

[Cite as *State v. Brown*, 2014-Ohio-4158.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 12 MA 118
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
MILOUS BROWN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 09 CR 557.

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 16, 2014

[Cite as *State v. Brown*, 2014-Ohio-4158.]
DeGenaro, P.J.

{¶1} Defendant-Appellant, Milous Brown, appeals the June 18, 2012 judgment of the Mahoning County Court of Common Pleas convicting him of one count of gross sexual imposition and sentencing him accordingly. On appeal, Brown contends: 1) there was insufficient evidence to convict him; 2) the verdict of guilt was against the manifest weight of the evidence; and 3) the trial court erred by enhancing his sentence to that of mandatory jail time based upon convictions that were indicted contemporaneously but occurred after the events giving rise to the present case. These assignments of error are meritless and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On May 28, 2009, Milous Brown was indicted on two counts of gross sexual imposition, R.C. 2907.05(A)(4) & (B)¹, both third degree felonies, and rape, R.C. 2907.02(A)(1)(b) & (B), a felony punishable by life imprisonment. The gross sexual imposition counts were severed and tried separately resulting in convictions. In *State v. Brown*, 7th Dist. No. 11 MA 117, 2013-Ohio-5528 (*Brown I*), this court affirmed the judgment of the trial court. The present appeal is from the June 5, 2012 bench trial on the rape charge, wherein Brown was convicted of the lesser included offense of gross sexual imposition.

{¶3} The State's first witness was the victim C.W. She testified that she was eight years old in the early summer of 2006 and lived in Campbell, Ohio, with her mother and her step-father at the time. She knew Brown as a family friend through Julie Mulac, who lived with Brown nearby. C.W. had been to their house fifteen to twenty times prior to the incident giving rise to this case and not again thereafter.

{¶4} C.W. further testified that sometime after Memorial Day but before her birthday on July 20th, 2006, Brown, Mulac, and some of Mulac's children came to C.W.'s house to go swimming. When everyone was inside of the house, C.W. and Brown were alone outside in the pool. Brown picked her up by grabbing her from behind, placing his left arm over her chest and moving his right arm towards the bottom of her bathing suit. Brown then moved her bathing suit aside and put his fingers into her vagina. C.W. broke

away from him screaming for her mother. C.W.'s mother met her at the back doorway of the house. C.W. did not tell her mother what happened immediately. She was afraid her mother might have "freaked out and just been really scared or upset about it." C.W.'s mother told Mulac and Brown it was time for them to go and they left.

{¶15} C.W. told her mother about the incident a few days later by writing it down on a piece of paper and giving it to her mother. She then told her mother what happened and her mother called the police. C.W. talked to someone at the Campbell Police Department and Children Services. C.W. ended her direct testimony by identifying Brown as the perpetrator.

{¶16} On cross examination C.W. testified that prior to the incident four of the children and Brown were in the pool, and she confirmed that the only two people outside at the time of the incident were Brown and herself. Brown was the only adult to get into the pool. C.W. was not taken to a doctor for examination and only spoke to the police and Children Services.

{¶17} Sergeant David Michael Taybus of the Campbell Police Department testified that he was called to the victim's home in regards to a sexual incident, either imposition or rape. Once informed that the matter involved a child, he called Children Services pursuant to department protocol. He took the initial report from C.W.'s mother and took the handwritten note, but he never spoke to C.W. and his involvement with the case ended.

{¶18} Lenore Blanton, retired investigator from the Mahoning County Children Services abuse unit, testified that she conducted a home visit and spoke with C.W., who disclosed to her the details of the incident. C.W. was not taken to the Child Advocacy Center due to the fact that three to four weeks had passed by the time Blanton had talked to C.W. Blanton forwarded all the information she had collected to the Campbell Police Department and had no other involvement in the case.

{¶19} The State next presented the testimony of child abuse pediatrician, Dr. Paul McPherson. He testified that he had never met C.W., did not treat her, and never saw the

¹ Brown was indicted under a previous version of R.C. 2907.05 that was in effect at the time of the actions giving rise to the present case.

file. Instead, McPherson answered generalized questions about child sexual abuse based upon his training, education and experience. McPherson testified that the decision to have a child submit to a sexual assault examination is made on a case-by-case basis. He also described the concept of delayed disclosure, and that it is more likely to occur when the victim knew the perpetrator.

{¶10} The State's final witness was Sergeant TJ Assion who testified that in the Mahoning County Jail each inmate is assigned a pin number during booking to determine the phone calls placed by that individual. Assion identified a disk of recorded phone conversations made by Brown while he was in jail; select calls were then played for the trial court.

{¶11} The defense presented one witness, Julie Mulac, who dated Brown from May 2003 until January 2012. They have one child together. Mulac testified that she, Brown and her five children went to the victim's home to swim on May 27, 2006, at about noon, and they stayed until about six or seven that evening. Brown never got in the pool; he would toss the children in by grabbing an arm and a leg and throwing them, which was the only interaction that she saw between Brown and C.W. Mulac said C.W. did not scream or call for her mother.

{¶12} On cross, Mulac admitted to spending a lot of time talking about the case and getting people to cooperate as witnesses. Brown instructed her to contact C.W. to "find out her angle." Mulac contradicted her earlier testimony and admitted seeing Brown in the swimming pool. Mulac also admitted that she told Brown in a phone conversation that it was good that she was dating someone else now so the prosecutor could not say that the only reason she was testifying was due to her relationship with him. Regarding the incident with C.W., Brown told her that "he didn't remember what happened."

{¶13} Brown was acquitted of the charge of rape; the trial court found that the element of penetration was not proven beyond a reasonable doubt. The trial court did find that Brown had sexual contact with C.W., who was less than thirteen at the time in violation of 2907.05(A)(4). The trial court convicted Brown of gross sexual imposition rather than rape, reasoning that there was an absence of physical evidence; C.W.'s recall of the incident was uncorroborated; and C.W.'s testimony was otherwise credible to an

extent although inconsistent with the note given to her mother as to the element of penetration. Sentencing was held the following day. The State argued that Brown had two previous convictions for gross sexual imposition, which would make the jail sentence mandatory. Brown argued that those convictions were based on events that occurred after this incident. The trial court imposed a mandatory five-year sentence, to run consecutive to the sentence imposed for his two previous convictions for gross sexual imposition in *Brown I*, and classified him as a tier II sex offender.

Sufficiency of Evidence

{¶14} We will address Brown's assignments of error out of order, as our resolution of any particular one may render the remaining moot. In his second of three assignments of error, Brown asserts:

{¶15} "Appellant's conviction and sentence violate U.S. CONST., [A]mend. XIV and OHIO CONST., [A]rt. I, § 16 because there was an insufficiency of evidence of sexual contact and no ability to defend against the lesser gross sexual imposition charge."

{¶16} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In our review of sufficiency of the evidence, we must "assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390 (Cook, J., concurring). "The test of sufficient evidence is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *State v. Bulin*, 7th Dist. 09 BE 27, 2011-Ohio-3398, ¶57 citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court should not reverse the verdict of the trier of fact unless it finds that reasonable minds could not reach that conclusion. *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991).

{¶17} Brown argues that there was no proof that he touched the erogenous zone of C.W. for the purpose of arousal or gratification. Brown was convicted of gross sexual imposition, which provides that no person shall have sexual contact with another, not their

spouse, who is less than thirteen years old, whether or not the offender knows the victim's age. R.C. 2907.05(A)(4). In order to convict Brown of gross sexual imposition, the State must prove beyond a reasonable doubt that sexual contact occurred. Sexual contact means "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).

{¶18} Considered in a light most favorable to the prosecution, the testimony presented at trial established beyond a reasonable doubt that Brown touched an erogenous zone, specifically the vagina, of C.W, who was eight years old at the time the incident occurred, as required by R.C. 2907.05(A)(4). However, pursuant to R.C. 2907.01(B) the State must also prove that the sexual contact was for the purpose of sexual gratification or arousal. Brown disputes that this was proven.

