kidnapping indictments in CR-524278 rather than merging them with the corresponding rape counts. See *State v. Stephens*, Cuyahoga App. No. 93252, 2010-Ohio-3997, ¶22-23. Additionally, the trial court failed to merge kidnapping with rape in CR-519564. Therefore, this cause must be remanded for a new sentencing hearing "at which the state must elect which allied offense it will pursue against the defendant[,]" and the trial court shall "accept the state's choice and merge the crimes into a single conviction for sentencing." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶24-25.

Conclusion

{¶ 48} Appellant's convictions are supported by evidence in the record. A lack of physical evidence does not require this court to overturn appellant's convictions as he claims. The testimony of the victims and appellant's own statements supply the necessary evidence to affirm. Appellant's trial was not compromised by unfair testimony as he claims. The social worker's testimony about a lack of eye contact he had with appellant during an interview does not implicate *Boston*. The testimony was admitted because the witness did not offer any opinion about appellant's truthfulness, but merely commented on personal observations of appellant's demeanor. Further questioning by the state about the social worker's reaction was improperly allowed, but did not amount to reversible error.

{¶ 49} Appellant must be resentenced because the journal entry setting forth his convictions incorrectly lists a kidnapping conviction that the trial court, the appellant, and the state agreed should have merged. Finally, appellant must be properly informed of the terms of postrelease control at resentencing.

Judgment affirmed in part, reversed in part, and remanded for resentencing for proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court

of Common Pleas to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., CONCURS WITH MAJORITY AND WITH SEPARATE CONCURRING OPINION;

COLLEEN CONWAY COONEY, J., CONCURS (WITH SEPARATE CONCURRING OPINION)

COLLEEN CONWAY COONEY, J., CONCURRING:

{¶ 50} I concur in the majority opinion but write separately to stress that May's argument in the third assignment of error is worthy of a cautionary warning to the prosecuting attorney. The prosecutor improperly asked the social worker if he found it "disturbing" that May had almost no eye contact. Although it may have been allowable to ask about May's demeanor, the witness should never be permitted to state his own judgment about the lack of eye contact. However, I agree that this error is harmless in light of all the evidence presented.

APPENDIX

Appellant's four assignments of error:

I. "The state failed to present sufficient evidence to sustain a conviction."

II. "Appellant's convictions are against the manifest weight of the evidence."

III. "Appellant was denied a fair trial by a social worker's improper comments while testifying."

IV. "Appellant's sentence must be vacated because the trial court did not properly advise him at sentencing of postrelease control."