[Cite as *State v. McCall*, 2017-Ohio-296.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104479

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MIKELL E. MCCALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599126-A

BEFORE: Keough, A.J., Kilbane, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 26, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Mikell E. McCall ("McCall"), appeals his convictions. For the reasons that follow, we affirm.

{¶2} In September 2015, McCall was named in a 32-count indictment charging him with 16 counts of rape, 8 counts of kidnapping with an attendant sexual motivation specification, and 8 counts of sexual battery. The charges arose from eight separate incidents that allegedly occurred over a two-week period in July 2015 involving a 14-year-old victim. McCall waived his right to a jury trial, and following the state's case during a bench trial, the court granted McCall's Crim.R. 29 motion with respect to all rape counts that alleged force or threat of force (Counts 1, 5, 9, 13, 17, 21, 25, and 29) and the rape counts related to two of the four incidents that alleged cunnilingus (Counts 18, 19, 20, 22, 23 and 24).

{¶3} The trial court found McCall guilty of the remaining counts — Counts 2, 3, and 4 (substantial impairment rape by digital penetration, sexual battery, and kidnapping related to the first incident); Counts 6, 7, and 8 (substantial impairment rape by digital penetration, sexual battery, and kidnapping related to the second incident); Counts 10, 11, and 12 (substantial impairment rape by cunnilingus, sexual battery, and kidnapping related to the third incident); Counts 14, 15, and 16 (substantial impairment rape by

cunnilingus related to the fourth incident); Counts 26, 27, and 28 (substantial impairment rape by vaginal penetration, sexual battery, and kidnapping related to the seventh incident); and Counts 30, 31, and 32 (substantial impairment rape by vaginal penetration related to the eighth incident). After merging all incident-related counts, the trial court sentenced McCall to 19 years in prison. McCall now appeals, raising two assignments of error.

{¶4} In his first assignment of error, McCall contends that his convictions related to the third and fourth incidents, rape by cunnilingus as charged in Counts 10, 11, 12 and 14, 15, and 16, are not supported by legally sufficient evidence.

{¶5} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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 to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). "'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. Walker*, Slip Opinion No. 2016-Ohio-829, ¶ 12,

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

{¶6} R.C. 2907.02(A)(1)(c) provides in relevant part that,

> [n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * *, when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

"Sexual conduct" includes the act of cunnilingus, which has been described as "placing one's mouth on the female's genitals." R.C. 2907.01(A); *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 86. As for the element of substantial impairment, this court has repeatedly held that "sleep constitutes a mental or physical condition that substantially impairs a person from resisting or consenting to sexual conduct." *State v. Jones*, 8th Dist. Cuyahoga No. 98151, 2012-Ohio-5737, ¶ 30, citing *State v. Clark*, 8th Dist. Cuyahoga No. 90148, 2008-Ohio-3358, ¶ 21.

{¶7} In this case, the victim testified that McCall "put his mouth on her vagina." (Tr. 35-37.) McCall argues on appeal that this testimony is insufficient, however, because the victim further testified that she did not actually know whether or not McCall had engaged in cunnilingus; rather, she was merely "guessing" or speculating.

{¶8} The victim testified that when she went to sleep she was wearing pajama pants. She testified that she felt something touching her vagina, which caused her to wake up. When she awoke, she discovered that her pants were down and McCall's head was "down there." (Tr. 37.) When questioned further about where McCall's head was when she woke, the victim stated: "My vagina." (Tr. 71.) She stated that she saw his whole head turn when she woke up.

{¶9} Despite McCall's characterization of the victim's testimony as "guessing," the testimony, when viewed in the light most favorable to the state, creates an inference that McCall's mouth was on the victim's vagina. The trial court could reasonably infer that McCall raped the victim by the act of cunnilingus when the victim testified that she was awakened by something touching her vagina, and discovered her pants were down and McCall's head was by her vagina.

{¶10} Because we find sufficient evidence was presented to support these rape convictions, sufficient evidence was presented to support the sexual battery and kidnapping convictions related to each of these incidents because McCall removed the victim's pajama pants while she was sleeping to engage in the act of cunnilingus. *See State v. Simpson*, 8th Dist. Cuyahoga No. 88301, 2007-Ohio-4301 (use of force for kidnapping found when defendant removes clothing for purpose of rape); *State v. Antoline*, 9th Dist. Lorain No.

02CA008100, 2003-Ohio-1130, ¶ 55 (sexual battery found when victim is asleep and then wakes to discover the offender engaging in sexual conduct with her).

{¶11} Accordingly, McCall's first assignment of error is overruled.

{¶12} In his second assignment of error, McCall contends that his convictions related to the first and second incidents (rape by digital penetration) as charged in Counts 2, 3, 4, 6, 7, and 8; and his convictions related to the seventh and eighth incidents (rape by vaginal penetration) as charged in Counts 26, 27, 28, 30, 31, and 32 are against the manifest weight of the evidence. Specifically, he claims that these convictions are against the manifest weight of the evidence due to the victim's uncorroborated, vague, and inconsistent testimony.

{¶13} In contrast to a sufficiency argument, a manifest weight challenge questions whether the state met its burden of persuasion. *Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 388, 678 N.E.2d 541. A conviction should be reversed as against the manifest weight of the evidence only in the

most "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶14} Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. In a bench trial, the court may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶15} In this case, the record demonstrates that the court weighed the victim's testimony and resolved any inconsistencies. While the victim may not have been consciously aware or awake when McCall commenced the sexual assault, McCall's actions caused her to awaken during the rape. The victim testified that on at least two instances, she awakened to discover that McCall had his finger inside her vagina. On other nights, she was awakened

to McCall having his penis inside her vagina. Each time, McCall stopped his conduct when the victim awoke. Whether the sexual assault was still occurring when the victim woke or whether McCall had completed the action by the time the victim woke is irrelevant. The victim's testimony was consistent that McCall engaged in sexual conduct with her without her consent while she was sleeping. Finally, although no forensic or witness testimony was presented corroborating the victim's testimony, there is no requirement that a rape victim's testimony be corroborated. *State v. Brothers*, 8th Dist. Cuyahoga No. 100163, 2015-Ohio-2283, ¶ 6, citing *State v. Gingell*, 7 Ohio App.3d 364, 365, 455 N.E.2d 1066 (1st Dist.1982).

{¶16} Therefore, this is not the exceptional case where the evidence weighs heavily against McCall's convictions. Accordingly, McCall's convictions for rape, sexual battery, and kidnapping as charged in Counts 2, 3, 4, 6, 7, 8, 26, 27, 28, 30, 31, and 32 are not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶17} 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.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
ANITA LASTER MAYS, J., CONCUR