[Cite as *State v. Russell*, 2010-Ohio-5466.]

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

STATE OF OHIO	C.A. No. 25154
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN A. RUSSELL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 11 3675

DECISION AND JOURNAL ENTRY

Dated: November 10, 2010

MOORE, Judge.

{¶1} Appellant, John A. Russell, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On November 3, 2008, at approximately 7:30 p.m., Sergeant Brian Brown and Lieutenant Morber of the Barberton Police Department met under the Robinson Street Bridge in Barberton to discuss manpower and employment plans for the department. Each was in a separate cruiser. As they talked, they noticed a bicycle near the point where the incline of poured concrete meets the bridge, but thought little of it at the time. Approximately 15 or 20 minutes later they heard a phone ringing somewhere near the top of the incline. The two went to investigate and came upon a Pepsi can, a Dr. Pepper bottle holding a clear liquid that smelled like vodka, two unopened beer cans, a phone and a purse. Because the beer cans were still cold, the police officers deduced that they had not been there long. The officers called out to see if

anyone was in the area. Receiving no response, they began to search the area with their flashlights. The officers found Russell hiding in the high weeds bordering the poured concrete under the bridge. Russell's answers to the officers' questions were evasive. He claimed that he was coming from Save-A-Lot, but he could not produce any groceries and the bridge is south of Save-A-Lot, and is in the opposite direction of Russell's residence.

{¶3} In the purse, the officers located paperwork indicating that it belonged to M.W., a female who, at the time, was 15 years old. The officers contacted dispatch to find contact information for M.W. Dispatch informed them that M.W.'s father had recently reported the purse and phone as stolen. The officers arrested Russell on suspicion of theft and transported him to the police station to investigate further. After he was notified, M.W.'s father brought her to the police station, as well.

{¶4} In the purse, the officers found a strip of four small photographs from a photo booth depicting Russell and M.W. making funny faces. One photograph depicted M.W. kissing Russell on the cheek. Russell informed them that he thought of M.W. like a daughter. The officers requested to speak with M.W. M.W. was reserved in answering questions, indicating that she did not want to get Russell in trouble and that "they weren't more than just friends." She also referred to Russell as "Jay Jay." These statements aroused concern in the police, who implored her to tell them the entire story. M.W. later admitted that she had been having sexual intercourse with Russell since June of 2008. While reviewing the contents of her phone, the officers discovered in a folder labeled "Jay Jay" a photo of an erect penis.

{¶5} The police then referred M.W. to Akron Children's Hospital to speak with a social worker, Kimberly Bach, and undergo an examination that included the attempted

collection of physical evidence. The examination was conducted by Dr. Jeffrey Shaw. Detective Shannon Davis, also of the Barberton Police Department, later interviewed M.W. at school.

{¶6} On November 17, 2008, the Summit County Grand Jury indicted Russell on three counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04, all felonies of the third degree, and one count of disseminating matter harmful to juveniles in violation of R.C. 2907.31(A)(1), a felony of the fifth degree.

{¶7} The charges were tried to a jury from May 4, 2009, to May 6, 2009. The jury found Russell guilty of all charges. On July 1, 2009, the trial court sentenced Russell to four years of imprisonment on each of the charges of unlawful sexual conduct with a minor and one year of imprisonment on the charge of disseminating matter harmful to juveniles. The trial court ordered that the sentences for unlawful sexual conduct with a minor run concurrent to each other but consecutive to the sentence for disseminating matter harmful to juveniles, for a total of 5 years of imprisonment. The trial court also adjudicated Russell as a Tier II Sexually-Oriented Offender.

{¶8} Russell timely filed a notice of appeal. He has raised three assignments of error for our review. We have rearranged his assignments of error to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

> "THE COURT ERRED IN PERMITTING THE STATE TO INTRODUCE AND ADMIT AS EXHIBITS THE PRIOR INCONSISTENT STATEMENTS OF MW."

{¶9} In his first assignment of error, Russell contends that the trial court erred in permitting the State to introduce and admit as exhibits the prior inconsistent statements of M.W. We do not agree.

{¶10} Russell contends that the trial court erred in allowing the State to admit as an exhibit the handwritten statement M.W. gave to Sergeant Brown on the night of November 2, 2008, and the DVD recording of M.W.'s interview by Kimberly Bach, a social worker at Akron Children's Hospital. In his appellate brief, however, Russell concedes that trial counsel failed to properly preserve objections. Russell did not, in fact, object to the presentation or admission of M.W.'s written statement, thus forfeiting this issue for appellate review.

{¶11} "By forfeiting the issue for appeal, [Russell] has confined our analysis to an assertion of plain error." *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165 at ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23; Crim.R. 52(B). "While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so." *Akron v. Lewis*, 179 Ohio App.3d 649, 2008-Ohio-6256, at ¶22; App.R. 16(A)(7); App.R. 12(A)(2); Loc.R. 7(B)(7). As Russell did not assert plain error, we will not undertake such analysis.

{¶12} Contrary to counsel's concession, Russell's trial counsel did object to the presentation and admission of the DVD recording of M.W.'s interview at Akron Children's Hospital. Assuming without deciding that the admission of the interview into evidence constituted error, any error was harmless. "Harmless error * * * includes '[a]ny error, defect, irregularity, or variance which does not affect substantial rights' and shall, therefore, 'be disregarded.' Crim.R. 52(A). Harmless error, by definition, would have no impact on the outcome of the trial." *State v. Bullard*, 9th Dist. No. 08CA0034, 2009-Ohio-1826, at ¶10. The contents of the interview essentially establish that M.W. and Russell engaged in sexual intercourse on multiple occasions. This evidence was virtually duplicative of that found in M.W.'s written statement, admitted as noted above, and the impeachment evidence of M.W.'s

oral statements to the police. Accordingly, any error was harmless. Russell's first assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT [RUSSELL'S] CONVICTION OF 'DISSEMINATING MATTER HARMFUL TO JUVENILES'." [SIC]

{¶13} In his third assignment of error, Russell contends that his conviction for disseminating harmful material to juveniles is supported by insufficient evidence. Specifically, Russell contends that there is insufficient evidence that he disseminated the photograph of an erect penis to M.W. and that the lone image of a penis is sufficient to satisfy the requirement that the material be obscene or harmful to juveniles. We do not agree.

{¶14} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶15} Disseminating matter harmful to juveniles is prohibited under R.C. 2907.31, which provides, in pertinent part, that:

> "(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

> "(1) "Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile * * * any material or performance that is obscene or harmful to juveniles."

R.C. 2907.01(E) defines the phrase "[h]armful to juveniles" to mean:

> "* * * that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:
>
> "(1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.
>
> "(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.
>
> "(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles."

{¶16} Russell directs this Court to M.W.'s testimony that Allison Carter, Russell's now-deceased fiancé, sent the photograph of an erect penis to M.W.'s phone. Impeachment evidence indicated that M.W. told Detective Shannon Davis of the Barberton Police Department that she had asked Russell for the picture and that he sent it to her. The picture was stored under the name Jay Jay and Russell used the phone from which the picture was sent. The record indicates that Russell knew that M.W.'s phone password was originally 1535, their ages being 15 and 35 respectively, and that he later changed the password to 1993, the year of M.W.'s birth. Accordingly, viewed in the light most favorable to the State, the evidence indicated that Russell knew that M.W. was 15 years old and he sent her a picture of an erect penis.

{¶17} As for his contention that a mere picture of an erect penis is not obscene or harmful to juveniles, Russell failed to provide this Court with any citation to authority supporting his view. App.R. 16(A)(7). We note, however, that other courts have held that photographs depicting an erect penis and sent to a minor are sufficient for conviction under R.C. 2907.31. *State v. Maxwell* (Sept. 14, 2000), 10th Dist. No. 99AP-1177, reversed on other grounds by *State*

v. Maxwell, 95 Ohio St.3d 254, 2002-Ohio-2121; see, also *State v. Haddox*, 5th Dist. No. 2006-CA-00063, 2006-Ohio-6140, at ¶76. Russell's third assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[RUSSELL'S] CONVICTIONS WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶18} In his second assignment of error, Russell contends that his convictions are against the manifest weight of the evidence. We do not agree.

{¶19} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶20} R.C. 2907.04(A) provides that:

> "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

R.C. 2907.01 defines "sexual conduct" as, among other things, "vaginal intercourse between a male and a female[.]"

{¶21} In support of his argument with respect to his conviction for unlawful sexual conduct with a minor, Russell cites to M.W.'s trial testimony in which she "was adamant that at no time did she have sexual intercourse with [Russell]." She also testified that when interviewed by Sergeant Brian Brown, she felt compelled to implicate Russell. M.W. alleged that Sergeant Brown became confrontational and threatened to handcuff her when she told him that she and Russell were just friends and that nothing happened between them. Russell also directs this Court to M.W.'s testimony that she gave her statement to Sergeant Brown while still upset with Russell because he pushed her away when she kissed him earlier that night. Essentially, Russell contends that the jury should have believed M.W.'s testimony.

{¶22} The State, however, impeached M.W. with statements she made to several law enforcement officers, as well as the written statement she provided the night of Russell's arrest. Impeachment evidence indicated that Russell and M.W. had sexual intercourse more than ten times, their relationship began in June of 2008 and they had been having sex approximately once every two-and-a-half weeks. The record also indicated that their most recent sexual activity occurred on November 1, 2008. The record further indicated that M.W. was protective of Russell, that she did not want him to get in trouble and that they were in love. With respect to his conviction for disseminating matter harmful to juveniles, Russell contends that the jury should have believed M.W.'s unequivocal testimony that Russell's fiancé sent her the photo of an erect penis. The record indicates, however, that the photo was stored on M.W.'s phone under a folder labeled "Jay Jay." Moreover, impeachment evidence indicated that M.W. asked Russell for the picture and he sent it to her.

{¶23} In light of the impeachment evidence, the fact that the jury did not find M.W.'s testimony to be credible does not lead to the conclusion that Russell's convictions for unlawful sexual conduct with a minor and disseminating matter harmful to juveniles were against the manifest weight of the evidence. After reviewing the record, weighing the inferences and considering the credibility of the witnesses, we cannot say that this is the extraordinary case in which the evidence weighs heavily in favor of the defendant. *Otten*, 33 Ohio App.3d at 340. Russell's second assignment of error is overruled.

III.

{¶24} Russell's assignments of error are overruled. The judgment of the Summit 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 Summit, 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.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.