

ORIGINAL

THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO: 09-1349
Plaintiff - Appellee	:	APPEAL FROM THE
VS	:	TWELTH APPELLATE
	:	DISTRICT OF OHIO
HEATHER R. CARMEN	:	COURT OF APPEALS
Defendant - Appellant	:	CLINTON COUNTY COURT
	:	OF COMMON PLEAS
	:	APPEAL NO: CA 20070630
	:	CLINON CO. NO: CR 20065318
	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT HEATHER R. CARMEN**

ATTORNEY FOR APPELLANT
 Inza E. Johnson-Hebb #0040642
 3955 Antioch Road
 Wilmington, Ohio 45177
 (937) 382-2833

ATTORNEY FOR APPELLEE
 Richard Moyer
 Prosecuting Attorney for Clinton County
 103 East Main Street
 Wilmington, Ohio 45177

FILED
 OCT 15 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 OCT 15 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

- i. EXPLANATION OF WHY THIS CASE IS AN APPEAL OF RIGHT AS TO THE PROPOSITION OF LAW NO. 1 and EXPLANATION OF WHY THIS CASE IS A DISCRETIONARY APPEAL INVOLVING A FELONY P. 4
- ii. STATEMENT OF THE CASE P. 6
- ii. STATEMENT OF FACTS P. 7
- iii. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1 P. 7

IT WAS PREJUDICIAL ERROR TO ALLOW THE TESTIMONY OF THE APPELLANT'S PAST SEXUAL HISTORY OR HER SEXUAL ORIENTATION.

Proposition of Law No. 2 P. 10

THE APPELLANT WAS NOT GRANTED A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER CONSTITUTIONAL RIGHTS.

Proposition of Law No. 3 P. 11

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S RULE 29 MOTION TO DISMISS

Proposition of Law No. 4 P. 12

THE APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

Proposition of Law No. 5 P. 14

THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Proposition of Law No. 6 P. 15

THE COURT ERRED IN SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCE WHEN SHE HAD NO PRIOR CRIMINAL HISTORY CONCLUSION

CONCLUSION P. 15

CERTIFICATE OF SERVICE P. 17

APPENDIX Appx. Page

Judgment Entry of the Clinton County Court of Appeal
(November 10, 2008) 1

Opinion of the Clinton County Court of Appeals
(November 10, 2008) 2

Judgment Entry of Sentence from the Clinton County
Common Pleas Court 14
(May 18, 2007)

**EXPLANATION OF WHY THIS CASE IS AN APPEAL OF RIGHT and A
DISCRETIONARY APPEAL AS TO THE PROPOSITION OF LAW NO. 1 and 2 and
EXPLANATION OF WHY THIS CASE IS A DISCRETIONARY APPEAL INVOLVING
A FELONY**

This matter presents several critical issues for this Court to weigh and consider. The first proposition of law is appealed as a matter of right as well as a discretionary appeal. The Clinton County Court of Common Pleas should never have allowed the Prosecution to introduce evidence concerning the Appellant's sexual orientation and past sexual history. The Courts and the Legislature and acknowledged that the issue of sexual orientation and past sexual history are extremely prejudicial in a criminal action. The legislature did so by enacting O.R.C. 2907.02(D). The Courts of Ohio have done so in case after case, State v. Brewster (1990) 1990 Ohio App. LEXIS 1734, State v. Hatfield (1988) 1988 Ohio App. LEXIS 5208. In discussing the rationale behind the rape shield law the Ohio Supreme Court in State v. Gardner (1979) 59 Ohio St. 2d 14 stated "by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute [2945.59] is intended to aid in the truth-finding process."

Since none of the questions were directed to illicit testimony concerning the presence or origin of semen they were improper and should not have been allowed. O.R.C. 2907.02 provides that evidence of a defendant's sexual activity and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under O.R.C. 2945.59 and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Sexual orientation and past sexual

history are not indicators as to an individual's capacity to commit crimes and therefore the testimony should not have been allowed.

Proposition of Law 2 is an appeal of right and a discretionary appeal on the issue of the ineffective assistance of counsel. The ineffective assistance of counsel violated the Appellant's Constitutional Rights. Counsel failed to protect the Appellant's right on numerous occasions throughout the trial. Counsel failed to object to the line of questions concerning the Appellant's sexual orientation and past sexual history. After a conference with the Judge counsel for the Appellant finally objected to the Prosecutor's line of questioning. Counsel failed to make a motion to strike and to ask that the Court admonish the jury that the entire line of questioning should be disregarded.

The Court should review the Appellant's Proposition of Law 3, 4, 5, and 6 as discretionary appeals. Proposition of Law 3, addresses the trial court's failure to grant a rule 29 Motion to Dismiss made at the close of the state's case. The victim stated on the record several times that he lied in his statement to the Clinton County Children's Services. He admitted that he made up part of his testimony. He even told the jury that he didn't know why he lied. The State failed to establish the incident occurred during the time frame in the amended indictment wherefore the Rule 29 Motion should have been granted.

Proposition of Law 4 addresses the insufficiency of evidence. The state's only witness admitted that he lied several times. No reasonable and rational trier of fact would find his testimony credible.

Proposition of Law 5 addresses the Manifest weight of the evidence. The Appellant's conviction is against the manifest weight of the evidence. The only evidence presented against the Appellant was the testimony of Jonathon Shaffer. His testimony was not credible. The

transcripts show that the Prosecutor feed the witness facts on the stand and that the witness reversed himself several times during his testimony. The issue of weight of the testimony given to the witness's testimony in light of the Appellant's Proposition of Law 1 is clearly in doubt.

Proposition of Law 6 addresses the issue of sentencing. Was the Clinton County Court of Common Pleas correct in sentencing the Appellant to the maximum sentence when she had no prior criminal history. The Appellant in this matter had no prior criminal history. It was error for the court to impose the maximum sentence on the defendant in this matter.

The Court should review this case for the reasons as set forth in this Memorandum in Support of Jurisdiction.

STATEMENT OF THE CASE

This action began with allegations of sexual abuse made by the minor children of the Appellant on or about Father's Day of 2006. The police were notified and an investigation ensued. The Appellant was indicted in a four-count indictment on October 5, 2006. The Appellant entered a not guilty plea on October 11, 2006. The State of Ohio filed discovery on October 20, 2006. The Attorney for the Appellant did not file a request for discovery nor file any disclosure pursuant to Criminal Rule 16. On January 16, 2007 this case was consolidated with case no 20065321, State of Ohio vs. Edward Carmen. There was no objection filed on the written record nor was there a motion to separate filed by counsel for the Appellant.

On May 1, 2007 the prosecution filed a Motion in Limine pursuant to O.R.C. 2907.02(D) requesting that the court prevent the introduction of any prior sexual abuse or sexual experience of any of the three victims during the course of the trial.

The consolidated trial began on May 8, 2007 and continued through May 17, 2007. On May 8, 2007, during the course of Voir Dire the prosecution orally amended the time frame of the indictment to include from January 1, 2006 to June 8, 2006. The State also amended the indictment to remove the allegation or specific finding that J.S. (Jonathan Shaffer) was under the age of 10 at the time of the alleged offense. On May 17, 2007 the Appellant was found not guilty on three of the four counts of the indictment and guilty on count three, rape pursuant to O.R.C. 2907.02A1b as amended.

STATEMENT OF FACTS

The facts in this matter are disputed. It is the Appellant's contention that the state failed to show that anything occurred between the dates the State specified in its amended indictment. Therefore there are no facts to present to this court. The prosecution admitted that the victim in this matter gave her no specific dates.

The State has alleged that the Appellant has sexual intercourse with the victim in this matter and that the victim was under the age of 13 at the time of the alleged offense. The State further alleged that this offense occurred between January 1, 2006 through June 8, 2006.

Proposition of Law No. I

IT WAS PREJUDICIAL ERROR TO ALLOW THE TESTIMONY OF THE APPELLANT'S PAST SEXUAL HISTORY OR HER SEXUAL ORIENTATION.

During the course of the trial the State asked the Appellant numerous questions concerning her past sexual history and her sexual orientation. Since none of the questions were directed to illicit testimony concerning the presence or origin of semen they were improper and should not have been allowed. O.R.C. 2907.02 provides that evidence of a defendant's sexual

activity and reputation shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under O.R.C. 2945.59 and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value, State v. Brewster (1990) 1990 Ohio App. LEXIS 1734, State v. Hatfield (1988) 1988 Ohio App. LEXIS 5208. In discussing the rationale behind the rape shield law the Ohio Supreme Court in State v. Gardner (1979) 59 Ohio St. 2d 14 stated "by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute [2945.59] is intended to aid in the truth-finding process."

In the case at bar the prosecution was allowed to ask the Appellant if she was bi-sexual, if she and the co-defendant went to swingers clubs, if the Appellant and the co-defendant had been involved in-group sex before, if she owned sex toys and if she owned a whip. Further the prosecution tried to insinuate that the Appellant's tattoo was of a sexually deviant nature. The prosecution then asks again about sex toys and bondage. At this point the counsel for the Appellant raises an objection as to the questions. The attorneys have a side bar conference with the court and the court sustains the objection to the questions. There was no motion to strike. Then the Prosecutor again begins to question the Appellant about her tattoo and its meaning. When the prosecution asks the Appellant about a body piercing counsel for Appellant objects and the court has the jury removed from the courtroom. The court expressed concern over the line of questioning. The court clearly indicates that it is his opinion that the questions and answers would have been protected and inadmissible under O.R.C. 2907.02. The prosecution tries to show that there would be an exception to the statute in regard to these questions by stating that they would go to the credibility of the witness. However, the only exception set forth

in the statute to allowing these kinds of issues into evidence is O.R.C. 2945.59. O.R.C. 2945.59 specifically relates to proof of defendant's motive. There is no exception to allow for this type of questioning because the State hopes to use it to impeach the defendant's credibility. To allow these questions and statements into the record was clearly against the O.R.C. 2945.59, the Ohio Supreme Courts statements in State v. Gardner (1979) 59 Ohio St. 2d 14, and all of the case law in this area. The Court could have on its own motion stopped the questioning before it got to the point it did. The court clearly had concerns about the line of questioning that the prosecutor was employing, yet the court did not stop the questioning until the damage was done. The questions and issues raised in this series of questions were clearly prejudicial. These questions painted a picture of the Appellant as a sexual deviant. It clearly was intended to plant in the minds of the jury that the Appellant was so free sexually that she would have no qualms about having sexual intercourse with her son. This is all the more clear by the fact that the prosecution immediately stopped this line of questioning and did not introduce any of these issues in her case in rebuttal. The court tried to limit the impact of these questions by placing in the jury instructions a limiting instruction about prior bad acts. The Attorney for the Appellant tried to correct the situation by telling the jury to disregard these issues in his closing arguments. However, there was nothing stricken from the record. The only possible way to correct this highly prejudicial testimony would have been to strike it from the record and to tell the jury directly that they are to disregard this testimony and that it is not relevant to the issue of the criminal charges before it. The court had a duty to do this on its' own motion if there was no request made. The court did not do so, thus the Appellant was unduly prejudiced by the fact that the state was allowed to paint such an unfavorable picture of her to the jury.

Wherefore, the Appellant's conviction was tainted by this issue. The Appellant requests that the Court overturn her conviction on this basis.

Proposition of Law No. 2

**THE APPELLANT WAS NOT GRANTED A FAIR TRIAL DUE TO THE
INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER
CONSTITUTIONAL RIGHTS.**

The issue is did counsel make mistakes and did those mistakes result in prejudice to the defendant such that there should be a reversal of the judgment. All of the decisions that address the issue of ineffective assistance of counsel indicate that the court does not need to review any issues in a vacuum. The U.S. Supreme Court in Strickland v. Washington (1984) 466 U.S. 668 specifically says that the court should review all of the circumstances of the case.

In the case at bar it is clear that the counsel for the Appellant made several mistakes. First was his failure to object to the State's questions concerning the sexual actions of the Appellant as set out in our First Proposition of Law. Counsel for Appellant failed to object for an extended period of time. This allowed the testimony to progress way beyond the point where it should have stopped. Second counsel never did ask for a motion to strike. All of the offending testimony should have been stricken from the record and the jury should have been told that they were not to consider it in any way. This was never done. Then counsel refers to the issues in his closing arguments. While this is a trial strategy and was probably intended to try and gain back ground, the end result was it again brought it to the forefront of the jury's mind. Counsel failed to object to the State asking if the Appellant used drugs. Counsel failed to object to the State asking questions that had been asked and answered. Counsel failed to object to the testimony of Kathy Runnels. This testimony was intended to rebut testimony given prior but there was

nothing in the testimony to tie it into a particular issue. Counsel failed to request a rule 29 motion at the close of the Appellant's case. The Court was clearly confused as to what actions the State was alleging constituted the allegations.

Further issues that the court should consider in determining whether there was ineffective assistance of counsel: Counsel failed to join in the co-defendant's motion for a mistrial, Counsel opened the door for opinion testimony based upon hearsay, Counsel failed to request discovery, Counsel failed to file any discovery, Counsel did not subpoena any witnesses and Counsel did not call any witnesses on the Appellant's behalf.

In State v. Lytle (1976) 48 Ohio St, 2d 391, 358 N.E.2d 623, 1976 Ohio LEXIS 767, 2 Ohio Op. 3d 495 the Ohio Supreme Court stated in order to hold error harmless, a court must be able to declare a belief that the error is harmless beyond a reasonable doubt. In the case at bar, this court cannot say that the error of allowing the improper questions of the prosecutor to go unchallenged was harmless error beyond a reasonable doubt.

Clearly there is at least one issue that counsel failed to act upon that prejudiced the Appellant. Therefore the Appellant asks that her conviction be overturned on the basis of ineffective assistance of counsel.

Proposition of Law No. 3

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S RULE 29 MOTION TO DISMISS

The trial court failed to grant a rule 29 motion to dismiss made at the close of the state's case. It was clear from the testimony that the state had failed to meet its burden of proof. The trial court should have granted the motion to dismiss.

In the case at bar the victim stated on the record several times that he lied in his statement to the Clinton County Children's Services. He admitted that he made up part of his testimony. He even told the jury that he didn't know why he lied.

The State failed to establish the incident occurred during the time frame in the amended indictment.

Wherefore the Rule 29 Motion should have been granted.

Proposition of Law No. 4

THE APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

The trials Court conviction of the Appellant is not supported by any reliable evidence. The only evidence given was the testimony of the victim, Jonathan Shaffer. This witness admitted numerous times that he lied, both in his written statement and in his testimony before the court. He admitted that he made up part of his testimony. He even told the jury that he didn't know why he lied. Throughout his direct testimony and cross-examination he changed his story. When he was asked on direct if anything happened he said no. Then the Prosecutor changed the question and he answered yes. Then he had problems with the time frame. Again the Prosecutor supplied him the time frame. He never did say what acts happened when. The witness did not testify when any of the acts occurred. The Prosecution in her closing arguments before the Jury provided them with the incidents and the dates. The closing arguments are not evidence. Yet in this case that is how it was presented to the Jury. This witness was a child. However, the court and the Jury are to apply the same standards of review to the testimony of a child as they are to any other witness. If you apply these standards of truthfulness and credibility there is no credible evidence to support this conviction. In State v. Crawford (2007) 2007 Ohio 1854, 2007 Ohio

App. LEXIS 1688 the Eighth Appellate District relied upon State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, State v. Eley (1978), 56 Ohio St.2d 169, 383 N.E.2d 132 and Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560. The court stated that the relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. An Appellant Court's function when reviewing the issue of sufficiency of evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt. The further noted that a judgment should not be reversed if it is supported by competent credible evidence which goes to all of the elements of the case. See Cohen v. Lamko (1984) 10 Ohio St.3d 167, 10 Ohio B. 500, 462 N.E.2d 407. In State v. Martin (1983) 20 Ohio App. 3d 172, 485 N.E.2d 717, 1983 Ohio App. LEXIS 16057, 20 Ohio B. Rep. 215 the First Appellate Court stated that "as to a claim of insufficient evidence, the test is whether after viewing the probative evidence and inferences reasonably drawn there from in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt".

It is significant that the courts use the terms reasonable and rational. In cases of this nature it is clear that everyone is touched by what a witness presents. Emotions run high in child abuse cases and rape cases. That is clear from the court's comments during Voir Dire. Each day the court re-iterated that the jury must set their emotions aside in deciding this case. Everyone acknowledged that this would be an emotionally charged case. So the court of appeals must now take up the Appellant's issues and decide if the evidence is sufficient to support a conviction when there is not emotional factor and when they are the reasonable and rational jury member.

The Appellant submits that the evidence in this case is lacking. There is not sufficient evidence to support a conviction when reviewed in a reasonable and rational way. The state's only witness admitted that he lied several times. No reasonable and rational trier of fact would find his testimony credible. This court must reverse the decision of the trial court.

Proposition of Law No. 5

THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The Appellant's conviction is against the manifest weight of the evidence. The only evidence presented against the Appellant was the testimony of Jonathon Shaffer. His testimony was not credible. In State v. Crawford (2007) 2007 Ohio 1854, 2007 Ohio App. LEXIS 1688 the court stated that review of a case as against the manifest weight of the evidence is subjected to a different standard of review than is sufficiency of the evidence. The Ohio Constitution Article IV § 3(B)(3) authorizes appellate courts to assess the weight of the evidence independently of the fact finder. An Appellate Court has the authority and the duty to weigh the evidence and determine whether the findings of the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial, See State ex rel. Squire v. City of Cleveland (1948) 150 Ohio St. 303, 82 N.E.2d 709. In State v. Martin (1983) 20 Ohio App. 3d 172, 485 N.E.2d 71, 1983 Ohio App. LEXIS 16057, 20 Ohio B. Rep. 215 the First Appellate Court stated that the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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. See also State v. Jenks

(1991), 61 Ohio St.3d 259, 574 N.E.2d 492 and State v. Eley (1978), 56 Ohio St.2d 169, 383 N.E.2d 13,

In this case the court was confused as to the acts that the state had alleged. The court at one point told the state that he would “need some guidance tomorrow” T.P. 1236, L. 6 and 7. If the court is confused doesn’t that indicate that there is an issue with the weight of the evidence.

Throughout the entire transcript there are issues concerning the proper adjudication of justice. There were tapes that were not provided to the defense. There were reports that were provided on the day of cross-examination of the witness. There is no credible evidence as to when these allegations were to have occurred. The evidence to support this conviction is simply not there. Therefore, the Appellant’s conviction should be overturned and the matter referred to the court for a new trial.

Proposition of Law No. 6

THE COURT ERRED IN SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCE WHEN SHE HAD NO PRIOR CRIMINAL HISTORY.

The Appellant in this matter had no prior criminal history. It was error for the court to impose the maximum sentence on the defendant in this matter.

CONCLUSION

The Appellant’s conviction should be reversed. The Appellant’s conviction was tainted by the admission of improper testimony. Counsel for the Appellant was ineffective. He failed to object to issues in the trial. Clearly there is at least one issue that counsel failed to act upon that prejudiced the Appellant. Therefore the Appellant asks that her conviction be overturned on the basis of ineffective assistance of counsel. Appellant’s Rule 29 Motion should

have been granted. The Appellant submits that the evidence in this case is lacking. There is not sufficient evidence to support a conviction when reviewed in a reasonable and rational way. The state's only witness admitted that he lied several times. No reasonable and rational trier of fact would find his testimony credible. This court must reverse the decision of the trial court. Throughout the entire transcript there are issues concerning the proper adjudication of justice. There were tapes that were not provided to the defense. There were reports that were provided on the day of cross-examination of the witness. There is no credible evidence as to when these allegations were to have occurred. The evidence to support this conviction is simply not there. Therefore, the Appellant's conviction should be overturned and the matter referred to the court for a new trial. The Appellant's sentence was improper. The Appellant in this matter had no prior criminal history. It was error for the court to impose the maximum sentence on the defendant in this matter.

For the forgoing reasons the Appellant requests that the Appellate Court reverse her conviction.

Respectfully Submitted,


Liza E. Johnson-Hebb #0040642
Attorney for Appellant
3955 Antioch Road
Wilmington, Ohio 45177
(937) 382-2833

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served upon the prosecuting Attorney, Richard Moyer at 103 W. Main Street, Wilmington, Ohio 45177 by fax at 937-382-6278 on this 14th day of October, 2009.


Inza E. Johnson-Hebb

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

CLINTON COUNTY
JOANN M. CHAMBERLIN, CLERK

2008 NOV 10 PM 1:55

FILED-CT. OF APPEALS

STATE OF OHIO,

Plaintiff-Appellee,

CASE NO. CA2007-06-030

JUDGMENT ENTRY

- vs -

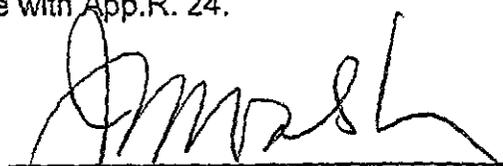
HEATHER R. CARMEN,

Defendant-Appellant.

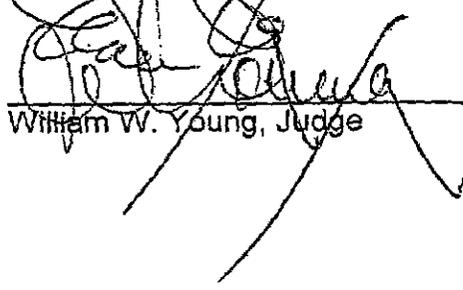
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clinton County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


James E. Walsh, Presiding Judge


H.J. Bressler, Judge


William W. Young, Judge

Jr 10p 506

App. P. 2

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

CLINTON COUNTY
JOANN M. CHAMBERLIN, CLERK

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FILED CT. OF APPEALS

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2007-06-030
	:	<u>OPINION</u>
- vs -	:	11/10/2008
	:	
HEATHER R. CARMEN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI 2006-5318

William E. Peelle, Clinton County Prosecuting Attorney, Deborah S. Quigley, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

~~Susan M. Zurfaco Daniels, P.O. Box 589, Hillsboro, Ohio 45133, for defendant-appellant~~
INJA Johusau-Helob

BRESSLER, J.

{¶1} Defendant-appellant, Heather R. Carmen, appeals her conviction in the Clinton County Court of Common Pleas for the offense of rape. We affirm.

{¶2} In 2003, appellant and her husband, Edward Carmen, moved into her parent's home located in Sabina, Ohio. Appellant has two sons from previous relationships, J.S. and S.P. Both boys lived with appellant and Edward. Edward has two daughters from his previous marriage, M.C. and D.C. Both girls reside with their mother and have visitation with

Edward every other weekend. Around approximately February 2006, Edward's daughter M.C. wanted a cell phone. She discussed the matter with her father and appellant and, thereafter, the couple purchased a phone for her. Around February 14, 2006, Edward and appellant were advised by his ex-wife that M.C. was abusing the phone by text messaging and overuse, and requested that Edward remove the phone from M.C.'s possession. That evening Edward and appellant drove to his ex-wife's home to retrieve the phone. M.C. became very upset, yelling at her parents and engaging in a physical altercation with appellant. Following the altercation, M.C.'s mother proceeded to ground her from her school's upcoming Valentine's Day dance. M.C. went to her room and wrote a letter to her mother, alleging that Edward had given her the phone in exchange for engaging in sexual behavior with him. After reading the letter, M.C.'s mother contacted the Children's Medical Center.

{¶3} M.C. went to the medical center on February 17, 2006 for a forensic interview and physical examination. During the interview, M.C. relayed that she had been sexually assaulted by Edward at appellant's request and in the presence of appellant two weeks prior. The medical evaluation was inconclusive and showed no physical signs of assault or forced sexual entry. Pursuant to M.C.'s disclosure, Fayette County Children's Services was notified and made a referral to Clinton County Children's Services. Clinton County social workers contacted appellant's children at school and interviewed them on or about February 23, 2006. During the interview, the boys denied any sexual activity involving the couple.

{¶4} Around June 18, 2006, appellant's sons were visiting S.P.'s natural father during his allotted parenting time. J.S. disclosed that appellant and Edward had engaged in sexual activity with both him and his brother. The disclosure was reported to the Warren County Sheriff's Office, who contacted the Sabina Police Department. The boys went to the police department, where they were interviewed by a caseworker. The boys made

statements alleging that Edward and appellant engaged in sexual activity with them. Appellant and Edward were interviewed and advised that the agency was going to remove the children from the home. As a result, appellant and Edward agreed to relinquish their home so that the children could remain safely placed with appellant's parents.

{115} Appellant was charged with five counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree.¹ Edward was charged with four counts of rape. The cases were consolidated and a single trial was held involving both defendants. Following a jury trial, appellant and Edward were each found guilty of one count of rape.² Appellant was sentenced to ten years in prison and classified as a sexually-oriented offender. Appellant timely appeals, raising six assignments of error.

{116} Assignment of Error No. 1:

{117} "IT WAS PREJUDICIAL ERROR TO ALLOW THE TESTIMONY OF THE APPELLANT'S PAST SEXUAL HISTORY OR HER SEXUAL ORIENTATION."

{118} In her first assignment of error, appellant directs this court to review testimony regarding her past sexual history and sexual orientation. Appellant argues that allowing the prosecutor to question appellant about past sexual behavior resulted in prejudicial error. Appellant argues the trial court erred by failing to enforce Ohio's rape shield law.

{119} Ohio's rape shield law provides that "[e]vidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section

1. The first and fifth count related to appellant's alleged sexual activity with S.P. The second, third, and fourth count related to appellant's alleged sexual activity with J.S.

2. Appellant was found guilty of count three.

2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D).

{¶10} It is within the sound discretion of a trial court to determine the relevancy of evidence and to apply R.C. 2907.02(D) to best meet the purpose of the statute. *State v. Hart* (1996), 112 Ohio App.3d 327, 331.

{¶11} During cross-examination of appellant, the prosecution inquired into appellant's sexual orientation. The prosecution asked if appellant was bisexual. Appellant admitted that she was. The prosecution asked whether appellant and Edward went to "swinger's clubs" and engaged in group sex. Appellant replied that they went to a swinger's club one time and that they did not engage in group sex, but that she had engaged in sex with other partners before. Appellant acknowledged that she is very open about her sexuality between herself and Edward and other adults. The prosecution inquired whether appellant engaged in bondage, owned any sex toys, or showed pornography to her children; which she denied. Further, the prosecution also asked about one of appellant's tattoos. Specifically, the prosecution asked:

{¶12} "Q: Well, I mean, you've got a tattoo, don't you?"

{¶13} "A: Yes, I have tattoos.

{¶14} "Q: And it says, 'Pudge's slave'?"

{¶15} "A: Yeah.

{¶16} "Q: And it's a picture that has you and a donkey and a whip or what?"

{¶17} "A: No. (laughs), it's a heart and flowers.

{¶18} "Q: And, it just says, 'Pudge's Slave'?"

{¶19} "A: Yeah, says 'Pudge's Slave' and it's a purple rose and the stem comes down and have my children's names on my other arm."

{¶20} The prosecution thereafter inquired into the meaning of the tattoo, asking whether it was sexual in nature. Appellant denied any sexual connotation. The prosecution then inquired whether appellant had a clitoris piercing, which she denied.

{¶21} Following the question regarding the piercing, appellant's counsel entered an objection. The trial court sustained the objection and instructed the jury to strike the reference to any piercing. However, no motion for a mistrial or motion to strike was made relating to the other sex-related questions and testimony. Due to this omission, our review is limited to plain error. Appellant argues the improper line of questioning by the prosecutor prejudicially characterized her as a sexual deviant.³

{¶22} Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶12; *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. "Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Baldev* at ¶12, citing *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶23} After a review of the record, we find no plain error. On direct examination, appellant was questioned by her trial counsel and testified about her sons' access and knowledge of sex, pornography and sex toys. Appellant was also asked about her husband's sexual orientation and whether she owned a dildo. Appellant testified that she did not own a dildo and that Edward was not gay. The prosecutor's questions relating to appellant's sexual

3. Appellant notes that the prosecution filed a motion in limine requesting that the court prevent the introduction of any prior sexual abuse or experience of any of the three victims during the course of trial. Appellant states in her brief that by filing "this motion the state requested that the court enforce [the rape shield] law during the course of the trial." Appellant argues that the questioning was a violation of the Ohio rape shield law and the trial court erred by failing to instruct the jury to disregard the resulting testimony.

practices were invited by the direct examination of appellant.

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

{¶25} Assignment of Error No. 2:

{¶26} "THE APPELLANT WAS NOT GRANTED A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER CONSTITUTIONAL RIGHTS."

{¶27} In her second assignment of error, appellant claims ineffective assistance of counsel. Appellant argues that her trial counsel committed multiple mistakes; including failing to object or request a motion to strike following the questions regarding her sexual history discussed in the previous assignment of error. Appellant also argues that her counsel, referring to those issues during closing argument, prejudiced her by bringing the testimony "to the forefront of the jury's mind." Additionally, appellant alleges further mistakes by her trial counsel. Appellant claims her counsel erred by failing to object to the questioning regarding appellant's past drug use, failing to object to questions that had been asked and answered, failing to object to the testimony of Kathy Runnels, failing to renew her Crim.R. 29 motion at the close of appellant's case, failing to join her co-defendant's motion for a mistrial, failing to request or file discovery, and failing to subpoena or call any witnesses on her behalf.

{¶28} To establish ineffective assistance, appellant must show that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693, 104 S.Ct. 2052. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland* at 689. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the

result of the trial would have been different. *Strickland* at 694. In order to establish ineffective assistance, appellant must establish that trial counsel's performance was deficient; and that the deficient performance prejudiced the defense to the point of depriving appellant of a fair trial. *Id.*

{¶29} Appellant submits a laundry list of potential errors committed by trial counsel. As we discussed in the previous assignment of error, the sexual questioning by the prosecution was invited by appellant's direct testimony. Accordingly, counsel's failure to object to the questioning, and appellant's resulting testimony, did not prejudice appellant. As to the remaining errors, appellant further fails to demonstrate the effect of the alleged omissions. First, appellant fails to show that the renewed Crim.R. 29 motion would have been successful if requested by her trial counsel. Second, appellant claims that counsel erred by failing to subpoena or call witnesses, yet appellant does not identify any potential witnesses or testimony. Finally, appellant claims that her trial counsel was insufficient for not objecting to questions about her drug use, the testimony of Kathy Runnels, or joining her co-defendant's motion for mistrial; but appellant fails to show that she was prejudiced by these decisions or that the motion would have been successful.

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

{¶31} Assignment of Error No. 3:

{¶32} "THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S CRIM.R. 29 MOTION TO DISMISS."

{¶33} Assignment of Error No. 4:

{¶34} "THE APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE."

{¶35} Due to the similarity of appellant's argument, we will address appellant's third and fourth assignments of error together. At the close of the state's case, appellant's counsel

moved for acquittal based upon Crim.R. 29, which was denied by the trial court. In her third assignment of error, appellant argues that the trial court erred by failing to grant the Crim.R. 29 motion. In her fourth assignment of error, appellant claims that insufficient evidence was presented to support the rape conviction.

{¶36} Under both assignments of error, appellant presents the same argument. Further, we address these assignments of error together because our review of a court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14.

{¶37} Appellant argues in both assignments of error that the state failed to establish the time frame the incident occurred as alleged in the indictment. Appellant also attacks the credibility of the victim's testimony, arguing that the conviction is not supported by any reliable evidence. However, evaluation of witness credibility is not proper for the review of evidentiary sufficiency. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79, citing *State v. Waddy* (1992), 63 Ohio St.3d 424. In reviewing the sufficiency of the evidence underlying a criminal conviction, a reviewing court will not substitute its evaluation of witness credibility for that of the jury. *State v. Williams*, 73 Ohio St.3d 153, 165, 1996-Ohio-275. As a result, the credibility argument raised by appellant is improper when reviewing a case for sufficiency or the denial of a Crim.R. 29 motion. We will address the issue of credibility below under appellant's fifth assignment of error, relating to the manifest weight of the evidence.

{¶38} Accordingly, the lone argument for review is whether sufficient evidence was presented to establish the time frame the incident occurred. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would

convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶39} The crime of "rape" as defined in R.C. 2907.02(A)(1)(b) provides, "[n]o 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 * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶40} The indictment in the case at bar alleges that the illegal sexual conduct occurred "on or about the period of January 1, 2006 through and including February 28, 2006."

{¶41} After a review of the record, sufficient evidence was presented to establish that the rape occurred during the alleged time period. At trial, the victim testified that the conduct occurred after he turned ten years old on January 6, 2006, while he was in the third grade. This timeframe was supported by S.P.'s testimony. S.P. affirmed in his testimony that the incidents he was testifying about occurred around January 2006.

{¶42} Appellant's third and fourth assignments of error are overruled.

{¶43} Assignment of Error No. 5:

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

{¶45} In her fifth assignment of error, appellant argues that her conviction was against the manifest weight of the evidence. In this assignment of error, appellant attacks the credibility of the victim. Appellant charges that the victim changed his story during his direct testimony and cross-examination and had difficulty committing to a time frame in which the

offense occurred. Appellant claims that the victim lied numerous times about the alleged offense and acknowledged to the jury that he fabricated the events. As a result, appellant argues the jury clearly lost its way.

{¶46} While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, 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. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶34. Weight of the evidence 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; weight is not a question of mathematics, but depends on its effect in inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. The question is "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." *Id.*; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶47} At trial, the victim testified that appellant, his mother, engaged in sexual conduct with him. He testified that he, appellant, Edward, and his younger brother watched a pornographic film and they then were required to engage in group sex in which appellant placed her mouth on his genitals. The victim also testified that appellant required him to suck on her breasts and lick her genitals. The victim's testimony was supported by his brother and stepsister. When questioned on cross-examination, the victim testified that he lied to the children's services worker when first questioned at his school. Also on cross-examination, the victim stated that he was not truthful when estimating the number of times that he had

been abused.

{¶48} After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the trial court clearly lost its way and that appellant's conviction must be reversed. The trier of fact was in the best position to observe and assess witness credibility. *State v. Tyler* (1990), 50 Ohio St.3d 24, 32, citing *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶49} Based on the foregoing, appellant's fifth assignment of error is overruled.

{¶50} Assignment of Error No. 6:

{¶51} "THE COURT ERRED IN SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCE WHEN SHE HAD NO PRIOR CRIMINAL HISTORY."

{¶52} In her final assignment of error, appellant argues that the maximum sentence imposed by the court was improper when she had no prior criminal history.

{¶53} Trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. An appellate court may not disturb an imposed sentence unless it finds by clear and convincing evidence that the sentence is not supported by the record, or is "otherwise contrary to law." R.C. 2953.08(G)(2). Clear and convincing evidence is that evidence "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Rhodes*, Butler App. No. CA2005-10-426, 2006-Ohio-2401, ¶4, citing *State v. Boshko* (2000), 139 Ohio App.3d 827, 835.

{¶54} We find no abuse by the trial court in sentencing appellant to the maximum prison term. *State v. Brandenburg*, Butler App. No. CA2007-07-155, 2008-Ohio-3593, ¶51.

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

{¶56} Judgment affirmed.

WALSH, P.J., and YOUNG, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

App. P. 14

IN THE COURT OF COMMON PLEAS
Clinton County, Ohio

THE STATE OF OHIO PLAINTIFF	CASE NO: <u>CRI 2006-5318</u>
-vs.	JUDGMENT ENTRY <u>OF SENTENCE</u>
HEATHER R. CARMEN DEFENDANT	JOAHN H. CHAMBERLAIN CLERK 2007 MAY 18 PM 1:21

FILED-COMM. PLEAS

Rudduck, J.

On May 18, 2007, a sentencing hearing was held pursuant to law, notice having been given to all parties. In addition and contemporaneously with the hearing, the court first conducted a sexual predator classification hearing consistent with RC §2950.09 (B) (1) (a). Defendant was present in person in the custody of the Clinton County Sheriff, was represented by Counsel George Wolfe, was given an opportunity to speak and to present witnesses, and was afforded all rights pursuant to Criminal Rule 32. Assistant prosecuting attorney Deborah Quigley represented the state of Ohio.

The court then proceeded to conduct the sentencing hearing. The court has considered the record, the oral statements in court, the purposes and principles for felony sentencing under Ohio law, the seriousness of the offense, and the need for deterrence, incapacitation, rehabilitation, and restitution.

The Court finds that the defendant has been convicted, after an 8-day jury trial, under THIRD Count of the Indictment filed with the court on October 5, 2006 as follows:

- For violation of RC §2907.02 (A) (1) (b), rape, a felony of the first degree as charged, that carries with it a mandatory term of imprisonment under RC§2929.13 (F) (2).

Accordingly, consistent with the legislative mandate, with respect to the THIRD Count of the Indictment, for violation of RC §2907 .02 (A) (1) (b), Rape, a felony of the first degree, defendant Heather E. Carmen is ordered to be imprisoned for a term of 10-years, all of which is mandatory.

Defendant has been incarcerated since October 6, 2007, for a total of 225- days in jail served awaiting resolution of this case through and including this date May 18, 2007 for which she shall be credited. Defendant is remanded to the custody of the Clinton County Sheriff to be conveyed to the custody of the Ohio Department of Rehabilitation and Corrections at Marysville, Ohio forthwith to serve this mandatory 10-year term of imprisonment.

Further, Defendant shall initiate no contact whatsoever by any means, directly or indirectly, with the victim of the offense, Jonathan Shaffer, or interfere with his life in any manner. No claim for restitution has been presented.

No fine shall be imposed, but it is further ORDERED that the defendant pay all costs of prosecution in connection with this case as imposed and authorized pursuant to law including a \$25.00 application fee for Court appointed counsel representation.

Upon completion of the prison term, the offender shall be subject to a period of post release control up to 5-years as determined by the Parole Board pursuant to RC 2967.28. If violations of post release control occur, the Parole Board may return the defendant to prison for up to fifty-percent of the stated prison term and 9-months for any specific violation; and for commission of a new felony while on post release control, a court having jurisdiction of the new felony may, pursuant to RC 2967.28, extend the stated prison term for further periods, not less than one year, as provided by law. Such additional periods of time imposed by another court or by the Parole Board for violations in this case while on post release control are part of the sentence in this case.

The court did conduct a sexual offender classification hearing prior to the sentencing. Defendant has been notified that she must register as a Sexual Oriented Offender with the Sheriff of the county in which she establishes residency, is employed and attends school once released from custody within 5-days of coming into that county, and maintain such a current registry on file with the Sheriff of the county of her residency as required by law, and set forth in the Notification Entry filed this date. Community notification of her presence shall NOT be required. *{See Separate Judgment Entry.}*

Defendant was advised of her right to appeal this Judgment but she must act within 30-days or lose the right. Counsel may be appointed for her for good cause shown if determined to be legally indigent.

May 18, 2007

John W. Rudduck
John W. Rudduck, Judge
Clinton County Common Pleas Court

A copy of this Entry was personally served upon defendant and / or defense counsel the date of this hearing by MDS