{¶19} "Whether that touching was undertaken for the purpose of sexual arousal or gratification must be inferred from the type, nature, and circumstances surrounding the contact." *State v. Mundy*, 99 Ohio App.3d 275, 279, 650 N.E.2d 502 (2d.1994). "While purpose of sexual arousal or gratification is an essential element of gross sexual imposition, there is no requirement that there be direct testimony regarding sexual arousal or gratification." *In re D.S.*, 160 Ohio App.3d 552, 2005-Ohio-1803, 828 N.E.2d 143, ¶19 citing *In re Anderson* (1996), 116 Ohio App.3d 441, 444, 688 N.E.2d 545.

{¶20} C.W. testified that Brown was alone with her outside in the swimming pool. Once everyone went into the house, Brown picked her up from behind, putting his left arm over her chest and moved his right arm down towards the bottom of her bathing suit. Thereafter, he moved the bottom of her bathing suit aside and his fingers went in towards her "private area." C.W. testified that she was afraid and that he "kept holding me" and she "finally broke off of him" and "was screaming for her mother." Afterwards, Brown said nothing and "stared off blankly."

{¶21} The evidence demonstrated the type, nature and circumstances surrounding Brown's contact with C.W. was such that the trial court reasonably concluded that Brown touching C.W.'s vagina was not accidental or inadvertent; rather, it was a deliberate, premeditated act. That evidence is sufficient to support a reasonable

inference that Brown's contact with C.W. was for the purpose of sexual arousal or gratification.

{¶22} Brown additionally argues that the conviction on the lesser-included offense of gross sexual imposition deprived him of the opportunity to argue to the trial judge why there was no evidence of sexual contact. He contends that there is no legal middle ground; either the victim's version of the incident occurred or nothing happened. This argument is unpersuasive. An indictment on a greater offense necessarily and simultaneously charges a defendant with lesser-included offenses as well. *State v. Lytle*, 49 Ohio St.3d 154, 157, 551 N.E.2d 950 (1990). Implicit in the charge of rape, was the lesser-included offense of gross sexual imposition. Brown had sufficient notice that he could be found guilty if the evidence showed that he committed gross sexual imposition.

{¶23} Further, as the State points out, Brown argued from the onset that the incident did not occur, that he was never in the pool, and he was never left alone with C.W. Trial counsel's strategy focused on disproving that the incident occurred at all, not the manner in which Brown may or may not have touched C.W. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. Accordingly, this assignment of error is meritless.

Manifest Weight

{¶24} In his third of three assignments of error, Brown asserts:

{¶25} "The Verdict of Guilt of Gross Sexual Imposition was Against the Manifest Weight of the Evidence."

{¶26} "When a court conducts a manifest-weight analysis, it weighs all of the evidence and reasonable inferences, considers the credibility of each witness, and determines whether the fact-finders clearly lost their way in resolving conflicts in the evidence to the point that they 'created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143, ¶68 (7th Dist.) citing *Thompkins, supra*, 78 Ohio St.3d at 387. A reversal on weight of the evidence is ordered only in exceptional

circumstances. *Id.* "This is because the trier of fact was in the best position to determine the credibility of the witnesses and the weight due to the evidence." *Kaufman, supra*, ¶69 *citing State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶27} Brown bases his manifest weight argument upon his contention that C.W.'s testimony was contradicted by Mulac, Brown's former girlfriend and mother of his child. Mulac testified that Brown was not left alone with C.W, and that he was never in the pool that day. The trial court apparently discounted the credibility of Mulac likely due to the fact that she admitted to spending a lot of time talking about the case and getting people to cooperate as witnesses, and that Brown instructed her to talk to C.W. to "find out her angle." Further, Mulac contradicted her own testimony, admitting later that she saw Brown in the swimming pool. Mulac's credibility is squarely within the province of the trial court, which found her testimony less credible than C.W.'s. *Id.* Based upon the entire record, the trier of fact did not lose its way or create a manifest miscarriage of justice. Accordingly, this assignment of error is meritless.

Previous Conviction

{¶28} Finally, in his first assignment or error, Brown asserts:

{¶29} "The Trial Court Erred and Abused its Discretion by Sentencing Appellant to a Mandatory Term When the Enhancing Convictions Were Convictions Separately Tried but Contained in the Same Indictment upon Which Appellant Was Tried in this Case."

{¶30} In the present case, Brown was convicted by the trial court in 2012 of gross sexual imposition based upon conduct alleged in the indictment to have occurred in 2006. Within the same indictment Brown was also charged with two counts of gross sexual imposition both of which occurred in 2009, for which he was convicted by a jury in 2011. As a result of those two prior convictions, the trial court here determined that Brown's sentence was mandatory pursuant to R.C.2907.05(C)(2).

{¶31} Brown argues that since those convictions were contained in the same indictment as the count in the present case, and that the substantive events in the present case actually occurred prior thereto, that they cannot serve as the basis of enhancing the sentence to a mandatory one in this case. The statute provides in pertinent part: "Except as otherwise provided in this division, for gross sexual imposition

committed in violation of division (A)(4) or (B) of this section there is a *presumption that a prison term shall be imposed for the offense*. The court shall impose * * * a mandatory prison term * * * if either of the following applies: * * *(b) The offender previously was convicted of or pleaded guilty to a violation of this section, * * * and the victim of the previous offense was less than thirteen years of age. (emphasis added) R.C. 2907.05(C)(2)(b).

{¶32} Brown cites *State v. Smith*, 104 Ohio St.2d 106, 2004-Ohio-6238, 818 N.E.2d 283, for the proposition that a "conviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Id.* at syllabus. The State correctly points out that *Smith* was effectively superseded by statute.

{¶33} The *Smith* case is additionally inapposite as it deals with specifications contemporaneously charged in the same indictment, and as such an element of the offense requiring proof at trial. Here, it is a sentencing factor for the trial court to consider. Brown was indicted on two counts of gross sexual imposition and one count of rape; he chose to sever and proceed to a jury trial on the gross sexual imposition charges for which he was found guilty. Counsel for Brown argues that he was in a "Catch 22" of choosing between a fair trial and the possibility of the severed counts being used as prior convictions to enhance his sentence here. This argument is flawed for two reasons.

{¶34} First, counsel ignores that Brown received two, separate fair trials. As a result of severing the 2006 and 2009 offenses for trial, this had the practical effect of two separate de facto indictments. Separately tried charges, either because of severance or separate indictment, can be tried out of order. Moreover, this decision falls within the realm of trial strategy, which we will not second-guess, *Carter*, supra at 558, particularly where an ineffective assistance of counsel claim has not been raised on appeal. Second, this did not enhance Brown's sentence; rather, it modified the manner in which the trial court considered the imposition of Brown's sentence. Instead of the trial court's discretion being guided by the statutory presumption in favor of prison, a prison sentence – the length of which is within the trial court's discretion – was mandatory.

{¶35} The plain language of R.C. 2907.05(C)(2) dictates that the trial court is required to impose a mandatory prison term due to Brown's previous convictions for gross sexual imposition in 2011. Although the events giving rise to the charge in the present case may have occurred prior in time to those in his 2011 convictions, the statute does not make a distinction or provide for an exception. "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." *E. Liverpool v. Buckeye Water Dist.*, 2012-Ohio-2821, 972 N.E.2d 1090, ¶66 (7th Dist.) citing *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). Accordingly, Brown's prior convictions must be taken into consideration for sentencing purposes here, and this assignment of error is meritless.

Conclusion

{¶36} In sum, the trial court's judgment was support by sufficient evidence as to the elements of the offense of gross sexual imposition. Further, Brown's conviction is not against the manifest weight of the evidence. The trial court did not err when it determined that Brown's previous convictions served to enhance his jail sentence to a mandatory term. Accordingly, all of Brown's assignments are meritless and the judgment of the trial court is affirmed.

Vukovich, J., concurs.

Waite, J., concurs.