

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 08AP-936
 : (C.P.C. No. 07CR-07-5230)
 Darrell L. Borders, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 11, 2009

Ron O'Brien, Prosecuting Attorney, and *Richard Termuhlen*,
for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Darrell L. Borders, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of two counts of rape in violation of R.C. 2907.02, both felonies of the first degree, and one count of gross sexual imposition in violation of R.C. 2907.05, a felony of the third degree. Because sufficient evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

I. Procedural History

{¶2} In a three-count indictment filed July 24, 2007, defendant was charged in Counts 1 and 2 with rape and in Count 3 with gross sexual imposition. The first count alleged defendant engaged in anal intercourse with the victim; the second count alleged defendant engaged in fellatio with the victim; and the third count alleged defendant had sexual contact with the victim. The victim, the same in each instance, was asserted to be six or seven years of age at the time of the offenses.

{¶3} On January 10, 2008, defendant filed a "Notice of Intent to Offer Alibi Defense." In it, defendant noted that the discovery the state provided, as well as the allegations of the indictment, stated the offenses occurred between January 1, 2003 and December 31, 2004 at 1454 South Fourth Street in Columbus, Ohio. Defendant's alibi indicated he did not reside at or visit 1454 South Fourth Street during that period. Instead, defendant asserted he lived at various group homes that the Franklin County Board of Mental Retardation and Developmental Disabilities ("MRDD") sponsored and supervised, including those located on Miller Avenue, Moon Road, Benefield Avenue, and Redbird Court.

{¶4} On the day scheduled for trial, defendant voluntarily waived his right to a jury trial, and the matter was tried to the court. At the conclusion of the trial, the trial court found defendant guilty of the indicted offenses. The trial court imposed a sentence of ten years to life on each of the two rape charges, to be served consecutively to each other but concurrently with the five years the trial court imposed for the gross sexual imposition charge. Contrary to the sentence pronounced in court, the original judgment entry

indicated defendant would be eligible for parole after ten years. A "Corrected Entry" states defendant becomes eligible for parole after serving 20 years.

{¶5} Defendant appeals, assigning four errors:

First Assignment of Error: Appellant's convictions are not supported by legally sufficient evidence.

Second Assignment of Error: The court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

Third Assignment of Error: Appellant's conviction was against the manifest weight of the evidence.

Fourth Assignment of Error: The ambiguous recitation in the judgement [sic] entry that appellant will be eligible for parole after ten years requires remand for clarification.

II. First and Second Assignments of Error

{¶6} Because defendant's first two assignments of error are analyzed under the same standard, we discuss them together. In the first assignment of error, defendant asserts the evidence presented at trial was legally insufficient to support his convictions. Generally, a review of the sufficiency of the evidence is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We construe the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶7} Defendant's second assignment of error contends the trial court erred in overruling his Crim.R. 29 motion for acquittal. Crim.R. 29(A) provides that the court "on motion of a defendant or on its own motion, after the evidence on either side is closed,

shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." We apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence. *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, citing *State v. Ready* (2001), 143 Ohio App.3d 748.

{¶8} R.C. 2907.02(A)(1)(b) defines rape, providing that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender" if "[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Similarly, R.C. 2907.05 defines gross sexual imposition and provides that "[n]o person shall have sexual contact with another" if "[t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶9} At the bench trial conducted on the charges against defendant, the victim testified that when he was six or seven years of age, he visited his grandmother's home with his biological father, his father's girlfriend, and two other children. Sometimes he spent the night at his grandmother's home, although neither his father nor his father's girlfriend stayed overnight with him. Defendant, brother of the victim's biological father and son of the grandmother the victim visited, sometimes was at the home and sometimes spent the night. On occasion, he did so on the same night the victim was visiting overnight with his grandmother.

{¶10} The victim testified that when he was six or seven, he was in defendant's bedroom at his grandmother's home. According to the victim, the bedroom had a big screen television, a PlayStation, a mattress, and a lamp. The victim stated that while he was in the bedroom with defendant, defendant sucked his "private part," putting the

victim's penis in defendant's mouth for four minutes. (Tr. 24.) The victim further testified defendant "humped" him. (Tr. 26.) When asked for an explanation, the victim stated defendant "put his private part into my butt." (Tr. 26.) Sometimes, the victim testified, defendant would do both acts on the same day. The victim testified defendant also asked the victim to "hump" defendant. (Tr. 27.) The victim said he was unable. Explaining, the victim testified defendant would have the victim "put my private part in his butt, but it didn't really do nothing." (Tr. 27.)

{¶11} The victim stated that when defendant did those things to him, only the victim and defendant were in defendant's bedroom; his grandmother was "in a different room sleeping or she would be like downstairs with the other kids and stuff." (Tr. 32.) The events happened mostly during the weekends, on Friday, Saturday and Sundays. According to the victim, defendant performed the acts "a lot," meaning more than ten times. (Tr. 37.)

{¶12} Initially, the victim did not disclose defendant's actions, because defendant said he would kill the victim's mother and sister if the victim told anyone. The victim testified that when he was eight years old he actually told his grandmother about defendant's actions, but she did not believe him. He ultimately told his mother, who took him to Children's Hospital where he was examined for sexual abuse. While the examination revealed no indices of sexual abuse, the examining doctor testified the absence of such evidence did not mean the abuse did not happen.

{¶13} If we construe the victim's testimony in favor of the state, it supports the conclusion that defendant engaged in anal intercourse with the victim, performed fellatio on the victim, and forced the victim to have sexual contact with defendant. With those

facts, the prosecution presented sufficient evidence to support the allegations of the indictment, and the trial court properly denied defendant's Crim.R. 29 motion. Accordingly, defendant's first and second assignments of error are overruled.

III. Third Assignment of Error

{¶14} Defendant's third assignment of error asserts his convictions are against the manifest weight of the evidence.

{¶15} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley, supra; Thompkins, supra*, at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶16} Defendant's argument hinges on the victim's testimony about where the alleged acts occurred in 2003 and 2004. The victim initially was uncertain where his grandmother lived at that time. On cross-examination, however, he stated she lived on Fourth Street. Similarly, the victim's mother, Crystal Sullivan, testified she believed the victim's grandmother lived on Fourth Street during those years. Contrary to their

testimony, the victim's grandmother testified she lived at 1454 South Fourth Street in 2000 and moved out of that residence in March 2001; she did not return there until July or August 2005. She stated that because she did not live on Fourth Street in 2003 and 2004, defendant spent no time at that address in those years.

{¶17} Instead, the victim's grandmother testified, defendant in the latter part of 2002 and 2003 lived in an MRDD group home on Miller Avenue. She explained that when defendant was three or four months old, he was diagnosed with craniosynostosis and behavioral dysthymic disorder; the craniosynostosis resulted in mild mental retardation. Defendant took 16 to 18 medications per day and had an explosive behavior disorder that was ameliorated with medication. As a result of his condition, he qualified for the services of MRDD and had a staff member with him on a regular basis.

{¶18} The grandmother testified that when defendant was living in the group home on Miller Avenue, the victim's grandmother lived on Morrill Avenue. Defendant did not live with her, did not have a bedroom there, and had no television or PlayStation. Although defendant visited occasionally at the Morrill Avenue home, his visits typically were a 30-minute visit once a week; staff always accompanied him. While the victim's grandmother was living on Morrill Avenue, the victim's biological father, his girlfriend, and two children moved in with the grandmother. Defendant never spent the night there.

{¶19} At the time the victim's father and girlfriend were living with the victim's grandmother, the victim came to visit a couple of times, but those visits stopped around April 2003 when the victim's mother accused the victim's biological father of abusing him. The visits resumed in August 2003. According to the grandmother, neither defendant nor

the victim ever spent the night at her Morrill Avenue home, and defendant was never left alone with any children due to his behavioral disability.

{¶20} In September 2003, the grandmother moved out of the Morrill Avenue residence to Benefield Avenue; she stayed there until August 2004. Defendant in May 2003 moved to a group home on Moon Road. He remained at the group home until approximately September 2003, when he moved in with the victim's grandmother. According to the grandmother, defendant never stayed overnight at Benefield until he moved there in September 2003.

