

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 30366

Appellee

v.

EDDIE DUKES

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 21 09 3482

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 16, 2023

SUTTON, Presiding Judge.

{¶1} Defendant-Appellant Eddie Dukes appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Mr. Dukes was indicted by a Summit County grand jury for two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B), felonies of the first degree; and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (C)(2), felonies of the third degree. On November 2, 2021, the indictment was supplemented with two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B), felonies of the first degree. Each count of the supplemental indictment included a repeat violent offender (“RVO”) specification pursuant to R.C. 2941.149(A). It was alleged in the indictment that Mr. Dukes had engaged in sexual conduct with his 10-year-old step-granddaughter, E.C.

{¶3} The matter proceeded to a jury trial on May 31, 2022. At the start of the trial, the State moved to dismiss counts one and two and proceeded on counts three through six of the indictment. The court renumbered the remaining counts as one through four. Mr. Dukes waived his right to a trial by jury on the repeat violent offender specifications, allowing for those to be tried by the court.

{¶4} The evidence adduced at trial is as follows. The victim, E.C., along with two of her younger siblings, were visiting their grandmother's home for a week-long sleepover to celebrate the end of the school year. E.C. testified her grandmother would take her and her siblings to the pool, shopping, roast marshmallows, and play in a tent in their grandmother's backyard. One night, after she fell asleep, E.C. said she awoke to someone touching her inappropriately while she slept in the bed next to her siblings. She said the touching continued for several consecutive nights. E.C. identified the person who touched her as her step-grandfather, Mr. Dukes. She testified that on the third night that this happened, she heard her grandmother, S.M.D., confront Mr. Dukes in the hallway as he was leaving the children's room. Mr. Dukes told her grandmother that he had been in the children's room covering up the kids. When S.M.D. entered the room though, she saw E.C. was uncovered. E.C. said her grandmother covered her up and proceeded to use the bathroom and return to her bed.

{¶5} E.C. testified that a few days later her sister said "something weird" that made her grandmother "[tell] me she remembered what [Mr. Dukes] did that night." E.C. said her grandmother then left the living room, came back in, and asked E.C. if she remembered what Mr. Dukes did the night he was in her room. E.C. testified she told her grandmother that she did remember, so her grandmother took her out of the living room into the dining room to talk to her about it. E.C. said her grandmother "got really surprised so [she] called my mom, and then my

mom got really surprised because I told her what happened [with Mr. Dukes] and then [E.C.'s mother] called again and asked if I was ready to tell the police about it. I told her yes."

{¶6} The State presented the testimony of E.C.'s grandmother S.M.D., Mr. Dukes' wife. S.M.D. met Mr. Dukes in 2001 through an acquaintance, and they married in 2016. She testified that every year at the end of the school year, she would have her grandchildren come and stay with her for a week. With her grandchildren, S.M.D. said they "bought a swimming pool, set up a tent, and we made ice cream, smores, and watched movies." She said that every evening she would try to get the children in bed by 10:00 pm, because Mr. Dukes usually worked an afternoon shift and arrived home from work at about 11:15 pm.

{¶7} S.M.D. testified that in the early morning hours of June 12, 2020, while her grandchildren were sleeping over at her house, she woke up between 1:00 and 2:00 am. She stated "the Holy Spirit woke me up" and she went out into the hallway and "saw [Mr. Dukes] coming out of the [children's] room and closing the door." This was not something Mr. Dukes normally would be doing because she "always told him to let [her] take care of the kids." She testified she asked Mr. Dukes what he was doing in the children's room and he said he was "covering up the kids." So she went into the children's bedroom, turned the light on, and found "[t]here was no cover on the kids." S.M.D. testified that Mr. Dukes "didn't want me to go in there" but that she went into the children's room anyways. She said that they "had a few words and went back to sleep."

{¶8} S.M.D. further testified that the following Sunday:

E.C. was sitting on the couch, and I was sitting on the couch across from her. And so she was just, like, sitting and staring into space, like. And I - - I don't know, women's intuition or whatever you want to call it, I asked her, I said, "E.C., do you remember [Mr. Dukes] coming into the room?" And she said, "Yes." I said, "Is there anything you want to talk to me about? And she said, "Yes."

* * *

[E.C.] said, "I felt something heavy on my chest," and she said, "Mr. Dukes put his hands in my pants and touched parts of my privates."

* * *

[S]he said he came in there three times during - - from Tuesday, Wednesday, Thursday.

S.M.D. also testified that E.C. told her that she had heard the conversation between her grandmother and Mr. Dukes in the early morning hours on Friday, June 12, 2020, but that she "was just scared" and did not say anything.

{¶9} S.M.D. also described her husband's behavior as out of the ordinary following the visit to his home by the police: "He started reading his Bible every day. Every day. Every morning. Every night. And we also went to go see a preacher, and he prayed with him."

{¶10} S.M., E.C.'s mother, testified she had been at her mother's house the day before the police were called and "noticed that [E.C.] just was, like, real reserved and stayed in a tent." She noticed her daughter "kept getting up every five minutes going to the bathroom[.]" She asked her daughter what was wrong and E.C. replied "she didn't want to talk about it." The next day, S.M. received a call from her mother, S.M.D., who put E.C. on the phone. During the call, "[E.C.] was crying" and told her "[t]hat [Mr. Dukes] put his hands in her bra and in her panties." S.M. testified she called the police and immediately went to her mother's house. S.M. spoke with the police officers when they arrived. When the police officers left, she took all of her children home and waited for her adult son to come home from work so he could stay with her younger children while she took E.C. to Akron Children's Hospital for an examination.

{¶11} S.M. testified about the effect the sexual assault had on her daughter: "she just - - she wasn't herself anymore. She was always upset. Couldn't sleep at night. Crying. Angry." As

a result of these behavior changes, S.M. sought treatment for her daughter at Child Guidance and Family Solutions.

{¶12} The State presented testimony from Officer Davon Jackson, one of the officers who responded to the call from S.M. at the Dukes' home. Officer Jackson testified that when he arrived at the Dukes' home, S.M.D. was present and told him that E.C.'s mother had left the scene and was at a nearby gas station. He also spoke with Mr. Dukes, who was at the home. Officer Jackson also spoke with E.C., who seemed "scared, timid. Her voice was extremely shaky." Officer Jackson testified that when he spoke with E.C., she was alone and no other family members were present. E.C. told him "that she was on the edge of the bed, that [Mr. Dukes] came in, reached over top of her, uncovered her, and touched her private parts." Officer Jackson stated that he also spoke to E.C.'s mother and grandmother, before notifying his supervisor and the detective bureau about the allegations being made. Officer Jackson testified that he left the scene shortly after 9:00 pm.

{¶13} The State also presented the testimony of several medical professionals that treated E.C. at Akron Children's Hospital and in the weeks following the sexual assaults. Shannon Smith, the overnight social worker at Akron Children's Hospital who conducted the initial interview with E.C., testified E.C. told her that when she was spending the night at her grandparents' house with her two siblings, while she was sleeping, "she would wake up to her pants and her underwear being down, and [Mr. Dukes] would put fingers in her private parts. She explained her private parts as what she uses to poop and pee." Ms. Smith also testified that no rape kit was ordered because E.C. was brought into the hospital over 72 hours after the last alleged sexual assault. Ms. Smith testified when she interviewed E.C., E.C. was alone and in a separate room from others.

{¶14} Dr. Brett Luxmore is an emergency medicine physician who was working at Akron Children’s hospital on the night E.C. was brought to the hospital. Dr. Luxmore explained that if the child does not require immediate emergency treatment, an interview is conducted by a social worker as a first step to help direct treatment. Dr. Luxmore testified that a rape kit was not performed, not only because it was 72 hours after the last alleged contact, but also because the child had reported she had showered and “there’s also a lack of reported significant DNA contact” since the sexual contact was “finger penetration to a vagina and buttocks area.” Dr. Luxmore noted all of these factors “decrease the likelihood of finding anything on a rape kit.” Dr. Luxmore testified E.C. reported experiencing “dysuria, which means painful urination and * * * a sensation to go more frequently to the bathroom to urinate.” He also testified that an insertion of an object into the vagina could cause the condition, but was unable to say for certain what was the cause. He did perform a urinalysis to check for “sign[s] of infection, * * * injury, * * * menstrual cycle, [or] * * * kidney stone” as a possible cause. The urinalysis came back “clean,” ruling out those possible other causes of the dysuria.

{¶15} Darla Helmick is a social worker at Akron Children’s Hospital. She conducts forensic interviews in the CARE Center of the hospital, typically with children who have been victims of sexual abuse. Ms. Helmick conducted the forensic interview of E.C. She conducted the interview without E.C.’s mother present, and made sure that E.C. knew that her mother was not watching. Ms. Helmick testified E.C. stated she had been touched inappropriately four different times by Mr. Dukes. E.C. indicated to Ms. Helmick that Mr. Dukes had pulled her pants down, touched her vaginal area, and then pulled her pants back up. E.C. did not disclose any anal or breast touching. Ms. Helmick testified that “it’s not unusual for kids to not tell me everything.”

When asked whether she would expect a child to not leave out certain “big things,” Ms. Helmick stated:

I don’t look at it that way. Kids - - kids will sometimes tell me that someone sexually assaulted them, and then maybe they’ll tell me they were raped vaginally and there was also anal rape and they never reported that to me. That might be a big thing to you, but the child doesn’t want to tell me that for some reason, and that’s not unusual.

Ms. Helmick also testified that she had been employed as a social worker for 33 years, had received significant forensic interview training, and had been employed at Akron Children’s Hospital since 2016.

{¶16} Kathleen Nduati, an advanced practice registered nurse at Akron Children’s Hospital, also met with E.C. at the CARE Center. She testified on behalf of the State that over the past seven years, she had evaluated close to a thousand children for sexual abuse at Akron Children’s Hospital. Ms. Nduati testified that she recommended E.C. receive counseling at Child Guidance and Family Solutions.

{¶17} Amber Thacker, a licensed professional counselor at Child Guidance and Family Solutions also testified for the State. She performed a diagnostic health assessment of E.C. when she sought treatment at Child Guidance and Family Solutions. Ms. Thacker testified about the things E.C. reported experiencing that resulted in her seeking treatment:

I learned that [E.C.] had been struggling with flashbacks of her sexual assault. She had been unable to sleep at night. I had learned that she had been up until 5 or 6:00 in the morning. She described it as being up until the sun was up again. She presented with sad mood, low self-esteem, anxiety, fear of her peers judging her, and mom was worried about that.

Ms. Thacker diagnosed E.C. with post-traumatic stress disorder (“PTSD”). She testified that E.C. had given her some details of the sexual assault. E.C. identified Mr. Dukes as the individual who

came into her room at night at her grandmother's house. E.C. told Ms. Thacker that when the lights were off in the bedroom at her grandmother's house, Mr. Dukes put his fingers in her vagina.

{¶18} Mr. Dukes testified in his own defense, and was the only witness testimony presented by the defense. He started his testimony by describing how he had previously been convicted of aggravated burglary and domestic violence. He testified on the day that E.C. disclosed the allegations to his wife, he had gone to the store and bought his wife beer that she had been drinking all day. With regard to the moment his wife confronted him with the allegations made by E.C., he testified:

I was upstairs watching TV at the time. But I had went to the store earlier and got her some beer that day, so this was all in the evening so she was still drinking through most of the day. So I come downstairs, and that's when she questioned me. But I was just shocked. All I said was just, "[y]ou've got to be kidding," and that was - - you know, I don't get loud because I don't drink nomore. * * * She say "Why ain't you hollering?" I said, "Sue, I don't need to be hollering because I didn't do it."

{¶19} With regard to the evening his wife saw him exiting the children's bedroom, Mr. Dukes testified that he had been in the bathroom when he heard E.C.'s youngest sister crying. He stated that he went in the children's room, reached over E.C., and calmed the child, and was only in the children's room for about ten seconds. Mr. Dukes disputed his wife's testimony that he began acting differently after the incident on June 14, "[s]he made that up at the time[.]" but admitted he started reading his Bible more "because I didn't understand what was going on and I was asking God for help[.]" Mr. Dukes testified that when he called his wife from work the next day after the police were called, he could hear the grandchildren in the background and they had returned to their grandmother's home. Mr. Dukes testified that he did avoid talking to E.C.

{¶20} The jury returned a verdict on June 3, 2022, finding Mr. Dukes guilty of all four counts of the indictment. Additionally, the jury made a special finding that the victim was less than thirteen years of age at the time of the offense.

{¶21} On June 7, 2022, the trial court entered findings on the RVO specifications, finding Mr. Dukes guilty of RVO specifications attached to each rape count of which he was convicted. The trial court sentenced Mr. Dukes to a prison sentence of life in prison with eligibility for parole after 25 years.

{¶22} Mr. Dukes timely appealed, assigning four errors for this Court’s review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DENYING [MR.DUKES’] MOTION FOR A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT[.]

{¶23} In his first assignment of error, Mr. Dukes argues that the trial court erred in denying his motion for a mistrial based on prosecutorial misconduct. For the reasons that follow, we disagree.

{¶24} When a defendant moves for a mistrial based on prosecutorial misconduct, the trial court must determine whether “the prosecutor’s actions were improper, and, if so, whether the defendant’s substantial rights were actually prejudiced.” *State v. Dukles*, 9th Dist. Medina No. 12CA0100-M, 2013-Ohio-5263, ¶ 33. “[A] judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial.” *State v. Knight*, 9th Dist. Lorain No. 03CA008239, 2004-Ohio-1227, ¶ 6. “The defendant must show that, but for the prosecutor’s misconduct, the trier of fact would not have convicted him.” *Dukles* at ¶ 33. Because the “touchstone of the analysis” is the fairness of the trial and not the culpability of the prosecutor, *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 140, “[a] reviewing court [must] consider

the trial record as a whole, and [must] ignore harmless errors ‘including most constitutional violations,’” *Knight* at ¶ 6, quoting *State v. Lott*, 51 Ohio St.3d 160, 166 (1990).

{¶25} Here, the trial court denied Mr. Dukes’ objection to the question posed by the prosecutor:

[PROSECUTOR]: You’d agree with me you don’t want to go back to prison, do you, sir?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. Answer the question.

[MR. DUKES]: No. Who would?

[PROSECUTOR]: Right. Who would? Especially for an offense like this, right?

[MR. DUKES]: For something I didn’t do, yes.

{¶26} A review of the record shows the following exchange occurred between the trial court judge, the prosecutor, and defense counsel after the conclusion of Mr. Dukes’ case in chief, when Mr. Dukes made his motion for a mistrial:

[DEFENSE COUNSEL]: Your Honor, on the mistrial, I believe its prosecutorial misconduct to comment at all on the potential sentence in this case. At this time everybody in this room right now knows it’s mandatory prison. Everybody in this room knows it’s a mandatory life sentence if he’s convicted. But the reality of the situation is for [the prosecutor] to go into him wanting to avoid going back to prison, if he said he was trying to avoid the conviction that’s one thing, but to comment specifically on what the sentence is for the jury, I believe, rises to the level of misconduct and I would ask for a mistrial at this time.

THE COURT: * * * As to the mistrial, there was - - when you say everybody in this courtroom knows it’s mandatory prison sentence or a life sentence, nobody indicated that to the jury. While [the prosecutor] may have

gotten his toes up to the line as to whether or not he wishes or doesn't want to go back to prison, the jury will be instructed that they are not to consider punishment, that they are to consider only the facts, they're not to consider bias, sympathy, and/or prejudice, and that sentencing is left strictly up to the Court. I will give them an additional admonition that any reference to prison should be disregarded by them. And I believe that cures the problem - - your concerns, and, therefore, your request for a mistrial is denied. * * *

[T]here's been no indication to the jury - - and, again, I will admonish them that they are not to consider any subject of punishment and any comments by [the prosecutor] during his questioning of Mr. Dukes regarding prison should be disregarded by them. * * *

[PROSECUTOR]: Can I respond briefly?

THE COURT: You may.

[PROSECUTOR]: First of all, the defense brought up prison when they asked [Mr. Dukes] if he had ever been to prison before. So that issue was now in play. Secondly, I was asking him that in regards to his motive or a reason for not telling the truth. I did not say that he would mandatorily be going back to prison. I did not say what the sentence would be. All I asked him is: You do not want to go back to prison, which was purely a question regarding his reason to tell the truth to the jury. And so I just want the record to be clear for that. I understand the [c]ourt's ruling and I respect it, but I just want that to be clear for the record.

THE COURT: Well - - I mean it was not prosecutorial misconduct in that it can be cured with the current jury instructions that tells the jury they're not to consider any punishment during their deliberations and/or sentence. And so I'm going to leave it at that and I've now decided I'm not giving any additional admonition. What I want to know is whether you want this instruction. Evidence has been - - evidence was received that the defendant was convicted of

aggravated burglary, felonious assault, and domestic violence. That evidence was received for - - only for two limited purposes.

It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity with that character. If you find the defendant was convicted of felonious assault, aggravated burglary, or domestic violence, you may consider the evidence only for the following purposes: To test the defendant's credibility or believability and the weight to be given the defendant's testimony. It cannot be used for any other purpose.

[DEFENSE COUNSEL]: Yes ma'am. Thank you.

THE COURT: * * * I will include that in the instructions.

[DEFENSE COUNSEL]: Thank you, ma'am.

{¶27} Here, when Mr. Dukes made his motion for a mistrial, the trial court proposed a curative instruction. Mr. Dukes accepted and agreed to that instruction. As the State argued, Mr. Dukes first introduced the fact that he had been to prison before when discussing his previous convictions. Given the context of the State's question within the trial, the trial court granting Mr. Dukes' objection, and the curative instruction the trial court judge gave, this Court cannot conclude that this isolated question deprived Mr. Dukes of a fair trial.

{¶28} Mr. Dukes' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT OVERRULED A TIMELY DEFENSE MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29 AS THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED BY THE STATE OF OHIO TO ESTABLISH A PRIMA FACIE CASE OF RAPE OR GROSS SEXUAL IMPOSITION TO WARRANT THE CASE BEING SUBMITTED TO THE JURY[.]

{¶29} In his second assignment of error, Mr. Dukes argues that the trial court erred in denying his motion for acquittal because the State failed to present sufficient evidence to identify Mr. Dukes as the perpetrator of the alleged crimes. For the reasons that follow, we disagree.

Criminal Rule 29 Tests Sufficiency.

{¶30} Under Criminal Rule 29(A), a defendant is entitled to a judgment of acquittal on a charge against him “if the evidence is insufficient to sustain a conviction * * *.” Crim.R. 29(A). “We review a denial of a defendant’s Crim.R. 29 motion by assessing the sufficiency of the State’s evidence.” *State v. Frashuer*, 9th Dist. Summit No. 24769, 2010-Ohio-634, ¶ 33. Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In carrying out this review, our “function * * * 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.” *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. “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.*

R.C. 2907.02(A)(1)(b) and R.C. 2907.05(A)(4)

{¶31} Mr. Dukes was convicted of two counts of rape in violation of R.C. 2907.02(A)(1)(b) and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). R.C. 2907.02(A)(1)(b) states “[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[.]” Included within the definition of sexual conduct is “without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another.

Penetration, however slight, is sufficient to complete vaginal or anal intercourse.” R.C. 2907.01(A) .

{¶32} R.C. 2907.05(A)(4) states “[n]o person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender * * * when * * * the 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.” Sexual contact is defined as “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.” R.C. 2907.01(B).

{¶33} Mr. Dukes argues on appeal that the victim failed to identify him as the perpetrator of the crimes against her. At the end of her testimony, E.C. stated she did not open her eyes to see who was touching her the first two times and that on the third incident, she opened her eyes and saw someone who “kind of looked like” Mr. Dukes. However, earlier in her testimony she gave a more definitive identification of Mr. Dukes:

[PROSECUTOR]: And you said you opened your eyes. Who did you see that was touching you?

[VICTIM]: [Mr. Dukes].

[PROSECUTOR]: * * * And can you tell the jury where it was he was touching you?

[VICTIM]: He was touching me, like, where I go pee and stuff and where I go number 2 as well.

* * *

[PROSECUTOR]: [W]ere your clothes on or off?

[VICTIM]: They were by my knees.

[PROSECUTOR]: Did you take them down or did someone else?

[VICTIM]: He did. [Mr. Dukes] did.

* * *

[PROSECUTOR]: After it stopped, where did he go?

[VICTIM]: After it stopped, like, that night he went back to his room, and then, like, it happened every night. So yeah, he kept going back to his room.

* * *

[PROSECUTOR]: All three of these incidents, the first, second, and third time[], who was it that was actually touching you and putting their fingers inside of you?

[VICTIM]: It was [Mr. Dukes].

* * *

Additionally, the victim testified that after the third night she was assaulted, she heard a conversation between Mr. Dukes and her grandmother in the hallway.

[PROSECUTOR]: The third time you had indicated * * * that something happened with your grandma. Tell us * * * about that again.

[VICTIM]: [Mr. Dukes] was coming out of the room. [Grandma] needed to use the bathroom. When she was coming out her room to go to the bathroom she saw [Mr. Dukes] walking out of the room, like, closing the door slowly so she asked what he was doing.

He said nothing or something like that, and then she opened the door and turned the light on, and she said, "What were you doing in here?"

And he said, "I was covering up [younger sister]."

And she – then she said, "Go back to the room," or something like that, and he went back to the room and she closed the door and turned the light off.

[PROSECUTOR]: You heard all this conversation taking place?

[VICTIM]: Yes.

{¶34} Additionally, multiple individuals testified that the victim told them it was Mr. Dukes who sexually assaulted her. The victim's mother testified that the child identified Mr. Dukes as the person who had inappropriately touched her. The responding police officer stated that the victim identified Mr. Dukes as the man who touched her. Both the social worker at the hospital and the social worker that later conducted the forensic interview testified that the victim identified Mr. Dukes as the person who sexually assaulted her. Viewing this evidence in a light most favorable to the State, a rational trier of fact could have found that the State established the identity of the perpetrator of the crime as Mr. Dukes beyond a reasonable doubt.

{¶35} Mr. Dukes' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE VERDICT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]

{¶36} In his third assignment of error, Mr. Dukes argues that his conviction was against the manifest weight of the evidence. For the reasons that follow, we disagree.

Manifest Weight of the Evidence

{¶37} A conviction that is supported by sufficient evidence may still be found to be against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12. In determining whether a criminal conviction is against the manifest weight of the evidence, 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*, 33 Ohio App.3d 339, 340 (9th Dist.1986). "[W]hen reversing a conviction on the basis

that it was against the manifest weight of the evidence, an appellate court sits as a ‘thirteenth juror,’ and disagrees with the factfinder's resolution of the conflicting testimony.” *State v. Tucker*, 9th Dist. Medina No. 06CA0035-M, 2006-Ohio-6914, ¶ 5. This discretionary power “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). *See also Otten* at 340. “Additionally, it is well established that ‘the weight to be given the evidence and the credibility to the witnesses are primarily for the trier of facts.’” *Bilder v. Main Paint and AutoBody*, 9th Dist. Summit No. 20723, 2002-Ohio-748, ¶ 9, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶38} A review of the record does not support Mr. Dukes’ contention that this is the exceptional case where the trier of fact clearly lost its way. In his argument, Mr. Dukes asserts that there is no medical, physical, or biological evidence linking him to the crimes. While it is true that no physical evidence linked Mr. Dukes to the crimes, it is not true that the record is void of evidence linking him to the crimes. Mr. Dukes’ argument ignores certain evidence presented and testimony given. As discussed above, his step-granddaughter repeatedly identified Mr. Dukes as the person who assaulted her. Mr. Dukes’ wife caught him leaving the child’s room one evening. Additionally, evidence in the form of the testimony of medical professionals and medical records indicated E.C. had been a victim of a sexual assault.

{¶39} Mr. Dukes argues that this case amounts to “simply a case of the credibility of the alleged victim [versus] [Mr. Dukes’] credibility.” This Court must “consider the credibility of witnesses” as part of our manifest weight review. *Thompkins* at 387. Nonetheless, this Court is mindful of the well-established principle that a trier of fact enjoys the best position to assess the credibility of witnesses. *See State v. Hemingway*, 9th Dist. Lorain No. 22CA011852, 2023-Ohio-

1075, ¶ 23; *See also State v. Rivera*, 9th Dist. Lorain No. 18CA011263, 2019-Ohio-62, ¶ 39, quoting *State v. Johnson*, 9th Dist. Summit No. 25161, 2010-Ohio-3296, ¶ 15. “[T]his Court will not overturn the trial court’s verdict on a manifest weight of the evidence challenge simply because the trial court chose to believe certain witnesses’ testimony over the testimony of others.” *State v. Bell*, 9th Dist. Medina No. 21CA0052-M, 2023-Ohio-277, ¶ 30, citing *State v. Thomas*, 9th Dist. Summit No. 26893, 2014-Ohio-2920, ¶ 20, quoting *State v. Ross*, 9th Dist. Wayne No. 12CA0007, 2013-Ohio-522, ¶ 16. Because the jury chose to believe the testimony of E.C. and her grandmother over the testimony of Mr. Dukes does not mean the jury clearly lost its way. The jury could have reasonably found important aspects of the victim’s testimony to be credible, including her repeated identification of Mr. Dukes as the individual that came into her room and sexually assaulted her. The victim also testified she heard the person who assaulted her in the hallway talking to her grandmother, and it was not unreasonable for the jury to believe that she could have recognized that person’s voice as belonging to her step-grandfather.

{¶40} Given the evidence presented by the State in this case, this Court cannot conclude that this is the exceptional case in which the evidence weighs heavily against Mr. Dukes’ conviction. Mr. Dukes’ third assignment of error is overruled.

III.

{¶41} Mr. Dukes’ 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(C). 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.

BETTY SUTTON
FOR THE COURT

CARR, J.
STEVENSON, J.
CONCUR.

APPEARANCES:

ANGELA M. KILLE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and JACQUENETTE S. CORGAN, Assistant Prosecuting Attorney, for Appellee.