

[Cite as *State v. Phillips*, 2011-Ohio-475.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94881

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WALTER PHILLIPS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-202596

BEFORE: Celebrezze, P.J., Sweeney, J., and Gallagher, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Walter Phillips, appeals his convictions for rape and felonious assault. He argues that these convictions must be reversed because they are not supported by sufficient evidence, are against the manifest weight of the evidence, and that his trial was compromised by prosecutorial misconduct. Appellant also takes issue with his designation as a Tier III sex offender. After a thorough review of the record and law, we affirm.

{¶ 2} During the Labor Day weekend of 1985, appellant's wife, D.P., had taken his car and damaged it. She returned the car, but then left, ostensibly to avoid the repercussions from the damaged automobile. Appellant awoke on Saturday, August 31, and saw the state of his car parked in the driveway. Unable to find his wife, he inquired of the three children about her whereabouts. Appellant first asked his step-son ("Step-son One"),¹ then age 13, where his mother was. After Step-son One responded that he did not know, appellant beat him with a metal mop handle. Appellant then took Step-son One into the master bedroom and forced him to perform oral sex on appellant. Step-son One testified that appellant then did the same acts to him. After this ordeal ended, appellant instructed Step-son One to send his brother ("Step-son Two") into the room, and Step-son One left.

{¶ 3} Step-son Two testified that appellant made him and his siblings perform oral sex on appellant, one by one. He also testified that appellant threatened them with a handgun. Step-son Two stated that the events occurred over two days, which was contradicted by the testimony of the other victims.

¹Pursuant to this court's established policy, the identities of the victims and family members are shielded.

{¶ 4} N.P., appellant's daughter, testified that she was the last child forced into the bedroom² and that once there, she was instructed to remove her clothes. At first she refused. This caused appellant to beat her with the mop handle. She was forced to suck appellant's nipples as Step-son Two performed oral sex on him. Appellant also made her perform oral sex on him. N.P. also testified that appellant attempted to engage in vaginal intercourse with her, but was unable to achieve full penetration.

{¶ 5} Once D.P. was reunited with her children, they relayed the events that occurred, and the police were contacted. Appellant was arrested on September 2, 1985 and indicted on five counts of rape, two counts of gross sexual imposition, and one count of felonious assault. During jury selection, appellant asked to use the bathroom, was excused, and slipped out of the courthouse. It was not until 2009, when appellant was arrested by the Kenton, Ohio police that he was apprehended and tried.

{¶ 6} A jury trial began on March 15, 2010, where the victims, now adults, testified about what appellant had done to them. At the close of the state's case, the trial court partially granted appellant's Crim.R. 29 motion and dismissed one count of rape and both counts of gross sexual imposition. On March 17, 2010, the jury returned verdicts of guilty to four counts of rape and one count of felonious assault.

²Step-son Two was still present in the bedroom when N.P. was called in.

{¶ 7} Appellant was sentenced on March 19, 2010 to an aggregate term of incarceration of between 18 and 75 years, in accordance with the sentencing laws in effect in 1985.³ Appellant was also informed, by operation of law, that he was labeled a Tier III sex offender. Appellant timely filed the instant appeal, assigning four errors.⁴

³Appellant's sentence consisted of four terms of incarceration between 5 and 25 years, one for each count of rape, and a term of between 3 and 15 years for felonious assault with a three-year consecutive sentence for the firearm specification. Three of the rape terms were to be served consecutively to each other, while the fourth term and the felonious assault term were ordered to be served concurrently.

⁴Appellant withdrew his first assignment of error after confirming that the indictment and verdict involving Step-son One did not require the state to show that he was under age 13 at the time of the incident. Appellant's assigned errors are completely set forth in the Appendix to this opinion.

Law and Analysis

Sufficiency and Manifest Weight

{¶ 8} In appellant's second assignment of error, he argues that his convictions for rape and felonious assault are not supported by sufficient evidence and 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.

{¶ 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 fact-finder. 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 United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court’s disagreement with the jurors’ weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. *Id.* at 43.

{¶ 14} Upon application of the standards enunciated in *Tibbs*, the court 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 of

the evidence. The *Martin* court stated: “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.” *Id.* at 720.

{¶ 15} With regard to the counts of rape and felonious assault, appellant argues that the state failed to adduce evidence of all the required elements sufficient to sustain convictions for each. Appellant was convicted of felonious assault in violation of former R.C. 2903.11(A)(2), which, in 1985, stated:

{¶ 16} “(A) No person shall knowingly:

{¶ 17} “* * *;

{¶ 18} “(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.”

{¶ 19} This charge applied solely to N.P. and alleged that appellant attempted to cause physical harm with a deadly weapon. Step-son Two testified that appellant held a gun to all their heads and told them to perform sex acts on him or he would kill them. The Ohio Supreme Court has held that “[t]he act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use such weapon, is sufficient evidence to convict a defendant of the offense of ‘felonious assault’ as defined by R.C. 2903.11(A)(2).” *State v.*

Green (1991), 58 Ohio St.3d 239, 569 N.E.2d 1038, at the syllabus. His testimony is sufficient to sustain appellant's conviction for felonious assault.

{¶ 20} Appellant was also convicted of rape in violation of former R.C. 2907.02(A)(3)⁵ and (A)(1). Former R.C. 2907.02 stated, in part:

{¶ 21} “(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶ 22} “(1) The offender purposely compels the other person to submit by force or threat of force.

{¶ 23} “* * *

{¶ 24} “(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.”

{¶ 25} The testimony of Step-son One, Step-son Two, and N.P. offers sufficient evidence to satisfy the elements of rape in violation of these two subsections. Step-son Two and N.P. testified that they were 11 and 10 years old, respectively, when these crimes occurred, satisfying one of the requirements of R.C. 2907.02(A)(3). All three testified that they were forced to engage in sexual conduct. Step-son One and N.P. testified they were beaten with a mop handle and sustained physical injuries. Step-son Two and Step-son One both testified that appellant threatened them with a gun. The children's medical records also

⁵ Now R.C. 2907.02(A)(1)(b)

documented their injuries and bolstered their testimony. This evidence, viewed in a light most favorable to the state, is sufficient to sustain the rape and assault convictions.

{¶ 26} Appellant points to inconsistencies in the testimony of various witnesses and argues that the jury clearly lost its way in convicting him. Step-son Two's trial testimony does not differ from his written statement given to the police in 1985 in such a way that would cast appellant's convictions into significant doubt. The testimony of all three victims, coming some 25 years after the incident, is sufficiently similar and corroborating. It demonstrates that no miscarriage of justice occurred in this case.

Sex Offender Classification

{¶ 27} Appellant raises a constitutional challenge to his classification as a Tier III sex offender in his third assignment of error. However, as stated in his brief, he simply raises this issue to preserve it for review by a higher court. Contrary to appellant's contention, Ohio courts have upheld the constitutionality of sex offender classification laws, including their civil nature and retroactive application. See *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, and 91532, 2009-Ohio-2031, ¶¶26-33; *Spangler v. State*, Lake App. No. 2008-L-062, 2009-Ohio-3178, ¶¶ 64-67; *State v. Acoff*, Cuyahoga App. No. 92342, 2009-Ohio-6633, ¶124.

{¶ 28} In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, the Ohio Supreme Court struck down a portion of these laws dealing with the reclassification of

sexual offenders by an executive branch body as a violation of a separation of powers. However, it left the remaining statutory scheme untouched. *Id.* at ¶63-65. Appellant does not present an unusual case that would distinguish his case from others previously denied by this court. See *Gildersleeve*. Therefore, this assigned error is overruled.

Prosecutorial Misconduct

{¶ 29} Appellant finally argues that the state made improper statements during closing arguments. The test for prosecutorial misconduct during opening statements and closing arguments is whether the remarks made by the prosecutor were improper and, if so, whether they prejudicially affected a substantial right of the accused. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. We review a prosecutor's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial. *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749. "The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 30} In response to appellant's argument that attempted to sympathetically characterized him a father, the state remarked, "this defendant, the Defense calls a father, this individual who does not deserve the dignity of being called a father. You saw his reaction

when he saw his kids for the first time in 25 years. Did he look very moved to you? Did he look very moved to you at all throughout this [sic] proceedings? * * * He had nothing but absolute disdain for these kids who are seated back there. Nothing. After 25 years.” This does not demonstrate an impermissible argument on the part of the state when viewed as a response to appellant’s characterization of himself as a caring father made in closing arguments. The state did not remark that appellant appeared or acted guilty, but merely that he was not moved after seeing his children for the first time in many years. This was not impermissible. This 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 convictions 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.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and
SEAN C. GALLAGHER, J., CONCUR

Appendix

Appellant's assignments of error:

I: "The trial court erred in denying the defense an acquittal on count #3 (Rape of [Step-son One], under the age of 13) when the testimony indicated that [Step-son One] was over 13 years of age. Put another way, proof that the victim was under the age of 13 is an essential element of the charge and the alleged victim was not under the age of 13."

II: "Walter Phillips's convictions for Rape (1,3,4,5) and Felonious Assault (8) should be reversed due to insufficiency of [the] evidence and a failure of the state to carry the manifest weight of the evidence."

III: "Walter Phillips'[s] designation as a Tier III sex offender, is the result of an unconstitutional law and, further, said registration subjects him to cruel and unusual punishment."

IV: "The prosecutor's suggestion in closing argument that Phillips behaved in a guilty manner in court deprived him of a fair trial and amounted to prosecutorial misconduct."