

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94722

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH F. KINDER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524151

BEFORE: Blackmon, P.J., Stewart, J., and Jones, J.

RELEASED AND JOURNALIZED: March 10, 2011

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Joseph F. Kinder appeals his convictions for felonious assault and promoting prostitution and assigns the following two errors for our review:

“I. The felonious assault statute specifically identifying persons with HIV violates the appellant’s Equal Protection rights pursuant to the 14th Amendment to the United States Constitution and the pertinent relative Ohio Constitution provisions.”

“II. The verdicts were against the manifest weight of the evidence and the jury lost their way when finding the appellant guilty of three counts of felonious assault and two counts of promoting prostitution.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Kinder's convictions. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Kinder for three counts of felonious assault and two counts of promoting prostitution.

{¶ 4} The charges arose from Kinder having consensual sexual relations with three men without informing them that he was HIV positive. He also ran a prostitution website where he posted the photographs of the victims, along with photographs of other men, and advertised the men were available for sexual relations. One of the victims also testified that Kinder required him to work as a prostitute in exchange for allowing him to stay at his house. The victim recalled one instance where Kinder transported him to a hotel to perform oral sex on a client.

{¶ 5} The jury found Kinder guilty of all the charges. The trial court sentenced him to a total of nine years in prison.

Statute Unconstitutional

{¶ 6} In his first assigned error, Kinder argues R.C. 2903.11(B) violates the Equal Protection Clauses of the U.S. and Ohio Constitutions because it unfairly punishes gay people with HIV and not people who have other communicable diseases.

{¶ 7} Our review of the record shows that Kinder failed to raise this argument regarding the constitutionality of R.C. 2903.11(B) before the trial court. It is well-settled that “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus; *State v. Pasqualone* (2000), 140 Ohio App.3d 650, 748 N.E.2d 1153; *State v. Powell* (1993), 87 Ohio App.3d 157, 621 N.E.2d 1328. Accordingly, Kinder’s first assigned error is overruled.

Manifest Weight of the Evidence

{¶ 8} In his second assigned error, Kinder argues his convictions are against the manifest weight of the evidence.

{¶ 9} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, 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.”

{¶ 10} However, 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶ 11} Kinder argues the testimony of the three victims was not credible because of their lifestyle where they regularly sought out strangers online with whom to have sex. He also contends the victims had unprotected sex with other people, and, that the victims should have brought condoms or inquired about his HIV status. The fact the men may not live a conventional lifestyle, did not inquire about Kinder’s HIV status, and failed to provide condoms, are not defenses to Kinder failing to notify the victims he was HIV positive prior to having unprotected sex with them. Moreover, the jury was well aware of the victims’ lifestyle. It was within the jury’s discretion whether to believe the victims.

{¶ 12} Kinder also contends the men were angry with him for kicking them out of the house. This does not weaken their testimony because it was corroborated by Kinder’s long time friend and neighbor, who testified that Kinder had told him it was his practice not to tell partners he was HIV positive. Kinder also confronted his friend when he believed he was the one that revealed his HIV status to the victims and admitted to the friend that he

had not disclosed his HIV status to the victims. Kinder’s friend did not have any motivation to lie.

{¶ 13} Recorded conversations between Kinder and his friend while he was in jail were also admitted into evidence. Kinder is heard agreeing with the friend’s statement that if someone is stupid enough to have unprotected sex and not ask the partner’s HIV status, that was their problem. Kinder is also heard instructing the friend to help his ex-wife “wipe” his computers clean of all data to prevent the discovery of his online businesses.

{¶ 14} Several people other than the victims testified regarding Kinder’s online prostitution business. He posted photographs of them and other men online, along with their personal information. His website also indicates that along with massages, he offers services such as bondage, role playing, and that some roles “may require Master to be present.” Thus, his own website discounts his claim that it was only a massage service.

{¶ 15} Kinder also argues the victims’ testimony was not credible because the men admitted to taking drugs before having sex. The jury was well aware that two of the victims had taken drugs before having sex with Kinder. We defer to the jury whether the witnesses were credible in recalling the events. The jury is best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. See *Seasons Coal Co. v. Cleveland* (1994),

10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. However, given the corroborating evidence outside of the victims’ testimony, we conclude the jury did not lose their way and create a manifest injustice by finding Kinder guilty of the charges. Accordingly, Kinder’s second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR