[Cite as *State v. Hill*, 2011-Ohio-1154.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. JAMES O. HILL Appellant	C.A. No. 09CA009709 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CR074407

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

MOORE, Judge.

{¶1} Appellant, James Hill, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 17, 2007, the Lorain County Grand Jury indicted Hill on one count of sexual battery in violation of R.C. 2907.03(A)(2), a felony of the third degree. From August 14, 2009, through August 15, 2009, the case was tried to the court. On October 16, 2009, the trial judge entered a finding of guilty and sentenced Hill to two years of incarceration that was to run concurrently with the sentence on an unrelated charge.

{¶3} Hill timely filed a notice of appeal. He raises four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE SEXUAL BATTERY STATUTE, R.C. 2907.03(A)(2) IS AN OVERLY BROAD STATUTE, AND THEREFORE, UNCONSTITUTIONAL."

{¶4} In his first assignment of error, Hill contends that the sexual battery statute is unconstitutional because it is overly broad. Hill did not raise this issue in the trial court. Because Hill forfeited this issue and does not argue plain error, we do not address the merits of his first assignment of error.

{¶5} Failure to raise the constitutionality of a statute when the issue is apparent in the trial court "constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore [the issue] need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11. Because Hill forfeited this issue on appeal and has not raised a claim of plain error, we must conclude that his first assignment of error lacks merit. Hill's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"[HILL] WAS NOT PROPERLY NOTIFIED OF HIS REGISTRATION DUTIES AS A TIER III SEX OFFENDER."

{¶6} In Hill's second assignment of error, he contends that the trial court did not properly notify him of his registration duties as a Tier III sex offender should he become homeless, thereby rendering his judgment entry void. We do not agree.

{¶7} R.C. 2950.03(A) provides that sexually-oriented offenders classified under the Adam Walsh Act and obligated to register pursuant to R.C. 2950.04:

> "shall be provided notice in accordance with this section of the offender's * * * duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and of the offender's duties to similarly register, provide notice of a change, and verify addresses in another state if the offender resides, is temporarily domiciled, attends a school or institution of higher education, or is employed in a state other than this state."

{¶8} R.C. 2950.05 describes the proper registration procedure for individuals who temporarily do not have a fixed address. R.C. 2950.05(A).

{¶9} The transcript of Hill's sentencing hearing indicates that the court notified him of his duty upon release from prison to register with the sheriff of the county in which he established residency. As in *State v. Calhoun*, 9th Dist. No. 09CA009701, 2011-Ohio-769, the court further notified him, pursuant to RC. 2950.03(A), of his "duties to register in any county where he intended to work or attend school, to register in other states if he left Ohio, to periodically verify his initial registration, and to notify the sheriff of any changes in residency, employment, or educational institution." Id. at ¶18. The transcript of the sentencing hearing contains that following statement from Hill's trial counsel: "Your Honor, if it please the Court, the record should reflect that Mr. Hill has acknowledged that the Court has read to him the required registration requirements and acknowledged it by placing his signature on the appropriate documents." Moreover, that document included the explanation that "[i]f the residence address change is not to a fixed address, you shall include a detailed description of the place or places you intend to stay * * *." Hill did, in fact, sign the document acknowledging that the registration requirements were explained to him. Further, Hill did not direct this Court to any authority that suggests the trial court's oral and written notification was insufficient to inform him of his duties. App.R. 16(A)(7). We also note that this Court previously approved such a procedure in *State v. Calhoun*. *Calhoun* at ¶16-19. Accordingly, Hill was notified of his

registration duties should he become homeless upon his release from prison. Hill's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT [HILL'S] CONVICTIONS OF SEXUAL BATTERY."

ASSIGNMENT OF ERROR IV

> "[HILL'S] CONVICTION FOR SEXUAL BATTERY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 3, OF THE OHIO CONSTITUTION."

{¶10} In his third and fourth assignments of error, Hill contends that his conviction was supported by insufficient evidence and against the manifest weight of the evidence. Because his sufficiency argument focuses on the witnesses' credibility and conflicting statements, however, we address the assignments of error together as a challenge to the manifest weight of the evidence. We do not agree that Hill's conviction is against the manifest weight of the evidence.

{¶11} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest[-]weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶12} A determination of whether a conviction is against the manifest weight of the evidence does not permit this court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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 conviction must be

> reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶13} In support of his contention, Hill points to conflicting testimony regarding the number of bars the group, of which Hill and Woods were a part, visited, the amount of drugs and alcohol Woods ingested that night, the manner in which Woods reached the couch on which she slept, and the location of her shoes.

{¶14} R.C. 2907.03(A)(2) provides that: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: * * * [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired." "Sexual conduct" includes vaginal intercourse between a male and a female. R.C. 2907.01(A).

{¶15} Woods testified that at the time of the offense, she had recently learned that Hill is her cousin. She testified that she, Hill, several other cousins and friends, including Charles Wilson, and her boyfriend, John Carter, all spent time together on the night of June 8, 2007. Early in the morning of June 9, the group went to a bar known at the time as The Office. She stated that they also went to a second bar, which she did not name. Woods, who is five-feet-eight-inches tall and weighs only 125 pounds, testified that she consumed two drinks that night, although she stated that she gave Carter half of the second shot of alcohol. As a result, she testified that she had a headache, but otherwise was not affected. On cross-examination she testified that after the group returned to Hill's home she also shared a marijuana blunt with several other members of the group. She admitted that she was familiar with marijuana and agreed that she was not excessively high after smoking. Because she had a headache, Hill gave

her two aspirins and some Kool-Aid. As the group rapped, played video games, listened to music and danced, Woods fell asleep on a sofa in the room. The next morning, Woods awoke and noticed that her shoes had been placed in front of the couch. She and Carter walked to her cousin, Kelly Hunt's, house. Woods felt "weird" on the way to Hunt's house. She used the bathroom at the house and discovered that "[her] underwear were gone and [her] pad was placed inside [her] pants." It had migrated from its original location in her underwear to the leg of her jeans. Woods then went to her mother's house where they called an ambulance that transported her to the Nord Center where a rape kit was completed.

{¶16} Carter testified that the group only went to one bar that night, The Office. He testified that he saw Woods consume a couple of mixed drinks and a shot of 151-proof rum. He described her as "[b]uzzed, looking tired and stuff." He stated that when the group returned to Hill's home she shared part of two marijuana blunts with three other people, including him. When she fell asleep, he helped her up the stairs and laid her down on a sofa in Hill's nephew's room. He believed that Hill was in the bathroom next to this room. He testified that he checked on her approximately 15 minutes later and her shoes had been removed and placed by the door.

{¶17} Detective Mark Carpentiere of the Lorain Police Department testified that on June 12, 2007, he interviewed Hill at the police station. During the interview, Hill admitted that on June 9, 2007, he and Woods engaged in consensual sex.

{¶18} Hill's nephew, Charles Wilson, who was part of the group on June 9, testified that Woods walked up the stairs on her own, knocked on the bathroom door and went inside. Wilson testified that Woods then pulled Hill out of the bathroom and into Wilson's room.

{¶19} The State then called Detective Carpentiere as a rebuttal witness. He testified that at the time he interviewed Wilson, Wilson said he saw Carter carry Woods upstairs.

{¶20} As Hill contends on appeal, the trial court was faced with discrepancies about the number of bars the group visited, the amount of alcohol and drugs Woods consumed, how she arrived in Wilson's room, the location of her shoes after she was taken upstairs and whether she approached Hill in the bathroom at his home. These discrepancies, however, created questions of fact for the trial court to resolve based upon the credibility of the witnesses. "The weight to be given the evidence and the credibility of the witness[es] are primarily for the trier of the facts." *State v. Jackson* (1993), 86 Ohio App.3d 29, 32, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 363. Accordingly, we cannot say that Hill's convictions created a manifest miscarriage of justice that must be reversed. *Otten,* 33 Ohio App.3d at 340. Hill's third and fourth assignments of error are overruled.

III.

{¶21} Hill's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

ERIN A. DOWNS, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and RICHARD A. GRONSKY, Assistant Prosecuting Attorney, for Appellee.