

[Cite as *State v. Kenney*, 2009-Ohio-5584.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-231
v.	:	(C.P.C. No. 07CR07-4874)
	:	
Christopher M. Kenney,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Christopher M. Kenney ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of eight counts of rape, two counts of gross sexual imposition, and two counts of disseminating matter harmful to juveniles. For the following reasons, we affirm.

{¶2} The Franklin County Grand Jury indicted appellant on nine counts of rape, three counts of gross sexual imposition, and three counts of disseminating matter harmful to juveniles. The charges stem from appellant sexually abusing C.C. and showing her pornography when she was four, five, and six years old. The single rape count pertaining to C.C. at four years old concerned cunnilingus. The eight rape counts pertaining to C.C. at five and six years old concerned fellatio and cunnilingus and vaginal and anal intercourse. C.C. lived with appellant after being separated from her biological parents. C.C. and appellant are related; she has referred to him as an uncle and a cousin. Appellant pleaded not guilty to the charges, and a jury trial ensued.

{¶3} C.C. testified on behalf of plaintiff-appellee, the state of Ohio. C.C. was nervous and apprehensive about discussing the sex abuse, but she eventually testified as follows. Appellant sexually touched her with his hands. One area appellant touched was her breasts. Appellant's mouth never touched her body. Appellant had anal and vaginal intercourse with her, and she experienced pain from the vaginal intercourse. She had to touch appellant's "private part." (Tr. 139.) Appellant made her perform fellatio. Appellant showed her pornographic movies. She did not remember if the sex abuse happened when she was four years old, but she said the sex abuse happened when she was five and six years old. The sex abuse happened almost every night. Appellant told her to keep the sex abuse a secret.

{¶4} Kerri Marshall is a social worker at the Center for Child and Family Advocacy ("Advocacy Center"). Marshall interviewed C.C. before her medical examination at the Advocacy Center. C.C.'s statements at the Advocacy Center tracked

C.C.'s testimony about the pornography, fellatio, touching of erogenous zones, and vaginal and anal intercourse. C.C. identified the breasts, vagina, and anus of an anatomical drawing of a girl to indicate where appellant molested her. C.C. added that she bled from the sex abuse and that both forms of intercourse hurt. C.C. reiterated that the sex abuse occurred when she was five years old and "a little bit" when she was six years old. (Tr. 330.) Unlike at trial, C.C. said that the sex abuse also occurred when she was four years old. Unlike at trial, C.C. said that appellant performed cunnilingus, and C.C. identified the vagina on the anatomical drawing to confirm where that sexual activity occurred.

{¶5} After the prosecution rested its case, appellant raised a Crim.R. 29 motion for acquittal. The court denied the motion. Appellant testified at trial and denied sexually abusing C.C. or showing her pornography. Witnesses also testified for appellant that he was a good caregiver for C.C. and that he was a truthful and peaceful person. Appellant raised another Crim.R. 29 motion after he rested his case. The court denied the motion.

{¶6} During closing argument, defense counsel noted that, at the Advocacy Center, C.C. said that appellant performed cunnilingus, but at trial C.C. denied this sexual activity. Defense counsel also said that, when he questioned C.C., he "treated her as if she was my own daughter." (Tr. 662.) The jury found appellant guilty of all charges pertaining to when C.C. was five and six years old, but not guilty of the charges pertaining to when she was four years old. The trial court sentenced appellant and

labeled him a Tier III sex offender. Appellant did not object to the sex offender classification.

{¶7} Appellant appeals, raising the following assignments of error:

I. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HIM HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

II. APPLICATION OF THE PROVISIONS OF SENATE BILL 10 TO THOSE CONVICTED OF OFFENSES COMMITTED BEFORE ITS JANUARY 1, 2008 EFFECTIVE DATE, BUT SENTENCED AFTER THAT DATE, VIOLATES THE BAN ON EX POST FACTO LAWMAKING BY THE STATES SET FORTH IN ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

III. THE APPLICATION OF S.B. 10 TO PERSONS WHO COMMITTED THEIR OFFENSE PRIOR [TO] THE ENACTMENT OF S.B. 10 VIOLATES THE RETROACTIVITY CLAUSE OF THE OHIO CONSTITUTION, ARTICLE II, SECTION 28.

IV. THE APPLICATION OF S.B. 10 VIOLATES THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

V. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF RAPE, GROSS SEXUAL IMPOSITION AND DISSEMINATING MATTER HARMFUL TO JUVENILES AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} In his first assignment of error, appellant argues that defense counsel rendered ineffective assistance. We disagree.

{¶9} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

{¶10} Appellant argues that defense counsel was ineffective for not cross-examining C.C. over prior inconsistent statements she made during her Advocacy Center interview. Appellant notes that (1) at the Advocacy Center, C.C. said that the sex abuse occurred when she was four years old, but C.C. said at trial that she did not remember if the sex abuse happened at that age, and (2) at the Advocacy Center, C.C. said that appellant performed cunnilingus, but C.C. denied this activity at trial. The scope of cross-examination falls within the ambit of trial strategy. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101. Reasoned trial strategy existed for defense counsel not to take a confrontational stance against C.C. while she was on the stand because she was a sympathetic witness as the young victim of sex abuse. Defense

counsel acknowledged this strategy when he said, during closing argument, that he treated C.C. as if she was his daughter. In any event, appellant cannot establish prejudice from defense counsel's failure to cross-examine C.C. about her conflicting statements on whether the sex abuse happened when she was four years old; the jury acquitted appellant of the charges pertaining to when C.C. was four years old. Appellant cannot establish prejudice from defense counsel's failure to cross-examine C.C. on her prior inconsistent statement about cunnilingus. The jury was presented with the prior inconsistent statement when the prosecution played the Advocacy Center interview in court and when the court admitted into evidence Marshall's summary of the interview. In addition, defense counsel highlighted the inconsistent statement during closing argument. We conclude that defense counsel was not ineffective for not cross-examining C.C. over prior inconsistent statements she made during her Advocacy Center interview. Therefore, we overrule appellant's first assignment of error.

{¶11} Appellant's second, third, and fourth assignments of error concern his Tier III sex offender classification. The trial court made this classification pursuant to the Adam Walsh Act, implemented under S.B. 10. Appellant argues that retroactive application of this law violates the Ex Post Facto Clause of the United States Constitution and the Ohio Constitution's ban on retroactive laws. Appellant also argues that the classification violates constitutional protections against cruel and unusual punishment. Appellant did not raise these issues in the trial court. A constitutional issue not raised at trial "need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Accord *State v. Franklin*, 182 Ohio App.3d 410,

2009-Ohio-2664, ¶21. We decline to consider appellant's constitutional arguments because he failed to raise them in the trial court.¹ Accordingly, we overrule appellant's second, third, and fourth assignments of error.

{¶12} In his fifth assignment of error, appellant argues that his convictions are based on insufficient evidence and against the manifest weight of the evidence. We disagree.

{¶13} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See

¹ This court has held that a defendant does not have standing to challenge S.B. 10 on direct appeal. See *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304, ¶7-10, and *State v. Conkel*, 10th Dist. No. 08AP-845, 2009-Ohio-2852, ¶8. We need not reach the issue of standing because appellant did not preserve the S.B. 10 constitutional challenges for appeal. See *Franklin* at ¶20-21 (declining to consider S.B. 10 constitutional challenges not raised in the trial court). See also *State v. Richey*, 10th Dist. No. 09AP-36, 2009-Ohio-4487, ¶12 (same).

Jenks, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶14} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we 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." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶15} Appellant challenges his convictions by raising credibility issues against C.C. This credibility challenge is not relevant to appellant's sufficiency of the evidence claim. See *Yarbrough* at ¶79. Appellant raises no other arguments to support his sufficiency of the evidence claim, and we find that the prosecution's evidence, in particular C.C.'s testimony and Advocacy Center interview, support appellant's

convictions. Thus, we conclude that appellant's convictions are based on sufficient evidence.

{¶16} Appellant's challenge to C.C.'s credibility is relevant to his manifest weight of the evidence claim. See *Thompkins* at 387. Appellant reiterates that, at the Advocacy Center, C.C. said that the sex abuse occurred when she was four, but C.C. said at trial that she did not remember if the sex abuse happened at that age. This inconsistency is irrelevant because the jury acquitted appellant on those charges pertaining to when C.C. was four years old. Appellant reiterates that, at the Advocacy Center, C.C. said that appellant performed cunnilingus, but C.C. denied this activity at trial. We conclude that the jury did not lose its way when it convicted appellant of rape by cunnilingus when C.C. was five and six years old. At the Advocacy Center, C.C. made explicit statements concerning two acts of cunnilingus, statements that provide compelling support for the convictions.

{¶17} Lastly, to the extent that appellant argues that C.C.'s inconsistent statements rendered all of his convictions against the manifest weight of the evidence, we disagree. At trial and at the Advocacy Center, C.C. described the pornography that appellant showed her. At the Advocacy Center, C.C. bolstered her sex abuse claims when she identified on an anatomical drawing the areas of her body that appellant molested. Also supporting C.C.'s allegations is her revelation that she bled and experienced pain from the sex abuse. In addition, appellant telling C.C. to keep the sex abuse a secret indicates furtive conduct reflective of a consciousness of guilt. See *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶86. By convicting appellant,

the jury accepted C.C.'s credibility, and the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. Accordingly, we conclude that appellant's convictions are not against the manifest weight of the evidence. Having also concluded that appellant's convictions are based on sufficient evidence, we overrule appellant's fifth assignment of error.

{¶18} In summary, we overrule appellant's five assignments of error. Therefore, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
