IN THE COURT OF APPEALS OF OHIO

FIFTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 2017CA00005 (C.P.C. No. 13CR-0203)
v.	:	(REGULAR CALENDAR)
Michael T. Brown, Jr.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on

On brief: *John D. Ferrero,* Prosecuting Attorney, and *Renee M. Watson*, for appellee.

On brief: *The Law Offices of Cleveland,* and *W. Scott Ramsey,* for appellant.

APPEAL from the Stark County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Michael T. Brown, Jr., appeals from an order of the Stark County Court of Common Pleas denying his motion for new trial. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed February 12, 2013, plaintiff-appellee, State of Ohio, charged Brown with five counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree; three counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree; one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04, a felony of the third degree; and one count of sexual imposition in violation of R.C. 2907.06(A)(4), a misdemeanor of the third degree. The victims were

six juvenile family members. Following a trial, a jury found Brown guilty of all ten counts. The trial court sentenced Brown to an aggregate prison term of 75 years to life, journalizing his conviction and sentence in a July 26, 2013 judgment entry.

{¶ 3} Brown appealed his conviction and sentence to this court, challenging the sufficiency of the evidence, the imposition of consecutive sentences, and alleging he received ineffective assistance of counsel. This court sustained Brown's assignment of error related to the sufficiency of the evidence, vacating one of Brown's rape convictions, and remanded the case for resentencing. *State v. Brown*, 5th Dist. No. 2013CA00167, 2014-Ohio-2744.

{¶ 4} On remand, in a September 8, 2014 judgment entry, the trial court imposed an aggregate prison term of 60 years to life imprisonment. Brown filed a pro se appeal from the resentencing entry, but this court ultimately dismissed the matter for failure to prosecute. *State v. Brown*, 5th Dist. No. 2014CA00183 (Nov. 7, 2014) (judgment entry).

{¶ 5} More than two years later, on October 11, 2016, Brown filed a motion for leave to file a motion for new trial instanter. Brown claimed in the motion that he had newly discovered evidence, pursuant to Crim.R. 33(A), that he had been unavoidably prevented from discovering at the time of his trial. The alleged newly discovered evidence was the affidavit of Jennifer Akers, Brown's friend. Akers averred she knew all the children involved, as well as Brown's ex-girlfriend and his ex-girlfriend's mother. Akers asserted she had witnessed Brown's ex-girlfriend stating she was going to get Brown in trouble in retaliation for him ending their relationship. Further, she averred she had overheard Brown's ex-girlfriend and her mother coaching the children on how to lie "both in and out of court" about Brown's conduct. (Akers Aff. at ¶ 5.)

{¶ 6} The trial court conducted a hearing on Brown's motion on November 28, 2016. At the hearing, Akers testified she met Brown, his girlfriend Bobbi Rae Butler, and Bobbi Rae's mother, Nadine Butler, through her boyfriend's family. Akers said that Bobbi Rae once told her she was "going to get [Brown] in trouble" if he ended their relationship. (Tr. at 9.) On another occasion, Akers said she was at Nadine's house and she overheard Nadine "trying to teach the kids * * * to basically say that [Brown] touched them." (Tr. at 10.) Akers testified that the children were in the kitchen with Nadine and Akers was in another room during this conversation. Akers said she never told anyone about

overhearing that conversation because she "didn't really think that it was anything serious." (Tr. at 12.)

{¶ 7} Upon further questioning, Akers testified she heard Bobbi Rae and Nadine talk to two of the children, but she admitted she "didn't hear exactly what Nadine said" and only "heard a little bit of what Bobbi Rae said." (Tr. at 24.) Akers said she overheard Bobbi Rae and Nadine telling "K" to say that Brown had touched her and that they then told "M" to say the same thing.

{¶ 8} When asked why she had kept this information to herself until now, Akers said she had been taking care of her ill father in Canton, Ohio, every day during 2012 and 2013. Akers said she never left the house during that time except to go to doctor appointments, she had no contact with friends, had no cell phone, no house phone, and no computer. She testified she did not learn of Brown's indictment and conviction until June 2016.

{¶ 9} In a December 15, 2016 judgment entry, the trial court denied Brown's motion for new trial. The trial court stated that although it granted Brown's motion for leave to file a motion for new trial, it nonetheless denied Brown's motion for new trial because it did not find Aker's affidavit and testimony to be "credible enough to overturn the jury's decision." (Dec. 15, 2016 Entry at 4.) The trial court specifically noted it had conducted its own observations of the children's testimony and their credibility during trial. Brown timely appeals.

II. Assignment of Error

{¶ 10} Brown assigns the following error for our review:

> The trial court improperly denied appellant's motion for new trial.

III. Analysis

{¶ 11} In his sole assignment of error, Brown argues the trial court erred in denying his motion for new trial. An appellate court reviews a trial court's decision granting or denying a Crim.R. 33 motion for new trial for an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990). An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} Brown premised his motion for new trial on newly discovered evidence. Crim.R. 33 provides, in pertinent part:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

{¶ 13} In order to warrant the granting of a motion for new trial in a criminal case based on newly discovered evidence, the defendant must show that the new evidence "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505 (1947), syllabus.

{¶ 14} Brown acknowledges that Akers' affidavit and testimony serves largely to impeach the credibility of witnesses who testified at trial. However, " '*Petro* does not establish a per se rule excluding newly discovered evidence as a basis for a new trial simply because that evidence is in the nature of impeaching or contradicting evidence. The test is whether the newly discovered evidence would create a strong probability of a different result at trial.' " *State v. Meeks*, 5th Dist. No. 2016CA00050, 2016-Ohio-7517, ¶ 53, quoting *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, ¶ 14 (2d Dist.).

{¶ 15} Even if we were to assume that Brown could not have secured the information contained in Akers' affidavit by the exercise of reasonable diligence, the trial court nonetheless concluded Akers' affidavit and testimony did not create a strong probability of a different result at trial. Having reviewed the record as a whole, we agree with the trial court. Akers' testimony at the hearing lacked credibility as she was unable to state specifically the contents of the conversations she alleges she overheard, she admitted she did not come forward with the information sooner because she did not think it was serious, and she provided a suspect account of having no contact with the outside world

for a two-year period. *See State v. Philips*, 10th Dist. No. 14AP-362, 2014-Ohio-4947, ¶ 16 (concluding trial court did not abuse its discretion in denying defendant's motion for new trial where the trial court gave specific reasons it did not find a witness credible).

{¶ 16} Moreover, Akers testified she overheard Bobbi Rae and Nadine "coaching" two of the young children, "K" and "M." The state never charged Brown with any crime related to "K," so any allegation of coaching "K" to lie could not possibly have changed the outcome of trial. As to "M," Akers testified only that she heard Bobbi Rae and Nadine tell "M" to say that Brown touched him. However, "M" testified in great detail about the tactics Brown used to trick him into sexual contact, going far beyond a mere allegation of touching. The trial court noted it had the opportunity to both observe the child witnesses at trial and to scrutinize their videotaped interviews with the forensic interviewers and that the trial court saw nothing that would indicate the children's testimony had been rehearsed or coached. Specifically, the trial court noted the victims appeared nervous and frightened to be seeing Brown again at trial.

{¶ 17} Thus, the trial court articulated detailed, rational bases for concluding Akers' testimony lacked credibility and that Brown's new evidence did not disclose a strong probability of a different result at trial. Having reviewed the record of both the trial and the motion for new trial, we agree with the trial court's conclusions. Accordingly, the trial court did not abuse its discretion in denying Brown's motion for new trial. We overrule Brown's sole assignment of error.

IV. Disposition

{¶ 18} Based on the foregoing reasons, the trial court did not abuse its discretion in denying Brown's motion for new trial. Having overruled Brown's sole assignment of error, we affirm the judgment of the Stark County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.