[Cite as *State v. Melendez*, 2009-Ohio-4425.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 08CA009477
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ABRAHAM MELENDEZ	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 07CR074402

DECISION AND JOURNAL ENTRY

Dated: August 31, 2009

CARR, Judge.

{¶1} Appellant, Abraham Melendez, appeals his conviction out of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On October 10, 2007, Melendez was indicted on one count of rape of a child under thirteen years old in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; and one count of gross sexual imposition involving a child under the age of thirteen in violation of R.C. 2907.05(A)(4), a felony of the third degree. The rape charge further expressly stated that the victim was less than ten years old at the time of the commission of the offense. Melendez pled not guilty to the charges at arraignment.

{¶3} On February 9, 2008, Melendez filed a request for a competency hearing regarding the then eight-year-old victim. The child was seven years old at the time of the alleged

incidents. On April 11, 2008, Melendez filed a motion to suppress his confession. The trial court denied the motion to suppress on April 29, 2008, after a hearing on same.

{¶4} On June 10, 2008, the trial court held a hearing to determine whether the child victim was competent to testify. The trial court issued a journal entry in which it found her to be competent. The matter proceeded to trial before the bench. At the conclusion of trial, the court found Melendez guilty of rape of a child less than ten years old and guilty of gross sexual imposition. In support of its verdict regarding the rape, the trial court concluded that "insertion into the vagina, as required by R.C. 2907.01(A), sexual conduct, is satisfied by insertion into the vulva and labia, and does not require insertion into the vaginal cavity." The trial court ordered a pre-sentence investigation.

{¶5} Prior to sentencing, the trial court held a sex offender classification hearing. The trial court adjudicated Melendez a Tier III child victim offender. The trial court sentenced Melendez to life in prison, with eligibility for parole, for rape; and to five years in prison for gross sexual imposition. The court ordered that the sentences would be served consecutively and that the sentence for gross sexual imposition be served prior to the sentence for rape. Melendez filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> "[APPELLANT'S] RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, WERE DENIED WHEN HE WAS CONVICTED OF AND SENTENCED FOR RAPE ON EVIDENCE WHICH WAS INSUFFICIENT AS A MATTER OF LAW."

{¶6} Melendez argues that the State presented insufficient evidence of penetration to support his rape conviction. This Court disagrees.

{¶7} The law is well settled:

> "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. 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. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶8} Melendez was charged with rape in violation of R.C. 2907.02(A)(1)(b), which states, in relevant part:

> "No person shall engage in sexual conduct with another who is not the spouse of the offender *** when *** [t]he other person is less that thirteen years of age, whether or not the offender knows the age of the other person."

R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body, instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however, slight, is sufficient to complete vaginal or anal intercourse."

{¶9} Whether the insertion of an object inside a female's vulva or labia, without penetration into the vaginal cavity itself, constitutes sexual conduct is an issue of first impression for this Court. Many of our sister districts, however, have considered the issue and have concluded that such activity constitutes penetration sufficient to establish rape.

{¶10} The Second District Court of Appeals held:

> "The vagina is the hollow passage leading from the uterus of the female body outward to the exterior genitalia, or vulva, which is comprised of lip-like folds of skin called the labia majora. The term 'vaginal cavity' refers to that entire anatomical process and any part of it.
>
> "Penetration of the vaginal cavity requires introduction of an object from without, which necessarily implies some forceful spreading of the labia majora. The penetration need only be 'slight.' R.C. 2907.01(A). Therefore, if the object is introduced with sufficient force to cause the labia majora to spread, penetration has occurred." *State v. Grant*, 2d Dist. No. 19824, 2003-Ohio-7240, at ¶29-30.

{¶11} The Tenth District Court of Appeals acknowledged that "the overwhelming majority of the appellate courts in this state" which have addressed the issue have declined to categorize the touching of the interior realm of the vulva as mere "sexual contact" as defined in R.C. 2907.01(B). *State v. Gilbert*, 10th Dist. No. 04AP-933, 2005-Ohio-5536, at ¶27. R.C. 2907.01(B) defines "sexual contact," in relevant part, as "any touching of an erogenous zone of another, including without limitation the *** genitals *** [or] pubic region, *** for the purpose of sexually arousing or gratifying either person." The *Gilbert* court recognized, with some concern, that "[a]s it stands now, touching a single labia on the side away from the vaginal cavity is sexual contact, touching the opposite side would be sexual conduct." Id. at ¶37. However, the *Gilbert* court declined to deviate from its prior precedent or the established case law from throughout the state. Id.

{¶12} Melendez urges this Court to reject the holdings of our sister districts and apply instead the Ohio Supreme Court's reasoning in *State v. Wells* (2001), 91 Ohio St.3d 32. The *Wells* court held that evidence that the defendant placed a part of his body or other object merely between the victim's buttocks is not sufficient to prove anal rape. Id. at 34. The high court arrived at its holding upon review of the common, everyday meaning of "cavity," in conjunction

with "anal intercourse," reasoning that there can be penetration into the anal cavity only upon insertion of an object into the anus. Id.

{¶13} In a case very similar to the instant one, the First District Court of Appeals rejected the application of the reasoning in *Wells* to a situation involving digital vaginal rape. *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391. Instead, the *Roberts* court relied on the abundance of case law from numerous appellate districts which have held that any insertion of an object which causes the labia majora to spread is sufficient proof of vaginal penetration. Id. at ¶62, citing *Grant*, supra (sufficient evidence of rape where defendant inserted his finger one-half inch between the victim's external labia); *State v. Childers* (Dec. 19, 1996) ("entry of the anterior of the female genitalia organ, known as the vulva or labia, is sufficient penetration to constitute rape"); *State v. Ulis* (July 22, 1994), 6th Dist. No. L-93-247 (entry of the vulva is sufficient proof of vaginal penetration); *State v. Falkenstein*, 8th Dist. No. 83316, 2004-Ohio-2561; *State v. Blankenship* (Dec. 13, 2001), 8th Dist. No. 77900; *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236; *State v. Carpenter* (1989), 60 Ohio App.3d 104; *State v. Lucas* (Sept. 21, 2001), 2d Dist. No. 18644; *Gilbert*, supra.

{¶14} More recently, the Sixth District Court of Appeals rejected the application of *Wells* to a situation involving vaginal rape, in part because the *Wells* holding was specific to anal rape, and in part because of the consensus among the appellate courts which have addressed the issue "that penetration of the labia is sufficient to prove penetration of the vagina for the purpose of satisfying R.C. 2907.02." *State v. Schuster*, 6th Dist. No. L-05-1365, 2007-Ohio-3463, at ¶67. This Court now joins in the reasoning of our sister districts and holds that insertion, however slight, of a part of the body or other object within the vulva or labia is sufficient to prove vaginal

penetration for purposes of proving sexual conduct as defined in R.C. 2907.01(A) and rape in violation of R.C. 2907.02.

{¶15} In addition, this Court has consistently held that "[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration. Thus, the testimony of the victim may be enough, and does not need corroborating evidence." (Internal citations omitted.) *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11. Melendez has recognized this proposition of law in his brief. In addition, "victim testimony related to penetration is sufficient to support a conviction for rape even where the victim's own testimony is conflicting on the issue." *Blankenship*, supra, citing *Nivens*, supra. Furthermore, "[t]hat medical records reveal no sign of damage to a victim's hymen, in light of unequivocal testimony from the victim, does not make the evidence insufficient as a matter of law." *Blankenship*, supra, citing *State v. Lewis* (1990), 70 Ohio App.3d 624.

{¶16} At trial, the victim S.B. testified regarding three incidents during which Melendez touched her inappropriately when she was seven years old. In what was described as the "Ninja Turtles incident," S.B. testified that Melendez was lying in bed with her while they watched a movie. She testified that he touched her on her "coochie." When asked to identify that area on a picture of a girl, S.B. pointed to the genital area. In what was described as the "blanket incident," the victim testified that Melendez came to her room wearing only a blanket and made her touch him. When asked to identify the place where he made her touch him on a picture of a man, S.B. pointed to the genital area. She testified that Melendez also touched her on her "coochie" during that incident. Finally, S.B. testified regarding the "bunk bed incident." She testified that Melendez got into bed with her, kissed her on her "coochie," and touched her

"coochie" on the outside and the inside a "little bit" in past where she wipes after going to the bathroom. She acknowledged that Melendez touched her "in the lips part." She testified that she had to go to bathroom after he finished touching her. The victim testified that Melendez washed his hands each time after he finished touching her.

{¶17} The State used a box of crayons to simulate the victim's "coochie" and asked S.B. to use one crayon to indicate where Melendez touched her with his hand or finger during each of the incidents. S.B. touched the crayon to the outside of the box to demonstrate where Melendez touched her during the blanket and Ninja Turtles incidents. She touched the crayon to the outside of the box and placed it inside the box to demonstrate where he touched her during the bunk bed incident. Defense counsel asked her to repeat her demonstrations. While demonstrating how Melendez touched her during the bunk bed incident, S.B. placed the crayon halfway inside the box.

{¶18} S.B. expressly testified that Melendez "stuck his finger in [her] coochie," although she admitted that she did not tell that to the nurse who later examined her. S.B. testified that she did not scream when he put his finger inside her, but she tried to push him off her.

{¶19} The victim's mother ("Mother") testified that Melendez was her boyfriend and that he moved in with her family after they had been dating a couple months. Mother testified that S.B. told her that Melendez had kissed her, but later disclosed that he had touched her inappropriately. Melendez denied the allegations, but later sent her a text message from the police station, apologizing for what he had done and asking for her forgiveness. Mother testified that S.B. told her that Melendez put his finger inside her "coochie." Mother took S.B. to the hospital for an examination.

{¶20} Officer Charles Lavelle of the Avon Police Department ("APD") testified that he was dispatched to Rainbow Babies and Children's Hospital on August 21, 2007, regarding a child victim of rape. He testified that he spoke with S.B. during the course of his investigation and that she told him that Melendez touched her private parts, although she did not mention that he had stuck anything inside of her.

{¶21} Detective Kevin Krugman of the APD testified that he interviewed Melendez after he voluntarily turned himself in to the police. The detective testified that Melendez initially denied the allegations, but that he kept changing his story, first admitting that his hand may have accidentally landed on the victim's thigh during a movie, then admitting that he placed his hand inside S.B.'s pants. Detective Krugman testified that Melendez admitted that he left his hand in the victim's pants approximately five minutes, although he denied ever placing anything inside the victim's vagina.

{¶22} Detective Krugman testified that he was hesitant after only interviewing Melendez to charge him with rape. The detective further testified without objection, however, that he felt comfortable with the rape charge after speaking with the victim.

{¶23} Deborah McDermott, an intake case worker with the Lorain County Children Services Board, testified that she was assigned to investigate allegations of sexual abuse regarding S.B. Ms. McDermott testified that she has specialized training in assessing child sexual abuse. She testified that, based on her education, training and experience, she determined that the allegations of sexual abuse were substantiated, i.e., that she found confirmed proof of sexual abuse. Ms. McDermott clarified that the agency substantiates as to "sexual abuse," rather than as to a particular offense.

{¶24} Renee Hotz, coordinator of the Sexual Assault Nurse Examiner ("SANE") unit of the emergency department at Rainbow Babies and Children, testified that she examined S.B. after she presented to the hospital amid allegations of sexual abuse. She testified that she noted S.B.'s responses on the "Assault/Abuse History." Under "Vaginal Penetration by:" she checked "No" next to "Penis" but "Yes" next to "Fingers." Nurse Hotz noted that, based on the victim's story, saliva was likely used for lubrication, and an alternative light source indicated the presence of a foreign substance in that area on the child's body.

{¶25} Nurse Hotz testified that she noted a hypervascularized (reddened) area on the child's labia, indicative of some type of irritation or trauma, although she asserted that it was not absolutely indicative of sexual abuse. She testified that the irritation could have been caused by the child simply scratching or rubbing the area. Nurse Hotz testified that she also noted a "small white scratch healing" at the 6:00 position on the child's vagina. She testified that she did not ascertain the reason for the scratch, and that it is not particularly indicative of anything. Nurse Hotz testified that the victim's hymen was intact and that there was no indication of penetration into the vagina itself. She testified, however, that she has seen infants who have suffered full penis penetration without any disruption to the hymen, so that hypothetically S.B. could have experienced digital penetration without disruption to her hymen. Nurse Hotz testified that such penetration would have been very painful for a young girl, and the victim did not indicate that she experienced pain when Melendez touched her.

{¶26} When asked to render her opinion based on her education, training and experience, and to within a reasonable clinical certainty, Nurse Hotz testified without objection that she believed that S.B. experienced oral penetration and possible digital penetration based on

the scratch and the child's disclosures. She further testified that it was "definitely" possible that there was penetration to the vulva area, and she agreed that such penetration occurred.

{¶27} The victim's rape kit was sent to the Bureau of Criminal Investigation and Identification ("BCI") for analysis. The kit included vaginal samples, anal samples, and mouth samples, skin stain swabs from the victim's "backside" and mons, as well as the victim's underwear. The parties stipulated to the expertise of Christopher Smith and Melissa Zielaskiewicz, forensic scientists at BCI who analyzed various samples from S.B.'s rape kit.

{¶28} Mr. Smith testified that he found no semen or seminal fluid in the vaginal, anal and oral samples, but that he did not test those samples for the presence of saliva. He admitted that it would be unlikely that semen would be found in the case of a digital assault, although saliva might be present if the perpetrator used saliva as a lubricant. He testified that it would be difficult to detect saliva in a vaginal swab.

{¶29} Ms. Zielaskiewicz testified that she performed DNA testing on S.B.'s underwear. She testified that the DNA profile from the underwear swabs presented as a mixture, including a major profile from the victim and a minor profile that provided limited value for comparison purposes. She testified that she picked up the male chromosome in her testing. She conceded that there would not be much DNA present in a "touching" case. Ms. Zielaskiewicz testified that she could not absolutely exclude Melendez as the male contributor of the DNA found.

{¶30} This Court concludes that the State presented sufficient evidence to allow any rational trier of fact to find beyond a reasonable doubt that Melendez digitally penetrated S.B. to constitute sexual conduct within the meaning of R.C. 2907.01(A). S.B. identified her "coochie" as her genital area and testified that Melendez touched her both outside and inside that area. She demonstrated the depth of the penetration using a crayon to simulate Melendez' finger and the

crayon box to simulate her "coochie." Based on the victim's testimony, which needs no corroboration, the State presented sufficient evidence of penetration into the victim's vaginal opening. Moreover, the State presented sufficient evidence that Melendez stuck his finger inside the victim's vulva. S.B. testified that he touched her in the area she wipes after going to the bathroom. Deborah McDermott investigated and substantiated the allegations of sexual abuse. Nurse Renee Hotz noted that the child indicated vaginal penetration by Melendez' fingers. She noted a healing scratch on the victim's vagina which possibly indicated digital penetration. Nurse Hotz testified that there was oral penetration. The nurse agreed that there was penetration of the victim's vulva. Detective Krugman testified that Melendez admitted to placing his hand inside S.B.'s pants and keeping it there for an extended period of time. The detective testified without objection that, after completing his investigation, he was comfortable with the rape charge in addition to merely gross sexual imposition.

{¶31} Based on the evidence presented at trial, this Court concludes that there was sufficient evidence, when construed in a light most favorable to the prosecution, to convince an average person that Melendez committed rape. His sole assignment of error is overruled.

III.

{¶32} Melendez' sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

JACK W. BRADLEY, and BRIAN J. DARLING, Attorneys at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.