[Cite as *State v. Benchea*, 2016-Ohio-1369.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0054**
- vs -	:	
RICK A. BENCHEA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CR 00537.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Rhys Brendan Cartwright-Jones, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, OH 44503-1130 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Rick A. Benchea, appeals his convictions arising from the repeated rape and sexual assault of A.C. during a five-year period. Benchea alleges he was denied the right to expert assistance; his rape convictions were not supported by sufficient evidence; and his convictions were against the manifest weight of the evidence. For the following reasons, we affirm.

{¶2} Benchea was indicted and charged with two counts of gross sexual imposition and twelve counts of rape. All of the offenses involved the same victim, his step-granddaughter A.C. The case was tried to a jury, which found him guilty on all counts.

{¶3} A.C. testified at trial and explained that she and her older brother went to live with their grandmother and step-grandfather, Benchea, when she was approximately five or six-years-old. At some point thereafter, her aunt and first cousin also moved into the home. A.C. said the sexual abuse began when she was seven years old when Benchea started touching her private areas over her clothes. His touching progressed about a year later to touching her privates under her clothes. The touching again progressed into her step-grandfather making her perform fellatio on him. A.C. described complying with his directives out of fear. Although Benchea never struck her, she said he hit her cousin and brother on a daily basis. She described being afraid of Benchea and thought he was a "very abusive man."

{¶4} Approximately another year passed, and Benchea began raping her anally. Another year passed, and he started raping her vaginally as well. Her step-grandfather consistently touched her or raped her about two or three times a week usually after school when her grandmother was at work and her brother and cousin were at friends' houses. Benchea did not work. The abuse also occurred sometimes in the middle of the night. A.C. explained that Benchea usually initiated each episode with the statement "I need a favor," and he usually concluded each with the statement, "promise not to tell." She felt he would hurt her if she told. She resisted, but she never

fully refused Benchea's directives because she was afraid. A.C.'s aunt testified and described seeing Benchea yell at A.C. once, which caused her to pass out.

{¶5} A.C. stated that Benchea also occasionally used a blue apparatus on her that he would fasten to himself. She identified the device at trial and described how he used it. He also, on occasion, made her view pornography. She explained that he kept the device along with his pornography DVDs locked in his safe that was behind his bedroom door. She never entered his bedroom without him and never accessed the safe or this device.

{¶6} A.C. finally told her mother that Benchea was sexually abusing her when she was eleven years old. Her mother took her to the emergency room where she was interviewed and examined. A.C.'s physical exam revealed no physical signs of sexual abuse.

{¶7} Warren Police Detective John Greaver executed a search warrant at Benchea's home and secured the blue sex apparatus from Benchea's safe. The safe and the device were exactly where A.C. told them it would be located, and Benchea had the keys to the safe in his pocket at the time the warrant was served.

{¶8} Benchea's interview with Greaver was played for the jury during which he denied the allegations against him. Benchea told Greaver that A.C. came to live with him and his wife because her father had molested her when she was even younger. Benchea told Greaver that he had the safe to lock up his prescriptions since one of his stepdaughters had previously stolen his pills. He said his wife did not know that he had the sex device. He said "nobody but me" knows about this device in his safe and that he bought it without his wife's knowledge, and has never told her about it or had the

opportunity to use it with her. In fact, Benchea kept the keys to the safe in his pocket and said its "real unlikely" that the kids were able to get the keys and open the safe.

{¶9} The device was sent away for DNA testing, but Greaver never asked for it to be fingerprinted to determine if other members of the household had touched the device.

{¶10} A.C.'s brother and cousin testified and explained that Benchea favored A.C. and would often be alone with her after school when Benchea told them to go outside or to a friend's house. He also hit them when they did not do what they were told.

{¶11} Dr. John Melville, a board certified child abuse pediatrician and director of the child advocacy center at Akron Children's Hospital, explained to the jury that the majority of children reporting sexual abuse and penetration have normal or nonspecific physical examinations that do not reflect bruising, tearing, or damage. Melville explained that the anus and vagina heal very quickly and are designed to expand, and that any injuries to these areas tend to heal within 72 hours, usually with no signs of injury.

