[Cite as *State v. Duszynski*, 2010-Ohio-6511.]

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

State of Ohio — Court of Appeals No. L-10-1063

Appellee — Trial Court No. CR0200802110

v.

Christopher J. Duszynski — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Christopher Duszynski, appellant, appeals his conviction and sentence on two counts of gross sexual imposition, violations of R.C. 2907.05(A)(4) and (B) and third degree felonies.[1] The convictions are based upon jury verdicts returned at trial in the Lucas County Court of Common Pleas.

[1]In an earlier appeal, we considered whether appellant's indictment was defective on mens rea grounds. *State v. Duszynski*, 6th Dist. No. L-08-1215, 2009-Ohio-2284.

{¶ 2} In a final judgment filed on February 5, 2010, the trial court sentenced appellant to serve consecutive, two year prison terms on each count, resulting in a total period of incarceration of four years. The trial court also classified appellant as a Tier II Sex Offender.

{¶ 3} Appellant appeals the judgment to this court and asserts three assignments of error on appeal:

{¶ 4} "First Assignment of Error

{¶ 5} "The trial court erred in allowing a prior consistent statement of the victim to be introduced into evidence in violation of appellant's right to a fair trial under the Fourteenth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

{¶ 6} "Second Assignment of Error

{¶ 7} "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 Section 10 of Article I of the Ohio Constitution.

{¶ 8} "Third Assignment of Error

{¶ 9} "The trial court abused its discretion by imposing a sentence that was not the shortest authorized by law and by imposing consecutive sentences 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."

{¶ 10} The state contended at trial that appellant had knowing sexual contact with B.S, a boy, age twelve. The charges included two incidents occurring during the period from January 1, 2007, through May 28, 2007. During the period, appellant resided with B.S. and the boy's mother and sister in a two bedroom apartment. In May 2007, appellant's girlfriend, Tammi Jefferies, also moved into the apartment.

{¶ 11} The testimony at trial was that appellant shared a bedroom with B.S. until Tammi moved into the apartment. After that, appellant and Tammi slept together on a mattress in the living room or on the bottom bunk of the bunk bed in the boy's bedroom.

{¶ 12} B.S. was the only witness at trial who testified as to personal knowledge of the sexual contact. He was age 15 at the time of trial. B.S. testified as to two incidents. In the first, he testified that appellant entered his bedroom drunk, rubbed his back and then reached with his hand into B.S.'s pants. B.S. testified appellant touched his penis with his hand, rubbed it, and that he had an erection. According to B.S., appellant "told me he wanted to make me feel good." Eventually appellant stopped. B.S. testified: "I felt humiliated, and I really didn't know what to think." B.S. described appellant as a close friend of his mother and like an uncle to him.

{¶ 13} B.S. testified that his mother was home at the time of the incident but that he did not yell for help because he was embarrassed. He did not tell her of the incident when it occurred.

{¶ 14} B.S. described a second incident: appellant entered the bedroom drunk, started rubbing his back and reached down his pants. B.S. testified that he told appellant to leave him alone and went into the living room, but that appellant followed. According to B.S., appellant began "rubbing my penis area" and appellant stated he was going to make B.S. feel good.

{¶ 15} B.S. testified that his mother was in her bedroom at the time of the incident, but that he did not tell her of appellant's actions "[b]ecause I was feeling embarrassed again and humiliated." He testified that he later told his friend Ashley about the incident.

{¶ 16} B.S. also testified to a third attempt at sexual contact:

{¶ 17} "He tried to, and I told him to like leave me alone, and I was screaming and he stopped, and then that morning I woke up and he told me he touched my penis."

{¶ 18} At the time of trial, Ashley was age 13 and in the eighth grade. During the pertinent timeframe she was either 10 or 11 years old. She lived in the same apartment building as B.S. She and B.S. were friends and in the sixth grade together.

{¶ 19} Ashley testified that in June 2007, B.S. told her about sex abuse by appellant. She described B.S. as "very nervous and edgy" and "very upset" when they talked. Ashley told B.S. that they needed to tell his mother of the incidents. B.S. initially disagreed, but went with Ashley to speak with his mother. S.S., B.S.'s mother, testified

that when she was approached by Ashley and her son, the girl "told * * * [B.S.] * * * right in front of me, you better tell your mom what happened or I will. You have to tell your mom." B.S. and S.S. then spoke privately.

{¶ 20} S.S. testified that she had known appellant for seven years when he moved into the apartment and he was "like a brother" to her. After her son told her of the incidents, she confronted appellant:

{¶ 21} "Q. What did you say to Christopher?

{¶ 22} "A. I asked him – I told him what * * * [B.S.] * * * said. I said is this true?

{¶ 23} "Q. And what did he say?

{¶ 24} "A. Then he told me that he can't say it was true or he can't say it wasn't true. He said he doesn't know, that he's been known to get drunk and high or drunk – yeah, drunk and high and have blackouts and people would tell him that he's done stuff and he wouldn't remember it."

{¶ 25} Therese May testified that she knew both S.S. and appellant for years. Both were friends. May testified that she confronted appellant after learning of allegations concerning his treatment of B.S.:

{¶ 26} "Q. Did you confront him?

{¶ 27} "A. Yes, I did.

{¶ 28} "Q. And what did you ask Mr. Duszynski?

{¶ 29} "A. I said, What in the heck is this that I'm hearing about * * * [B.S.] * * *, that you did to * * * [B.S.] * * *? And he said, Oh, I've been told I've done things like that before. I have blackouts and I don't remember."

{¶ 30} Appellant's defense at trial was that the sex abuse never occurred and that B.S. fabricated the sex abuse claims. Appellant claimed that B.S. was motivated to fabricate claims of sexual abuse in order to distract attention from a family dispute in which he was responsible for losing his mother's cell phone and lied to avoid responsibility.

{¶ 31} B.S. was not permitted to have other children in the apartment while his mother was at work. He admitted at trial that he broke the rule and that after he permitted a boy or group of boys into the apartment, he discovered that the cell phone was missing. When his mother came home, he lied about how the phone was lost, claiming that he lost the phone when he went to the store. His mother, appellant, and Tammi looked about the apartment for the phone. The phone was regularly used by S.S. in her work.

{¶ 32} Later B.S. told his mother that a group of boys had been to the apartment and that he believed one had taken the phone. Learning this, his mother became upset. She testified that she made B.S. find the child who had been in the apartment and had taken the phone and get it back. S.S. testified that she was uncertain whether the cell phone incident occurred on the same day that she learned of B.S.'s accusations against appellant.

{¶ 33} Tammi Jefferies testified that B.S. made the accusations against appellant on the same day, during the midst of the family dispute. That date was June 28, 2007. Tammi testified of S.S. being upset and yelling at the boy concerning the phone and then 20 minutes to a half hour later spoke privately with appellant. Afterwards, appellant told Tammi of the accusations made against him and that they needed to get their belongings and leave.

{¶ 34} B.S. testified that a day or two later appellant and Tammi returned to the apartment to get the rest of their things and that appellant told him to tell his mother "that I had made it all up."

{¶ 35} Ashley testified that the dispute over the cell phone did not occur on the same day, but a week or two before. She recalled that B.S. had been grounded for a week or two over the cell phone dispute when B.S. disclosed the sexual abuse to her. Ashley also testified that both she and B.S.'s mother first learned of the sexual abuse on the same day.

{¶ 36} B.S. testified that he did not recall whether the cell phone dispute occurred on the same day as he first told his mother of the sex abuse.

{¶ 37} At the time they testified, both S.S. and Tammi Jefferies had felony records. S.S. was convicted in 1997 of forgery and theft. Tammi Jefferies was convicted of forgery in 2006.

{¶ 38} Under the first assignment of error, appellant asserts the trial court erred in permitting Detective Ron Permar of the Toledo Police Department to testify as to

statements made by B.S. to him during his investigation of the allegations of sexual abuse. Over objection, the detective testified as to information provided by B.S. in a July 2007 interview:

{¶ 39} "He provided me information of 2 separate occasions in which Chris Duszynski had come into his room that he shared with him. Both times he felt that the defendant was intoxicated in some manner and that he would start rubbing on his back while they were in the bed watching television and it would proceed into him putting his hand into his pants and touching his penis."

{¶ 40} Appellant objected to the testimony at trial on the basis that B.S.'s statement to the detective was hearsay. The trial court overruled the objection and permitted the testimony ruling that the statement was admissible under an exception to the hearsay rule as a prior consistent statement of the declarant under Evid.R. 801(D)(2)(b). The rule provides:

{¶ 41} "Evid.R. 801

{¶ 42} "* * *

{¶ 43} "(C) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

{¶ 44} "(D) Statements which are not hearsay. A statement is not hearsay if:

{¶ 45} "(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * *

(b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive * * *."

{¶ 46} The record is clear that the cell phone incident occurred prior to the July 2007 statement to Detective Permar. Appellant has argued that the hearsay exception for prior consistent statements did not apply, as the statements by B.S. in his interview with Detective Permar were made after the motive to fabricate arose.

{¶ 47} A trial court's decision to admit or exclude evidence is reviewed on appeal under the abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, ¶ 33. The term abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 48} In the first assignment of error appellant argues that the admission of Detective Permar's testimony summarizing B.S.'s July 2007 statement was error and violated appellant's rights to a fair trial under the Fourteenth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

{¶ 49} Evid.R. 801(D)(1)(b) does not allow for admission into evidence all prior consistent statements made by a declarant. *State v. Lopez* (1993), 90 Ohio App.3d 566, 578-79; *Motorists Mut. Ins. Co. v. Vance* (1985), 21 Ohio App.3d 205, 207. "Ohio courts have interpreted this rule to include only those prior consistent statements that have been made before prior inconsistent statements or before any motive to falsify testimony." (Citations omitted.) *State v. Jones*, 1st Dist. No. C-080518, 2009-Ohio-4190, ¶ 35;

accord *State v. Grays* (Oct. 29, 2001), 12th Dist. No. CA-2001-02-007; *State v. Lopez*, supra; *Motorists Mut. Ins. Co. v. Vance*, supra.

{¶ 50} There was no claim of prior inconsistent statements by B.S. at trial. Impeachment was based upon a claim that B.S. fabricated his testimony and that he was motivated by a desire to avoid punishment for events surrounding the loss or theft of his mother's cell phone in June. As the July statement was made after the claimed motive to falsify testimony, the exception to the hearsay rule under Evid.R. 801(D)(1)(b) does not apply. We conclude that the statement to Detective Parmer was hearsay and that the trial court abused its discretion in overruling appellant's objection to the admissibility of the testimony at trial.

{¶ 51} Where a victim's hearsay statement is admitted in error at trial, on appeal the issue remains of whether the error was harmless. *In re T.L.*, 127 Ohio St.3d 9, ¶ 2. The state argues that any error in admitting the July 2007 statement was harmless error.

{¶ 52} B.S., the declarant, testified extensively at trial including cross-examination on all matters contained in Detective Permar's hearsay testimony. The hearsay statement was cumulative in nature, mirroring properly admitted trial testimony. It offered no new matter. Admission of hearsay statements under such circumstances has been recognized as constituting harmless error. *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958, ¶ 38-39; *State v. Tomlinson* (1986), 33 Ohio App.3d 278, 281-82; see *State v. Deerm*, 6th Dist. No. L-06-1086, 2007-Ohio-1866, ¶ 21.

{¶ 53} We conclude that admission of hearsay testimony by Detective Parmer of the July 2007 statement at trial was harmless error. Accordingly we find appellant's first assignment of error is not well-taken.

{¶ 54} Under the second assignment of error, appellant argues that appellant's conviction is against the manifest weight of the evidence in violation of his rights to due process of law under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution. Despite assertion of constitutional grounds, the argument advanced by appellant on this assignment of error has been based on the traditional analysis of the issue under *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 55} In an appeal in a criminal case where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d at 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. Thompkins*, 78 Ohio St.3d at 387, quoting with approval, *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." Id.

{¶ 56} In claiming the verdicts were against the manifest weight of the evidence, appellant argues that there were inconsistencies in the evidence and issues of credibility. The state responds that the credibility issues were for the jury to resolve.

{¶ 57} The key prosecution witness was age 12 at the time of the charged offenses and he delayed for months informing his mother or other adults about the sexual abuse. There were no other witnesses with personal knowledge of what occurred. Credibility of the boy was challenged based upon claims of fabrication motivated by a family dispute over a cell phone.

{¶ 58} Appellant was confronted, however, after the claimed incidents by the boy's mother and by another mutual friend on whether the boy's claims of sexual abuse were true. In neither case did appellant deny the claims. He stated he was unsure as he sometimes has blackouts and does not remember. The boy's friend, age 10 or 11 at the time of the events, testified that the family turmoil over the cell phone had occurred a week or two before, not on the day the boy made allegations against appellant.

{¶ 59} We have reviewed and reweighed the evidence under *Thompkins* and find that the jury acted within its province in resolving conflicts of evidence and determining the credibility of witnesses. We find no miscarriage of justice in this verdict.

{¶ 60} Appellant's second assignment of error is not well-taken.

{¶ 61} Under the third assignment of error, appellant argues that the trial court abused its discretion as to the sentence. Appellant argues that the trial court erred by

failing to impose the shortest sentence authorized by law and by imposing consecutive sentences.

{¶ 62} In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 8, the Ohio Supreme Court considered a claim that after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, trial courts never could impose nonminimum or consecutive sentences. The court ruled that such an argument had been "specifically considered and rejected" in *Foster*. Id. We consider appellant's third assignment of error as asserting an abuse of discretion in imposing sentence and not asserting a lack of authority to ever impose consecutive or nonminimum sentences.

{¶ 63} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, the Ohio Supreme Court set forth the standard of review on appeal of felony sentencing. Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶ 64} Here appellant does not dispute that the trial court imposed sentences within the statutory range and the sentences met the first step of the *Kalish* analysis.[2] We therefore review the sentence under an abuse of discretion standard.

[2]The statutory range of sentence for third degree felonies is one to five years. R.C. 2929.14(A)(3).

{¶ 65} An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 66} After *Foster*, trial courts remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 67} R.C. 2929.11(A) provides:

{¶ 68} "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 69} R.C. 2929.12 sets forth a non-exhaustive list of "factors to consider in felony sentencing" including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A).

{¶ 70} Here, the trial court considered the harm suffered by the child victim when imposing sentence: "you have robbed this child of trust of adults, which all children ought to have. There ought to be some sort of comfort and safety in being around adults to protect children, but you robbed him of that. You robbed him of his innocence." The court reviewed a victim's impact letter from the boy's mother and commented that the victim was in counseling because of the offenses.

{¶ 71} The trial court also considered appellant's presentence report before imposing sentence and appellant's history of problems with alcohol. The court specifically reflected that appellant had failed to take action to deal with his abuse of alcohol and had even "offered it as an excuse to engage in this predatory behavior."

{¶ 72} The trial court also stated it had considered the purposes and principles of sentencing before imposing sentence. It discussed the seriousness of the crimes and likelihood of recidivism.

{¶ 73} A review of the record in this case demonstrates that the trial court properly considered the statutory guidelines of R.C. 2929.11 and 2929.12 when it pronounced sentence. We find appellant's third assignment of error is not well-taken.

{¶ 74} We conclude that substantial justice was done the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the court costs, 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

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE