

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-861
v.	:	(C.P.C. No. 09CR-7146)
	:	
Kevin L. Spires,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Kevin L. Spires ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas after a jury found him guilty of eight counts of rape committed against K.R., in violation of R.C. 2907.02, all of which are felonies of the first degree. For the following reasons, we affirm.

{¶2} On November 27, 2009, appellant was indicted for eight counts of rape (Counts 1-8), in violation of R.C. 2907.02, committed against K.R., from nine years of age to ten years of age; six counts of rape (Counts 9-14), in violation of R.C. 2907.02, committed against C.P., from 11 years of age to 12 years of age; two counts of rape

(Counts 15-16), in violation of R.C. 2907.02, committed against T.P., from 11 years of age to 12 years of age; and three counts of illegal use of a minor in nudity-oriented material or performance (Counts 17-19), in violation of R.C. 2907.323. Appellant entered a plea of not guilty and proceeded to a jury trial, which commenced on June 15, 2010.

{¶3} Prior to the commencement of trial, the state moved to dismiss Counts 17, 18 and 19 of the indictment that charged appellant with the illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323. The trial court granted the state's motion and proceeded to trial on Counts 1 through 16 of the indictment that charged appellant with rape, in violation of R.C. 2907.02. (Tr. 5.) In support of its case, the state put on testimony from T.P., C.P., K.R., and Gail Horner.

{¶4} T.P., 16 years old, testified that she began visiting appellant's residence at age 11 for weekend sleepovers and that she referred to him as "Pops." (Tr. 30, 33, 42.) She knew appellant's niece, Sabrina Nicole Spires, through cheerleading for the Hilltop Cowboys. (Tr. 32-33.) T.P. stated that, other than appellant and his roommate "Pappy," no adults lived at the residence. (Tr. 33-34.) In addition, T.P. reported that appellant allowed her and other girls to "party, drink, [and] smoke marijuana." (Tr. 34.) T.P. testified that appellant took her, along with other girls, to Galaxy Games & Golf and illegal street races, in exchange for "time." (Tr. 39-40.) According to T.P., "time" meant "[h]ow long we was going to be up in his bedroom for him to do stuff with us, sexual stuff." (Tr. 40.) T.P. also testified that during sleepovers, appellant called her, C.P., and K.R. up to his bedroom in order to give him "back massages," which really meant sexual intercourse. (Tr. 42-45.) T.P. stated that she only discussed the situation with C.P. and K.R. "[b]ecause they were going through it too." (Tr. 45.) T.P. further testified:

Q: How old were you when you first learned that this was going on with C.P. and K.R.?

A: Eleven or 12.

Q: Where would you guys talk about this?

A: In the bathroom.

Q: At his place?

A: Yes, sir.

(Tr. 46.)

{¶5} C.P., 17 years of age, stated that she "got brought into the situation," at the age of 11 or 12, when she saw appellant "fingering" K.R. during a game of Truth or Dare.

(Tr. 116, 130.) The following questioning ensued:

Q: Got brought into what situation?

A: The time thing.

Q: The sex?

A: Yes.

Q: How did that—what happened when you got brought into it?

A: Me and [K.R.] was playing Truth Or Dare, and she—well, she dared me to let him do that to me, and –yeah.

* * *

Q: So what did you do when she dared you?

A: I didn't really have a choice. I mean, I had a choice, but I don't know. I just let him.

* * *

Q: My client wasn't playing the game; did he get up across from the room and agreed to do it?

A: No. [K.R.] was sitting on his lap, and then he told her to get up, and then I got in his lap then.

(Tr. 131-33.)

{¶6} K.R., 14 years of age, testified that appellant is her step grandfather and that she would visit him "[a]bout three times a week," which included overnight visits. (Tr. 175-76, 180, 183.) During her testimony, K.R. indicated that appellant repeatedly raped her between the ages of 10 and 13. (Tr. 191, 194.) K.R. described, in detail, the events that occurred during sleepovers at appellant's residence:

Q: Describe how—when you would stay the night or what happened at bedtime.

* * *

A: Sometimes we would be downstairs playing. He would ask us for back rubs.

Q: One at a time or as a group or—

A: One at a time.

* * *

Q: Did you actually give him a back rub?

A: Yeah, sometimes.

Q: Anything else happen?

A: Yeah, he would start touching us.

Q: Where would he start touching you?

A: Down there.

Q: "Down there," are you referring to your vagina?

A: Yeah.

Q: What would he touch you with?

A: His fingers.

* * *

Q: Did he ever put his finger inside your vagina?

A: Yeah.

Q: How old were you the first time when this happened?

A: Like ten.

* * *

Q: Did he ever touch your vagina with anything else?

A: Yeah.

Q: What?

A: His penis.

Q: Did he ever put his penis inside your vagina?

A: He tried.

* * *

Q: Did he ever touch any other part of your body with his penis?

A: Yeah.

Q: Tell me about that. Where else did he touch you with his penis?

A: My mouth.

Q: Did he ask you to put your mouth on his penis?

A: Yeah.

* * *

Q: Did he ever put his mouth on your vagina?

A: Yeah.

* * *

Q: Did all of these things—him putting his penis in your mouth, him putting his mouth on your vagina, did that happen every time?

A: Almost.

* * *

Q: Did it happen while you were 11?

A: Yeah.

Q: Did it happen while you were 12?

A: Yeah.

Q: Did it happen while you were 10?

* * *

A: Yeah.

* * *

Q: Can you approximate or give me a close number of how often this happened?

A: It happened a lot of times. Like, it happened every time I would go over there. I don't know how many times.

* * *

Q: Do you remember how old you were the last time this happened?

A: Around 13.

(Tr. 186-91, 194.)

{¶7} Gail Horner ("Horner") a pediatric nurse practitioner at Children's Hospital in Columbus, testified that she works at the Center for Child and Family Advocacy and, as part of her work duties, coordinates the pediatric Sexual Assault Nurse Examiner program. (Tr. 223.) The state qualified Horner as an expert in the field of pediatric sexual assault examination. (Tr. 226.) Horner described the type of examination given to T.P., C.P., and K.R., stating:

It's not an internal exam like grown women have. This is a look at the outside of the anus and outside of the vagina. We use an instrument. It's called a colposcope. It's kind of like a microscope. It magnifies things. I had a medical assistant who is in the room who is assisting me. She kind of separates the labia so I can better see the [v]agina and the hymen, which is the tissue around the opening for the vagina.

(Tr. 231.) The record shows that T.P. was examined in August 2009, K.R. was examined in September 2009, and C.P. was examined in "October 2000 [sic.]," which we understand to mean October 2009. (Tr. 231, 239, 247.) Horner reported that the results of the three girls' examinations showed normal hymens with no tears. (Tr. 234, 240, 248.) During her testimony, Horner explained that, in younger girls, physical signs of trauma often heal very quickly and, therefore, if the trauma occurred years earlier, there may be no physical signs of sexual abuse. She stated that, "[i]n my practice and overall in the practice of physicians too, it's between three and four percent of the children and the teens that we see have physical findings that are diagnostic of sexual abuse." (Tr. 237.) Further, to give an example of how the hymen heals quickly, Horner testified regarding a ten-year-old girl not involved in this matter:

I was called into the emergency room to do an exam on a ten year old, who gave a history of the night before—it was like within 24 hours—her uncle, who was an adult male, putting his penis in her vagina; and on exam[,] there was clear physical evidence diagnostic of penetration. Her hymen was torn. There was some bleeding, bruising of the hymen. Her posterior fourchette where the kind of outer lips of the labia, the outer lip come together was torn, so clear physical evidence of penetration.

And then I saw her two weeks later because her mother was worried. * * * the tear of the posterior fourchette had healed. There was no scarring. The bruising, the bleeding on the hymen, of course, was gone. It was no longer swollen; and the tear had healed to the point where there was just a shallow notch, just a slight imperfection in the hymen, which is just considered a variation of normal.

So if I examined that girl only two weeks after being penetrated by her uncle's penis, I would have to have said her exam was normal. So in these girls who are sexually abused, their findings can heal very quickly and there would be no scarring. That's one reason why not many of these girls have physical findings.

(Tr. 236-37.)

{¶8} Subsequent to presenting its evidence, the state moved to amend Counts 1, 2, 3, and 4 of the indictment to reflect that K.R. was ten years of age, instead of nine years of age when the allegations occurred. (Tr. 310-13.) Over appellant's objection, the trial court granted the state's request and amended the indictment. After the state rested, appellant put on testimony from Tommie Jo Stewart, a family friend, Kari White, appellant's niece, Thomas Tope, appellant's roommate, and Sabrina Nicole Spires, appellant's niece.

{¶9} Appellant's witnesses each testified that they never saw appellant engage in any inappropriate or sexual behavior with T.P., C.P., or K.R. Tommie Jo Stewart

("Stewart"), 17 years of age, stated that she had been best friends with appellant's niece, Sabrina Nicole Spires, since the third grade, but recently they had a falling out. (Tr. 273.) Stewart also stated that she is familiar with T.P. and C.P. but that, at this time, she would not recognize K.R. (Tr. 273-74.) Stewart indicated that she spent a lot of time at appellant's residence on North Harris Avenue watching television and doing laundry. (Tr. 275.) In addition, Stewart testified that she was never alone in appellant's bedroom and that appellant never asked her for a back rub. (Tr. 275-76.) Stewart disclosed that she never spent the night at appellant's residence with the other girls. (Tr. 299.)

{¶10} Kari White ("White"), 18 years of age, testified that she is appellant's niece and that "[h]e is more like a father figure than an uncle." (Tr. 320.) White stated that she attended sleepovers at appellant's residence and that she never saw him do anything inappropriate; however, White also stated that she did not visit appellant's residence from 2006 through 2007 because she had run away from home. (Tr. 330, 333.)

{¶11} Thomas Tope ("Tope"), 60 years of age, testified that he has known appellant for 25 years. (Tr. 345-46.) Tope stated that, in November of 2006, he moved into appellant's Warren Avenue residence and that both he and appellant slept in separate bedrooms upstairs. (Tr. 347.) Further, Tope testified that, at their residence on North Harris Avenue, his bedroom was in the basement, and appellant's bedroom was upstairs. (Tr. 350-51.) During his testimony, Tope admitted that, even though he drank two 40-ounce containers of King Cobra beer every night, he did not get drunk. (Tr. 357-58.) In addition, Tope testified that he never saw appellant act inappropriately with young girls. (Tr. 355.)

{¶12} Sabrina Nicole Spires ("Spires"), 17 years of age, testified that she is appellant's niece and that "he is basically like a second father to me, and I was always over there." (Tr. 364, 367.) Spires stated that she had her own bedrooms at appellant's Warren Avenue and North Harris Avenue residences. (Tr. 367.) Further, Spires testified that, during the summer, she would have sleepovers with four or five girls every weekend, including T.P. and C.P., at appellant's residence. (Tr. 368-69.) However, Spires testified that, although K.R. "was over there during the day," she "never stayed the night." (Tr. 369.) In response to this testimony, the state showed Spires a photograph, taken at appellant's residence, with K.R. in her pajamas surrounded by pillows and blankets on the couch. (Tr. 394.) Upon viewing the picture, Spires agreed that K.R. appeared to be wearing pajamas and that it looked like a sleepover; however, she stated that "[d]oesn't mean it's night time." (Tr. 394.)

{¶13} On June 23, 2010, the jury found appellant guilty of Counts 1, 2, 3, 4, 5, 6, 7 and 8, for the rapes of K.R., and not guilty of Counts 9, 10, 11, 12, 13, 14, 15 and 16, for the rapes of C.P. and T.P. (Tr. 475-80.) At the sentencing hearing on August 25, 2010, the trial court imposed a prison sentence of 20 years to life. (Tr. 490.) However, the judgment entry dated September 2, 2010 incorrectly imposed a prison sentence of 33 years. On January 13, 2011, subsequent to appellant filing his notice of appeal, the trial court filed an amended judgment entry reflecting the correct prison sentence of 20 years to life.

{¶14} On September 10, 2010, appellant filed a timely notice of appeal, setting forth the following assignment of error for our consideration:

APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} In his sole assignment of error, appellant contends that his convictions are against the manifest weight of the evidence. Appellant does not challenge the sufficiency of the evidence or assert that the state failed to produce evidence as to any element of R.C. 2907.02. Appellant argues that "[t]he testimony tending to establish [his] guilt for the offenses involving K.R. is outweighed by the testimony introduced by the defense." (See appellant's brief, 9-10.) In support of this argument, appellant specifically references the testimony of Tope, White and Spires because they each state that appellant never acted inappropriately with young girls. In addition, appellant contends that no physical evidence and/or expert opinion supported the guilty verdict. (See appellant's brief, 9-10.)

{¶16} In response, the state contends that appellant's convictions are not against the manifest weight of the evidence because: (1) the testimony of Tope, White, and Spires is not inconsistent with the testimony of the state's witnesses; (2) the jury, as fact finder, determines issues relating to the credibility of witnesses; and (3) the expert testimony of Horner supports appellant's convictions. (See appellee's brief, 2-4.)

{¶17} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a

conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin*.

{¶18} Further, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to resolve conflicts in evidence, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶57. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17; *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶5-6.

{¶19} Here, in its charge to the jury, the trial court stated "[y]ou are the sole judges of the facts, the credibility of the witnesses and weight of the evidence." (Tr. 454.) The trial court further explained:

To weigh the evidence, you must consider the credibility of witnesses. You will apply the tests of truthfulness which you apply in your daily lives.

These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear and know the things concerning the testimony; the accuracy of the witness' memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

(Tr. 454.)

{¶20} First, in addressing appellant's argument regarding credibility and weight of the witnesses' testimony, we believe that the jury, as trier of fact, properly reconciled these issues. The jury heard K.R.'s graphic testimony regarding the manner in which appellant repeatedly raped her from the age of 10 to 13. K.R. testified that, during sleepovers at appellant's residence, he would call each girl up to his bedroom, one at a time, in order to give him "backrubs." (Tr. 186-87.) K.R. also testified that appellant used his fingers, penis and mouth to rape her over a three-year period. In corroboration of K.R.'s testimony, Horner, the state's expert witness, stated that, during the examination, K.R. reported a history of sexual abuse:

She had given a history of genital-to-genital contact of a penis going into her vagina. * * * She talked about his finger going inside her vagina. She talked about touching his penis. She talked about him kissing her, and she also talked about her grandfather putting his penis in her mouth and putting his mouth on her vagina.

(Tr. 235.) Also, the jury heard C.P. testify that she witnessed appellant "fingering" K.R. during a game of Truth or Dare. (Tr. 131-33.)

{¶21} Based upon the record, we believe that the jury could have reasonably found K.R. and Horner's testimony to be more credible than the testimony of Tope, White

and Spires, thus properly convicting appellant of rape. Tope stated that he has known appellant for 25 years, and that appellant is his best friend, which could raise the concern of bias. (Tr. 346.) Further, because Tope admitted to drinking two 40-ounce beers every night, the jury could easily question the accuracy of Tope's memory, thus affecting Tope's credibility as a witness.

{¶22} In addition, both White and Spires testified that appellant is more like a "father figure" than an uncle, again possibly raising the issue of bias. (Tr. 320, 367.) The record establishes that both White and Spires care for appellant, and, therefore, the jury could have reasonably placed less weight upon their testimony and more weight upon the testimony of K.R. and Horner. Also, White testified that, between 2006 and 2007, she ran away from home and, therefore, had no knowledge of any events occurring at appellant's residence during this period of time. Finally, Spires stated that K.R. never spent the night at appellant's residence, and, in response, the state presented a photograph of K.R. in pajamas and surrounded by blankets and pillows on appellant's couch. After examining the photograph, Spires admitted that K.R. appeared to be wearing pajamas at a sleepover but maintained her previous testimony that K.R. never spent the night at appellant's residence. In reliance upon the photographic evidence, it is reasonable for the jury to conclude that K.R., in fact, did attend sleepovers at appellant's residence and that Spires's testimony was either inaccurate or untruthful.

{¶23} As this court has consistently held, the weight to given to inconsistencies in any witness's testimony is a determination within the province of the trier of fact. In the present matter, the jury was free to believe, or disbelieve, any part of the witness's testimony, and a conviction is not against the manifest weight of the evidence merely

because the jury believed the prosecution's testimony. See *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765.

{¶24} Second, we disagree with appellant's argument alleging that the guilty verdict is against the manifest weight of the evidence because no physical evidence and/or expert opinion supported the guilty verdict. In *State v. Reinhardt*, 10th Dist. No. 04AP-116, 2004-Ohio-6443, ¶29, this court held that "[t]here is no requirement, statutory or otherwise, that a rape victim's testimony must be corroborated as a condition precedent to conviction." In addition, we noted that "not all rape victims exhibit signs of physical injury." *Id.* Factually similar to the present matter, the victim in *Reinhardt* was 10, 11, and 12 years old at the time the rapes were committed and Horner also performed her physical examination. *Id.* at ¶7, 21. In *Reinhardt*, the victim's examination showed normal results, and Horner averred that "a normal genital examination would not necessarily negate the history of sexual abuse." *Id.* at ¶7.

{¶25} Here, the state qualified Horner as an expert in the field of pediatric sexual assault examination. (Tr. 226.) Horner testified that, although K.R.'s physical examination was normal, physical signs of abuse often heal quickly in younger girls. As a result, Horner explained that physical manifestations of abuse are found in only three to four percent of cases involving young girls or teenagers. (Tr. 237.) Therefore, the jury could reasonably believe K.R.'s testimony regarding the rapes, in spite of there being no physical evidence regarding the same.

{¶26} Based upon the record, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice in arriving at its verdicts. We decline to substitute our judgment for that of the jury regarding the credibility of the witnesses or the

weight given their testimonies. Accordingly, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