{¶12} Melville reviewed A.C.'s examination and confirmed that she had a normal sexual evaluation, which he felt was expected based on her description of ongoing abuse over a period of years. He agreed on cross-examination that A.C.'s physical examination does not assist in determining whether she was raped.

{¶13} Megan Martin, A.C.'s caseworker with the Trumbull County Children Services Agency, conducted a recorded interview of A.C., which was played for the jury. A.C. explained during the interview that A.C. knew Benchea kept the blue device in the

safe since she had seen him remove it from his safe before using it on her. He would then wash it and put it back in the safe afterward. The device had a controller on it that Benchea would control causing it to vibrate. A.C. confirmed that she never accessed his safe and she never saw anyone else access his safe. She also explained that Benchea would sometimes "ground" her, but she would get "ungrounded" early by doing him "a favor," which meant being raped or performing fellatio on him.

{¶14} A forensic scientist from the Ohio Bureau of Criminal Identification & Investigation swabbed the blue sex device taken from Benchea's safe. She analyzed the swabs and tested for bodily fluids. Testing confirmed that sperm was present on both swabs. The DNA analyst also testified and confirmed that further tests verified that the sperm located on both ends of this blue device belonged to Benchea. The analyst also stated that only two individual's DNA were identified on the blue device and that the major contributor of the DNA obtained from the "sex end" of the device was consistent with A.C.'s DNA. When questioned about transfer DNA that may occur as a result of an individual touching an item, the analyst explained:

{¶15} "So in this case, [A.C.] is the major contributor to the non-sperm fraction on Item 2.2. * * * There would have to be, in my opinion, a large amount of contact in order for her to be the major contributor to the non-sperm fraction. * * *

{¶16} "Q. * * * would you expect numbers this large if she were to just touch that device with her hand?

{¶17} "A. The amount of contact [from just touching or handling an item] would not leave a significant amount of DNA to compete with the semen present in order to give * * * the amount of DNA that we detected on that item, no."

{¶18} On cross-examination, the DNA analyst was asked:

{¶19} "Q. Without knowing [A.C.'s] mother's DNA profile, she cannot be excluded as a contributor without comparison; would you agree?

{¶20} "A. I don't have her DNA profile to compare to, but based on analyzing the data and having a full inclusion of a particularized individual, I would not expect there to be any other individuals that could [have] contributed to this sample, only because we don't have any unknown DNA present."

{¶21} A.C.'s grandmother, Debra Benchea, testified that she was unaware that her husband had the blue sex device. Debra had never touched it or used it. She does not believe that these allegations against her husband are true.

{¶22} Benchea's timely appeal asserts three assignments of error:

{¶23} "The trial court denied Benchea his Sixth and Fourteenth Amendment rights to expert assistance by denying further DNA analysis and review relative to transfer of DNA.

{¶24} "The trial court entered convictions for life rape without sufficient evidence.

{¶25} "The trial court entered convictions as to all counts against the manifest weight of the evidence."

{¶26} Benchea first challenges the trial court's failure to grant his counsel additional funds to secure expert assistance requested for DNA analysis regarding the transfer of DNA. Benchea claims the trial court denied him the opportunity to conduct further testing of a bag and its contents that were taken from his safe, which included the blue device.

{¶27} "As a matter of due process, indigent defendants are entitled to receive the 'raw materials' and the 'basic tools of an adequate defense * * *.'" *State v. Mason*, 82 Ohio St.3d 144, 149, 694 N.E.2d 932, quoting *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087 (1985).

{¶28} "Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need. Nor does it require the government to provide expert assistance to an indigent criminal defendant upon mere demand of the defendant. * * * [I]n order to establish a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, '"a defendant must show more than a mere possibility of assistance from an expert. Rather, a defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial."' * * * Accordingly, * * * due process * * * requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense *only where* the trial court finds, *in the exercise of a sound discretion*, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." (Emphasis added.) (Citations omitted.) *Id.* at 150.

