

[Cite as *State v. Pipkins*, 2015-Ohio-1823.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101624

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JARED PIPKINS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576542

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: May 14, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Jared Pipkins (“Pipkins”), appeals from his conviction for gross sexual imposition. Having reviewed the record and the controlling case law, we find no error; therefore, we affirm the conviction but remand the matter for a nunc pro tunc correction of the sentencing entry to indicate that court costs are waived.

{¶2} On August 12, 2013, Pipkins was indicted pursuant to a three-count indictment in connection with the alleged July 21, 2013 attack upon J.M., his third cousin, who was less than 13 years old. Counts 1 and 2 charged Pipkins with two counts of rape, in violation of R.C. 2907.02(A)(1)(b), which carried sexually violent predator specifications, and Count 3 charged him with kidnapping, in violation of R.C. 2905.01(A)(4), with sexual motivation and sexually violent predator specifications.

{¶3} The record indicates that pretrials were continued in the matter at defendant’s request on September 12, 2013, and September 30, 2013, and that on October 16, 2013, Pipkins executed a waiver of his speedy trial rights until January 31, 2014. Additional continuances were issued within this time period at the request of defendant because his trial counsel was in trial on other matters. On December 24, 2013, Pipkins filed a pro se request for a hearing regarding his right to a speedy trial. On January 29, 2014, Pipkins filed a pro se motion to disqualify his counsel. On January 30, 2014, the trial court appointed new counsel for Pipkins and continued the matter several times, until June 2, 2014, all at the request of defendant.

{¶4} The matter proceeded to a jury trial on June 2, 2014. J.M. testified that on July 21, 2013, she and her grandmother (“Gloria”) went to visit J.M.’s great-grandmother (“Marian”) so that Gloria could assist J.M.’s aunt and Pipkins’s mother (“Sonia”) with Marian’s care. When they arrived at the home, J.M. helped Gloria put away groceries. Pipkins, who was also there, told J.M. that he had something for her upstairs, and pulled her by the arm. J.M. went upstairs to a suite shared by Pipkins and her cousins, C.P. and K.P. Eventually, C.P. and K.P. went downstairs, and according to J.M., Pipkins said that she had been teasing him by what she was wearing and he pulled down her romper. She pulled it back up, and he pulled it down again. When J.M. tried to leave the room, he pushed her onto the bed. She told him to stop and pushed him away. Pipkins then put something on his penis, which she later learned was a condom. He told her to shut up, then raped her vaginally and anally. On the way home with Gloria, J.M. was teary and told Gloria that she had a headache. The next day, J.M. told her uncle that Pipkins had raped her.

{¶5} Gloria testified that J.M. was in the upstairs of the house with Pipkins, while Gloria did laundry and attended to Marian. K.P. and C.P. were upstairs then came back downstairs, and J.M. and Pipkins were upstairs for over an hour. When it was time to leave, Gloria sent K.P. to get J.M., but K.P. could not go into Pipkins’s room because the door was locked. Gloria then sent C.P. to get J.M., and J.M. eventually came downstairs.

{¶6} Gloria admitted that J.M. had problems at school that included lying to the teachers. She can be mean, and she is in counseling because of anger and other issues resulting from the murder of one of her aunts. In addition, according to the testimony of J.M.'s mother, J.M. had been in an accident as a young child that caused her to sustain seizures and a brain injury.

{¶7} Sonia, who is Pipkins's mother, testified that when J.M. visits, J.M. usually plays video games upstairs in the section of the house where Pipkins, C.P., and K.P. live. On July 21, 2013, J.M. was upstairs playing. According to Sonia, Pipkins was downstairs putting away groceries, but eventually went back upstairs. According to Sonia, when it was time for J.M. to leave, J.M. came downstairs immediately and was happy, laughing, and dancing. The next day, Gloria called Sonia and said that a group of J.M.'s relatives were on their way over to confront Pipkins about abuse allegations. When the group arrived, Sonia instructed Pipkins to lock himself in the house. Sonia then called the police, but asked the police not to come inside. The house was not searched that day. Sonia also demanded to know whether J.M. had been taken to the hospital, and the relatives indicated that she had not.

{¶8} J.M. was taken to MetroHealth Hospital to have a medical exam on July 22, 2013. She was seen by Jennifer Jacobs, a sexual abuse nurse. According to this examination, J.M.'s vaginal and anal areas presented as "unremarkable." A rape kit, which included J.M.'s underwear, was collected for the presence of semen.

