

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 63
v.	:	T.C. NO. 09 CR 160
	:	
JAMES B. DAWSON	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

OPINION

Rendered on the 20th day of August, 2010.

ELIZABETH A. ELLIS, Atty. Reg. No. 0074332, Assistant Prosecutor, 61 Greene Street,
Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

SHA D. HINDS-GLICK, Atty. Reg. No. 0080822, 7501 Paragon Road, Dayton, Ohio 45459
Attorney for Defendant-Appellant

DONOVAN, P.J.

{¶ 1} Defendant-Appellant James Dawson (“Appellant”) appeals his conviction and sentence for one count of Importuning, in violation of R.C. 2907.07(D)(2), a felony of the fifth degree, and Attempted Unlawful Sexual Conduct With A Minor, in violation of R.C. 2923.02(A) and 2907.04(A), a felony of the fourth degree. After a jury trial, Dawson was found guilty on both counts and sentenced

to an aggregate term of thirty months in prison. Appellant filed a timely notice of appeal on January, 8, 2010.

I

{¶ 2} The facts of this case arise from an incident that occurred on March 10, 2009, when Detective Cyr of the Fairborn Police Department was online in an internet chat room, posing as a fourteen year-old girl under the name of “kate14roxohio”. Upon entering the chatroom, Officer Cyr was contacted, via a private instant message, by Appellant, age fifty-two, who was utilizing the username “temene.” Appellant, in his initial message, asked “Kate” her age, gender, and where she lived. Appellant learned that “Kate” was a fourteen year-old female from Fairborn. Appellant and “Kate” exchanged photos. Appellant sent pictures of himself, and Officer Cyr sent photos of “Kate,” which were actually photos of Officer Cara Houck of the Fairborn Police Department taken when she was fourteen years old. Appellant introduced himself as Jim, and complimented “Kate,” noting she was “hot,” called her a “gorgeous girl,” and told her she looked good in a bathing suit.

{¶ 3} Appellant initiated a more sexual dialogue, asked “Kate” about oral sex, and indicated that if “Kate” performed oral sex on him he would perform it on her, and he would never tell anyone about it. Appellant then discussed how they would be able to meet and assured “Kate” that he would wear a condom so she would not become pregnant. Appellant made more sexual comments, indicating he wished to kiss her all over, suck on her breasts, and reiterated his desire to

perform oral sex on “Kate.” They made plans to chat on the next day, March 11, so they could arrange to get together. Before ending the conversation, Appellant mentioned that he wanted pictures of “Kate” either clothed or nude, offering to buy her a camera to take the pictures. Appellant also inquired as to what style of underwear “Kate” wore.

{¶ 4} Appellant and “Kate” made arrangements to meet on March 11, 2009, at 4:15 P.M. at the Long John Silvers restaurant located on Dayton-Yellow Springs Road in Fairborn, Ohio. When Appellant arrived in a red Buick Rendezvous, the same car he described to “Kate,” he was arrested by the Fairborn Police Department.

{¶ 5} Thereafter, Appellant was taken to the Fairborn police station, where he was questioned by Detective Cyr. After being informed of his rights, Detective Cyr showed copies of the internet chats to Appellant, who admitted to the conversation between himself and “Kate.” In a written statement he made, Appellant wrote, “The aforementioned incident is one that I have never done before and I know that I was wrong for engaging in the chat.”

{¶ 6} Following a jury trial, Appellant was found guilty of Importuning and Attempted Unlawful Sexual Conduct With A Minor. At sentencing, the trial court sentenced Appellant to twelve months for Importuning, as well as eighteen months for Attempted Unlawful Sexual Conduct With A Minor. The court ordered the sentences be served consecutively for an aggregate sentence of thirty months.

{¶ 7} It is from this judgment that Appellant now appeals.

II

{¶ 8} Appellant's first assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN ADMITTING THE TRANSCRIPT OF THE INTERNET 'CHATS' BETWEEN APPELLANT AND THE DETECTIVE WITHOUT PROPER FOUNDATION AND AUTHENTICATION AS REQUIRED BY OHIO RULES OF EVIDENCE 901(A) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 10} In his first assignment, Appellant contends that the internet chats between him and Detective Cyr were not properly authenticated per Evid.R. 901(A).

Appellant argues that a defendant in a trial has a Constitutional right to a fair trial, which includes the defendant's right to "some reasonable means of verifying that a purported transcript of the conversation, prepared from the direct evidence by the adverse party, is accurate and complete." (Brief of Appellant, page 8; citing *State v. Rivas* (2007), 172 Ohio App.3d 437, 477). Transcripts of the conversation between Appellant and Detective Cyr which occurred on March 10 and March 11, 2009, were admitted. Detective Cyr testified that he saved a copy thereof on a Microsoft Word file. He did not offer any additional testimony as to how the file was saved, where it was saved, the chain of custody for the transcript, or if the file had been accessed since the date it was saved. Appellant argues that since Microsoft Word documents can be edited and changed, it was "overwhelmingly prejudicial" to permit these conversations to be admitted without proper authentication, and this "violated his right to Due process under both the United

States Constitution and the Ohio Constitution.” (Brief of Appellant, page 9).