{¶29} An abuse of discretion connotes that a court's judgment lacks reason or runs contrary to the record. *Ivancic v. Enos*, 11th Dist. Lake No. 2011-L-050, 2012-Ohio-3639, ¶70. When an issue is within the trial court's discretion, the fact that the

reviewing court would decide the issue differently is not enough, standing alone, to find error. *Id*.

{¶30} Benchea initially asked the trial court to award him funds to secure DNA testing. The trial court granted him $1,500 to secure a DNA expert on January 14, 2015. On March 9, 2015, he filed another motion for court ordered DNA testing in order to send "the black plastic bag, evidence inside the plastic bag, and the DVD video that were located in the safe" for DNA testing at the state's expense. Although this motion identified what he wanted tested, it did not state why the testing was warranted or how it would aid his defense. This motion also asked the court to continue the jury trial set for March 30, 2015. Benchea did not explain the basis for this additional DNA testing request. Furthermore, Benchea asked the court in the alternative to continue the trial and permit him to secure further DNA testing at his own expense.

{¶31} The state did not file a response, and the trial court denied the motion. Benchea's jury trial commenced March 30, 2015.

{¶32} He now specifically alleges that the DNA identified by the prosecution as belonging to A.C. on the sex device could have belonged to A.C.'s mother, grandmother or aunt, and not A.C. However, this argument was never raised in his motion pending before the trial court. His motion provided no argument demonstrating need or identifying how the failure to secure additional DNA testing would result in an unfair trial. Thus, Benchea did not demonstrate a particularized need for further DNA testing as required by *State v. Mason*, supra.

{¶33} In addition, Debra Benchea testified that she had never seen the device before. Moreover, Benchea informed the police that he was the only person with

access to his locked safe and that he was the only one who knew about the blue device. A.C. confirmed this in her testimony as well. Further, defense counsel was able to fully cross-examine A.C., her brother, cousin, and aunt and likewise had the opportunity to cross-examine the state's experts regarding their findings. Thus, the trial court acted within its discretion in denying additional funds for an expert because Benchea did not establish or even allege that said funds were necessary to ensure a fair trial. Accordingly, his first assignment of error lacks merit.

{¶34} Benchea's second assignment of error alleges that his convictions for rape were based on insufficient evidence. He does not challenge his convictions for gross sexual imposition. Specifically, he claims the state failed to establish that he raped A.C. via the use of force or under threat of force. He does not challenge the other elements of the offenses, and as such, we only address the issue of force.

{¶35} In reviewing a record for sufficiency of the evidence, "[t]he 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶36} Benchea was charged and convicted of twelve counts of rape of a child less than thirteen years of age and each charge specified that the victim was compelled to submit by force or threat of force. Four of these twelve counts of rape also specified that the victim was less than ten years of age at the time of the offenses.

{¶37} R.C. 2907.02(A)(1)(b) states in part, "No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies: * * * The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶38} R.C. 2971.03(B)(1) states in part,

{¶39} "[I]f a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code * * * , the court shall impose upon the person an indefinite prison term consisting of one of the following:

{¶40} "* * *

{¶41} "(b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.

{¶42} "(c) If the offender purposely compels the victim to submit by force or threat of force * * * , a minimum term of twenty-five years and a maximum of life imprisonment."

{¶43} Benchea asserts that the state failed to establish that he used force to rape A.C. "'Force' means 'any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). Although we agree that there was no evidence of Benchea using physical force to compel A.C. to comply with his directives to perform sex acts, the Ohio Supreme Court has held that "'[f]orce need not be overt and physically brutal, but can be subtle and psychological. *As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.*'" (Emphasis added.) *State v. Daniel*, 9th Dist. Summit No. 19809, 2000 Ohio App. LEXIS 4133, *13 quoting *State v. Eskridge*, 38

Ohio St.3d 56, 58-59, 526 N.E.2d 304 (1988); *State v. Stump*, 4th Dist. Scioto No. 1817, 1990 Ohio App. LEXIS 5942, *7; *State v. Kauffman*, 187 Ohio App.3d 50, 72, 2010-Ohio-1536, 931 N.E.2d 143 (holding in part that the rape of a seven-year-old by a "family friend" did not require evidence of actual physical use of force.)

{¶44} In *Eskridge*, the victim was the four-year-old daughter of the defendant, who was in his custody and care at the time of the offenses. The court of appeals reversed the convictions in part based on the lack of evidence of actual force in the commission of the offenses. The Supreme Court disagreed and held:

{¶45} "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligations of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength." *Id.* at paragraph one of the syllabus.

{¶46} The *Eskridge* court also emphasized the importance of the parent-child relationship and the child being confronted "'with being told to do something by an important figure of authority, and commanded not to tell about it. In such a case, we find nothing unreasonable about a finding that the child's will was overcome. Consequently, the forcible element of rape was properly established.'" (Citations omitted.) *Id.* at 59.

{¶47} Benchea's offenses against A.C. began after she moved in with him and her grandmother as her legal custodians. A.C. was seven when he first sexually abused her, and the abuse progressed thereafter. His abuse continued until she was eleven when she finally told her mother. Benchea was in a position of authority over

A.C. as her grandfather and guardian at the time the abuse began, and he consistently instructed her not to tell others about his actions. She also testified that he would hurt her if she told on him. Thus, like the facts in *Eskridge*, the state established that Benchea's acts in raping A.C. involved compelling her to submit by threat of force based on his position of authority over her and in light of her tender age of seven when these crimes began. A.C's fear coupled with Benchea's position of authority as her father figure was sufficient to establish the forcible element of rape. Accordingly, Benchea's second assigned error lacks merit.

{¶48} His third and final assignment of error asserts that his convictions were against the manifest weight of the evidence. Benchea alleges that the victim's testimony, without corroborating evidence, failed to establish that he raped A.C. We disagree.

{¶49} A claim that a jury verdict is against the manifest weight of the evidence requires the reviewing court to review the entire record, weigh the evidence and all reasonable inferences, and to consider the credibility of witnesses and assess "'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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶50} "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict

and judgment, most favorable to sustaining the verdict and judgment." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3. Furthermore, the jury, as trier of fact, is in the best position to determine whether or not a witness's testimony is credible. *State v. Williams*, 10th Dist. Franklin No. 02AP-35, 2002-Ohio-4503, ¶58. A jury is the sole judge of the credibility of the witnesses and may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶51} "[T]here is no requirement, statutory or otherwise, that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Flowers*, 10th Dist. Franklin No. 99AP-530, 2000 Ohio App. LEXIS 1933 *24 (May 4, 2000). "'[T]he testimony of a rape victim, if believed, is sufficient to support each element of rape.'" *State v. Kring*, 10th Dist. Franklin No. 07AP-610, 2008-Ohio-3290, ¶42, quoting *State v. Reinhardt*, 10th Dist. Franklin No. 04AP-116, 2004-Ohio-6643, at ¶29.

{¶52} Here, A.C. testified and explained that Benchea began touching her privates when she was only seven. She was living with him and her grandmother at the time. She said the touching occurred several times per week. Approximately two years later, Benchea's touching escalated to weekly rapes, which could be vaginal, anal, or both. A.C. also testified that he had her perform fellatio on him on numerous occasions. Benchea would initiate each interaction by asking her for a favor. He concluded each with the statement "promise not to tell." A.C. also explained that she was fearful of Benchea and that she complied with his directives out of fear. These rapes occurred two to three times per week until she was eleven. Thus, A.C.'s testimony alone

supports Benchea's twelve convictions for rape and two counts of gross sexual imposition.

{¶53} Contrary to Benchea's argument, A.C.'s testimony was bolstered by additional evidence. She told the police that Benchea used a blue sexual device on her. The police obtained the device and had it tested. The testing confirmed that Benchea's sperm was on the device as well as A.C.'s DNA. The state's expert witness confirmed that there were only two individual's DNA on the device, Benchea's and A.C's. Furthermore, Benchea stated in his interview that no one else knew about the device or had access to it since he kept the key to the safe in his pocket.

{¶54} Based on the foregoing, this court cannot find that Benchea's convictions are against the manifest weight of the evidence. Benchea's third assignment of error lacks merit.

{¶55} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the court of common pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.