[Cite as *State v. Hosey*, 2024-Ohio-7.]

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

STATE OF OHIO Appellee v. DAVID HOSEY Appellant	C.A. No. 30696 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 22 07 2579

DECISION AND JOURNAL ENTRY

Dated: January 3, 2024

FLAGG LANZINGER, Judge.

{¶1} David Hosey appeals his convictions from the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} A grand jury indicted Hosey on two counts of attempted rape in violation of R.C. 2923.02 and R.C. 2907.02(A)(2), and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1). Hosey pleaded not guilty. The matter proceeded to a jury trial wherein the following evidence was adduced.

{¶3} The evidence presented at trial indicated that B.S. was 14 years old at the time of the incident and that he lived within walking distance of Hosey. Hosey, an adult, lived in a house with his mother. B.S. had known Hosey for about a year at the time of the incident. B.S. would sometimes cut Hosey's mother's grass to earn money.

{¶4} On May 10, 2022, B.S. cut Hosey's mother's grass in the late afternoon. According to B.S., Hosey slapped him on the back of the head while he was cutting the grass. After B.S. finished cutting the grass, he and Hosey went for a walk. During the walk, B.S. and Hosey stopped at a construction site. While there, B.S. ran up a dirt hill a few times, fell down, and Hosey helped him back up. B.S. testified that Hosey slapped him on the buttocks at some point during the walk.

{¶5} After spending time at the construction site, B.S. and Hosey walked to an abandoned middle school as it began to get dark outside. Hosey then told B.S. that he wanted to show him something, so the two entered the abandoned middle school and walked around the inside of the dark building. B.S. and Hosey eventually walked to the gym and sat on a bench.

{¶6} While in the gym, B.S. asked Hosey if he would be paid for cutting Hosey's mother's grass. Hosey responded by asking B.S. whether he wanted to make more money. B.S. testified that Hosey grabbed him by the hair and waist, told him not to tell anyone, pushed him against the bench, and pulled B.S.'s pants and underwear down, all while B.S. resisted and tried to leave. Hosey then tried to force his penis into B.S.'s anus. B.S. testified that Hosey's penis touched his anus but did not penetrate it. B.S. pushed Hosey, who then grabbed B.S. again and pushed B.S.'s face toward his penis. B.S. testified that Hosey's penis touched his eyes, cheeks, and lips, but did not enter his mouth. B.S. then managed to get away from Hosey. B.S. used his cell phone flashlight to navigate his way through the dark gym, but his cell phone eventually ran out of battery. Before he exited the gym, B.S. turned toward Hosey and saw Hosey ejaculate.

{¶7} B.S. then ran to a nearby friend's house and banged on the front door. B.S.'s friend, Z.P., and his friend's grandmother opened the door. According to Z.P., B.S. was screaming and crying and told them that someone had tried to force him to do things he did not want to do. According to Z.P.'s grandmother, B.S. arrived at her house "crying and upset" and saying that "a

guy tried to rape him." Z.P. later told the police that he was not sure whether to believe B.S. at first because B.S. had lied about "little things" in the past. Z.P. testified that he believed B.S., however, because B.S. would never lie about anything "major" like this. Z.P. and B.S. started to walk back toward the abandoned middle school where they saw Hosey pulling up his pants. Z.P. then returned home and B.S. ran home and told his parents, who called the police.

{¶8} The police arrived and EMS transported B.S. to Akron Children's Hospital, where he was evaluated. A detective who later interviewed Hosey testified that Hosey admitted to going to the construction site and the abandoned middle school with B.S., and that Hosey was cooperative with the investigation.

{¶9} While at the hospital, a social worker interviewed B.S., a sexual assault nurse examiner ("SANE") collected a rape kit, and a physician examined B.S. The SANE nurse testified that B.S. stated that Hosey hit him on the buttocks and on the back of the head, which caused a lump. The physical examination, however, did not reveal a lump on B.S.'s head. The physical examination did not otherwise reveal any injuries, which the SANE nurse testified is not uncommon, especially since there was no allegation of penetration. As part of her evaluation, the SANE nurse swabbed B.S.'s body and collected his clothing, including B.S.'s underwear, which was sent to the Bureau of Criminal Investigation ("BCI") for forensic testing.

{¶10} A forensic scientist with the BCI who specializes in DNA testified that the crotch panel of B.S.'s underwear tested positive for DNA consistent with two major contributors: B.S. and Hosey. The crotch panel of B.S.'s underwear also testified positive for a third contributor, but it was a minor contributor that was not interpretable given the "very, very small amount" of that DNA present. The forensic scientist explained that the presence of small amounts of foreign DNA is not uncommon on underwear because someone else could have handled the underwear during

the laundry process. The forensic scientist also testified that, while B.S.'s underwear tested positive for Hosey's DNA, he was unable to determine the source of Hosey's DNA (e.g., from Hosey's semen, skin cells, saliva, etc.).

{¶11} After the State presented its evidence, Hosey moved for acquittal under Crim.R. 29, which the trial court denied. Hosey presented no evidence. The jury ultimately found Hosey guilty of all three counts. The State stipulated that the count for gross sexual imposition merged with one of the counts for attempted rape, and the trial court sentenced Hosey accordingly. Hosey now appeals, raising three assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT VIOLATED MR. HOSEY'S RIGHTS TO DUE PROCESS AND FAIR TRIAL WHEN IT OVERRULED HIS JUDGMENT FOR ACQUITTAL UNDER CRIMINAL RULE 29.

{¶12} In his first assignment of error, Hosey argues that the trial court erred when it denied his motion for acquittal under Crim.R. 29. This Court disagrees.

{¶13} This Court reviews the denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence. *State v. Frashuer*, 9th Dist. Summit No. 24769, 2010-Ohio-634, ¶ 33.

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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 (1991), paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶14} As noted, the jury found Hosey guilty of two counts of attempted rape in violation of R.C. 2923.02 and R.C. 2907.02(A)(2), and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1). One count of attempted rape related to Hosey's attempt to force his penis into B.S.'s anus. The other count of attempted rape related to Hosey's attempt to force his penis into B.S.'s mouth. The count for gross sexual imposition related to Hosey forcibly touching B.S.'s buttocks with his penis.

{¶15} R.C. 2907.02(A)(2) governs forcible rape and provides that "[n]o 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. 2907.02(A)(2). "Sexual conduct" is defined, in part, as anal intercourse and fellatio between persons, regardless of sex. R.C. 2907.01(A). "A person acts purposely when it is the person's specific intention to cause a certain result * * * ." R.C. 2901.22(A). "'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).

{¶16} R.C. 2923.02 governs attempt and provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶17} R.C. 2907.05(A)(1) governs gross sexual imposition and provides that "[n]o person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force." R.C. 2907.05(A)(1). "'Sexual contact' means any touching of an erogenous zone of another, including [the] buttock, * * * for the purpose of

sexually arousing or gratifying either person." R.C. 2907.01(B). "The force element needed to prove the offense of gross sexual imposition is the same as it is for rape." *State v. Torres*, 4th Dist. Scioto No. 21CA3951, 2023-Ohio-1406, ¶ 47, quoting *State v. Biggs*, 5th Dist. Delaware No. 21 CAA 09 0048, 2022-Ohio-2481, ¶ 16.

{¶18} Hosey argues that the evidence was legally insufficient to sustain his convictions because the witnesses provided conflicting testimony. Hosey also argues that the evidence was legally insufficient because there was a lack of DNA evidence to corroborate B.S.'s version of the events. This Court will address each argument in turn.

{¶19} Regarding the conflicting testimony, Hosey points to: (1) the fact that B.S. did not identify him by name at the time of the offense despite having known each other for about one year; (2) discrepancies in B.S.'s timeline of events; and (3) discrepancies in B.S.'s testimony regarding whether Hosey hit him on the head and/or buttocks. Hosey also argues that the evidence indicated that B.S. is a "known liar[,]" yet omits the fact that Z.P. testified that B.S. only lied about "little things" in the past and would never lie about anything "major" like this.

{¶20} Regarding the lack of DNA evidence, Hosey argues that–despite B.S. testifying that Hosey touched B.S. with his penis on B.S.'s anus, eyes, cheeks, and lips–the swabs taken on B.S.'s body did not contain Hosey's DNA. Hosey also argues that the DNA present on B.S.'s underwear "is easily explained by 'DNA transfer,'" given that the evidence indicated that Hosey helped B.S. up after B.S. fell while running at the construction site.

{¶21} Hosey's arguments lack merit. Initially, this Court notes that any argument regarding the alleged inconsistencies in B.S.'s testimony relates to B.S.'s credibility as a witness, which sounds in weight, not sufficiency. *State v. McCain*, 9th Dist. Medina No. 18CA0108-M, 2019-Ohio-4392, ¶ 12 ("[A] challenge to credibility sounds in weight, not sufficiency * * *.").

Here, B.S. testified that Hosey forcibly tried to insert his penis into B.S.'s anus and mouth while B.S. resisted. B.S. also testified that he saw Hosey ejaculate as B.S. was leaving the gym. This evidence, if believed, was sufficient to support Hosey's convictions, even without further corroboration. *State v. Schultz*, 9th Dist. Summit No. 30407, 2023-Ohio-4228, ¶ 13, quoting *State v. Rivera*, 9th Dist. Lorain No. 22CA011875, 2023-Ohio-1788, ¶ 22 ("In sex offense cases, this Court has held that the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration."). While corroboration of B.S.'s testimony is not necessary under a sufficiency analysis, the State also presented evidence indicating that the crotch panel of B.S.'s underwear tested positive for Hosey's DNA. Viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of attempted rape and gross sexual imposition proven beyond a reasonable doubt. Accordingly, Hosey's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> MR. HOSEY'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶22} In his second assignment of error, Hosey argues that his convictions were against the manifest weight of the evidence. This Court disagrees.

{¶23} When considering whether a conviction is against the manifest weight of the evidence, this 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). A reversal on this basis is reserved for the exceptional case in which the evidence weighs heavily against the conviction. *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶24} In support of his assignment of error, Hosey primarily argues that B.S. lacked credibility. Hosey again characterizes B.S. as a "known liar" and points to the fact that Hosey did not identify him by name at the time of the offense. Hosey also points to the fact that B.S. claimed that Hosey hit him on the buttocks and head, causing a lump, yet a physical examination of B.S. revealed no injuries. Hosey further points to the fact that B.S. claimed that he saw Hosey ejaculate, yet the SANE nurse found no bodily fluids on B.S. Hosey concludes that B.S. presented an uncorroborated version of the events, and that reasonable doubt existed because other DNA (i.e., not belonging to B.S. or Hosey) was found on B.S.'s underwear.

{¶25} Hosey's arguments lack merit. As noted in our analysis of Hosey's first assignment of error, Hosey's characterization of B.S. of as a "known liar" ignores the fact that Z.P. testified that B.S. had only lied about "little things" in the past and would never lie about anything "major" like this. Additionally, while B.S. claimed that Hosey hit him on the buttocks and head, causing a lump, the fact that no injuries were documented on physical exam does not render Hosey's convictions against the manifest weight of the evidence. The evidence indicated that B.S. did not undergo a physical examination until several hours after the incident, meaning any lump could have subsided by that time. Moreover, the jury was in the best position to assess B.S.'s credibility. *See State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus ("[T]he credibility of the witnesses [is] primarily for the trier of the facts [to determine]."). In doing so, the jury was "entitled to believe all, part, or none of the testimony of" B.S. *State v. Ferguson*, 9th Dist. Summit No. 30458, 2023-Ohio-1964, ¶ 7, quoting *State v. Shank*, 9th Dist. Medina No. 12CA0104-M,

2013-Ohio-5368, ¶ 29. Thus, the jury could have believed that Hosey attempted to force his penis into B.S.'s anus and mouth but could have chosen not to believe that Hosey hit B.S. in the head and/or that it caused a lump.

{¶26} Regarding the lack of bodily fluids on B.S., B.S. never claimed that Hosey ejaculated on him. Rather, B.S. testified that he saw a small amount of semen come out of Hosey's penis as B.S. was leaving the gym. Hosey's argument in this regard, therefore, lacks merits.

{¶27} Lastly, regarding the presence of foreign DNA on B.S.'s underwear, the forensic scientist testified that small amounts of foreign DNA on underwear is not uncommon because someone else could have handled B.S.'s underwear during the laundry process. But even with the presence of a "very, very small" amount of uninterpretable foreign DNA on B.S.'s underwear, the fact remains that B.S.'s underwear tested positive for DNA consistent with two major contributors: B.S. and Hosey.

{¶28} The jury in this case chose to believe the State's version of the events over the defense's version of events, which does not render Hosey's convictions against the manifest weight of the evidence. *State v. Fry*, 9th Dist. Medina No. 16CA0057-M, 2017-Ohio-9077, ¶ 13 ("We will not overturn a conviction as being against the manifest weight of the evidence simply because the trier of fact chose to believe the State's version of events over another version."). Having reviewed the record, this Court concludes that this is not the exceptional case in which the evidence weighs heavily against Hosey's convictions. *Otten*, 33 Ohio App.3d at 340. Accordingly, Hosey's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT VIOLATED MR. HOSEY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FAIR TRIAL WHEN IT ADMITTED INADMISSIBLE HEARSAY TESTIMONY AND/OR MISLEADING/CUMULATIVE TESTIMONY.

{¶29} In his third assignment of error, Hosey argues that the trial court erred by allowing the State to play the video of B.S.'s interview with the social worker at trial. Hosey argues that the statements B.S. made in the video were hearsay, and that they were not admissible under Evid.R. 803(4) regarding statements made for the purpose of medical diagnosis or treatment. Hosey also argues that, even if the statements were admissible under Evid.R. 803(4), their probative value was outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury and/or cumulative evidence under Evid.R. 403. Hosey further argues that the admission of B.S.'s hearsay statements violated his constitutional rights under the Confrontation Clause. For the following reasons, Hosey's arguments lack merit.

{¶30} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180 (1987). Thus, an appellate court will not reverse the trial court's decision absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 75. "The term 'abuse of discretion' connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying an abuse of discretion standard, a reviewing court is precluded from substituting its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). Even if an appellant demonstrates that the trial court's ruling was an abuse of discretion, he does not establish reversible error unless he shows that the error prejudiced his substantial rights. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20. "An error affects the appellant's substantial rights if it affected the outcome of the trial." *State v. Baskerville*, 9th Dist. Summit No. 28148, 2017-Ohio-4050, ¶ 32. Additionally, regarding Hosey's arguments under the Confrontation Clause, "[a] constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt." *State*

v. Ricks, 136 Ohio St.3d 356, 2013-Ohio-3712, ¶ 46, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78.

{¶31} Evid.R. 803(4) provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are "not excluded by the hearsay rule, even though the declarant is available as a witness * * *." Evid.R. 803(4). In short, "[s]tatements made for the primary purpose of medical diagnosis or treatment are nontestimonial and, therefore, admissible under Evid.R. 803(4)." *State v. Weaver*, 9th Dist. Medina No. 17CA0092-M, 2018-Ohio-2998, ¶ 12.

{¶32} At trial, the social worker testified that the purpose of her interviews with victims of sexual abuse is to assess what happened so that she can inform the treating physician. The social worker testified that the treating physician then uses that information to determine what type of medical exam to perform on a victim. The social worker testified that, after she interviewed B.S. in this case, she relayed the information B.S. provided her to the physician.

{¶33} At trial, the State moved to play the video of the social worker's interview with B.S. for the jury. Defense counsel objected on the basis that B.S. had already testified, and that this was "an attempt by the State to try to bolster [B.S.'s] credibility or rehabilitate him in certain areas if need be." The trial court overruled defense counsel's objection, concluding that the evidence was admissible under the medical history exception. The State then played the video for the jury.

{¶34} Even if the trial court erred by allowing the State to play the video of the social worker's interview with B.S. for the jury, this Court concludes that any error in that regard did not

affect the outcome of the trial and was harmless beyond a reasonable doubt. *See State v. Mims*, 9th Dist. Lorain No. 21CA011801, 2023-Ohio-2806, ¶ 26, citing *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, ¶ 60. Among other evidence, the State presented: (1) testimony from B.S., who explained that Hosey forcibly tried to insert his penis into B.S.'s mouth and anus while B.S. resisted; (2) testimony from Z.P., who testified that B.S. arrived screaming and crying at his grandmother's house, saying that someone tried to force him to do things he did not want to do; (3) testimony from Z.P.'s grandmother, who testified that B.S. arrived at her house "crying and upset" and saying that "a guy tried to rape him"; and (4) DNA evidence indicating that the crotch panel of B.S.'s underwear tested positive for Hosey's DNA. Thus, even if the trial court should have excluded the video of B.S.'s interview with the social worker from evidence, this Court is not convinced that it impacted the jury's verdict. *See Mims* at ¶ 26; *Ricks*, 2013-Ohio-3712, at ¶ 46. Accordingly, Hosey's third assignment of error is overruled.

III.

{¶35} Hosey's assignments of error are overruled. The judgment of the Summit 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 Summit, 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(C). 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.

JILL FLAGG LANZINGER
FOR THE COURT

STEVENSON, J.
CONCURS.

CARR, P. J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

STEPHEN M. GRACHANIN, Attorney at Law, for Appellant.

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