

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 08AP-845
v.	:	(C.P.C. No. 07CR03-2331)
	:	
Adam C. Conkel,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on June 16, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Adam C. Conkel, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} In February 2007, C.B. discovered underwear in his daughter's bedroom and laundry that was hard and crusty. His daughter, M.B., was almost 10 years old at the

time. C.B. initially thought his daughter may have started to menstruate. However, when he continued to see evidence of vaginal discharge, C.B. became concerned that his daughter had an infection, so he took her to her pediatrician's office for an examination. Cultures taken of the discharge in and around M.B.'s vagina indicated that M.B. had gonorrhea.

{¶3} As a result, M.B. was referred to the Children's Advocacy Center at Children's Hospital in Columbus, Ohio, where she was interviewed by Alison Ferne. During the interview, which was recorded, M.B. disclosed that appellant had touched her vagina, both inside and outside, with his finger. She also disclosed that he had inserted his penis into her vagina. M.B. stated that this conduct occurred while she was staying with her mother, who had visitation rights with M.B. every other weekend.¹ Appellant lived with M.B.'s mother for portions of early 2007, including at least one weekend in January 2007 when M.B. also stayed with her mother.

{¶4} A Franklin County Grand Jury indicted appellant with two counts of rape in violation of R.C. 2907.02. One count alleged vaginal penetration and the other alleged digital vaginal penetration. Appellant entered not guilty pleas and the case proceeded to trial.

{¶5} At trial, Dr. James Durfee, M.B.'s pediatrician, testified that sexual activity is the only way M.B. could have contracted gonorrhea and that such a diagnosis confirms sexual abuse. M.B. testified that appellant touched the outside of her vagina with his finger and that he touched the inside of her vagina with his penis. Her taped interview with Ferne was also played to the jury. The jury found appellant guilty of both counts of

¹ M.B.'s parents were divorced in 1999. Her father had full custody of M.B.

rape and the trial court sentenced appellant accordingly. The trial court also notified appellant that he was a tier III sex offender because of his convictions, and informed him of the obligations arising from that designation.

{¶6} Appellant appeals and assigns the following errors:

I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING AN IMPERMISSIBLE SENTENCE FOR ACTS COMMITTED PRIOR TO JANUARY 2, 2007, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

II. 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.

III. 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.

IV. 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.

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

VI. 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 IMPOSITION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE

AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶7} At oral argument in this matter, appellant conceded and withdrew his first assignment of error from this court's consideration. Accordingly, we will not address the merits of that assignment of error.

{¶8} In his third, fourth, and fifth assignments of error, appellant challenges the constitutionality of his tier III sex offender classification mandated by R.C. 2950 et seq., effective January 1, 2008. However, this court has held that a defendant does not have standing to challenge the sex offender designation in a direct appeal from the criminal conviction. *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304, ¶10; see also *State v. Zerla*, 10th Dist. No. 04AP-1087, 2005-Ohio-5077, ¶8. In *Christian*, we reasoned that because a trial court makes no judicial determination of a sex offender's tier classification (which arises by operation of law based on the conviction) and, therefore, does nothing more than notify the defendant of requirements already imposed by law, a defendant is not aggrieved by the trial court's final order in this regard. *Id.* at ¶8. Accordingly, we overrule appellant's third, fourth, and fifth assignments of error.

{¶9} We next address appellant's sixth assignment of error, in which he contends that his rape convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. We disagree.

{¶10} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

{¶11} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

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. * * *

{¶12} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶13} In order to convict appellant of rape, the state had to prove beyond a reasonable doubt that appellant engaged in sexual conduct with M.B., who was less than 13 years of age. R.C. 2907.02. It is not disputed that M.B. was under 13 years of age at all relevant times. Sexual conduct is defined as "vaginal intercourse between a male and

female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, 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).

{¶14} The state alleged that appellant raped M.B. by engaging in vaginal intercourse and digital vaginal penetration. At trial, M.B. testified that appellant inserted his penis into her vagina. She also stated in her interview that was played to the jury that he touched the inside of her vagina with his finger. M.B.'s in-court testimony, as well as her recorded interview, is sufficient for a rational trier of fact to have found that appellant engaged in vaginal intercourse and inserted his finger into M.B.'s vagina. See *State v. Ruhlman*, 12th Dist. No. CA2005-05-125, 2006-Ohio-2137, ¶26 (noting that the testimony of the victim as to the elements of a sexual assault, if believed, is sufficient to establish the essential elements of the offense).

{¶15} Appellant's manifest weight of the evidence claim requires a different review. A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, 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.' " *Thompkins* at 387, quoting *State v. Martin* (1983), 20

Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶16} 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 trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, 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, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01 AP-1393, 2002-Ohio-4491, ¶74.

{¶17} Appellant claims that his convictions are against the manifest weight of the evidence because of the numerous inconsistencies between M.B.'s taped interview and her in-court testimony. Specifically, he contends that at trial, M.B. did not allege that appellant penetrated her vagina with his finger. However, in her interview with Ferne that was played to the jury, M.B. stated that appellant put his finger inside her vagina. Similarly, appellant points out that at trial, M.B. testified the rape occurred a few years ago, while she stated in the interview that the rape occurred only a few months before.

These inconsistencies by themselves do not render appellant's convictions against the manifest weight of the evidence, particularly given M.B.'s age. *State v. Thompson*, 10th Dist. No. 08AP-22, 2008-Ohio-4551, ¶20.

{¶18} Additionally, we note that the jury considered these inconsistencies in evaluating M.B.'s credibility. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, in determining the witnesses' credibility. *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2005-Ohio-6305, ¶73; see also *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58. The jury obviously chose to believe M.B.'s statement in her taped interview, which was made closer in time to the event, that appellant inserted his finger into her vagina, over her testimony that omitted this act. We will not substitute our judgment for that of the trier of fact. *State v. Day*, 10th Dist. No. 04AP-332, 2005-Ohio-359, ¶17-19.

{¶19} Moreover, M.B.'s taped interview and her in-court testimony were largely consistent. In both, she stated that appellant raped her early in the morning, on an air mattress, in her mother's apartment. She also stated in both that appellant's pants were around his knees while this occurred, and that he needed a paper towel or napkin to clean something up after it was done. This is not the exceptional case in which the evidence weighs heavily against the convictions.

{¶20} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Accordingly, we overrule appellant's sixth assignment of error.

{¶21} Finally, appellant contends in his second assignment of error that he received ineffective assistance of counsel. Specifically, he contends that his trial counsel

was ineffective because he cross-examined M.B. without first obtaining her taped interview. We disagree.

{¶22} In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690.

{¶23} In analyzing the first prong of *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶24} If appellant successfully proves that counsel's assistance was deficient, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. *Id.* at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial. *Id.* at 687. Appellant would meet this standard

with a showing "that 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.

{¶25} Appellant contends that if his trial counsel had obtained and viewed M.B.'s prior taped interview, he would have been able to bring out the inconsistencies between M.B.'s in-court testimony and her statements during the interview. However, the inconsistencies between M.B.'s in-court testimony and her taped interview were obvious, and trial counsel twice emphasized those inconsistencies in his closing argument.² Therefore, even if appellant's trial counsel should have reviewed the taped interview prior to trial, appellant cannot demonstrate any prejudice because the inconsistencies between M.B.'s in-court testimony and her taped interview were brought out and presented for the jury to consider. Accordingly, we overrule appellant's second assignment of error.

{¶26} In conclusion, we overrule appellant's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

² Transcript Vol. IV, p. 450, 453.