

[Cite as *State v. Griffin*, 2017-Ohio-7796.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 16 MA 0029
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
BRIAN C. GRIFFIN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio.
Case No. 14 CR 958

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 20, 2017

{¶1} Defendant-Appellant Brian C. Griffin appeals his conviction of multiple rape and gross sexual imposition counts in the Mahoning County Common Pleas Court. He contends the jury verdict finding he engaged in sexual conduct and sexual contact with a child under the age of ten was contrary to the manifest weight of the evidence. He also argues the trial court abused its discretion in excluding evidence that the child's grandfather had been accused and then convicted of a sex offense against a family member. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} A jury found Appellant guilty of eight counts of rape of a child under the age of ten and eight counts of gross sexual imposition (which merged with the rape counts for purposes of sentencing). See Judgment Entry (Mar 8, 2016) (imposing five consecutive and three concurrent life sentences on the rape counts). At trial, the victim's mother testified as to the pertinent time frame. At the time of the sexual abuse, she was separated from the victim's father. She rented a house in Campbell, Ohio for herself and her three children. As she regularly started work early in the morning, she needed someone to get her children ready for school approximately four days a week. (Tr. 247). When her neighbor could no longer assist, Appellant (who is the cousin of the victim's father) took over the duties. (Tr. 249).

{¶3} In late January of 2012, Appellant moved into the basement of the house. (Tr. 249-250). The victim had just turned eight years old. (Tr. 250-251). During this time, the victim would ask her mother if she could sleep in the mother's room or in the siblings' room; the victim's mother found this unusual for the child. (Tr. 254). The victim started attending counseling sessions due to perceived issues she was having with her parents' separation. (Tr. 258-259). Appellant lived with them until late May of 2013, just before the victim's family moved out of the house. (Tr. 254). The victim's parents reunited.

{¶4} On June 5, 2014, when the victim was ten years old, the victim's mother asked her if anyone had ever touched her inappropriately. (Tr. 255). The victim

started to cry and shouted Appellant's name. She disclosed that Appellant had touched her. (Tr. 256). The victim's mother immediately called the police. The police refrained from interviewing the child and advised the parents to refrain from discussing the matter with the child due to the procedure employed by the Child Advocacy Center at Akron Children's Hospital, where a caseworker conducts an interview with a nurse practitioner watching through a mirror after which the nurse practitioner conducts a physical examination. (Tr. 257-258, 301, 321, 334).

{¶15} This procedure was followed, and a detective interviewed Appellant after watching the videotaped interview. Appellant explained he regularly tended to the children on the mornings the victim's mother was at work by waking them, getting them dressed, and putting them on the school bus. (Tr. 302).

{¶16} The caseworker testified about how the victim's demeanor changed dramatically when the interview turned to talk of Appellant; the victim whispered, talked in a low voice, and cried. (Tr. 321). The caseworker and the nurse practitioner both testified it was common for a child to not disclose sexual abuse immediately. (Tr. 322, 335).

{¶17} The nurse practitioner explained how she watched the interview through the mirror as it is an important part of the medical history and guides her in deciding what procedures and tests to implement. (Tr. 333-334). She testified the victim stated Appellant would wake her before the other children, take her to the basement, and tell her to get on the bed. He would take off the victim's bottoms or instruct her to do so. (Tr. 334). The victim disclosed Appellant would rub the victim's vagina with his finger, lick her vagina, and put his tongue in her vagina. (Tr. 334-335). The victim reported this happened almost every day when she was nine years old. (Tr. 335). The physical examination was normal. (Tr. 336). She noted the child knew details that would not normally be known by a child of her age. (Tr. 339).

{¶18} The victim testified she was eight years old when Appellant moved into the basement of the house in Campbell. (Tr. 277-278). She noted her parents were separated at the time. (Tr. 276). She explained how her mother left Appellant in charge when she left early for work. (Tr. 279). The victim's mother set an alarm for

them, but Appellant would wake the victim earlier than necessary. (Tr. 280). The victim testified Appellant would take her to the basement, pull her bottoms down, and touch her private parts with his fingers and his tongue. When asked if (by private parts) she meant her vagina, she answered affirmatively. (Tr. 281).

{¶19} She estimated this happened almost every day he woke her for school. (Tr. 280-281). It never happened when her mother was home. (Tr. 281). She remembered the sexual abuse occurring on mornings when she was wearing a nightgown and on mornings when she was wearing a shirt with pajama bottoms. (Tr. 283). When asked if Appellant engaged in this behavior more than ten times, she said yes. (Tr. 284). She could remember the sexual abuse happening more than once in each of the four seasons. (Tr. 284-285). She said she asked Appellant to stop, explaining how she was initially afraid to tell him to stop because he told her not to tell anyone. (Tr. 282).

{¶10} The victim did not tell her counselor because she was afraid of what would happen. (Tr. 286). Wishing to avoid the situation, she would ask her mother if she could stay at the houses of friends or family. (Tr. 286). The victim explained she decided to tell her mother about the abuse when she was ten because her mother asked if anybody had ever touched her. (Tr. 285, 295). The victim also revealed that Appellant informed her he touched her when she was younger as well, while he was babysitting for her parents. (Tr. 282-283).

{¶11} The defense called the victim's counselor as a witness. She stated the victim attended nine appointments, from the intake interview on February 29, 2012 until the last session on October 30, 2012. (Tr. 361). The counselor testified the child did not disclose sexual abuse and noted her statutory obligation to report any suspected child abuse. (Tr. 360, 366).

ASSIGNMENT OF ERROR ONE: WEIGHT OF THE EVIDENCE

{¶12} Appellant sets forth two assignments of error, the first of which provides:

“The verdict was against the manifest weight of the evidence.”

{¶13} The rape charges stem from the allegations that Appellant touched the victim's vagina with his tongue, and the gross sexual imposition charges stem from the allegations that he touched her vagina with his fingers. Rape involves sexual conduct, which includes not only certain acts of penetration but also "cunnilingus." See R.C. 2907.01(A) (defining sexual conduct); R.C. 2907.02(A)(1)(b) (defining rape as sexual conduct with child under 13), (B) (sentence if victim was a child under 10). The pertinent gross sexual imposition statute provides: "No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." R.C. 2907.05(B).

{¶14} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Whether a verdict is contrary to the manifest weight of the evidence is not a question of mathematics but depends on the effect of the evidence in inducing belief. *Id.* See also *id.* at 390 (Cook, J., concurring) (weight of the evidence involves the state's burden of persuasion, whereas sufficiency involves the burden of production). The appellate court is to 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 jury 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶15} This discretionary power of the appellate court is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.* Where a criminal case has been tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution. The power of the court of appeals to sit as the "thirteenth juror" is

limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses and the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 389.

{¶16} In other words, “the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact occupies the best position to weigh the evidence and judge the credibility of each witness by observing gestures, voice inflections, and demeanor. See, e.g., *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). We therefore generally proceed under the premise that when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we do not choose which one we believe is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶17} Appellant contends the victim’s testimony was not credible. He stresses there was no physical evidence of sexual activity found by the nurse practitioner. He points to the victim’s delay in reporting the allegations to her mother, which was a year after he stopped living with them. He discounts the testimony which explained delayed reporting is common among children. Appellant emphasizes that the victim was in counseling at the time of the alleged events but did not disclose sexual abuse to the counselor even though the victim testified on cross-examination that she trusted her counselor and felt as though she could talk to her about anything. (Tr. 290-291). Appellant states the counselor, who was a mandatory reporter, did not suspect abuse. Appellant also notes the victim’s mother did not testify to harboring any suspicions while he was living with them. Appellant concludes his convictions were based on the unsubstantiated statements of a child.

{¶18} The state highlights the victim’s testimony and points out the victim denied anyone told her what to say or helped her remember the events. (Tr. 289). In addition, the victim was interviewed by a caseworker trained in forensic interviewing techniques designed to avoid any suggestiveness. Her testimony on the

commonality of a child's failure to immediately report sexual abuse was confirmed by the nurse practitioner without objections. See also *State v. Pistawka*, 9th Dist. No. 27828, 2016-Ohio-1523, ¶ 21 (where social worker testified it was common for children not to report abuse by a family member). The child's allegations were described as clear and consistent. (Tr. 338).

{¶19} Furthermore, the testimony established Appellant was in charge of getting the child ready for school while the mother was at work. The victim explained how Appellant would wake her earlier than her siblings and bring her to his room in the basement. The mother thought it unusual when her daughter began asking to sleep with her or with siblings. (Tr. 254). The child freely disclosed the abuse when her mother specifically asked her if anyone had touched her inappropriately; the mother did not mention any names when asking. Notably, the victim's parents were already back together by the time of her disclosure, dispelling any suggestion the child fabricated the story in an attempt to reunite her parents. (Tr. 255-256).

{¶20} The state emphasizes the testimony that children who report sexual abuse often have normal results upon a physical examination. The nurse practitioner pointed to the interval after the last event of abuse and to the elasticity of genital tissues, which "can accommodate touching or penetration with a tongue, for example, without tearing." (Tr. 336). The state concludes by noting there is no corroboration requirement for a rape victim's testimony to be considered credible. See *State v. Wright*, 7th Dist. No. 97CO35, 2002-Ohio-1548, ¶ 23.

{¶21} Upon reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we cannot conclude the jury clearly lost its way in resolving conflicts in the evidence. *Lang*, 129 Ohio St.3d 512 at ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387. The jury heard and saw the witnesses testify. It was the jury's responsibility to evaluate demeanor, gestures, voice inflection, eye movements, and any verbal/non-verbal disconnects during the testimony presented by each witness. The jury could draw various reasonable inferences from the testimony. It was within the province of the jury to find the child's story credible. This is not an exceptional case involving a manifest

miscarriage of justice compelling this court to sit as the thirteenth juror and order a new trial. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: EXCLUDED EVIDENCE

{¶22} Appellant’s second assignment of error provides:

“The trial court erred when it excluded relevant and admissible evidence.”

{¶23} Appellant argues the court abused its discretion in excluding testimony which would have disclosed the victim’s maternal grandfather was convicted of sexually abusing a family member. Defense counsel wished to elicit from the victim’s mother testimony that an accusation against the grandfather was the reason she asked the child if anyone had ever touched her inappropriately. The prosecution objected and noted they discussed the matter at the beginning of trial and the witnesses were instructed not to mention the grandfather. (Tr. 266, 268). The prosecution argued the grandfather’s conduct was not relevant as there was no accusation he touched the victim in this case. (Tr. 267-269). The court disallowed this line of questioning. (Tr. 266-269, 272).

{¶24} Appellant contends testimony about the accusations against the grandfather was relevant for three reasons: (1) to suggest the child’s knowledge of sexual acts came from a different source, e.g., “from being abused by her maternal grandfather^[1], from talking to the maternal grandfather’s victim, or even overhearing conversations about that situation”; (2) to show the context of why the victim’s mother asked the victim if anyone ever touched her inappropriately without which the jury may have speculated the mother asked because she suspected Appellant; and (3) to demonstrate “an alternative motivation for why the alleged victim would claim Appellant abused her * * * it is certainly possible that the attention that the maternal

¹ The state also argued below, even if the child was abused by her grandfather, this would be protected by the rape shield law, which precludes evidence of the victim’s sexual activity with another unless it deals with the origin of semen, pregnancy, or disease. See R.C. 2907.02(D) (even then, it can only be admitted if it is material to a fact at issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value). Even where evidence of prior sexual abuse is permitted to show the source of a young child’s knowledge, the courts require the acts to be specified and similar in order to be considered relevant. See, e.g., *In re M.C.*, 10th Dist. No. 12AP-618, 2013-Ohio-2109, ¶ 61-66. Here, there was no evidence this child was sexually abused by another person. And, there was no proffer as to specifically what the grandfather did to his victim.

grandfather's victim received caused the alleged victim to falsely reporting [sic] Appellant for abuse."

{¶25} The state responds by arguing we should not substitute our judgment for that of the trial court because the court's decision was not unreasonable, arbitrary, or unconscionable. The state posits the excluded testimony about the grandfather was not relevant as there was no allegation he abused this victim. The state also argues the trial court could rationally conclude the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury under Evid.R. 403(A).

{¶26} "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 402. "Evidence which is not relevant is not admissible." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶27} "It is within the sound discretion of the trial court to apply its common experience and logic to determine the relevance of evidence." *State v. Tapscott*, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, 978 N.E.2d 210, ¶ 22, citing *State v. Lyles*, 42 Ohio St.3d 98, 99-100, 537 N.E.2d 221 (1989). "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, 510 N.E.2d 343 (1987). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and the issue is properly preserved. Evid.R. 103(A).

{¶28} In *Arcuri*, the trial court precluded the defense from asking the victim's mother if her boyfriend was a convicted sex offender. The Eleventh District found the trial court acted within its discretion to find the evidence irrelevant as the victim never

raised such a claim against the mother's boyfriend, who was not present at the time of the defendant's alleged conduct. *State v. Arcuri*, 11th Dist. No. 2015-T-1023, 2016-Ohio-8254, ¶ 41.

{¶29} Here, the mother asked the victim if she had ever been inappropriately touched. (Tr. 256). In doing so, the mother did not mention anyone by name. (Tr. 271). The child responded by crying and shouting Appellant's name; she then explained Appellant inappropriately touched her. She reported to the case worker Appellant touched her vagina with his fingers and his tongue. Her accusations involved many mornings before school when Appellant was undisputedly the only adult in the house. There is no indication the grandfather was ever present on the mornings before school when the child's mother was at work, which is when the abuse was said to have occurred. The victim did not accuse her grandfather of sexual misconduct. She accused only Appellant. After this accusation, the mother asked if anyone else touched her inappropriately, and the victim did not name any other perpetrator. (Tr. 273).

{¶30} This court concludes the trial court did not abuse its discretion in excluding evidence that the victim's grandfather had been accused and then convicted of (unspecified) sexual misconduct with a family member and/or the exclusion did not affect Appellant's substantial rights. This assignment of error is overruled. For all of the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.