[Cite as *State v. Woodruff*, 2015-Ohio-2422.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-140256 C-140257
Plaintiff-Appellee,	:	TRIAL NOS. B-1107151 B-1201699
vs.	:	
		O P I N I O N.
DONALD WOODRUFF,	:	
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: June 19, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Melynda J. Machol*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Schuh & Goldberg, LLP., and *Brian T. Goldberg*, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} Donald Woodruff was found guilty of gross sexual imposition, illegal use of a minor in nudity-oriented material and pandering sexually-oriented material involving a minor. The trial court imposed consecutive sentences of imprisonment totaling 38 years.

{¶2} Mr. Woodruff advances the following arguments in this appeal: (1) the trial court erred by failing to sever the charges against him and order separate trials, (2) the court improperly prevented him from questioning the two young victims about an earlier purportedly false allegation of sexual abuse, (3) the court erred in allowing the victims' interviews with social workers to be played in their entirety, (4) the court improperly allowed the introduction of irrelevant and prejudicial photographs, (5) his convictions were based on insufficient evidence and against the weight of the evidence and (6) the court improperly imposed consecutive sentences.

{¶3} We agree that the court erred by imposing consecutive sentences without first having made the requisite findings on the record and without incorporating its findings into its sentencing entry. In all other respects, we affirm the judgment of the trial court.

I. Background

{¶4} In 2010, Mr. Woodruff began a romantic relationship with Angel. Angel was the mother of two daughters, B.W., age ten, and K.C., age eight. In November, Angel and the girls moved in with Woodruff. A month later, Angel and the girls moved to a separate apartment upstairs from Woodruff. Mr. Woodruff took care of the girls while Angel worked. In July 2011, K.C. told her grandmother and then her mother that she had been sexually abused by Woodruff. As a result of the allegation, Angel took K.C.

to Cincinnati Children's Hospital. Medical personnel there recommended that Angel take both girls to the Mayerson Center.

{¶5} B.W. told Mayerson social workers about a single incident in which Woodruff had pushed her down on a bed and touched her over her clothes on her breast, bottom and vagina. K.C. reported three encounters with Woodruff. In one incident, Mr. Woodruff showed K.C. photographs of women and girls and a picture of the cartoon character Inspector Gadget having intercourse with his niece Penny. According to K.C., after Woodruff had shown her the photographs, they lay in bed together naked. Mr. Woodruff then raped her vaginally, orally and anally. K.C. told the social worker about other incidents, including one in which she awoke from a nap to find Woodruff "nibbling" her private areas and one in which she was made to touch Woodruff's penis while they were in the shower together. Mr. Woodruff was later charged with three counts of rape of K.C., one count of gross sexual imposition ("GSI") involving K.C. and one count of GSI involving B.W.

{¶6} Based on the girls' allegations, Cincinnati police executed a search warrant at Woodruff's apartment. They removed a computer, external hard drive and Xbox game system, which were turned over to John Ruebusch, an investigator for the Hamilton County Sheriff Department's Regional Electronic Computer Investigation Section. Mr. Ruebusch recovered many photograph files from the hard drive and computer, including three that were the bases of charges for the illegal use of a minor in nudity-oriented material and one that was the basis of a charge for pandering sexually-oriented material. Upon the state's motion, the case involving the rape and gross-sexual-imposition charges was joined with the case involving the photographs. Woodruff's motion to sever the counts was denied.

{¶7} The case was tried to a jury. Before the trial started, the state made a motion in limine to prevent defense counsel from questioning K.C. and B.W. about what defense counsel characterized as a prior false allegation of abuse by K.C.'s father. The court held a hearing on the motion, during which it considered the investigation of an anonymous call that alleged K.C.'s father had touched the girls inappropriately. In the reports, both girls denied the allegations. Concluding that there had been no prior false allegation, the court ruled that defense counsel could not cross-examine the girls about the issue.

{¶8} At trial, the girls each testified about the incidents involving Woodruff. The state also called Andrea Powers, a social worker from Mayerson, who had interviewed the children. Over Woodruff's objection, videos of the girls' interviews at Mayerson were played in their entirety. Dr. Kathi Makoroff, a child-abuse pediatrician at Mayerson, testified about her physical examination of K.C. Because Woodruff had allegedly touched B.W. over her clothes, she was not physically examined for injuries. Mr. Ruebusch talked about his investigation of Woodruff's computer, external hard drive and game system. In the course of his testimony, a report that included over 60 images of nude women and girls, including the four that were the subject of charges against Woodruff, was admitted into evidence over the defense's objection.

{¶9} Mr. Woodruff testified on his own behalf. He stated that he did not possess child pornography and that several people had had access to his computer, which was not password-protected and was kept in an unlocked room. Mr. Woodruff also disputed K.C.'s story that he had "nibbled" her, maintaining that he had had 17 teeth removed earlier that summer.

{¶10} At the conclusion of the trial, the jury found Woodruff not guilty of two counts of rape and guilty of two counts of GSI, three counts of illegal use of a minor in

nudity-oriented material and one count of pandering sexually-oriented material. The jury was unable to reach a verdict on the third rape count, which was later dismissed. The court imposed consecutive sentences, for an aggregate term of 38 years.

II. Joinder

{¶11} Mr. Woodruff asserts in his first assignment of error that the court erred when it denied his motion to sever. He argues that the counts against each victim should have been severed, and that the rape and GSI counts should have been severed from the counts involving the photographs. He maintains that he was unduly prejudiced by the joinder.

{¶12} Joinder of multiple offenses is favored in the law. *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). But under Crim.R. 14, the court may grant severance if the defendant demonstrates that he will be prejudiced by joinder of the offenses. *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980). The defendant's claim of prejudice can be negated by the state by a showing either "(1) that the evidence for each count will be admissible in a trial of the other counts under Evid.R. 404(B), or (2) that the evidence for each count is sufficiently separate and distinct so as not to lead the jury into treating it as evidence of another." *State v. Bennie*, 1st Dist. Hamilton No. C-020497, 2004-Ohio-1264, ¶ 20. We review the court's denial of Woodruff's motion for an abuse of discretion. *Id.* at ¶ 22.

{¶13} The evidence concerning the rape and GSI counts would not have been admissible on the child-pornography counts, so our focus is on the second part of the test. Mr. Woodruff argues that the nature of the alleged crimes—sex offenses against children—would elicit emotional outrage with the jury such that he would be prejudiced by the joinder of the offenses. He cites in support *State v. Frazier*, 8th Dist. Cuyahoga No. 83024, 2004-Ohio-1121, in which the court considered "the

highly inflammatory nature" of sexually-related offenses when determining whether offenses against two victims were "separate and distinct":

> [Given the highly inflammatory nature of the offenses], combined with the fact that the offenses against each victim varied in degree and that the testimony by each victim was similar, the fact-finder would have had a very difficult time looking at the evidence supporting each offense as simple and distinct because the temptation would be too great to respond to the evidence emotionally rather than rationally.

Id. at ¶ 18.

{¶14} We find the logic of *Frazier* to be flawed, and decline to follow it. As we understand the second part of the joinder test, the focus is not on the emotional impact of the evidence but on the potential for juror confusion. We cannot presume that just because evidence may garner a strong emotional response that jurors are incapable of segregating the evidence in their minds. To accept the logic of *Frazier* would mean that sex counts could rarely be joined, because the evidence will often be inflammatory. Instead we believe the same rules on joinder should apply in sex cases as in any other case.

{¶15} Applying the traditional standard, Mr. Woodruff was not prejudiced by joinder because the evidence of each offense was separate and distinct. B.W. testified about one discrete incident with Woodruff, while K.C. was able to describe at least three incidents. The girls were very clear about where the incidents had occurred and what Woodruff had done. The evidence of the offenses involving the four photographs was likewise separate and uncomplicated. The jury could segregate proof for each offense. Further, the court instructed the jury to consider

each count separately. The court did not abuse its discretion in denying Woodruff's motion for severance. The first assignment of error is overruled.

III. Specific Instances of Conduct to Challenge Credibility

{¶16} In his second assignment of error, Mr. Woodruff asserts that the court erred when it refused to allow him to cross-examine K.C. and B.W. about a prior allegation of abuse that they had supposedly made against K.C.'s father. Mr. Woodruff frames this as an issue under the "rape-shield statute," which prohibits the admission of evidence of a rape victim's prior sexual activity. *See* R.C. 2907.02(D). But we fail to see how the rape-shield statute is implicated. Rather, the issue is more properly addressed under Evid.R. 608(B), which allows for cross-examination of a witness about specific instances of prior conduct to challenge her credibility. It is within the court's discretion to allow such questioning if the court determines it to be probative of truthfulness. Evid.R. 608(B).

{¶17} Mr. Woodruff sought to question the girls about a 2007 investigation that was opened by the Hamilton County Department of Job and Family Services based on an anonymous tip. According to the reports of the investigation, the girls denied that they had made the allegations, and the reports of abuse on the part of K.C.'s father were unsubstantiated. In granting the state's motion in limine, the court stated, "So based on what I see here, I don't see that there were prior false allegations of rape against their father [sic]. * * * So I'm not going to permit you to ask the question." The court agreed that defense counsel could proffer a question about the allegation "at the appropriate time." No proffer was made, so Woodruff did not preserve the issue for appeal. *See State v. Grubb*, 28 Ohio St.3d 199, 503 N.E.2d 142 (1996), paragraph two of the syllabus.

{¶18} Even if Woodruff had preserved the issue, the assignment of error would not be successful. The court did not abuse its discretion in not allowing the line of questioning after it had determined that the girls had not made false allegations. The second assignment of error is overruled.

IV. Admissibility of the Mayerson Interviews

{¶19} Woodruff's third assignment of error is that the court erred when it allowed the girls' interviews with the Mayerson social workers to be played in their entirety. He argues that his rights under the Confrontation Clause of the United States and Ohio Constitutions were violated because the girls' statements during the interviews were testimonial. We need not determine whether the statements were testimonial. The Confrontation Clause prohibits the admission of testimonial statements of a witness who does not testify at trial, unless the witness is unavailable for trial and the defendant had had a prior opportunity to cross-examine her. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2007). But "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements." *Id.* at 59. Because both girls testified and were cross-examined by Woodruff, his confrontation rights were not violated.

{¶20} In addition to his confrontation argument, Mr. Woodruff maintains that B.W.'s interview should not have been admitted because it was not made for the purposes of medical diagnosis or treatment. While not spelled out in his brief, Woodruff appears to be arguing that B.W.'s statements were inadmissible hearsay. Evid.R. 803(4) allows for the admission of hearsay statements made for purposes of medical diagnosis or treatment. To evaluate whether a child's statement was made for purposes of medical diagnosis or treatment, we consider

> (1) whether the child was questioned in a leading or suggestive manner; (2) whether a motive to fabricate existed, such as a custody battle; (3) whether the child understood the need to tell the medical personnel the truth; (4) the child's age; and (5) the consistency of the child's declarations.

State v. Lukacs, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶ 7 (1st Dist.). Applying these factors, our court has held that interviews with Mayerson social workers are admissible under Evid.R. 803(4). *See State v. Jillson*, 1st Dist. Hamilton No. C-110430, 2012-Ohio-1034.

{¶21} Mr. Woodruff argues that B.W.'s statements, which were made many months after the alleged incident, could not have been made for medical purposes. But application of the factors listed in *Lukacs* leads us to conclude otherwise. B.W. was not questioned in a suggestive way, and there appeared to be no motive to lie to the social worker about the incident. B.W., who was nearly 11 years old when she was interviewed, was unwavering in her story. She had reported the incident to her mother months earlier, and the story she told the social worker was consistent with her testimony at trial. The fact that the interview came some months after the sexual abuse matters little. The passage of time does not by itself make treatment for sexual abuse any less necessary or appropriate. The court did not err when it allowed the interviews to be played for the jury. The third assignment of error is overruled.

V. Admission of the Photographs was Not an Abuse of Discretion

{¶22} Mr. Woodruff's fourth assignment of error is that the court erred when it admitted the forensic report that contained over 60 sexually-explicit images of women, girls and cartoon figures. He argues that other than the four images that were the bases of the charges against him, the images were irrelevant and prejudicial.

{¶23} The report included an image of Inspector Gadget's niece Penny, which was relevant because it corroborated K.C.'s testimony that Woodruff had shown her a picture of the cartoon character during one of the incidents. Other images from the report were also relevant. Part of Woodruff's defense was that he did not possess child pornography and that other people could have accessed his computer. But the discovery of multiple images on Woodruff's computer in a subfolder named "Donald" weakened this defense. While 60 images may not have been necessary to make the point, we cannot say that the court abused its discretion in allowing the full report. The fourth assignment of error is overruled.

VI. Sufficiency and Manifest Weight of the Evidence

{¶24} The fifth assignment of error is that the convictions were based on insufficient evidence and were against the weight of the evidence.

{¶25} Mr. Woodruff argues that the GSI convictions were based on inconsistent stories told by K.C. and B.W. with no physical evidence as support. But the state adduced substantial, credible evidence from which the jury could reasonably have concluded that the state had proved beyond a reasonable doubt that Woodruff had sexual contact with the girls who were both under the age of 13. *See* R.C. 2907.05(A)(4). *See also State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The jury was in the best position to determine whether the girls were credible. And as explained by Dr. Makoroff, the lack of physical evidence was consistent with the girls' testimony. We are not persuaded that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the convictions for GSI and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997).

{¶26} Woodruff's challenge with respect to the convictions for illegal use of a minor in nudity-oriented material is two-pronged. First, he contends that the state did not establish that he had put the images on his computer. But the state presented substantial circumstantial evidence that he had downloaded the images to his computer. The computer was in his room, and the images were in a folder named "Donald." Mr. Ruebusch stated that some images were accessed in the very early morning hours when it was unlikely that another person would have gone unnoticed downloading the images. Further, K.C. testified that he had shown her an image that was similar to what was found on the computer.

{¶27} Mr. Woodruff next argues that even if he had put them on the computer, the images do not constitute a crime. Specifically, he argues that under *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988), the pictures are not illegal because they do not constitute a lewd exhibition or involve a graphic focus on the genitals.

{¶28} Mr. Woodruff was charged with a violation of R.C. 2907.323(A)(1), which makes it a crime to "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 certain exceptions apply. In *Young*, the Supreme Court dealt with another subsection of the same statute, R.C. 2907.323(A)(3). In construing that subsection, the court held that in order to avoid First Amendment problems nudity, as used in R.C. 2907.323(A)(3), means "a lewd exhibition or involves a graphic focus on the genitals." As pointed out by the state, there is conflict among other appellate districts about whether the definition of nudity for the (A)(3) offense applies to the (A)(1) offense at issue in this case. *See State v. Martin*, 141 Ohio St.3d 1452, 2015-Ohio-239, 23 N.E.2d 1194 (determining a conflict exists between the Second and Fourth Appellate Districts).

{¶29} But all this is a red herring; it is a question we need not answer. Here, the jury in its instructions was provided the definition of nudity set forth in *Young*. In finding the defendant guilty, the jury necessarily found that the pictures constituted a lewd exhibition or involved a graphic focus on the genitals. And upon our review of the record, we conclude the jury's finding was not against the weight of the evidence. *See Thompkins*, 78 Ohio St.3d at 386-387, 678 N.E.2d 541.

{¶30} Finally, Mr. Woodruff contends that his conviction for pandering sexually-oriented material was not based on sufficient evidence because, even if he downloaded the images, downloading did not constitute reproduction. It is settled, however, that "[t]he state can prove that an offender reproduced such material by presenting evidence that the offender downloaded images from the Internet onto the hard drive." *State v. Kraft*, 1st Dist. Hamilton No. C-060238, 2007-Ohio-2247, ¶ 92. That is precisely what happened in this case. The fifth assignment of error is overruled.

VII. The Court Failed to Make Consecutive-Sentence Findings

{¶31} Woodruff's final assignment of error is that the court erred when it imposed consecutive sentences without first having made the requisite findings on the record and incorporating them into its sentencing entry. The state does not challenge this assertion. Because the court did not make the findings on the record and incorporate them into its sentencing entry, we must vacate the imposition of consecutive sentences and remand the case so that the court may resentence Woodruff in accordance with *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The final assignment of error is sustained.

VIII. Conclusion

{¶32} We therefore vacate the imposition of the consecutive sentences and remand the case for resentencing. In all other respects, the judgment of the trial court is affirmed.

Judgment accordingly.

CUNNINGHAM, P.J., and **MOCK, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.