[Cite as *State v. Phillips*, 2010-Ohio-2577.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1149

Appellee — Trial Court No. CR 09-1276

v.

James Phillips — **DECISION AND JUDGMENT**

Appellant — Decided: June 4, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer L. Donovan, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for rape with a victim under age ten, entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} Appellant, James Phillips, was high school friends with B.C.'s father. On May 19, 2007, B.C.'s father's birthday, appellant and his girlfriend hosted a birthday party at appellant's east Toledo home. Present at the party were appellant, his girlfriend and appellant's two daughters. Also in attendance were B.C.'s parents, her sister, a friend and then 9 year-old B.C.

{¶ 3} Toward the end of the evening, B.C. asked and received permission from her parents to spend the night in appellant's home with his two daughters. Between 11:00 p.m. and midnight, B.C.'s parents left with their other daughter and the friend. That which occurred next is dispute.

{¶ 4} According to B.C.'s trial testimony, by the time her parents left appellant's home, she had fallen asleep on a living room recliner while watching a movie. Appellant's children were in their bedroom, getting ready for bed. Appellant's girlfriend had already gone to bed. Appellant was on a living room couch.

{¶ 5} "Q And then what happened?

{¶ 6} "A Uh, I fell asleep on the recliner chair, and he heard me snoring, snoring.

{¶ 7} "Q Okay. And then what happened?

{¶ 8} "A So he moved me to the couch.

{¶ 9} "Q Okay. So [appellant] moved you to the couch?

{¶ 10} "A Yeah.

{¶ 11} "Q Okay. And then so how were you on the couch? Were you sitting down, laying down or something else?

{¶ 12} "A I was laying down.

{¶ 13} "Q How was your body positioned?

{¶ 14} "A I was crouched up in a ball with my hand like this (indicating.)

{¶ 15} "Q So your knees were bent?

{¶ 16} "A (Nods head.)

{¶ 17} " * * *

{¶ 18} "Q Okay. And then did something happen?

{¶ 19} "A Yes. Uh, I felt something in my bottom and I thought it was fingers, and I think it was him.

{¶ 20} "Q And you think it was him. Now, what were you wearing, [B.]; do you remember?

{¶ 21} "A I think they were green shorts and a tank top.

{¶ 22} "Q But you had shorts on?

{¶ 23} "A Uh-huh.

{¶ 24} "Q And you said you felt what you think was fingers in your – bottom. Do you mean your butt where you go to poop out of?

{¶ 25} "A. Yes.

{¶ 26} "Q And what did that feel like?

{¶ 27} "A It felt weird and I didn't like it. So I woke up. And I told him then volume was too loud.

{¶ 28} "Q Who did you tell?

{¶ 29} "A [Appellant.]

{¶ 30} "Q And where was [appellant] at when you woke up?

{¶ 31} "A On the couch next to me [b]y my bottom part."

{¶ 32} According to B.C., after appellant turned down the volume, he went into his own bedroom. At that point, B.C. went to appellant's daughters' room and went to sleep. The next day, B.C. later testified, she, appellant and several others went fishing. Neither then, nor later in the day when her mother picked her up did B.C. mention the incident. Indeed, it was not until approximately one year later that B.C. told her mother what happened.

{¶ 33} B.C.'s mother called police, who initiated an investigation. At police request, B.C. submitted to a medical examination, which failed to produce corroborative evidence. On February 6, 2009, appellant was named in a single count indictment charging him with one count of rape, a first degree felony, with a specification that the victim was under age ten. He pled not guilty and the matter proceeded to trial before a jury.

{¶ 34} At trial, B.C. testified to the events of May 19, 2007, and attributed her delay in reporting the incident to fear of appellant and, later, fear that her mother would

not believe her. A Toledo police investigator testified that delayed reporting of such events was not unusual.

{¶ 35} B.C.'s mother testified, confirming some of the events of May 19. She reported that when B.C. returned home the next day, B.C. became reclusive. Over time, B.C.'s mother testified, B.C. became more withdrawn, prone to violence against her siblings and averse to being touched. According to B.C.'s mother, when she discovered her daughter engaging in "sexual talk" on the internet, she sought counsel from a pediatrician, resulting in B.C.'s disclosure. At the close of the state's case, appellant's Crim.R. 29 motion was denied.

{¶ 36} In his defense, appellant presented the testimony of his girlfriend and daughter, both of whom contested B.C.'s version of events. According to these witnesses, B.C. had not been in the living room when her parents left. Rather, she had been playing games with appellant's daughters in their room when she complained of a headache. According to appellant's witnesses, B.C. took an aspirin and went to sleep in the bed of one of appellant's daughters even before her parents left. Appellant's daughter testified she slept in the same bed with B.C. that night and B.C. could not have possibly left the bed to go to the living room. At the conclusion of the defense, the trial court again overruled appellant's renewal of the Crim.R. 29 motion and submitted the matter to the jury.

{¶ 37} Following deliberation, the jury found appellant guilty as charged. The trial court entered judgment on the verdict and sentenced appellant to a term of incarceration of 15 years to life. From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following five assignments of error:

{¶ 38} "First Assignment of Error

{¶ 39} "Appellant's conviction was not supported by the sufficiency of the evidence in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Sections 1 and 16 of Article I of the Ohio Constitution.

{¶ 40} "Second Assignment of Error

{¶ 41} "Appellant's conviction was against the manifest weight of the evidence in violation of the Due Process Clause of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections [sic] 10 of Article I of the Ohio Constitution

{¶ 42} "Third Assignment of Error

{¶ 43} "The prosecutor committed multiple acts of misconduct in violation of appellant's right to a fair trial under the Fourteenth Amendment to the United States Constitution and Section 14 of Article I of the Ohio Constitution

{¶ 44} "Fourth Assignment of Error

{¶ 45} "Appellant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Sections 10 and 16 of Article I of the Ohio Constitution

{¶ 46} "Fifth Assignment of Error

{¶ 47} "Appellant was denied due process under Section 10 of Article I of the Ohio Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in the form of cumulative error"

I. Weight and Sufficiency of Evidence

{¶ 48} We shall discuss appellant's first two assignments of error together.

{¶ 49} In a criminal context, a verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. Id. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390 (Cook, J., concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

{¶ 50} In his first assignment of error, appellant argues the state failed to prove an essential element of rape. Specifically, appellant insists, there was insufficient evidence that the victim's anal cavity was penetrated.

{¶ 51} R.C. 2907.02(A)(1) provides, in material part:

{¶ 52} "(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:

{¶ 53} " * * *

{¶ 54} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person. * * *"

{¶ 55} A violation of R.C. 2907.02 is a felony of the first degree. If it is specified and proved that the victim was under age ten, the court may sentence the offender to life imprisonment without parole. R.C. 2907.02(B).

{¶ 56} "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. * * *." R.C. 2907.01(A).

{¶ 57} According to appellant, B.C.'s testimony with respect to penetration was ambiguous. Appellant maintains B.C.'s testimony that she "felt something in my bottom" and that she "thought it was fingers" only shows there was contact with her buttocks.

Citing our recent decision in *State v. Holmes*, 6th Dist. No. L-08-1034, 2009-Ohio-6255, and *State v. Wells* (2001), 91 Ohio St.3d 32, 34, appellant insists failed attempts to penetrate a victim's anus is insufficient to prove anal rape.

{¶ 58} *Holmes* and *Wells* are unavailing to this appellant. Both cases stand for the proposition that, for the offense of anal rape to be sustained, there must be evidence of actual penetration, however slight. *Holmes* at ¶ 38; *Wells* at 34. B.C. testified that she felt what she believed was fingers "*in* my bottom." The state clarified B.C.'s response, inquiring, "And you said you felt what you think was fingers in your – bottom. Do you mean your butt where you go to poop out of?" The 11 year-old responded, "Yes." This is sufficient evidence by which the jury could have found the element of anal penetration established. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 59} With respect to the weight of the evidence, we have carefully reviewed the transcript of the trial and find nothing to suggest that the jury lost its way or that manifest injustice resulted. Accordingly, appellant's second assignment of error is not well-taken.

II. Prosecutorial Misconduct

{¶ 60} In his third assignment of error, appellant insists the state was guilty of prosecutorial misconduct when, during closing argument, the prosecutor repeatedly argued facts not in evidence. Appellant enumerates three such incidents.

{¶ 61} Appellant complains that during closing argument the prosecutor said, "The girls were in the bedroom, and [B.C.] told you they have a bedtime. They were already

in the bedroom. She wasn't tired. She decided to stay up, watch this movie." Nowhere in the record, appellant complains, is there testimony such as this.

{¶ 62} Next appellant quotes the prosecutor as saying, "and [B.C.] testified her sister and [her friend] were sleeping on the couch, and she sat down on the recliner and fell asleep. And the state would submit to you that that is credible." There was never any testimony, appellant insists, as to where B.C.'s sister and friend were when B.C. went to sleep on the recliner.

{¶ 63} Finally, appellant complains, the prosecutor's recitation that, "She feels him slip his hands, his fingers underneath her shorts * * * and stick his finger in her anus," was not in the record. B.C. actually testified that she "thought it was fingers" and made no mention of appellant's hands, according to appellant.

{¶ 64} "[P]rosecutors are entitled to considerable latitude in opening statement and closing arguments. In closing argument, a prosecutor may comment freely on 'what the evidence has shown and what reasonable inferences may be drawn therefrom.' [A]ny alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: '(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the

evidence against the defendant.'" *State v. Gravelle,* 6th Dist. No. H-07-010, 2009-Ohio-1533, ¶ 70. (Citations omitted.)

{¶ 65} At trial, appellant objected to none of the statements he now insists constitute prosecutorial misconduct. Absent such objection, misconduct is waived unless there is plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604. Under any standard, we do not find prosecutorial misconduct in the statements of which appellant complains.

{¶ 66} It is a fair inference that appellant's fingers are connected to his hand. It would certainly be notable if they were not. It is likewise a fair inference from B.C.'s testimony that she stayed in the living room because she was not tired and wanted to watch the movie. We agree the sleeping arrangements of B.C.'s sister and friend prior to B.C.'s parent's departure is not in the record, but fail to find any prejudice in this remark. Consequently, appellant has failed to demonstrate prosecutorial misconduct in the state's closing argument. Accordingly, appellant's third assignment of error is not well-taken.

III. Ineffective Assistance of Counsel

{¶ 67} In his fourth assignment of error, appellant suggests he was denied effective assistance of counsel because his trial counsel failed to object to statements constituting prosecutorial misconduct in the state's closing argument.

{¶ 68} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made

errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord, *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 69} As we discussed above, the prosecutorial statements appellant asserts should have been objected to were either fair inferences on the evidence or non-prejudicial. As a result, trial counsel's performance in failing to raise such objections was not deficient. Accordingly, appellant's fourth assignment of error is not well-taken.

IV. Cumulative Error

{¶ 70} In his remaining assignment of error, appellant maintains that if the errors he previously raised are deemed individually harmless, collectively they constitute prejudicial error. Since we have not found any of appellant's prior assertions of error meritorious, appellant's fifth assignment of error is also found not well-taken.

{¶ 71} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE