[Cite as *State v. Woodward*, 2011-Ohio-6019.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-02-036
	:	O P I N I O N
- vs -		11/21/2011
	:	
JAMES WOODWARD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-09-1514

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

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RINGLAND, J.

{¶1} Defendant-appellant, James Neil Woodward, appeals from a judgment of the Butler County Court of Common Pleas, convicting him of one count of rape and one count of gross sexual imposition.

{¶2} On September 22, 2010, appellant was indicted for one count of rape in violation of R.C. 2907.02(A)(1)(b), a first-degree felony, and one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony. The charges stemmed

from allegations that appellant touched and digitally penetrated the genitals of his nine-year-old grandniece, R.W., and performed oral sex on her.

{¶3} At trial, R.W. testified that on numerous occasions, appellant touched or penetrated her vagina with his fingers, telling R.W. that it was their "secret." R.W. explained that appellant would pull down her pajama pants and begin touching her genital area, typically while they watched a movie on the couch or in appellant's bedroom. On at least three other occasions, R.W. testified appellant "hid" her in his bathroom and forced her to submit to oral sex.

{¶4} Following a jury trial, appellant was convicted as charged and sentenced to an indefinite sentence of 15 years to life in prison on Count One, and a consecutive four-year sentence on Count Two.

{¶5} Appellant timely appeals, raising two assignments of error for review.

{¶6} Assignment of Error No. 1:

{¶7} "THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} In his first assignment of error, appellant argues his convictions are not supported by the manifest weight of the evidence. This argument lacks merit.

{¶9} A manifest weight challenge 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. Willis*, Clermont App. No. CA2010-10-079, 2011-Ohio-3519, ¶24. In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact 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. Hernandez*, Warren App. No. CA2010-

10-098, 2011-Ohio-3765, ¶25.

{¶10} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." Id. at ¶26, quoting *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. See *State v. Thompkins* , 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶11} Appellant was charged with one count of rape in violation of R.C. 2907.02(A)(1)(b), which states:

{¶12} "(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:

{¶13} "* * *

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

{¶15} "Sexual conduct" is defined as "vaginal intercourse between a male and female; * * * 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." R.C. 2907.01(A); *Willis*, 2011-Ohio-3519 at ¶26.

{¶16} Appellant was also charged with gross sexual imposition in violation of R.C. 2907.05(A)(4), which states:

{¶17} "(A) No person shall have sexual contact with another, not the spouse of the

offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶18} "* * *

{¶19} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶20} "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶21} Appellant's manifest weight argument is premised upon the fact that there was no physical evidence against him. Additionally, appellant argues R.W.'s testimony was coached and unreliable, as evidenced by her "unusual knowledge of sexual acts and terminology."

{¶22} Upon reviewing the record, we find appellant's convictions are not against the manifest weight of the evidence.

{¶23} First, appellant is correct that no physical evidence implicates him. However, given the nature of the offenses and the delayed disclosure, physical evidence was unlikely to exist. Moreover, "[i]t is well settled that the testimony of a rape victim, if believed, is sufficient to support each element of rape * * * [f]urther, not all rape victims exhibit signs of physical injury." *State v. Reinhardt*, Franklin App. No. 04AP-116, 2004-Ohio-6443, ¶29.

{¶24} Appellant also contends R.W.'s testimony was coached, and therefore unreliable, because she had been exposed to anatomically-correct figurines and discussed various sexual topics with her mother prior to trial.

{¶25} As previously noted, the weight to be given the evidence and the credibility of

the witnesses are primarily for the trier of the facts, in this case, the jury. *State v. Jackson* (1993), 86 Ohio App.3d 29, 32, citing *State v. Richey* , 64 Ohio St.3d 353, 363, 1992-Ohio-44. The issue of whether R.W.'s testimony was coached was, therefore, one for the jury. See, e.g., *State v. Garfield*, Lorain App. No. 09CA009741, 2011-Ohio-2606, ¶27.

{¶26} Upon review, we see no reason to question the jury's decision to believe R.W., where there is no evidence to support appellant's contention that her testimony was coached.

{¶27} First, during direct examination, R.W. testified as follows:

{¶28} "[THE STATE]: [W]hen you told your mom about what happened, did she ever tell you what to say when you came into court?

{¶29} "[R.W.]: No.

{¶30} "* * *

{¶31} "[THE STATE]: Did I ever tell you what to say in court?

{¶32} "[R.W.]: No."

{¶33} Additionally, the state's expert witness explained that the phrases R.W. used in her testimony, including "rape" and "vagina," were not inconsistent with what someone her age would say about the circumstances. Moreover, R.W. testified that she learned these definitions "way before" the incidents with appellant.

{¶34} As for the figurines, R.W.'s mother testified that they were midwifery dolls, representing a female and a baby with an umbilical cord. Appellant does not explain how figurines depicting the birthing process would later provoke false testimony from R.W. regarding sexual advances by appellant.

{¶35} The jury in this case was in a better position to view the witnesses, observe their demeanor, and assess their credibility, and was free to believe or disbelieve all, part, or none of their testimony. See *State v. Anderson*, Fayette App. No. CA2008-07-026, 2009-Ohio-2521, ¶31. Here, the jury obviously found R.W.'s testimony to be more credible and

chose to believe her version of the events rather than appellant's proffered version.

{¶36} After reviewing the entire record, weighing the inferences and examining the credibility of the witnesses, we cannot say the jury clearly lost its way so as to create a manifest miscarriage of justice requiring appellant's convictions for rape and gross sexual imposition be reversed. See *State v. Siney*, Warren App. No. CA2004-04-044, 2005-Ohio-1081, ¶60 ("[a] conviction is not against the manifest weight of the evidence merely because the trier of fact believes the testimony of a witness for the state").

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

{¶38} Assignment of Error No. 2:

{¶39} "APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT."

{¶40} In his second assignment of error, appellant argues the prosecuting attorney committed misconduct during closing argument. However, defense counsel failed to object and thus waived all but plain error. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶154. The test for prosecutorial misconduct is whether the remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights. Id. at ¶155. See, also, *State v. Lester* (1998), 126 Ohio App.3d 1, 8 (appellants bear the burden of demonstrating prejudice on a claim of prosecutorial misconduct by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different"). The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Lang* at ¶155, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶41} First, appellant argues the prosecutor committed misconduct by improperly commenting on his pre-trial silence. During closing argument, the prosecutor stated that the crimes were "a secret because [appellant] didn't tell what happened, nor would you expect

him to do that." While dangerously close, we find this statement was not an improper comment on appellant's silence. Cf. *State v. Dougherty*, Butler App. Nos. CA2010-02-036, CA2010-02-037, 2011-Ohio-788.

{¶42} The record clearly reveals appellant told R.W. that the sexual conduct was "only [their] secret," which in turn prevented R.W. from immediately reporting appellant's behavior. Moreover, the evidence indicates appellant attempted to keep his activity a secret by purchasing expensive gifts for R.W., and that he touched R.W. when no one else could witness the activity.

{¶43} When viewed in the context with the rest of the closing argument, the prosecutor's comments appear to be fair based on the evidence and within the latitude accorded the prosecution during closing argument.

{¶44} Appellant also argues the prosecutor improperly commented on the lack of DNA or other physical evidence in the case. During closing argument, the prosecutor stated: "[t]his is a secret that didn't leave fingerprints or DNA, because this defendant told [R.W.] it was a secret, and she was afraid of him." Upon review, it is clear the prosecutor was not attacking appellant with this comment. Instead, the prosecutor was simply explaining that in keeping crimes of this nature a "secret" for an extended period of time, there was likely no physical evidence to be found. Further, there is no evidence that this statement prejudicially affected appellant's substantial rights, therefore we reject this argument.

{¶45} Lastly, appellant argues the prosecutor improperly vouched for R.W.'s credibility by claiming that "[a]s a result of [R.W.'s] courage in coming forward and telling her mom what happened, this defendant has been charged with one count of rape and one count of gross sexual imposition." We disagree.

{¶46} During trial, R.W. testified she failed to immediately disclose appellant's behavior due to her fear of appellant, explaining: "I was too scared, and I finally got up

enough courage to tell [my mother] * * * I was worried [appellant] was going to hurt my mom and maybe he would hurt me more or hurt my sister." R.W. also testified she was afraid appellant would "rape" her if she disclosed their secret. Additionally, on direct examination, appellant admitted R.W. had witnessed his "violent rages" against R.W.'s grandmother. When viewed in this context, it is clear the prosecutor's comments again argued the evidence. These comments do not vouch for R.W.'s veracity or imply knowledge of facts outside the record. See *Lang*, 2011-Ohio-4215 at ¶165-166 ("[v]ouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue"). Appellant's argument is unpersuasive and rejected.

{¶47} In sum, we reject appellant's arguments because prejudicial misconduct did not occur. Appellant's second assignment of error is overruled.

{¶48} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.