

[Cite as *State v. Tyree*, 2010-Ohio-4250.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93800

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RODNEY TYREE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500068

BEFORE: Cooney, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 9, 2010
ATTORNEY FOR APPELLANT

Fred D. Middleton
815 Superior Avenue, East
1717 Superior Building
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Rodney Tyree (“Tyree”), appeals his convictions for three counts of disseminating matter harmful to juveniles. We find no merit to the appeal and affirm the convictions.

{¶ 2} In August 2007, Tyree was indicted on 45 counts alleging various sexual offenses including rape, gross sexual imposition, complicity to commit rape, and disseminating material harmful to juveniles. The indictments alleged that from approximately April 7, 2000 to April 20, 2001, Tyree engaged in sexual relations with his minor children, instructed his son to rape one of his daughters, and allowed the children to view pornographic material. The State subsequently dismissed 25 of the rape counts.

{¶ 3} Before trial, Tyree filed a motion for “voir dire examination of the accusing witnesses and for an order disclosing evidence used in the interview process.” Tyree also filed a motion requesting appointment of an expert witness at state’s expense to testify regarding the reliability of the interview process and memory reconstruction of child victims. The court conducted the voir dire examination and denied the motions. The case proceeded to a jury trial, at which the following evidence was presented.

{¶ 4} The State’s first witness, J.S., testified that Tyree sexually molested her on several occasions. He also watched pornographic videos with her, which depicted two naked people having sex “in all different ways and shapes and forms” when she was nine or ten years old.

{¶ 5} Tyree's son, R.T., testified that Tyree forced him to have vaginal intercourse with his sister A.T. while Tyree masturbated. A.T. confirmed that Tyree forced R.T. to have intercourse with her, but she testified that R.T.'s penis touched her "crotch." It was unclear whether there was any penetration.

{¶ 6} R.T. also stated that he and Tyree watched pornographic videos while Tyree masturbated. R.T. was nine years old at the time. A.T., Tyree's youngest daughter, also testified that when she was six or seven years old, she watched pornographic movies in Tyree's bedroom with J.S. and Tyree.

{¶ 7} The victims also described numerous incidents of sexual conduct involving Tyree, which are not relevant to this appeal. J.S. also testified that she first disclosed the abuse to a friend in December 2006. The victims' grandmother learned about the abuse and notified children's services in Pennsylvania, where the family was residing at the time. The Cuyahoga County Department of Department of Children and Family Services was also notified.

{¶ 8} At the conclusion of the trial, the jury found Tyree guilty on three counts of disseminating material harmful to a juvenile but was hung on the remaining counts of rape and complicity to rape. The court sentenced Tyree to 12 months on each count to be served consecutively for a total three-year prison term.

{¶ 9} In May 2009, Tyree pled guilty to two counts of rape and the remaining charges were nolle. In July 2009, the trial court sentenced him to concurrent sentences of ten years on each rape count, to run concurrent with the

sentence on the three counts of dissemination. Tyree now appeals, raising three assignments of error.

Expert Witness at State's Expense

{¶ 10} In the first assignment of error, Tyree argues the trial court erred in denying his motion to hire an expert witness at state's expense to testify regarding the reliability of the interview procedures used to elicit the children's stories about what happened and memory reconstruction of minor children. Tyree claims the children's memories of what happened were tainted because they were not questioned properly when the alleged abuse was first disclosed.

{¶ 11} As a matter of due process, indigent defendants are entitled to receive the basic tools of an adequate defense, which may include the provision of an expert witness. *State v. Mason* (1998), 82 Ohio St.3d 144, 149, 694 N.E.2d 932. The decision whether to grant a defendant's request for an expert witness lies in the trial court's discretion. *Id.* at 150. An indigent defendant must be provided funds to obtain expert assistance at state expense only where the trial court finds that the defendant has demonstrated (1) a reasonable probability that the requested expert would aid in his defense; and (2) that the denial of the requested expert assistance would result in an unfair trial. *Id.* In the absence of a particularized showing of need, due process does not require the provision of an expert witness. *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d

680, ¶21, quoting *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53.

{¶ 12} An indigent defendant who seeks state-funded assistance bears the burden of establishing a reasonable necessity for such assistance. *State v. Gumm*, 73 Ohio St.3d 413, 427, 1995-Ohio-24, 653 N.E.2d 253. At a minimum, the indigent defendant must present sufficient facts with which the court can base a decision. *State v. Scott* (1987), 41 Ohio App.3d 313, 315, 535 N.E.2d 379. Undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate. *Id.*, citing *Caldwell v. Mississippi* (1985), 472 U.S. 320, 323-324, fn. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231.¹

{¶ 13} In applying these principles to the case before us, we conclude that Tyree has not demonstrated that the trial court abused its discretion in denying his motion to hire an expert at state's expense. The trial court conducted a voir dire examination of the social worker and detective who interviewed the victims to disclose what transpired during the interview process. There was no evidence that improper techniques were used nor did Tyree allege in his motion that an

¹ In support of his argument, Tyree relies on *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066. However, the issue in *Ogle* was not whether to permit the defendant to obtain an expert at state expense but rather whether to exclude the testimony of an expert the defendant apparently hired at his own expense. These are two distinct questions involving different legal standards and analyses. One involves the admissibility of evidence while the other involves an entirely different analysis discussed in this opinion. Therefore, we find *Ogle* is inapplicable to the issue presented in the instant case.

interviewer had used improper techniques. Tyree never identified an expert he wished to hire nor did he explain what testimony he anticipated from the expert. Rather, Tyree baldly asserted that “children are often very susceptible to suggestion and innuendo.” Such a generalized claim does not demonstrate a “particularized need” for such an expert. Therefore, the trial court properly denied Tyree’s motion to hire an expert at state’s expense.

{¶ 14} Accordingly, the first assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 15} In the second assignment of error, Tyree argues his convictions for disseminating material harmful to a juvenile are not supported by sufficient evidence. Tyree claims that because the pornographic videos that were shown to the victims were not offered into evidence, the evidence was not sufficient to prove that the videos were harmful to a juvenile. In the third assignment of error, Tyree argues his convictions were against the manifest weight of the evidence because the victims’ testimony was not credible. Because these two assignments of error are closely related, they are discussed together.

{¶ 16} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State’s evidence is to be believed, but whether, if believed, the evidence against a defendant would

support a conviction. *Id.* 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 17} A challenge to the manifest weight of the evidence attacks the verdict in light of the State's burden of proof beyond a reasonable doubt. *Thompkins* at 386-87. When inquiring into the manifest weight of the evidence, the reviewing court sits as the "thirteenth juror and makes an independent review of the record." *Id.* at 387. The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of all witnesses and determines 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 judgment must be reversed and a new proceeding ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Mattison* (1985), 23 Ohio App.3d 10, 14, 490 N.E.2d 926.

{¶ 18} Tyree was found guilty of three counts of disseminating material harmful to juveniles, pursuant to R.C. 2907.31(A)(3), which states: "No person, with knowledge of its character or content, shall recklessly * * * allow any juvenile

to review or peruse any material or view any live performance that is harmful to juveniles.” R.C. 2907.01(E) defines “harmful to juveniles” as follows:

“Harmful to juveniles” means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

“(1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

“(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

“(3) The material or performance, when considered as a whole, lack serious literary, artistic, political, and scientific value for juveniles.”

{¶ 19} Tyree argues the evidence adduced at trial was not sufficient to prove that the material Tyree showed the victims was “harmful to juveniles,” because the videos were not introduced at trial and thus, he asserts, “no one knows what these 4 and 5 year-old children saw.” This claim is unfounded.

{¶ 20} A conviction under R.C. 2907.31(A)(1) does not require that the material in question be presented to the trial court. At least two Ohio courts have expressly held that evidence of the content of the material can be established through testimony describing the material without introducing the actual material into evidence. *State v. Crosky*, Franklin App. No. 06AP-655, 2008-Ohio-145, ¶75; *State v. Toth*, Lorain App. No. 05CA008632, 2006-Ohio-2173, ¶53. Moreover, this court has found a victim’s testimony that he viewed on the defendant’s television naked people having sex was sufficient to support a conviction for disseminating material harmful to juveniles. *State v. Dissell*, Cuyahoga App. No.

85072, 2005-Ohio-4395. Neither the statute nor the case law requires the actual material be produced and presented as evidence at trial.

{¶ 21} Here, J.S. and A.T. both testified that on several occasions Tyree had them watch pornographic videos, which depicted naked people having sex “in all different ways and shapes and forms.” R.T. similarly testified that Tyree showed him videos of naked people having sex while Tyree masturbated. The three children testified that Tyree kept his pornographic videos locked in a cabinet in the basement, and other witnesses confirmed that Tyree possessed a collection of pornographic videos.

{¶ 22} Further, Christy Prochaska (“Prochaska”), a social worker from the Cuyahoga County Department of Children and Family Services, testified that Tyree admitted to her that he watched pornography with R.T. Tyree also admitted to her that he frequently viewed pornography including the depiction of bestiality and that all of his children probably witnessed him masturbate at one time or another. Det. Biglang-Awa also testified that Tyree admitted to him that every time he would watch pornography at home he would “get caught” by one of his children.

{¶ 23} Finally, Tyree himself testified at his trial and admitted to the jury that he frequently masturbated in various places throughout his home and that he viewed pornography in the living room. Tyree agreed that Prochaska accurately

stated that all of his children probably caught him masturbating and that his masturbation habits continued despite being caught.

{¶ 24} Thus, the record is replete with evidence to support the jury's finding that Tyree presented material representing sexual conduct, which is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles. Defense counsel never suggested that the material or performance had any literary, artistic, political, or scientific value.

{¶ 25} After reviewing the entire record in a light most favorable to the State and weighing the evidence and considering the credibility of the witnesses, we are not persuaded that the trial court clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions must be reversed. The record contains substantial evidence including Tyree's own admissions from which the jury could have concluded, beyond a reasonable doubt, that Tyree was guilty of disseminating material harmful to juveniles.

{¶ 26} Accordingly, the second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR