

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
DAVID L. ROBB, JR.	:	Case No. 2009AP050026
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 2008CR040120

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 14, 2010

APPEARANCES:

For Plaintiff-Appellee

RYAN STYER  
125 East High Avenue  
New Philadelphia, OH 44663

For Defendant-Appellant

NICOLE R. STEPHAN  
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*Farmer, J.*

{¶1} On April 30, 2008, the Tuscarawas County Grand Jury indicted appellant, David Robb, Jr., on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04. Said charge arose from an incident involving a fourteen year old girl, C.H.

{¶2} A jury trial commenced on August 7, 2008. A mistrial was declared due to a deadlocked jury.

{¶3} A second jury trial commenced on April 7, 2009. The jury found appellant guilty as charged. By judgment entry filed May 14, 2009, the trial court sentenced appellant to six years in prison.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE CONVICTION FOR UNLAWFUL SEXUAL CONDUCT WITH A MINOR OHIO REVISED CODE SECTION 2907.04 WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

II

{¶6} "THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE STATE'S EXHIBIT D WITHOUT THE STATE HAVING THE EXHIBIT AUTHENTICATED AND WITHOUT PROVING THE CHAIN OF CUSTODY OF THE EXHIBIT."

I

{¶7} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. Specifically, appellant claims the testimony of C.H. lacked credibility, and it was error to base his conviction on said testimony. We disagree.

{¶8} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine 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 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶9} Appellant was convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) which states, "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but

less than sixteen years of age, or the offender is reckless in that regard." "Sexual conduct" is defined in R.C. 2907.01(A) as follows:

{¶10} "'Sexual conduct' means 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."

{¶11} The bill of particulars filed on May 13, 2008 alleged appellant performed cunnilingus on C.H., a child who was fourteen years old at the time. Also, appellant had been convicted of the same offense, then known as "corruption of a minor" on March 7, 1991 (Tuscarawas Case No. 90CR110326), and attempted corruption of a minor on October 6, 1992 (Guernsey Case No. 92CR50).

{¶12} Appellant argues there was no physical evidence to substantiate C.H.'s testimony. In addition, appellant argues C.H. admitted to smoking marijuana, failed to call for help during the incident, and failed to tell appellant to stop. Further, two other individuals were present in the home at the time of the conduct and they did not see anything.

{¶13} Appellant also argues there were inconsistencies in C.H.'s testimony because C.H. wanted out of the home and had talked about suicide. C.H. has ADHD, a mood disorder, and a sleeping disorder.

{¶14} All of these issues were brought up at trial by defense counsel. The witness testimony explained and clarified the facts. Both the investigating officer, New Philadelphia Detective Captain Michael Goodwin, and the Tuscarawas County Job &

Family Services caseworker assigned to the case, Crystal Lawless, concluded a rape kit or medical examination was not necessary because there were no allegations of sexual penetration. T. at 178-179, 341-342. Further, Detective Goodwin explained the report of the incident was made approximately two weeks after the fact and therefore it was too late to obtain any valuable forensic information. T. at 342. Detective Goodwin was unable to collect any physical evidence because of the delay in reporting. A pair of scissors allegedly used to cut C.H.'s pubic hair personally belonged to appellant and its whereabouts were unknown. T. at 347-350. This testimony resolves the issue of the physical evidence.

{¶15} As appellant readily admits, the case was a "he said/she said." There were no witnesses to the event. The only other individuals in the home were a seven year old and a thirteen year old. T. at 200, 278-279.

{¶16} C.H. testified she went upstairs to take a bath. T. at 202. She undressed and appellant walked into the bathroom. Id. They smoked marijuana together and then appellant asked C.H. to "lay down on the floor." T. at 202-203. It was not unusual for appellant to provide marijuana to C.H. T. at 203, 228, 410. Appellant then trimmed C.H.'s pubic hair with scissors and performed cunnilingus on her. T. at 204-205. Appellant exposed his penis and placed it on her "private area." T. at 206, 233. Appellant stopped and pulled his pants up. T. at 233. Appellant did not ejaculate. Id. C.H. then took her bath, went downstairs to watch some television, and went to bed when she heard her mother's car outside. T. at 234, 312-313. C.H. testified that the incident began around 7:00 p.m. to 8:00 p.m. and lasted approximately one and one-half hours. T. at 200, 270, 310.

{¶17} A note C.H. watched appellant write stated, " 'I was scared at first. Not cutting your hair but when I started to play.' " T. at 236, 239; State's Exhibit B.

{¶18} During C.H.'s cross-examination, defense counsel elicited the fact that C.H. struggled academically and had some discipline problems at school. T. at 259-260. Two years prior to the incident, C.H. threatened suicide and received out-patient therapy. T. at 286-287, 314. C.H. was diagnosed with ADHD, a mood disorder, and a sleeping disorder. T. at 290. C.H. was prescribed medications, but stopped taking them and was not taking the medications on the day of the incident. T. at 290-292.

{¶19} C.H. considered appellant to be like a father to her. T. at 199. C.H. would follow appellant upstairs when he took a "bowl" with him, a marijuana pipe. T. at 296-297. C.H.'s mother cautioned her to leave appellant alone and "quit being too close to him." T. at 297-298.

{¶20} Appellant denied the incident in question, but freely admitted to providing and smoking marijuana with C.H. when her mother was present. T. at 402, 410-411. C.H. claimed she and appellant smoked marijuana only when her mother was gone. T. at 283-285.

{¶21} In his defense, appellant presented his mother's cell phone records which demonstrated his sister's cell phone called his mother's cell phone during the time of the incident, 9:33 p.m. T. at 396-397. The call lasted one minute. T. at 399. It was appellant's position that he had possession of his mother's cell phone and C.H.'s mother had possession of his sister's cell phone. T. at 396, 398-399. Prior to this call, a call was made to appellant's mother's cell phone at 9:13 p.m. and lasted nineteen minutes. T. at 400. The caller was not identified in court. T. at 401.

{¶22} Although there were inconsistencies in C.H.'s testimony i.e., whether she went straight to bed after her bath or talked to her mother, we find them to be minor. T. at 279-280. C.H.'s testimony was consistent between her interviews with Ms. Lawless and Detective Goodwin. T. at 175.

{¶23} Cases involving sexual conduct are invariably tried on the issue of credibility because sexual assaults are rarely done in public. The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶24} Upon review, we find sufficient evidence, if believed, to support the jury's guilty verdict on the count of unlawful sexual conduct with a minor, and no manifest miscarriage of justice.

{¶25} Assignment of Error I is denied.

## II

{¶26} Appellant claims the trial court erred in admitting into evidence State's Exhibit D without proper authentication and without proving the chain of custody. We disagree.

{¶27} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or

unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶28} Evid.R. 901 governs authentication and states the following in pertinent part:

{¶29} **"(A) General provision**

{¶30} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

{¶31} **"(B) Illustrations**

{¶32} "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

{¶33} "(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

{¶34} "(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

{¶35} "(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

{¶36} "(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

{¶37} In attempting to establish that appellant wrote the note marked as State's Exhibit B discussed supra, the state presented State's Exhibit D, a letter purportedly written by appellant to a former girlfriend. During his cross-examination, appellant admitted it was his signature on the letter, and it was a letter that he could have written as the handwriting looked a "little bit" like his handwriting. T. at 430.

{¶38} As a rebuttal, the state presented a forensic handwriting expert, Rebecca Barrett. Ms. Barrett testified that appellant "probably" wrote the note, State's Exhibit B. T. at 466-467.

{¶39} Given appellant's admission relative to the signature on the letter, State's Exhibit D, we find no error in admitting the exhibit into evidence.

{¶40} Assignment of Error II is denied.

{¶41} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

Sheila G. Farmer

Julie A. Edwards

W. Scott Gwin

JUDGES

