

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-05-113
 :
 - vs - : OPINION
 : 4/4/2011
 :
 ROBERT D. COOPER, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-12-2160

Michael T. Gmoser, Butler County Prosecuting Attorney, Kelly E. Heile, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Robert D. Cooper, appeals his conviction in the Butler County Common Pleas Court on four counts of sexual battery. We affirm the decision of the trial court.

{¶2} On December 17, 2008, appellant was indicted on four first-degree felony counts of rape in violation of R.C. 2907.02(A)(2), and four third-degree felony counts of sexual battery in violation of R.C. 2907.03(A)(5). The state alleged that during the period of July 2005 through April 2008, appellant engaged in unlawful sexual conduct

with his wife's niece, S.H., in their Monroe home. The alleged sexual conduct occurred while S.H. was between the ages of 14 and 16.

{¶3} S.H. reported the alleged abuse to family members on April 22, 2008 and a police investigation ensued. Following a bench trial in March 2010, appellant was found guilty of each sexual battery count. He was acquitted of the rape charges. The trial court sentenced him to four, three-year concurrent prison terms.

{¶4} Appellant has appealed his conviction, raising a single assignment of error for our review:

{¶5} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} In his sole assignment of error, appellant challenges the weight of the evidence supporting his conviction. Specifically, he contends that S.H.'s trial testimony was inconsistent with prior statements she made concerning the circumstances surrounding the alleged sexual conduct. He also argues that her credibility was diminished because she was a "problem child" and there was evidence before the court regarding her behavioral problems, including a criminal charge for theft and underage alcohol possession. According to appellant, S.H.'s testimony was not credible and should not have been considered by the trial court.

{¶7} "When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proven the offense beyond a reasonable doubt." *State v. Murray*, Clermont App. No. CA2009-03-015, 2009-Ohio-6174, ¶18, quoting *State v. Eckert*, Clermont App. No. CA2008-10-099, 2009-Ohio-3312, ¶16; *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. In conducting its review, an appellate court examines 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 trial court "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 380, 387, 1997-Ohio-52. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight to be given the evidence, these issues are primarily matters for the trier of fact to decide. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In a bench trial, the trial court acts as the fact-finder. *State v. Kersey*, Warren App. No. CA2008-02-031, 2008-Ohio-6890, ¶10.

{¶8} Appellant was convicted of sexual battery in violation of R.C. 2907.03(A)(5). This section prohibits a person from engaging in sexual conduct with another "when * * * [t]he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person." In addition, sexual conduct, defined in R.C. 2907.01(A) includes, inter alia, "vaginal intercourse between a male and female; * * * fellatio, * * * and, without privilege to do so, the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶9} At trial, S.H. testified that she had lived with her aunt, appellant, and her aunt's three young children since the age of 11. According to the record, appellant adopted her aunt's children and essentially raised S.H. as his own child. S.H. testified that her early relationship with appellant was good, but the relationship changed when she turned 14.

{¶10} S.H. testified that between July 2005 and April 2008 the sexual conduct

with appellant occurred multiple times. She claimed that there were "[t]oo many [incidents] to count, a lot." According to S.H., the incidents generally occurred in the morning and when she returned home from school. She testified that they occurred in many areas of the house, including upstairs in her bedroom, the master bedroom, and one of the other children's bedrooms, as well as in the downstairs living, laundry, and computer rooms.

{¶11} S.H. recalled four specific incidents at trial. She testified that the first sexual encounter with appellant occurred on July 23, 2005. S.H. entered the master bedroom and observed appellant sitting in a chair next to the bed. According to S.H., appellant pushed her onto the bed. He then removed her shorts and underwear and "stuck his penis" inside her vagina.

{¶12} The next incident occurred in October 2007, following S.H.'s surgery for a knee injury to her right leg. She testified that during her one and one-half week-long recovery period, she was home from school and would spend several hours each day on the couch in the living room with her leg in a therapeutic machine. S.H. claimed that during this period, appellant entered the room, removed her left pant leg and underwear while her right leg was still in the device, and inserted his penis into her vagina.

{¶13} Additional instances occurred in January and April 2008. According to S.H., appellant forced her to perform fellatio on him and penetrated her vagina with his penis in one of the other children's bedrooms.

{¶14} During the police investigation, carpet and mattress samples were taken from S.H.'s room. BCI reports and deposition testimony introduced at trial indicated that seminal fluid matching the DNA of appellant was found on S.H.'s mattress. S.H.'s aunt testified at trial that she could not recall an instance where she and appellant had engaged in sexual intercourse on S.H.'s bed, and that the mattress had been purchased

new when S.H. came to live with her. In addition, S.H. testified that appellant had a mole in his groin area. This testimony was corroborated by the testimony of a police detective, who photographed the mole during the course of the investigation. The photographs were introduced into evidence at trial.

{¶15} Appellant claims that S.H.'s testimony regarding the specifics of each encounter were inconsistent and lacked credibility because she recounted details of the incidents differently to the social worker who interviewed her shortly after she reported the alleged abuse in April 2008. On appeal, appellant points to several discrepancies. According to the social worker's written report, during the first incident, appellant was lying on the bed when S.H. walked into the room. He was not seated in a chair as S.H. testified at trial. In addition, S.H. could not recall whether she was pushed onto the bed or got onto the bed on her own, as she had told the social worker. There were also discrepancies with regard to whether the younger children were present during the encounters and what they could observe.

{¶16} Based on the foregoing, and upon review of the record, we cannot say that the trial court clearly lost its way in convicting appellant. Although her lengthy cross-examination indicated that some of the details pertaining to the incidents were inconsistent with her previous statements, and there was evidence to demonstrate that S.H. had behavioral issues, we must defer to the trial court's decision finding S.H.'s testimony credible. The court, as the trier of fact, was "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶79.

{¶17} The trial court also heard evidence that appellant's seminal fluid was present on the mattress on S.H.'s bed, as well as her aunt's testimony that she could not

recall engaging in sexual intercourse with appellant on S.H.'s bed. In addition, S.H.'s testimony that appellant had a mole in his groin area was corroborated by the detective's testimony and photographic evidence introduced at trial. In light of this evidence, we do not find appellant's sexual battery conviction against the manifest weight of the evidence.

{¶18} Appellant's assignment of error is overruled.

{¶19} Judgment affirmed.

POWELL, P.J., and BRESSLER, J., concur.