[Cite as *State v. Ingram*, 2017-Ohio-9360.]

wCOURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
CHARLES F. INGRAM	:	Case No. 17 CAA 03 0021
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 16 CR I 09 0427
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 26, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CAROL HAMILTON O'BRIEN Delaware County Prosecuting Attorney	LINDA L. KENDRICK 79 North Sandusky Street Delaware, Ohio 43015
By: CORY J. GOE Assistant Prosecuting Attorney 140 N. Sandusky Street, 3rd Floor Delaware, Ohio 43015	

Baldwin, J.

{¶1} Defendant-appellant Charles F. Ingram appeals his conviction and sentence from the Delaware County Court of Common Pleas for illegal use of a minor in nudity-oriented material or performance, unlawful sexual conduct with a minor, and rape. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 2, 2016, the Delaware County Grand Jury indicted appellant on five counts of rape (Counts 1, 3, 5, 6, 7) in violation of R.C. 2907.02(A)(2), felonies of the first degree, three counts of unlawful sexual conduct with a minor (Counts 2, 4 and 8) in violation of R.C. 2907.04(A), felonies of the third degree, and five counts of illegal use of a minor in nudity-oriented material or performance (Counts 9, 10, 11, 12 and 13) in violation of R.C. 2907.323(A)(1), felonies of the second degree. At his arraignment on September 16, 2016, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, a jury trial commenced on January 24, 2017. At trial, testimony was adduced that on July 18, 2016, the Delaware City Police Department received a call from Nationwide Children's Hospital concerning allegations of sexual abuse. The victim was M.T, who was thirteen years old, and the alleged perpetrator was appellant, who had been the live-in boyfriend of M.T.'s mother. M.T. alleged that appellant had been having inappropriate sexual contact/conduct with her for over a two year period and had taken nude and posed pictures of her. She further alleged that an incident had taken place on July 18, 2016.

{¶4} Testimony was adduced at trial that while appellant admitted to having sexual intercourse with M.T. on July 18, 2016, he denied that he had digitally penetrated her or had oral sex with her.

{¶5} A rape kit was performed on July 18, 2016 on M.T. DNA evidence showed that appellant's semen was found in the area of M.T.'s anus. A forensic analysis of appellant's cell phone was done that yielded numerous photos of the victim.

{¶6} At the conclusion of the State's case, appellant's counsel made a Crim.R. 29 motion for judgment of acquittal. After the State conceded that the motion should be granted as to Counts 4 (unlawful sexual conduct with a minor) and 6 (rape) and dismissed such counts, the trial court denied appellant's motion as to the remaining counts. The jury subsequently found appellant guilty of five counts of illegal use of a minor in nudity-oriented material or performance, one count of unlawful sexual conduct with a minor, and one count of rape. The jury found appellant not guilty of two counts of rape and failed to reach a decision with respect to one of the counts of rape and one of the counts of unlawful sexual conduct with a minor. The trial court declared a mistrial as to such counts.

{¶7} On February 6, 2017, appellant filed a motion pursuant to Crim.R. 29(C) requesting that Counts 2, 5, 7, 9, 11, and 12 be dismissed. Appellee filed a memorandum in opposition to the same on February 16, 2017. As memorialized in a Judgment Entry filed on March 15, 2017, the trial court denied the motion.

{¶8} On March 16, 2017, appellee filed a motion seeking a dismissal of Counts 2 and 7 on the basis that the jury had been unable to reach a verdict on such counts.

{¶9} Via a Judgment Entry filed on March 16, 2017, appellant was sentenced to eleven years in prison on Count 5, sixty months in prison on Count 8, and eight years in

prison on Counts 9 through 13. The trial court ordered that the sentences as to Counts 5, 8, and 9 were to run consecutively to one another and that the sentences as to Counts 10, 11 and 12 were to run concurrently to Count 9 for an aggregate prison sentence of 24 years. While the trial court, at the sentencing hearing, stated that Count 13 also was to be served concurrently to Count 9, for an aggregate prison sentence of 24 years, it did not indicate whether Count 13 was to be served concurrently or consecutively to Count 9 in its March 16, 2017, Judgment Entry.

{¶10} Pursuant to a Judgment Entry filed on March 20, 2017, Counts 2 and 7 were dismissed.

{¶11} A Nunc Pro Tunc Judgment Entry of Prison Sentence was filed on April 25, 2017.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL."

{¶14} 'II. THE TRIAL COURT ERRED WHEN IT OVER RULED (SIC) DEFENDANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29 AS TO COUNTS V. IX, X, CI, XII, AND XIII."

{¶15} "III. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES."

I

{¶16} Appellant, in his first assignment of error, argues that the trial court erred when it denied his Motion for a Mistrial. We disagree.

{¶17} Mistrials need to be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). The standard of review for evaluating a trial court's decision to grant or deny a mistrial is abuse of discretion. *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). An abuse of discretion connotes more than an error of law or judgment. It implies that the trial court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶18} Appellant's request for a mistrial concerned Heather Marie Holden, a defense witness. Holden testified that appellant, who was her ex father-in-law and the grandfather of two of her children, lived next to her and that she had known M.T. since M.T. was four or five years old. According to Holden, appellant and M.T. appeared to love one another. Holden testified that M.T. had borrowed appellant's phone more than once and told Holden that she "has watched enough CSI and Criminal Minds to frame somebody for DNA." Trial Transcript at 465.

{¶19} Holden testified that she had been identified as a witness for the defense when she was contacted by Detective Daniel Madden. The following is an excerpt from her testimony at trial:

{¶20} Q: After you were identified as a witness for the defense, were you contacted by a member of law enforcement?

{¶21} A: I was.

{¶22} Q: What was his name?

{¶23} A: Detective Madden.

{¶24} Q: Did you believe that that call was an attempt to keep you from testifying?

MR. SLEEPER: Objection.

THE COURT: Grounds.

MR. SLEEPER: Calls for speculation and it's irrelevant.

THE COURT: Each ground is overruled.

You may answer.

{¶25} A: Can you repeat that?

{¶26} Q: Do you believe that that call was an attempt to keep you from testifying today?

{¶27} A: I can say that what he had said to me on the telephone had altered my - - I guess, how I felt in different ways about things, yeah.

{¶28} Q: Did it make you feel intimidated?

{¶29} A: A little bit, yeah.

{¶30} Trial Transcript at 466-467.

{¶31} On cross-examination, Holden testified that Detective Madden had called her "a couple of days ago" and that he had shared with her the other evidence in this case, including the DNA results and that appellant had confessed to one of the incidents in his video. Holden, who had approached Detective Madden on July 18, 2016, had not been aware of any DNA evidence at the time.

{¶32} After Holden's testimony, appellant's counsel moved for a mistrial on the basis that Holden "was tampered with. She testified on the record that her opinion of the case was altered after the trial had began by the contact with Officer Madden—or Detective Madden,.." Trial Transcript at 491. In response, appellee's counsel indicated to the trial court that any contact between Holden and Detective Madden had occurred prior

to the commencement of trial. Detective Madden indicated to the trial court that the contact had occurred on Monday, January 23, 2017, the day before trial.

{¶33} As noted by appellee, Detective Madden did not, as alleged by appellant, speak with Holden after trial had commenced but rather spoke with her as a potential witness prior to trial. Moreover, while appellant maintains that Holden's testimony was "altered' by her contact with the Detective, we note that on recross examination, Holden denied ever saying that her conversation with Detective Madden altered how she felt about coming to court.

{¶34} Based on the foregoing, we find that the trial court did not abuse its discretion in denying appellant's request for a mistrial. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶35} Appellant's first assignment of error is, therefore, overruled.

II

{¶36} Appellant, in his second assignment of error, maintains that that trial court erred when it overruled appellant's motion for acquittal as to Counts 5, 9, 10, 11, 12 and 13. We disagree.

{¶37} Crim.R. 29(A) provides a court must order the entry of a judgment of acquittal on a charged offense if the evidence is insufficient to sustain a conviction on the offense. However, "a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman,* 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus. Thus, a motion for acquittal tests the sufficiency of the evidence. *State v. Tatum,* 3rd Dist. Seneca No. 13–10–18, 2011–Ohio–

3005, ¶ 43, citing *State v. Miley,* 114 Ohio App.3d 738, 742, 684 N.E.2d 102 (4th Dist.1996).

{¶38} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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.

{¶39} Appellant initially argues that the trial court erred in denying his motion with respect to Count 5 (rape) in violation of R.C. 2907.02(A)(2). The jury charge described the conduct as being an act of fellatio.

{¶40} R.C. 2907.02(A)(2) provides that "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.01(A) defines "sexual conduct" as including fellatio. The jury charge instructed the jury that fellatio meant a sexual act committed with the penis and the mouth.

{¶41} At trial. M.T. testified that appellant grabbed her hair and "he said, suck my dick. And I kind of tried to pull away, but he pulled me farther down, and he said then just kiss it. So I kissed the tip of his penis." Trial Transcript at 265. She further testified that appellant had grabbed her by the hair "pretty hard" and yanked her head forward with his hand while she was laying down and that she was unable to pull away. Trial Transcript at 267.

{¶42} Moreover, to establish the element of force in a rape case involving a minor child when the offender stands in a position of authority, neither express threat of harm

nor evidence of significant physical restraint need be proven. *State v. Dye,* 82 Ohio St.3d 323, 1998–Ohio–234, 695 N.E.2d 763, syllabus. Instead, it is the position of authority and power, in relationship with the child's vulnerability, that creates a unique situation of dominance and control in which explicit threats and displays of force are unnecessary. *State v. Eskridge*, 38 Ohio St.3d 56, 526 N.E .2d 304 (1988), syllabus one (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 obligation 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 where the parties are more nearly equal in age, size and strength). When rape involves a child and that child's parent, or person who stands in loco parentis, subtle and psychological forms of coercion sufficiently show force. So long as the prosecution establishes that the victim's will was overcome by fear or duress, the forcible element of rape can be established. *Eskridge,* supra at 56, 58–59.

