[Cite as *In re B.O.J.*, 2010-Ohio-791.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	No. 09AP-600 (C.P.C. No. 07JU-04-5294)
B.O.J.,	:	No. 09AP-601 (C.P.C. No. 07JU-11-15791)
(Appellant).	:	No. 09AP-602 (C.P.C. No. 07JU-10-14812)
	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on March 4, 2010

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

Ron J. O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

McGRATH, J.

{¶1} Defendant-appellant, B.O.J., appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, wherein the trial court adopted the magistrate's decision adjudicating appellant a delinquent minor as a result of having committed the offense of rape of a child under 13 years of age, in violation of R.C. 2907.02(A)(1)(b), kidnapping of a child under 13 years of age, in violation of R.C. 2905.01(A)(2), rape, in violation of R.C. 2907.02, and kidnapping, in violation of R.C. 2905.01.

{¶2} This matter arises out of a sleepover at appellant's house on March 2, 2007. On this date, 12-year-old appellant hosted a sleepover for M.P., co-defendant C.B., and his cousin, the victim S.J. According to the testimony at the hearing, the boys played video games and engaged in horseplay in the basement of the home. In the early morning hours of March 3, 2007, S.J. went upstairs for a snack. While upstairs, S.J. heard the others talking, which prompted him to ask the boys if they were planning to do something to him. The boys said no, but when S.J. walked into appellant's room, the boys grabbed him and threw him on the bed on his stomach. Appellant and C.B. pulled down S.J.'s pants, spread tanning lotion on his buttocks and inserted the tube from the lotion bottle into his rectum. The morning after the sleepover, appellant laughed and said "remember the lotion" as S.J. was leaving.

{¶3} On April 6, 2007, a complaint was filed charging appellant with rape of a child under 13 years of age and kidnapping of a child under 13 years of age. On October 15, 2007, a second complaint was filed charging appellant with felonious assault and kidnapping. On November 5, 2007, a third complaint was filed charging appellant with rape.

{¶4} An adjudicatory hearing was held on May 6, 2009. At the conclusion of the testimony, the felonious assault charge was dismissed, and the magistrate found appellant delinquent on the remaining charges. The magistrate imposed a disposition of intensive probation until June 17, 2010, or successful completion of the proscribed terms and conditions of probation. Appellant filed objections to the magistrate's decision, which the trial court overruled. However, the trial court did find, after a de novo review of the magistrate's decision, that the magistrate's disposition was not in appellant's best interest,

and ordered appellant "to compose and deliver a letter of apology to [S.J.] within fifteen days of the filing date" of the decision. (May 29, 2009 Decision and Entry at 8.)

{¶5} This appeal followed, and appellant brings the following two assignments of error for our review:

> **First Assignment of Error**
>
> Appellant's conviction is against the manifest weight of the evidence.
>
> **Second Assignment of Error**
>
> The trial court erred by entering separate judgments of conviction for allied offenses of similar import in violation of R.C. 2941.25(A).

{¶6} In his first assignment of error, appellant challenges the manifest weight of the evidence supporting the delinquency findings. Our review of the manifest weight of the evidence in a juvenile delinquency adjudication is the same as for criminal defendants. *In re D.R.*, 10th Dist. No. 05AP-492, 2006-Ohio-5205, citing *In re Watson* (1989), 47 Ohio St.3d 86; see also *In re Fortney*, 162 Ohio App.3d 170, 2005-Ohio-3618, ¶19.

{¶7} A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The court of appeals sits as a "thirteenth juror" and after " '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.' " Id. at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

" 'The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶8} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶9} As is pertinent to this matter, R.C. 2907.02 provides:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * *

> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
>
> * * *
>
> (2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

{¶10} As defined by statute, sexual conduct includes "without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the * * * anal opening of another. Penetration, however slight, is sufficient to complete * * * anal intercourse." R.C. 2907.01(A).

{¶11} Also relevant here is R.C. 2905.01, which provides:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
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> * * *
>
> (2) To facilitate the commission of any felony or flight thereafter;
>
> * * *
>
> (B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:
>
> * * *
>
> (2) Restrain another of the other person's liberty[.]

{¶12} The basis for appellant's manifest-weight challenge is the lack of physical evidence and the credibility of the witnesses. Specifically, appellant directs us to "some initial confusion" in S.J.'s testimony regarding whether or not penetration occurred, as well as C.B.'s and S.J.'s conflicting testimony regarding the events that occurred at the sleepover.

{¶13} S.J. testified he was 11 years old when he went to a sleepover at his cousin's house. While there, the boys had been roughhousing and playing games in the basement. S.J. testified he went upstairs to get a snack, and as he returned, he heard the others talking and asked if they were planning on attacking him. The boys said no, but S.J. described that when he entered appellant's bedroom, the others threw him facedown on the bed. S.J. stated that at this time, "appellant and C.B. just pulled my pants down and just started spreading the tanning lotion in my butt and then they said like, lets do something. I don't know what they were like saying. They took the tube out of the bottle and stuck it in my butt." (May 6, 2008 Tr. 20.) On direct examination, the following exchange took place:

> Q: * * * Now when you state that they inserted this tube in your butt, do you mean your butt crack?
>
> A: Yeah.
>
> Q: Do you mean your butt hole?
>
> A: Yes.
>
> Q: Are you certain?
>
> A: Yes.
>
> Q: Okay. How do you know?

A: Because the tube like, went all – almost all the way in –

Q: Okay –

A: – but –

Q: – and you felt it go in?

A: Yeah.

(Tr. 22-23.)

{¶14} After the incident, S.J. testified he just laid down on the bed and fell asleep. According to S.J., it hurt when it happened, but he did not tell anyone because he did not want to be a "snitch." (Tr. 25.) S.J. further explained that he told his mother what happened on the way home after she picked him up the next morning. That evening, S.J.'s parents took him to Children's Hospital, and S.J. testified that he told the hospital staff and Columbus Police Detective James Shockey what had happened. On cross-examination, S.J. indicated he was not sure of the difference between a butt crack and a butt hole, but after explanation he stated definitively the tube was in the "butt hole." (Tr. 46.) S.J. further testified that he screamed "once they put the tube in [his] butt hole." (Tr. 47.)

{¶15} S.J.'s mother testified that as she and S.J. were leaving the house that morning, appellant yelled out, " '[r]emember the lotion. Make sure you remember that lotion' and he started laughing." (Tr. 74.) S.J.'s mother explained that S.J. told her what happened on the way home and she took him to Children's Hospital later that evening.

{¶16} According to Detective Shockey, appellant described that at some point during the sleepover, S.J. came down the steps and the boys grabbed S.J. and held him

down on the bed. Appellant told Detective Shockey that he held down S.J.'s legs while C.B. held S.J.'s arms and M.P. took the tube from the lotion bottle and rubbed it between S.J.'s butt crack.

{¶17} C.B. testified that he remembered "a little bit" of the incident involving S.J. (May 15, 2008 Tr. 7.) According to C.B., they were playing in the basement, "watching TV and just hanging out and then we – and then we just started pantsing (sic) people. Pantsing is when you pull down somebody's pants and then it got out of hand" with regard to S.J. (Tr. 8.) C.B. testified that as he helped hold S.J. down, "[appellant] took a lotion tube and – and he ain't [sic] insert it in his butt or nothing, he just like, rubbed it against his butt." (Tr. 9.) According to C.B., the whole incident took about five seconds, and then the boys went back to watching television and playing video games. C.B. testified S.J. did not scream and never did anything but laugh.

{¶18} This court has consistently held that the weight to be given to inconsistencies in any witnesses' testimony is a determination within the province of the trier of fact, and such inconsistencies generally do not render a conviction against the manifest weight of the evidence. Moreover, "where a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding either as being against the manifest weight of the evidence or contrary to law." *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶26 (citations omitted).

{¶19} While there are some noted inconsistencies between the testimony of S.J and C.B., it is important to note that such testimony is similar in many respects. Both testified that the boys held S.J. down and proceeded to remove his pants and rub lotion

and the tube from the lotion bottle on S.J.'s buttocks. While C.B.'s testimony did not indicate whether or not there was penetration, S.J.'s testimony clearly established that there had been. The trier of fact was free to believe, or disbelieve, any part of the witnesses' testimony, and a conviction is not against the manifest weight of the evidence merely because the trier of fact believed the victim's testimony. See *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765. Further, as stated by the trial court, S.J. had the best ability to determine what part of him was touched.

{¶20} We decline to substitute our judgment for the trier of fact regarding the credibility of the witnesses or the weight to be given to their testimony. After reviewing the record in its entirety, we conclude there is nothing to indicate that the trier of fact clearly lost her way or that any miscarriage of justice resulted. Consequently, we do not find that the trial court's decision finding appellant delinquent on the above-described charges is against the manifest weight of the evidence. Accordingly, we overrule appellant's first assignment of error.

{¶21} In his second assignment of error, appellant contends the trial court erred in entering separate judgments of convictions for allied offenses of similar import in violation of R.C. 2941.25(A),[1] which protects against multiple punishments for the same criminal conduct and is a codification of the common law doctrine of merger.

{¶22} In 1982, this court held that the merger statute did not apply to juvenile adjudications since a juvenile is never convicted of a crime. *In re Skeens* (Feb. 25, 1982), 10th Dist. No. 81AP-882. Alternatively, this court in *In re Skeens* held that even if R.C.

[1] R.C. 2941.25(A) provides, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

2941.25 did apply to juvenile delinquency proceedings, it was not violated in that case because the trial court made only one disposition of commitment to the Department of Youth Services as to only one of the offenses. Years later, in *In re Durham* (Sept. 17, 1998), 10th Dist. No. 97APF12-1653, this court was asked to re-examine its holding in *In re Skeens* that R.C. 2941.25 did not apply to juvenile delinquency proceedings. The appellant in *In re Durham* suggested that due to the changes in the juvenile justice system, the underlying rationale of *In re Skeens* no longer existed, and, thus, the trial court erred in adjudicating the appellant delinquent for having committed aggravated robbery, robbery, kidnapping, felonious assault, carrying a concealed weapon, and receiving stolen property.

{¶23} Without deciding the applicability of R.C. 2941.25 to juvenile delinquency proceedings, this court in *In re Durham* instead relied on this court's alternative holding in *In re Skeens* and found that even if merger principles applied, they were not violated because separate dispositions were not entered on the offenses. Specifically, this court stated:

> The doctrine of merger prevents multiple convictions for the same conduct, but it does not prevent the defendant from being found guilty of multiple offenses arising out of the same conduct. As such, a jury can return separate guilty verdicts on each offense, but the defendant can only be sentenced for one. By analogy, the merger doctrine, to the extent that it applies to juvenile proceedings, does not prevent a juvenile court, as trier of fact, from finding that the same conduct supports multiple delinquency findings as long as the trial court enters one disposition for all such delinquency findings resulting from the same criminal act.

In re Durham (internal citations omitted)

{¶24} Likewise, in the matter currently before us, though appellant was found delinquent for committing each charged offense, the trial court proceeded to disposition on only one offense. The magistrate ordered a single disposition of intensive probation for the four delinquency findings; then, after a de novo review, the trial court reversed the magistrate's decision as to the disposition of intensive probation and instead ordered appellant to compose and deliver one letter of apology to the victim. Thus, we find that even if merger principles apply here, they were not violated. See *In re Durham*. Consequently, we overrule appellant's second assignment of error.

{¶25} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and KLATT, J., concur.

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