[Cite as *State v. Notestine*, 2009-Ohio-3220.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-08-038

Appellee — Trial Court No. 07-CR-156

v.

Dale E. Notestine — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2009

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

Sarah A. Nation, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, following a bench trial, in which the trial court found appellant, Dale E. Notestine, guilty of rape, unlawful sexual conduct with a minor, corrupting another with drugs, dissemination of matter harmful to juveniles, drug possession, and possession of drug paraphernalia. Thereafter, the trial court found appellant to be Tier III sex offender, and sentenced him to serve more than 40 years in prison.

{¶ 2} On appeal, appellant sets forth the following three assignments of error:

{¶ 3} "Assignment of Error No. 1

{¶ 4} "The trial court committed prejudicial error in prohibiting appellant from eliciting any information regarding the victim's juvenile court history or record of specific instances of conduct.

{¶ 5} "Assignment of Error No. 2

{¶ 6} "Appellant's indictment failed to include an essential element of the offense and is defective and voidable and fails to charge an offense.

{¶ 7} "Assignment of Error No. 3

{¶ 8} "The trial court's verdict was against the manifest weight of the evidence."

{¶ 9} The undisputed, relevant facts are as follows. On October 3, 2007, appellant was indicted by the Ottawa County Grand Jury on 15 counts of rape, in violation of R.C. 2907.02(A)(1)(c); 15 counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A); 15 counts of corrupting a minor with drugs, in violation of R.C. 2925.02(A)(4); two counts of providing obscene or harmful material to a juvenile, in violation of R.C. 2907.31(A)(1); four counts of drug possession, in violation of R.C. 2925.11(A); and one count of possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1). The indictment was based on allegations made by E. L., a 13 year old female ("victim"), that appellant gave her drugs, forced her to perform sexual acts, and showed her pornographic materials over approximately a six-week period between

June 1, and July 14, 2007. The victim made the allegations after her juvenile probation officer ordered a drug screen which came back positive for cocaine and benzodiazepine.

{¶ 10} A bench trial was held on April 21, 2008. At the outset, the prosecution made a motion to exclude all use of evidence from the victim's juvenile record to impeach her credibility, pursuant to Evid.R. 609(D), which the trial court granted. The following witnesses were then presented by the prosecution: the victim; the victim's probation officer, Amanda Martin; Karen LaFountain, Program Director for Sandusky Treatment Alternate to Street Crime; B.C.I. investigator Anthony Perchau; and Danbury Township Police Detective Mark Meisler.

{¶ 11} The victim testified at trial that she first became acquainted with appellant while visiting a mutual friend with her mother, T.S., when she was nine years old. In 2005, when the victim was 11 years old, she went to live with her father. The victim did not see appellant again until May 2007, when her mother took her to visit appellant at his home on North Lake Pine Drive in Marblehead, Ohio. The victim testified that T.S. had arranged to clean appellant's condo and prepare it for a memorial service to be held for appellant's deceased daughter in July 2007.

{¶ 12} The victim stated that she and T.S. went to the condo "every other day" until July 14, 2007. The victim testified that she was often left alone with appellant, a 63 year old man, while T.S. ran errands. The victim further testified that, one time while T.S. was gone, she observed appellant smoking crack cocaine in his "computer room."

When appellant noticed the victim watching him, he offered her drugs. After the victim smoked the crack cocaine, appellant began kissing and fondling her. This behavior pattern was repeated every time T.S. left to run errands. After several days, appellant progressed to digitally penetrating the victim and asking her to perform oral sex on him "countless times"; however, appellant was unsuccessful at attempting sexual intercourse.

{¶ 13} The victim testified that, in the course of one particular day, she smoked crack cocaine at least 25 times with appellant. She further testified that, after about two weeks, she told T.S. about the drugs, but not about appellant's sexual advances. The victim related that her mother did not want her to take the drugs; however, T.S. was unable to stop her from doing so, because T.S. also smoked crack with appellant. The victim further stated that, while she was under the influence of the drugs, she did not care what appellant did to her body.

{¶ 14} The victim stated that appellant showed her pornographic pictures that were on his computer and, on at least one occasion, appellant asked her to sit with him and watch a pornographic movie. She also stated that appellant had many books about sex in his computer room.

{¶ 15} On cross-examination, the victim testified that she has lied in the past "to get out of trouble"; however, she did not characterize herself as "manipulative." The victim stated that she never smoked crack cocaine until appellant gave it to her. She sarcastically referred to sexual activity with appellant as "all that happy stuff." The

victim testified that she and her mother spent at least ten nights at appellant's condo, and that both she and her mother did drugs with appellant. The victim further testified that she was on probation for running away from home, and that she tested positive for drugs in July 2007, after submitting to a random drug test.

{¶ 16} On redirect, the victim testified that she would sometimes stay up all night and do drugs in a room with appellant and her mother, and that sex happened "every other day" when she was with appellant. The victim also testified that she sometimes lies about "small things," like smoking cigarettes, to get out of trouble with her father. The victim stated that she never lied about the crack cocaine, the pornographic pictures, or having sex with appellant.

{¶ 17} Amanda Martin testified at trial that she has been the victim's probation officer since July 2006. Martin stated that she saw the victim on July 5, 2007, for a scheduled visit, at which the victim appeared tired, and had "baggy eyes." Martin referred the victim for drug testing that same day, which revealed the presence of cocaine and benzodiazepine in her system. Martin further stated that, two weeks later, the victim again tested positive for cocaine, after which she was arrested and taken to juvenile detention for two days, followed by house arrest.

{¶ 18} On cross-examination, Martin testified that, before June 2007, the victim showed up for most of her probation appointments, which were part of a diversion program. Martin also stated that the victim is sometimes untruthful. On redirect, Martin

clarified that the victim is truthful "for the most part"; however, she tends to manipulate others if she is in trouble. Martin stated that, for the last six months, the victim has been truthful about the allegations against appellant and that, in her opinion, the victim has only ever been untruthful about "non-serious things."

{¶ 19} LaFountain testified at trial that she performed a random drug test on samples provided by the victim on July 5, 2007, and again on July 16, 2007. On cross-examination, LaFountain testified that the court tells her what drug tests to run. She further testified that benzodiazepine, a sedative, stays in the system for up to two weeks, and cocaine is detectable for up to three days.

{¶ 20} Perchau, a forensic scientist, testified that he tested evidence found in appellant's apartment. Perchau stated that the tested evidence included a metal container, a plastic container, and a funnel, all of which tested positive for traces of cocaine; a plastic bag containing marijuana; and a bag of more than 140 pills, some of which were the controlled substance Oxycodone, a generic form of Percocet.

{¶ 21} Miesler testified that he began investigating allegations against appellant in August 2007, and executed a search warrant for appellant's home on September 27, 2007. As a result of the search, Meisler removed a computer, drug paraphernalia, vegetable matter, a drug scale, pills, computer disks, photographs, and books from the premises. Meisler testified that one of the items, a brass chore-boy, was used as a filter in a pipe used to smoke drugs.

{¶ 22} On cross-examination, Meisler testified that the victim told him she started smoking crack cocaine sometime after seeing her mother and appellant using drugs. Meisler stated that appellant told him that appellant gave her benzodiazepine three to five times. He further stated that the victim recalled watching a movie with appellant in which girls were auditioning for Playboy magazine; however, such a movie was not found in appellant's home. He testified that the search warrant was based on the victim's statements to police.

{¶ 23} Meisler testified that another man named Greg, a friend of appellant, tried to remove a box containing cocaine from appellant's home during the search. Greg was later indicted for drug possession. Meisler further testified that appellant was cooperative during the search. Meisler stated that his impression was that the victim was telling the truth about appellant. On redirect, Meisler testified that the victim's testimony was corroborated by the results of the search, and that she described accurately the process of "cooking" the drugs before smoking them. He stated that T.S., whom he interviewed on March 18, 2008, was "defensive." On re-cross, Meisler state that T.S. could still be charged with a crime and that, at one point during the interview, T.S. stated that she wanted an attorney.

{¶ 24} At the close of Meisler's testimony, the prosecution rested. At that point, testimony was presented by T.S.; Jennifer Briede, M.D.; Joseph Burns; the victim's maternal grandmother and step-grandfather, M.K. and D.K.; appellant's step-daughter,

Dawn Flores; appellant's sister, Marcella Nugent. Rebuttal testimony was then presented by Patti Hopple; and the victim's paternal grandmother, J.R.

{¶ 25} T.S. testified at trial that the victim has a history of behavioral problems, beginning with expulsion from daycare at age four. She further testified that the victim's misbehavior included skipping school, smoking, and boys. T.S. said that she gave up custody of the victim when the girl was ten years old. T.S. testified that she did not have a sexual relationship with appellant, but that she helped him clean his home four or five times in June 2007, while he was recovering from knee surgery. T.S. further testified that she sometimes left the victim with appellant while she ran errands; however, they never acted "different" when she came back. T.S. said she never saw the victim with drugs; however, she did do drugs with appellant in the past. T.S. stated that nothing the victim says is believable, and the victim has a reputation for untrustworthiness in the community.

{¶ 26} On cross-examination, T.S. testified that she has "done stuff" in the past with drugs, including doing "one line" of cocaine and smoking pot with appellant. She further testified that appellant asked her not to clean "his office" which the victim had identified as the "computer room." T.S. said she was surprised that appellant had pipes to smoke crack cocaine, and she never saw the books described by the victim; however, she knew he had pills. T.S. stated that the victim liked going to appellant's home, and she probably made up lies about appellant when it became clear that T.S. did not want to

regain custody of her daughter. On redirect, T.S. stated that the victim's father is a drinker and a drug user.

{¶ 27} Doctor Briede testified at trial that she is appellant's family physician. Briede stated that appellant suffers from degenerative joint disease, heart disease, and high blood pressure. He receives prescription medication for those conditions, including 120 Percocet [generic name Oxycodone] tabs per month; 90 valium [generic name benzodiazepine] tabs per month, in addition to prescription muscle relaxers, blood pressure medication, heart medication, and blood thinners. On cross-examination, Briede stated that appellant was instructed to keep all his medications in the original containers.

{¶ 28} Burns testified that he is a "family friend" who has known appellant and T.S. for many years. Burns further testified that T.S., who does not possess a valid driver's license, borrowed his vehicle to go to appellant's home to clean. On cross-examination, Burns testified that the victim and T.S. seem to get along; however, the victim is "strong willed." Burns stated that he never saw drugs or "naked pictures" in appellant's home.

{¶ 29} M.K., the victim's maternal grandmother, testified at trial that the victim has a reputation for being "unbelievable" and likes to "fabricate to get out of trouble." Both M.K. and her husband, D.K., testified that the victim stole cigarettes from D.K.'s business. On cross-examination, M.K. testified that Burns drives T.S. around because she does not have a driver's license and is not supposed to drive a car.

{¶ 30} Flores testified that appellant is liked by everyone. Flores also testified that she saw the victim at the memorial service and again, later, when the victim told Flores she was upset with her father. On cross-examination, Flores stated that both times she encountered the victim at appellant's home. Flores stated that she was surprised that cocaine and crack pipes were found in appellant's home, because appellant is ill and can "hardly breathe."

{¶ 31} Nugent testified that appellant visited her in Columbus, Ohio, from July 11, until July 17, 2007. Nugent stated that, during his visit, appellant had difficulty breathing. She was surprised that drugs were found in her older brother's home.

{¶ 32} In rebuttal, Patti Hopple testified at trial that she is a volunteer mentor for teenage girls, and that she became the victim's mentor in November 2006. Hopple stated that, since July 2007, the victim is more mature, and has been more focused on her emotions and goals. Hopple further testified that the victim is now "bluntfully" truthful where, previously, she would exaggerate. On cross-examination, Hopple stated that, while she does not know how the victim behaves at home or school, she is nevertheless surprised that T.S. says the victim is not truthful.

{¶ 33} J.R., the victim's paternal grandmother and a volunteer mentor, testified that the victim lived in her home for a while after T.S. gave up custody. J.R. testified that, during that time, the victim would often run away, after saying she wanted to live with her mother. J.R. further stated that, in the beginning, the victim "lied about everything"

and was a "streetkid." However, now she believes the victim is telling the truth, and is not being manipulative. J.R. stated that, through her volunteer work, she works with mentees to establish trust and get them to tell the truth.

{¶ 34} At the close of all the testimony, the defense rested. After taking the matter under advisement, the trial court found appellant guilty of four counts of rape, seven counts of unlawful sexual conduct with a minor, 12 counts of corrupting another with drugs, one count of dissemination of matter harmful to juveniles, two counts of drug possession, and one count of possession of drug paraphernalia. The remaining counts were dismissed.

{¶ 35} On June 5, 2008, a sentencing hearing was held, at which appellant refused to make a statement. Thereafter, statements were made by the victim and J.R. The trial court then reviewed the evidence presented at trial, and stated that it also had reviewed the presentence investigation report, which included appellant's prior convictions for misdemeanor traffic offenses and receiving stolen property. The trial court noted appellant's poor physical health. The trial court also noted that, while not evidence at trial, the record showed that the victim took three polygraph examinations, none of which indicated deception on her part. Next, the trial court recited the factors and purposes of sentencing in felony cases, pursuant to R.C. 2929.11, which include appellant's relationship with the victim and her mother. The trial court also stated that:

{¶ 36} "The victim is the offender's girlfriend's daughter. [The victim's] mother brought her to the place where these things happened.

{¶ 37} "It is not much of a stretch to suggest that the mother brought the daughter there so that these things could happen."

{¶ 38} The trial court also noted that appellant previously served a prison term for receiving stolen property, and he had a pattern of drug and/or alcohol abuse that related to the offenses of which he was convicted. Finally, the trial court stated that appellant "shows no genuine remorse" for his crimes. After concluding that a prison term is consistent with the purposes and principles of sentencing, the trial court sentenced appellant to serve ten years for each count of rape, five years for each count of unlawful sexual conduct with a minor, eight years for each count of corrupting another with drugs, 12 months for drug possession, and 12 months for possession of drug paraphernalia. The sentences within each category were made concurrent with each other. The aggregate sentences for rape, unlawful sexual conduct with a minor, corrupting another with drugs, and possession of drug paraphernalia were also made concurrent to each other. The sentence for drug possession was made consecutive to the other sentences as a matter of law.

{¶ 39} On June 6, 2008, a second hearing was held, at which appellant was advised of his right to appeal his conviction and sentence, and also of the conditions of postrelease control. The trial court then designated appellant as a Tier III sex offender

and advised him as to the restrictions and registration requirements attendant on that designation. A timely notice of appeal was filed on June 27, 2008.

{¶ 40} In his first assignment of error, appellant asserts that the trial court erred when it prohibited appellant from introducing any evidence relating to the victim's juvenile court history or other specific instances of conduct, in order to impeach her credibility at trial. Specifically, appellant argues that such evidence should have been permitted in order to show that the victim has a history of theft offenses and telling lies. In addition, appellant argues that evidence of the victim's involvement with the juvenile court system would help establish her motive for "fabricating this whole story," by bolstering his theory that she lied in order to take the focus off of her two positive drugs tests.

{¶ 41} On appeal, "[a] trial court's determination concerning the admissibility of extrinsic evidence will not be overturned absent an abuse of discretion." *Hartley v. Miller*, 3d Dist. No. 8-08-33, 2009-Ohio-1923, ¶ 10, citing *Atelier Dist., LLC v. Parking Co. of Am., Inc.*, 10th Dist No. 07AP-87, 2007-Ohio-7238, ¶ 17. (Other citations omitted.) An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 42} Evid.R. 609(D), which governs impeachment through evidence of a prior conviction, states that "[e]vidence of juvenile adjudications is not admissible except as

provided by statute enacted by the General Assembly." In this case, the trial court excluded evidence of the victim's juvenile record pursuant to R.C. 2151.357(H) which states, in pertinent part, that:

{¶ 43} "Evidence of a judgment rendered and the disposition of a child under the judgment is not admissible to impeach the credibility of the child in any action or proceeding. Otherwise, the disposition of a child under the judgment rendered or any evidence given in court is admissible as evidence for or against the child in any action or proceeding in any court in accordance with the Rules of Evidence * * *."

{¶ 44} Ohio courts have consistently held that juvenile adjudications are not admissible at trial for the purpose of generally impeaching a juvenile witness's credibility. *State v. Goodwin*, 7th Dist. No. 99 CA 220, 2001-Ohio-3416; *State v. Higgins*, 5th Dist. No. CT2005-0055, 2006-Ohio-5220; *State v. Covington* (Jan. 10, 1996), 9th Dist. No. 17205. Accordingly, the trial court did not abuse its discretion by refusing to admit evidence of the victim's juvenile court history to show that she has a history of telling lies. Appellant's argument to the contrary is without merit.

{¶ 45} As to appellant's remaining argument, the United States Supreme Court has held that that "the right to cross-examine an adverse witness for bias outweighed the state's policy interest in protecting the confidentiality of a juvenile offender." *Covington*, supra, citing Davis *v. Alaska* (1975), 415 U.S. 308, 319, 39 L.Ed.2d 347. However, as set forth above, the record contains direct testimony that the victim is capable of lying

and manipulating others to get herself out of trouble. In fact, the victim herself testified that she sometimes lies to her father to avoid punishment for smoking cigarettes, and stated that she has taken cigarettes from her step-grandfather's business. Accordingly, appellant was not deprived of an opportunity to show that the victim has been manipulative in the past, or that she may have had a motive to accuse appellant of wrongdoing in order to avoid punishment after testing positive for drugs.

{¶ 46} On consideration of the foregoing, we find that the trial court did not abuse its discretion by refusing to allow appellant to present evidence of the victim's prior involvement with the juvenile court system at trial. Appellant's first assignment of error is not well-taken.

{¶ 47} In his second assignment of error, appellant asserts that the 15 counts of rape and 15 counts of unlawful sexual conduct with a minor, as charged in the indictment, are fatally flawed pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), because they failed to state "an essential element of the offense." Specifically, appellant argues that the mental state of "knowingly" was not applied to the element of "engag[ing] in sexual conduct with another, not his spouse." Accordingly, appellant argues that the indictment contains a fatal "structural error" which renders it void.

{¶ 48} As to each of the original 15 charges of rape, the indictment stated that:

{¶ 49} "On or about a day in the period from June 1, 2007 to June 15, 2007, inclusive, in Ottawa County, Ohio, aforesaid did engage in sexual conduct with another, not his spouse, said victim's ability to resist or consent being substantially impaired because of a mental or physical condition, and said Dale E. Notestine knowing or having reasonable cause to believe that the victim's ability to resist or consent was substantially impaired because of a mental or physical condition, contrary to and violation of Section 2907.02(A)(1)(c) of the Ohio Revised Code, and against the peace and dignity of the State of Ohio."

{¶ 50} As to each of the original 15 charges of unlawful sexual conduct with a minor, the indictment stated that:

{¶ 51} "On or about a day in the period from June 1, 2007 to June 15, 2007, inclusive, in Ottawa County, Ohio, aforesaid, being eighteen years of age or older, did engage in sexual conduct with another, not his spouse, said Dale E. Notestine knowing that such other person was thirteen years of age or older but less than sixteen years of age, or being reckless in that regard, and said Dale E. Notestine being more than ten (10) years older than the victim, contrary to and in violation of Section 2907.04(A) of the Ohio Revised Code, and against the peace and dignity of the State of Ohio."

{¶ 52} In *Colon I*, the Ohio Supreme Court addressed the issue of whether an indictment is fatally flawed when it fails to set forth a required mens rea for a particular crime. In that case, the Ohio Supreme Court determined that an indictment for the crime

of robbery, which failed to include the mens rea of reckless as to the infliction of, or attempt to inflict, or threat to inflict, physical harm, was structurally deficient. Id., at ¶ 27. On reconsideration, the Ohio Supreme Court clarified that the structural-error analysis for defective indictments is "appropriate only in rare cases * * * in which multiple errors at trial follow the defective indictment." *Colon II*, at ¶ 8. Examples of those errors are the failure to include recklessness in the jury instructions, and the state's treatment of the crime of robbery as a strict liability offense. Id., at ¶ 6. In *State v. Mason*, 6th Dist. No. L-06-1404, 2008-Ohio-5034, this court, applying *Colon I* and *II*, stated that the structural error analysis utilized in those two decisions is "rare and unique to the facts of that case." Id., ¶ 61, citing *State v. Walker*, 6th Dist. O. L-07-1156, 2008-Ohio-4614. "Therefore, we have not found a structural error when the offense is not robbery as in *Colon I*. Id."

{¶ 53} Appellant was not charged with robbery. Accordingly, the indictment was not facially defective under the analysis set forth in *Colon I* and *Colon II*. In addition, Ohio courts have held that a particular mental state is not required for engaging in the acts that constitute "sexual conduct" pursuant to R.C. 2907.02(A)(1). *State v. O'Dell*, 2d Dist. No. 22691, 2009-Ohio-1040. Finally, although R.C. 2907.04 requires the offender to be at least reckless in knowing the victim's age, it does not require the state to prove the offender's mental state for engaging in sexual conduct. *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825, ¶ 27. The rationale for not requiring a mental state for

the element of "engaging in sexual conduct" is that the term, standing alone, does not constitute any particular offense. *State v. Patierno*, 3d Dist. No. 4-08-08, 2009-Ohio-410, ¶ 31.

{¶ 54} On consideration of the foregoing, we find that the indictment does not contain structural errors and is, therefore, not void pursuant to *Colon I* and *Colon II*. Appellant's second assignment of error is not well-taken.

{¶ 55} In his third assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. In support, appellant argues that evidence was presented at trial that the victim's testimony as to the charged offenses of rape, unlawful sexual conduct with a minor, and corrupting a minor with drugs is not credible, and the dates on which the alleged events occurred are unclear.

{¶ 56} In deciding whether to reverse a verdict obtained after a bench trial pursuant to a manifest weight of the evidence claim, 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 evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and new trial ordered." *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. In *Thompkins*, the Ohio Supreme Court further stated that "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily

against the conviction." *Thompkins*, supra, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 57} In addition to the above, in *Farris v. Port Clinton School Dist.*, 6th Dist. No. OT-05-041, 2006-Ohio-1864, this court stated that, on appeal, a reviewing court should not substitute its judgment for that of the trial court, which "was in the best position to view the witnesses, observe their demeanor, gestures and voice inflections, and to use those observations in weighing the credibility of the proffered testimony." Id., at ¶ 53, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Accordingly, we "will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt." *State v. Hines*, 8th Dist. No. 90871, 2009-Ohio-2118, ¶ 29, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 58} In this case, appellant was convicted of rape, in violation of R.C. 2907.02(A)(1), which states that:

{¶ 59} "No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:

{¶ 60} "* * *

{¶ 61} "(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or

consent is substantially impaired because of a mental or physical condition or because of advanced age."

{¶ 62} In addition, appellant was convicted of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), which states that:

{¶ 63} "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years age, or the offender is reckless in that regard."

{¶ 64} Appellant was also convicted of corrupting another with drugs, in violation of R.C. 2929.02(A)(4)(a), which states that:

{¶ 65} "No person shall knowingly do any of the following:

{¶ 66} "* * *

{¶ 67} "(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard."

{¶ 68} Appellant argues on appeal that the victim is a liar, and that her account of how she first smoked crack cocaine with appellant is inconsistent with Detective Meisler's testimony. Appellant also argues that the victim's description of how many times she smoked crack cocaine with appellant, the number of times appellant allegedly perpetrated sexual acts on her, and the dates on which those events occurred were

unclear. Finally, appellant argues that the victim made light of the seriousness of her allegations of appellant's sexual misconduct, by referring to it as "all that happy stuff."

{¶ 69} A review of the record reveals the following. The victim, a 13 year old female, was found to have cocaine and benzodiazepine in her system in July 2007. She stated that the drugs were given to her by appellant, a 63 year old man, whom she also accused of sexually molesting her while she was under the influence of the drugs. Upon executing a search warrant for appellant's home, police found both of those substances, in addition to several other types of pills, some of which were prescribed for appellant's arthritis. Police also found drug paraphernalia containing cocaine residue in appellant's office, which the victim identified on a diagram as the "computer room," along with marijuana and pornographic pictures and reading materials. Testimony was presented by the victim's mother and maternal grandparents that she is untruthful; however, other testimony was presented that the victim had changed and became more mature and truthful after the alleged incidents occurred. In addition, the victim testified that, in the past, she only lied about things like smoking cigarettes.

{¶ 70} As to the victim's statement that she and appellant smoked crack cocaine "25 times a day," the record contains the victim's testimony that she meant repeated use during one session, which would often last all night, and not 25 separate sessions. Similarly, the victim admitted she did not know how many times sex acts were performed, because she was under the influence of drugs at the time. As to alleged

discrepancies between Meisler's and the victim's account of how she began using drugs, the review of the record shows that the victim specifically recounted her first experience by stating that she saw appellant using drugs in the computer room, after which he offered the drugs to her. In contrast, Meisler testified, on cross-examination, that the victim told him appellant and her mother did drugs together and, eventually, drugs were offered to the victim. Meisler did not repeat a specific account of the circumstances surrounding the first time appellant allegedly offered drugs to the victim. Finally, as set forth above, the victim testified that her characterization of having sex and doing drugs with appellant as "all that happy stuff" was intended to be "a little bit sarcastic."

{¶ 71} On consideration of the foregoing, we cannot find that the trial court "lost its way" and created such a manifest miscarriage of justice that appellant's conviction must be reversed and a new trial ordered. Accordingly, appellant's conviction was not against the manifest weight of the evidence, and his third assignment of error is not well-taken.

{¶ 72} The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, J.
CONCUR.

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JUDGE