{¶ 11} Since Appellant did not object to the admission of the evidence at trial, he has waived any challenge to the admission of the evidence on appeal except for plain error. *State v. Fry* (2010), 125 Ohio St.3d 163, 177; citing *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus.

{¶ 12} Even if this issue is reached on its merits, the evidence was properly admitted. The decision to admit or exclude evidence is within the trial court’s discretion, and Appellant must show an abuse of discretion. To prove abuse of discretion, Appellant must prove the trial court acted in a manner that was “unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 13} The threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, requiring only foundational evidence for the trier of fact to conclude that the evidence is indeed what the proponent claims it to be. *State v. Young*, Montgomery App. No. 18874, 2002-Ohio-1815, ¶ 15; citing *State v. Easter* (1991), 75 Ohio App. 3d 22, 25. The testimony of a witness with knowledge is sufficient authentication. Evid.R. 901(B)(1). Since Detective Cyr testified he kept the internet chats on his computer, saved them, and after reviewing them, attested that they were complete and accurate representations of the conversations, there is no Evid.R. 901(A) violation.

{¶ 14} Furthermore, Appellant’s reliance on *Rivas* is misplaced. In *State v. Rivas* (2009), 121 Ohio St.3d 469 (*Rivas II*), the Ohio Supreme Court reversed *Rivas I* and held when a prosecutor provides a written transcript that purportedly

reflects the data stored on a computer, a court may not order an examination of the computer's hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated data. Since Detective Cyr testified that the transcripts were fair and accurate, and Appellant himself testified to the accuracy of the transcripts, Appellant failed to make a prima facie showing that the transcripts were altered or incomplete. Therefore, the online conversations were properly admitted.

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

III

{¶ 16} Appellant's second assignment of error is as follows:

{¶ 17} "THE TRIAL COURT ERRED IN FINDING DEFENDANT GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 18} In his second assignment of error, Appellant argues that the verdict is against the manifest weight of the evidence, and that after review of the entire record, it can be shown that the jury lost its way, a manifest injustice was created, and therefore a new trial must be ordered. The record shows that Appellant is trained in computer intelligence and was trained to notice things in the cyberworld that a layperson may miss. Appellant testified that he engaged in the internet the conversation only to "gather information and follow his curiosity." (Brief of Appellant, page 10). Appellant further argues that much of his training is complicated and "it would be easy for a juror not to fully understand the intricacies involved in such." *Id.* Appellant contends that he did not act in a manner

consistent with the mens rea required for a conviction.

{¶ 19} Courts give a substantial deference to juries' determinations. *State v. McGhee*, Montgomery App. No. 23226, 2010-Ohio-977, ¶ 36. "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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. "It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them." *Id.* "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.*; quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220.

{¶ 20} The evidence established Appellant committed every element of Importuning and Attempted Unlawful Sexual Conduct. Evidence adduced by the state establishes both internet chats and conduct by Appellant that constitute both offenses. Appellant admitted, "I know I was wrong for engaging in the chat." The jury did not lose its way.

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

IV

{¶ 22} Appellant's third assignment of error is as follows:

{¶ 23} "THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH

AMENDMENT OF THE CONSTITUTION, AS INCORPORATED TO THE STATES VIA THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WAS VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 24} In his third assignment of error, Appellant claims he received ineffective counsel.

{¶ 25} According to Appellant, counsel was ineffective because he failed to object to the introduction of the internet chat transcript between Appellant and Detective Cyr. He further suggests that his attorney also failed to question the date the chats were saved to a file or whether or not the file had been accessed or edited since the date they were saved. According to Appellant, “each inquiry was crucial in allowing the jury to weigh the evidence and its accuracy against the testimony of the Appellant.” (Brief of Appellant, page 13). Appellant argues that counsel failed to make himself available to Appellant before the trial to go over discovery matters and allow Appellant to point out inconsistencies.

{¶ 26} To prove ineffective assistance of counsel, Appellant must prove that his counsel’s performance was outside the range of professionally competent assistance, and was therefore ineffective. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Appellant must also prove that his counsel’s deficient performance prejudiced the defense and deprived Appellant of a fair trial. *Id.* A properly licensed attorney in Ohio is presumed to be competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56.

{¶ 27} Appellant’s assertion that his counsel fell below an objective line because of failure to object to admission of evidence is meritless. This assignment

must fail because not only did Detective Cyr testify that the conversations were true and accurate accounts, but also because Appellant himself testified that the transcripts were accurate copies of the chat.

{¶ 28} Furthermore, Appellant failed to prove the second part of the *Strickland* test, namely, that counsel's performance prejudiced Appellant, resulting in an unreliable or fundamentally unfair outcome to the proceedings. Appellant must be able to show an example of prejudice caused by counsel's failure to object to admitted evidence. *State v. Davis* (2008), 116 Ohio St.3d 404, 434. The state correctly notes that "a review of the record reveals that the Defendant had competent, credible representation at all stages of the proceedings." Since Appellant has failed to demonstrate prejudice, his third assignment of error is overruled.

V

{¶ 29} All of Appellant's assignments of error having been overruled, the judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.

Copies mailed to:

Elizabeth A. Ellis
Sha D. Hinds-Glick
Hon. Stephen A. Wolaver