{¶9} Hristina Lekova, the medical examiner, testified that there was no conclusive finding of seminal material or sperm cells. DNA analysis, however, revealed both a major and minor contributor. The major contributor was J.M., but the minor contributor was inconclusive and could not be identified because of insufficient information.

{¶10} Pipkins was arrested on July 22, 2013. He was advised of his *Miranda* rights and made a statement to the police. He stated that J.M. was in his room on the date of the alleged attack. J.M. told him that she had a boyfriend and was sexually active. According to Pipkins, J.M. asked if he found her attractive. She kissed him and then put her hand up his shorts and stroked his penis. Pipkins said he told her that this was wrong and could get them both into trouble. He denied having sex with her. Cleveland Police Detective Don Meel (“Detective Meel”) informed Pipkins that the hospital had examined J.M. and was searching for DNA. He asked whether Pipkins might wish to offer an explanation in the event that his DNA was found. Pipkins stated that it is possible that after touching him, J.M. may have touched herself. Detective Meel executed a search warrant at the home on July 24, 2013. No used condoms were found, but the police removed sections of Pipkins’s mattress to analyze a stain.

{¶11} After the presentation of the state’s case, the defense rested. The trial court agreed to instruct the jury on the lesser included offense of gross sexual imposition.

The jury found Pipkins guilty of one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a third-degree felony, and the trial court sentenced him to five years

of imprisonment, with credit for 321 days served. The trial court also found Pipkins to be indigent and it waived court costs.

{¶12} Pipkins now appeals and assigns the following errors for our review:

Assignment of Error I

Appellant's convictions were not supported by sufficient evidence and the trial court erred by denying his motions for acquittal.

Assignment of Error II

The convictions were against the manifest weight of the evidence.

Assignment of Error III

The trial court erred by denying appellant's motion to dismiss for violation of his federal and state constitutional right to a speedy trial.

Assignment of Error IV

The court erred by ordering appellant to pay costs.

Sufficiency of the Evidence

{¶13} In the first assignment of error, Pipkins argues that there is insufficient evidence to sustain his conviction for gross sexual imposition.

{¶14} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

See also State v. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶15} In this matter, Pipkins was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which provides:

(A) No person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies:

* * *

(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.

{¶16} In this matter, the evidence demonstrated that J.M. was 12 years old at the time of the incident. She testified that Pipkins, who is 31 years old, said that he had something for her and led her by the arm upstairs to his room. J.M. further testified that he pulled down her clothing and said that she had been teasing him. She pulled her clothing back up, but he pulled it down again. She stated that he pushed her down on the bed and put something, which she later learned was a condom, on his penis. J.M. testified that Pipkins then engaged in vaginal and anal sex with her. During this time period, her cousin could not get into the room and stated that the door was locked. An unidentified minor DNA contributor was detected on her underwear. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. This evidence is sufficient to establish the offense of gross sexual imposition under R.C. 2907.05(A)(4).

{¶17} Thus, the first assignment of error is without merit.

Manifest Weight

{¶18} In the second assignment of error, Pipkins argues that his conviction is against the manifest weight of the evidence.

{¶19} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, the Ohio Supreme Court described a challenge to the manifest weight of the evidence supporting a conviction as follows:

[T]he reviewing court asks whose evidence is more persuasive — the state’s or the defendant’s? * * * “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 ¶ 25, quoting *Thompkins*, 78 Ohio St.3d 380 at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 65 (1982).

{¶20} 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, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for “‘the exceptional case in which the evidence weighs heavily against the conviction.’” *Id.* at 386, quoting *Martin* at 175. In addition, this court must

remain mindful that the weight to be given the evidence and the credibility of the witnesses are matters left primarily to the jury. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Reversing a conviction on the manifest weight of the evidence requires the unanimous concurrence of all three appellate judges. *Thompkins*, at paragraph four of the syllabus.

{¶21} In this matter, there was compelling evidence that Pipkins caused 12-year-old J.M. to go to his room by telling her that he had something for her, that he said that she had been teasing him, that he pushed her to the bed, used a condom, and engaged in vaginal and anal sex with her. During this time, there was evidence that she did not respond to her grandmother's calls, and a younger cousin believed that Pipkins's bedroom door was locked. Furthermore, according to the forensic examiner, a minor DNA contributor was detected on her underwear. Accordingly, we cannot say that the jury lost its way and created a manifest injustice in convicting Pipkins of the offense of gross sexual imposition.