{¶43} In the case sub judice, M.T. testified that she initially thought of appellant, who lived in her house and was her mother's boyfriend, as a father figure and that he bought her clothes and essentials. She testified that she did not fight or scream because she was afraid of what appellant might do. As noted by appellee, it is clear that M.T. was fearful of coming forward and telling others about the incidents.

{¶44} Based on the foregoing, we find that any rational trier of fact could have found that appellant compelled M.T. to perform fellatio on him by force or threat of force.

{¶45} Appellant also argues that the trial court erred in denying his motion for judgment of acquittal with respect to Counts 9 through 13 (illegal use of a minor in nudity-oriented material or performance) in violation of R.C. 2907.323(A)(1).

{¶46} R.C. 2907.323 states, in relevant part, as follows:

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

{¶47} R.C. 2907.01(H) defines "nudity" as: "the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state."

{¶48} Appellant argues, in part, that while at least some of the five photos, which were admitted as exhibits, were located on his phone and taken using his phone, "the only evidence offered that [appellant] actually took the pictures came from M.T. who was known to borrow the phone." Appellant notes that his phone was located in a common area of the house that was accessible to others in the home.

{¶49} However, at trial, M.T. testified that appellant was constantly taking her picture using his phone and sometimes telling her what to do when he was taking the pictures. She further testified that she did not take any of the five pictures. The jury, as trier of fact, was in the best position to assess her credibility and clearly found her testimony credible.

{¶50} Appellant also argues that Exhibits 4, 6 and 7 are pictures of the victim fully clothed and that, at trial, M.T. testified that she was wearing underwear in the pictures. However, at trial, M.T. testified that in the pictures, she was posing and touching herself at appellant's direction. She testified that she was "[t]ouching her underwear" and that appellant took multiple photos. Trial Transcript at 275. The photos focus on M.T.'s pubic area and, as noted by appellant in his February 6, 2017 motion, M.T.'s crotch are was partially exposed.

{¶51} Appellant also argues that Exhibits 4, 6 and 7 were all the same picture. With respect to Exhibits 6 and 7, M.T. testified that the same picture was taken multiple times by appellant. The following testimony was adduced when M.T. was questioned about the pictures:

{¶52} Q: Okay. So those four and those other two pictures there is what you were just describing multiple pictures?

{¶53} A: Yes.

{¶54} Q: And are there differences in those three pictures?

{¶55} A: Number 4 and 7 are the same, and No. 6 looks like he cropped it so the head is cut off.

{¶56} Q: Okay. Now, you said he would tell you how to move; is that what you said?

{¶57} A: Yes.

{¶58} Q: Can you describe that?

{¶59} A: He would tell me how to pose in the picture, and then he would tell me to changes the pose and have a difference picture of the same thing.

{¶60} Q: What type of way would you be told to pose?

{¶61} A: Usually touching myself, my legs spread open, different things.

{¶62} Q: Okay. So you believe those three pictures [4, 6 and 7] were taken at the same time?

{¶63} A: Yes.

{¶64} Trial Transcript at 276-277

{¶65} Moreover, at trial, Detective Madden was questioned about Exhibit 3. He testified that it was a report he created after appellant's phone was forensically analyzed. Detective Madden testified that he found the same image in multiple places on appellant's phone but that they had different dates and times. While some of the photos appeared to be cropped, others "may have been zoomed in and cropped in on a specific portion." Trial Transcript at 220. He further testified that when an image is cropped and saved, "it creates a whole new image, new time stamp, new date stamp, all of that." Trial Transcript at 221.

{¶66} Based on the foregoing, we find that the trial court did not err in overruling appellant's motion for acquittal as to Counts 5, 9, 10, 11, 12 and 13. We find that any rational trier of fact could have found that appellant committed the offenses of illegal use of a minor in nudity-oriented material.

{¶67} Appellant's second assignment of error, is, therefore, overruled.

III

{¶68} Appellant, in his third assignment of error, contends that the trial court erred by imposing consecutive sentences on appellant. Appellant specifically argues that the record does not support the findings made by the trial court in imposing consecutive sentences. We disagree.

{¶69} R.C. 2929.14(C)(4) provides for the imposition of consecutive sentences as follows:

> (A) (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶70} At the March 3, 2017 sentencing hearing, the trial court found that consecutive sentences were necessary to protect and punish and were not disproportionate. The trial court found that the harm caused by appellant's conduct was so great that a single term would not be adequate and that the victim had suffered serious psychological harm. In its Nunc Pro Tunc Judgment Entry, the trial court found that at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶71} At the sentencing hearing, the victim's statement was read to the court. The victim, in her statement, indicated that she had been diagnosed with PTSD and had night terrors. She further indicated that she dug her fingernails into her scalp while sleeping, causing painful sores on her head, and that she had to go to weekly counseling. The

victim, in her statement, also indicated that appellant had stolen her innocence and caused her to become afraid of older men.

{¶72} Based on the foregoing, we find that the trial court did not err in imposing consecutive sentences. We find that the trial court's findings were supported by the record.

{¶73} Appellant's third assignment of error is, therefore, overruled.

{¶74} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Delaney, P.J. and

John Wise, J. concur.