{¶21} During the time the victim's grandmother lived at Benefield, the victim sometimes came to visit with his biological father and his father's girlfriend, but the victim was never left alone with defendant, and defendant was never at the residence unless the grandmother also was present. During the time defendant lived at Benefield, his bedroom was in a dining area that had no doors. Although the victim was present one or two times when defendant was also there, defendant had staff with him, and defendant was never left alone with the victim. In March 2004, defendant left the Benefield residence due to complications between him and the victim's biological father and began to reside at Redbird Court.

{¶22} Finally, the grandmother testified she never heard about the alleged sexual molestation until the victim's mother called her in 2006. She specifically testified the victim never said anything to her about it. Instead, he told her he was afraid the Children Services' agency would take him away if he did not tell the agency what his mother wanted it to hear, and he would never see his family again.

{¶23} Defendant asserts the victim's testimony cannot withstand the weight of the contrary evidence. Defendant primarily relies on the testimony of the victim's grandmother to undermine the events subject of the victim's testimony. In particular, defendant notes her testimony that at no time during 2003 and 2004 did his mother reside at 1454 South Fourth Street or did he have a bedroom with a large-screened television and PlayStation. Moreover, according to her testimony, defendant was never allowed to be with the victim alone, had staff members from MRDD with him at all times, and had severely limited visits with the grandmother at the time the victim claimed defendant sexually molested him.

{¶24} To further undermine the victim's credibility, defendant notes the victim testified his mother hit him with a spatula; the victim's mother testified the victim was lying if he so stated. The victim testified he told his grandmother when he was either six or eight years old that defendant molested him; the grandmother denied the victim ever told her about defendant's actions. Based on the victim's statements to his mother, which she in turn related to the Children Services' agency, the victim's biological father was investigated for abuse; actions the victim said his biological father was doing were determined to be unfounded.

{¶25} Defendant, in effect, asks us to substitute our judgment for that of the trial court in assessing the credibility of the witnesses. "A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial," as "[t]he trier of fact is free to believe or disbelieve any or all of the testimony presented." *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶10. Here, the trial court could disbelieve portions of the grandmother's testimony, given that her own son was the subject of the charges. Similarly, the trial court could disbelieve the victim's

mother when she denied hitting the child with a spatula and could conclude the mother would be disinclined to admit such conduct. Finally, the testimony at trial revealed that the relationship between the victim's biological father and the victim's mother was strained, at best; the trial court could have discounted the agency's investigation as a product of that uneasy relationship.

{¶26} Without question, additional inconsistencies exist in some of the details the victim supplied, such as his statements about the hours he was permitted to visit with this biological father. Similarly, however, the grandmother's chronology of where she lived left a gap during 2001 and 2002. In the end, however, the limits of appellate review constrain us: the trial court was vested with the responsibility of weighing the credibility of the witnesses, and it chose to believe the victim. The trial court specifically found the victim to be credible and noted the child was specific in describing the molestation. Because we cannot substitute our judgment for that of the trial court in assessing the credibility of the witnesses, we are compelled to conclude the judgment of the trial court is not against the manifest weight of the evidence.

{¶27} Finally, to the extent defendant claims an insufficient bill of particulars precluded his ability to try the case, defendant waived any error by proceeding to trial. *State v. Williamitis*, 2d Dist. No. 20508, 2004-Ohio-6234, ¶9, citing *State v. Sinclair*, 2d Dist. No. 2002-CA-33, 2003-Ohio-3246 (concluding a defendant waives "any claim of error concerning his failure to receive a bill of particulars by proceeding to trial without said bill of particulars or a request for a continuance"). Defendant's third assignment of error is overruled.

IV. Fourth Assignment of Error

{¶28} Defendant's fourth assignment of error asserts the trial court issued an inconsistent judgment entry in that he sentenced defendant to ten years to life on each of the two rape counts and ordered them to be served consecutively, but then stated in its judgment entry that defendant would be eligible for parole after ten years. The state acknowledges the ambiguity, noting defendant is not eligible for parole until he has served 20 years on the consecutive sentences.

{¶29} Before the notice of appeal was filed, the trial court filed a corrected entry which specifies that defendant is eligible for parole after 20 years. The trial court's corrected entry thus resolves any ambiguity and, because it is not contrary to law, resolves the assignment of error. Defendant's fourth assignment of error is overruled.

{¶30} Having overruled each of defendant's four assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