Speedy Trial

{¶22} In the third assignment of error, Pipkins maintains that his right to a speedy trial was violated.

{¶23} The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution. "The constitutional right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution." *State v. Kutkut*, 8th Dist. Cuyahoga No. 98479,

2013-Ohio-1442, ¶ 10, citing *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 1999 Ohio App.LEXIS 5458, *3 (Nov. 18, 1999). Courts should employ the balancing test of the factors enunciated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530-533, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The factors to be weighed include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) prejudice to the defendant. *Kutkut* at ¶ 10, citing *Carmon* at *4-5. This right must be observed by the states as mandated by the Fourteenth Amendment. Section 10, Article I of the Ohio Constitution guarantees an accused this same right. *State v. MacDonald*, 48 Ohio St.2d 66, 68, 357 N.E.2d 40 (1976).

{¶24} R.C. 2945.71(C)(2) also provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest. For purposes of computing time under R.C. 2945.71(C)(2), each day the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. *See* R.C. 2945.71(E). Thus, subject to certain tolling events, a jailed defendant must be tried within 90 days. *Id.* Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *State v. Howard*, 79 Ohio App.3d 705, 707, 607 N.E.2d 1121 (8th Dist.1992). At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *State v. Geraldo*, 13 Ohio App.3d 27, 28, 468 N.E.2d 328 (6th Dist.1983).

{¶25} We recognize that express waivers of time will toll the speedy trial days. *State v. Braden*, 197 Ohio App.3d 534, 2011-Ohio-6691, 968 N.E.2d 49, ¶ 41 (11th

Dist.). In addition, conflicts in the court's trial schedule and motions for continuance at the defendant's request toll the days. R.C. 2945.72(H). The Ohio Supreme Court has also recognized that, for purposes of trial preparation, a defendant's statutory right to a speedy trial may be waived, with or without the defendant's consent, by the defendant's counsel. *State v. King*, 70 Ohio St.3d 158, 160, 1994-Ohio-412, 637 N.E.2d 903, citing *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978), syllabus. A defendant's pro se motions may also toll speedy trial time. *State v. Taylor*, 9th Dist. Lorain Nos. 10CA009915 and 10CA009922, 2012-Ohio-1263, ¶ 13, citing *State v. Szorady*, 9th Dist. Lorain No. 02CA008159, 2003-Ohio-2716, ¶ 14 (holding that defendant's pro se motion to dismiss was a tolling event).

{¶26} In the instant case, Pipkins acknowledges that under current Ohio case law, defense counsel may waive speedy trial periods due to trial preparation, but he asserts a statutory speedy trial violation in order to preserve this issue for further appeal.

{¶27} The record indicates that Pipkins was arrested on July 22, 2013. The matter was continued at defense counsel's request at various points from September 2013 through December 2013. In addition, Pipkins executed a waiver until January 31, 2014. After executing this waiver, Pipkins filed several pro se motions. The matter was again continued at various points through April 2014 at defense counsel's request, and in that month, Pipkins filed additional pro se motions. We calculate that 108 speedy trial days elapsed in this matter from the date of arrest to the start of trial. Therefore, Pipkins's statutory right to a speedy trial was not violated.

{¶28} As to the claim that Pipkins's constitutional right to a speedy trial was violated, we conclude that there has been no presumptively prejudicial delay to trigger this claim. *State v. Winn*, 8th Dist. Cuyahoga No. 98172, 2012-Ohio-5888, ¶ 43; *State v. Stokes*, 193 Ohio App.3d 549, 2011-Ohio-2104, 952 N.E.2d 1192, ¶ 9 (12th Dist.) It is therefore without merit.

Costs

{¶29} In the fourth assignment of error, Pipkins maintains that the trial court erred insofar as it concluded in open court that Pipkins was indigent, and waived costs and fines at the sentencing hearing, but then imposed costs in the sentencing journal entry. The state concedes this error, and we agree, so we remand to the trial court for the limited purpose of issuing a nunc pro tunc journal entry that comports with its pronouncement as to costs that was made in open court.

{¶30} This assignment of error is well taken.

{¶31} Judgment is 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 conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR