[Cite as *State v. Calhoun*, 2011-Ohio-769.]

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

STATE OF OHIO Appellee v. DENNIS A. CALHOUN, JR. Appellant	C.A. No. 09CA009701 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CR076796

DECISION AND JOURNAL ENTRY

Dated: February 22, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Dennis Calhoun, Jr., appeals from his convictions in the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} Calhoun resided with his cousin, Erika Blackburn, and his uncle, James Blackburn, at various points during July and August 2008. Several times, Calhoun stayed at either Erika's or James' houses at the same time as Erika's daughter, A.R. Erika asked Calhoun to babysit A.R. and A.R.'s sibling while Erika worked at night, three times a week. After approximately a month, however, Erika and Calhoun fought. Calhoun stopped babysitting the children and left Erika's house. On August 22, 2008, A.R. told Erika that Calhoun had made her play a game, during which "[h]e made [her] suck on his private." A.R. indicated that Calhoun had made her "suck on his private" several times, including at her own home and at James' home

when she stayed there. Erika took A.R. to the hospital later that night. A.R. was six years old at the time the incidents with Calhoun occurred.

{¶3} On September 24, 2008, a grand jury indicted Calhoun on the following counts: (1) two counts of rape, in violation of R.C. 2907.02(A)(1)(b); and (2) two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4). A bench trial commenced on July 1, 2009, at the conclusion of which the trial court found Calhoun guilty on all counts. The court sentenced Calhoun to life in prison, with parole eligibility after fifteen years, and classified him as a Tier III sex offender/child-victim offender.

{¶4} Calhoun now appeals from his convictions and raises five assignments of error for our review.

II

Assignment of Error Number One

"THE COURT COMMITTED ERROR WHEN IT DETERMINED THAT THE CHILD WITNESS WAS COMPETENT TO TESTIFY."

{¶5} In his first assignment of error, Calhoun argues that the trial court erred when it found that A.R. was competent to testify. We disagree.

{¶6} Evid.R. 601(A) provides, in relevant part, that "[e]very person is competent to be a witness except *** children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

> "In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." *State v. Frazier* (1991), 61 Ohio St.3d 247, paragraph one of the syllabus.

The issue of whether a child under the age of ten is competent to testify is one properly addressed to the discretion of the trial court. *State v. Reinhardt*, 9th Dist. No. 08CA0012-M, 2009-Ohio-1297, at ¶4 ("Because trial courts have the ability to view the demeanor of a child witness during voir dire, a competency determination is reviewed for abuse of the trial court's discretion."). Accordingly, we review such competency determinations under an abuse of discretion standard of review. Id. Accord *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶70-87.

{¶7} A.R. was seven years old at the time of trial. The trial court questioned A.R. before allowing her to testify and gave both attorneys the opportunity to question her as well. The court asked A.R. numerous questions about the difference between the truth and a lie. A.R. stated that the truth is "when you say what really happened" and "when you do not tell a lie[.]" She also was able to identify a true statement and a false statement based on hypotheticals posed by the trial court. A.R. was able to recall an occasion on which she had lied to her mother and explained that she knew it was wrong to do so. A.R. promised that she would tell the truth in court. Based on A.R.'s responses, the trial court determined that she was competent to testify.

{¶8} We cannot conclude that the trial court erred by determining, in its sound discretion, that A.R. was competent to testify. The court's line of questioning elicited responses from A.R. that showed her ability to understand and tell the truth, accurately receive information, and communicate observations. See *Frazier*, 61 Ohio St.3d at paragraph one of the syllabus. Calhoun has not cited this Court to any authority or any portion of A.R.'s competency evaluation that might cause us to question the trial court's competency determination. See App.R. 16(A)(7). Because nothing in the record suggests that the court abused its discretion by finding A.R. competent to testify, Calhoun's first assignment of error is overruled.

Assignment of Error Number Two

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶9} In his second assignment of error, Calhoun argues that he received ineffective assistance of counsel. We disagree.

{¶10} To prove an ineffective assistance claim, Calhoun must show two things: (1) that counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. To demonstrate prejudice, Calhoun must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Furthermore, this Court need not address both *Strickland* prongs if an appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶11} First, Calhoun argues that his counsel was ineffective for failing to introduce medical documentation so as to prove that he had a sexually transmitted disease ("STD") at the time the alleged offenses occurred. Calhoun theorizes that "[p]roof that [he] had an STD and [A.R. was] STD free would tend to show that the molestation did not occur." We do not agree, however, that any additional evidence about an STD would have changed the result in Calhoun's trial. See *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. Erika Blackburn, A.R.'s mother, testified at trial that she had A.R. tested for STDs because she believed that Calhoun might have one. Calhoun's mother, Terry Blackburn, also testified that Calhoun had tested

positive for an STD between August 15, 2008 and August 22, 2008. The trial court, therefore, heard several witnesses testify that Calhoun had an STD. The court also heard testimony that A.R. tested negative for any STDs. We are not convinced that any additional evidence on this point would have had any effect on Calhoun's judgment. *Strickland*, 466 U.S. at 691. As such, his argument that he was prejudiced by his counsel's failure to introduce evidence to document his STD lacks merit.

{¶12} Calhoun also argues that his counsel was ineffective for the following reasons: (1) failing to ask any questions during A.R.'s competency hearing; (2) failing to object when the prosecutor asked his character witness, Mark Smith, whether he was aware that Calhoun had previously set fire to a building or committed domestic violence; (3) commenting during closing argument that the State had "done a tremendous job" and that Erika Blackburn's testimony was "good"; and (4) failing to object to Calhoun's tier classification on the basis that his crimes occurred before the enactment of the Adam Walsh Act. Calhoun has not presented this Court with any analysis, case law, or citations in support of his argument that the foregoing items constituted ineffective assistance of counsel. As such, we briefly address his claims.

{¶13} This Court has already determined that the trial court did not err by finding A.R. competent to testify. Absent any argument to the contrary, we find no merit in Calhoun's bald assertion that his counsel was ineffective because he failed to ask any questions during the competency hearing. Similarly, we decline to fault defense counsel for complimenting the prosecutor and stating that he thought Erika Blackburn's testimony was "good." Counsel's actual statement with regard to Erika was: "Erika's testimony also was good, but, again, I think there's (sic) inconsistencies." The statement was hardly a ringing endorsement of her testimony. More importantly, however, this case was tried to the bench and there is no evidence that the trial

court afforded any weight to defense counsel's comments. The foregoing items do not establish a claim of ineffective assistance.

{¶14} Similarly, no ineffective assistance claim lies for defense counsel's failure to object to either the question the State posed to Smith or Calhoun's tier classification. Smith testified as a character witness for Calhoun. Specifically, he offered his opinion of Calhoun and testified that this type of crime was "not in Dennis's character." On cross-examination, the prosecutor asked Smith whether it was in Calhoun's character "to set fire to an occupied building" or "commit domestic violence." Smith admitted that Calhoun had set fire to a building, but indicated that he did not know about any domestic violence charges. Evid.R. 405(A) permits evidence of a person's character by way of reputation or opinion testimony. The rule also provides, however, that "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct." Evid.R. 405(A). Calhoun has not explained why Evid.R. 405(A) would not apply in this situation. The record does not support Calhoun's blanket assertion that his counsel erred by not objecting to the State's question. Further, Calhoun's argument that his counsel was ineffective for failing to object to his tier classification lacks merit. According to Calhoun, his counsel should have objected "due to the fact that these crimes occurred prior to the Adam Walsh Act being enacted." Calhoun committed the acts at issue in this case in July and August 2008, after the Adam Walsh Act's 2007 enactment. See R.C. 2950, et seq. Thus, Calhoun's counsel did not err by failing to object to his tier classification on that basis. His final two arguments lack merit.

{¶15} Calhoun has failed to demonstrate that his trial counsel was ineffective. Consequently, Calhoun's second assignment of error is overruled.

Assignment of Error Number Three

"DEFENDANT WAS NOT PROPERLY NOTIFIED OF HIS REGISTRATION DUTIES AS A TIER III SEX OFFENDER."

{¶16} In his third assignment of error, Calhoun argues that the trial court failed to properly notify him of his registration duties under the Adam Walsh Act. Specifically, he argues that the trial court was required to tell him how to comply with his offender registration duties in the event that he: (1) qualifies for parole at some point during his life sentence; and (2) becomes homeless. We disagree.

{¶17} R.C. 2950.03(A) provides that offenders classified under the Adam Walsh Act and obligated to register by virtue of the same:

> "[S]hall be provided notice in accordance with this section of the offender's *** duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and of the offender's duties to similarly register, provide notice of a change, and verify addresses in another state if the offender resides, is temporarily domiciled, attends a school or institution of higher education, or is employed in a state other than this state."

R.C. 2950.05 describes the proper registration procedure for individuals who temporarily do not have a fixed address. R.C. 2950.05(A).

{¶18} Here, the trial court informed Calhoun that upon his release from prison, he was statutorily obligated to register with the sheriff of the county in which he established a residency. The court also informed him of his duties to register in any county where he intended to work or attend school, to register in other states if he left Ohio, to periodically verify his initial registration, and to notify the sheriff of any changes in residency, employment, or educational institution. See R.C. 2950.03(A). Moreover, Calhoun signed a written form entitled "Explanation of Duties to Register as a Sex Offender or Child-Victim Offender" that notified him of his registration duties. Calhoun's signature appeared under the line "I acknowledge that

the above requirements have been explained to me and that I must abide by all of the provisions of the Ohio Revised Code Chapter 2950."

{¶19} Calhoun has not pointed this Court to any law in support of his argument that the oral and written notifications he received were not sufficient to apprise him of his duties to register. See App.R. 16(A)(7). As such, we conclude that his argument lacks merit. Calhoun's third assignment of error is overruled.

Assignment of Error Number Four

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS OF TWO COUNTS OF RAPE AND TWO COUNTS OF GROSS SEXUAL IMPOSITION[.]"

{¶20} In his fourth assignment of error, Calhoun argues that his convictions are based on insufficient evidence. We disagree.

{¶21} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "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." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶22} R.C. 2907.02(A)(1)(b) 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 is less than thirteen years of age, whether or not the offender knows the age of the other

person." The phrase "sexual conduct" includes fellatio. R.C. 2907.01(A). The foregoing offense constitutes rape. R.C. 2907.02(B).

{¶23} R.C. 2907.05(A)(4) provides, in relevant part, as follows:

> "No person shall have sexual contact with another, not the spouse of the offender; [or] cause another, not the spouse of the offender, to have sexual contact with the offender *** when *** [t]he 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."

The phrase "sexual contact" means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region *** for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). The foregoing offense constitutes gross sexual imposition. R.C. 2907.05(C).

{¶24} Calhoun argues that his convictions are based on insufficient evidence because he was convicted solely on the basis of A.R.'s testimony. A.R., who was six years old at the time of these events, testified that on several occasions Calhoun made her touch his "privates" and perform fellatio on him. This Court has recognized that in sexual assault cases a victim's testimony may be enough to support a conviction, even absent corroborating evidence. *State v. Melendez,* 9th Dist. No. 08CA009477, 2009-Ohio-4425, at ¶15, quoting *State v. Willard,* 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11. A.R.'s testimony here supported the State's assertion that Calhoun engaged in both sexual conduct and sexual contact with her when she was less than thirteen years of age. See R.C. 2907.02(A)(1)(b); R.C. 2907.05(A)(4).

{¶25} Calhoun's specific argument on appeal is that "[d]ue to the lack of evidence regarding L.R.'s alleged abuse, and the weight of the evidence regarding A.R.'s claims of abuse, it is requested that the trial court's order of conviction be reversed." Calhoun's argument also refers to the evidence not being sufficient to support the offenses relating to "each child." This Court is perplexed by Calhoun's argument as it relates to L.R. and discusses the offenses relating

to "each child." There was some discussion in the record about Calhoun having sexually assaulted A.R.'s younger brother, L.R., but Calhoun's convictions in this case only relate to his crimes against A.R. While Calhoun's indictment did not identify a victim by name, the State's bill of particulars quite clearly establishes that A.R.'s victimization was the basis for all four of the charges in this case. To the extent that Calhoun argues about the evidence as it relates to L.R., his arguments have no bearing here. Moreover, to the extent Calhoun argues that the weight of the evidence does not support A.R.'s claims, such an argument sounds in manifest weight, not sufficiency. See *State v. Jones*, 9th Dist. No. 24776, 2010-Ohio-351, at ¶11. Calhoun's argument that his convictions are based on insufficient evidence lacks merit. Accordingly, his fourth assignment of error is overruled.

Assignment of Error Number Five

> "APPELLANT'S CONVICTION FOR TWO COUNTS OF RAPE AND TWO COUNTS OF GROSS SEXUAL IMPOSITION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 3, OF THE OHIO CONSTITUTION."

{¶26} In his fifth assignment of error, Calhoun argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶27} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust 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.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the

evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶28} Calhoun's entire manifest weight argument reads as follows: "It is submitted that Calhoun's conviction was against the manifest weight of the evidence, and in support the arguments in Section IV are resubmitted." Even if this Court were to construe the viable portion of Calhoun's sufficiency argument as his manifest weight argument, we find no merit in it. Calhoun argued that his convictions should be reversed because A.R. waited to report any abuse and there was no sign of physical injury. These items do not warrant a reversal. Denise Miller, the registered nurse who examined A.R. at the Nord Center, testified that delayed reporting is a common phenomenon among abuse victims. A.R. herself testified that she told her mother about the abuse when she did because Calhoun had moved out of the house at that point. Further, neither R.C. 2907.02(A)(1)(b), nor R.C. 2907.05(A)(4) requires proof of any physical injury. It is entirely reasonable in the circumstances here, which involved fellatio, that no physical injury would be present. Calhoun's fifth assignment of error is overruled.

III

{¶29} Calhoun's assignments of error are 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.

BETH WHITMORE
FOR THE COURT

BELFANCE, P. J.
MOORE, J.
CONCUR

APPEARANCES:

ERIN A. DOWNS, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and AMY IOANNIDIS BARNES, Assistant Prosecuting Attorney, for Appellee.