[Cite as *State v. Bokeno*, 2012-Ohio-4218.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-044
	:	O P I N I O N
- vs -		9/17/2012
	:	
JACOB MARK BOKENO,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-08-1393

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

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YOUNG, J.

{¶ 1} Defendant-appellant, Jacob M. Bokeno, appeals his conviction and sentence in the Butler County Court of Common Pleas for multiple sexual offenses.

{¶ 2} On September 1, 2010, the Butler County Grand Jury returned an eleven-count indictment against appellant alleging that appellant had committed various sexual offenses against four minor victims: (1) E.S., a girl born May 23, 1993; (2) B.H., a boy born September

18, 1996; (3) H.H., a girl born April 1, 1994; and (4) B.K., a girl born September 19, 1995.[1] As to B.H., appellant was indicted on one count of rape and one count of attempted gross sexual imposition. As to H.H., appellant was indicted on two counts of gross sexual imposition. As to B.K., appellant was indicted on six counts of rape. At the time of the commission of these acts, appellant was under the age of 18. However, appellant was not indicted until he was over the age of 21.

{¶ 3} A trial by jury was held wherein each victim testified. B.H. testified that in 2004 or 2005, when he was eight or nine years old, appellant began dating his sister, Rachel. During the summer of 2005, appellant would come over to Rachel's house on a regular basis and Rachel, appellant, B.H., and B.H.'s other sister, H.H., would play hide-and-seek. B.H., H.H., and appellant would go to the basement of the house to "hide" while Rachel waited upstairs. According to the testimony at trial, appellant would sexually assault B.H. and H.H. and then find them locations to hide, at which time appellant would go upstairs and tell Rachel it was time for her to find B.H. and H.H. B.H. testified that, on different occasions, appellant: (1) asked B.H. to pull down his pants; (2) asked H.H. to pull down her pants; (3) forcibly pulled down H.H.'s pants; (4) attempted to forcibly pull down B.H.'s pants; (5) asked B.H. to perform fellatio on him; (6) tried to maneuver B.H.'s hand to touch appellant's penis; and (7) pulled B.H.'s pants down and tried to penetrate B.H.'s anus with his penis. Appellant was charged with one count of rape and one count of attempted gross sexual imposition as to B.H.

{¶ 4} H.H. also testified about the hide-and-seek games. H.H. stated that she and her friend, B.K., would play hide-and-seek with appellant and Rachel. During these games, H.H. and B.K. would go downstairs with appellant where appellant would have the girls take

1. The facts as to E.S. are not pertinent to this appeal and shall not be addressed.

their clothes off and would "rape" and "abuse" them by putting his hands on their "private parts." During direct testimony, H.H. stated that appellant only touched the girls with his hands. However, on cross-examination, H.H. also stated that appellant would rape her using his penis. H.H. also testified that, on one occasion, H.H.'s father, Thomas, walked into a bedroom when H.H. had her shirt off and appellant had his pants down. According to H.H., Rachel broke up with appellant soon after this incident. Appellant was charged with two counts of gross sexual imposition as to H.H.

{¶ 5} Thomas, the father of H.H., B.H., and Rachel, also testified at trial, stating that appellant and Rachel began dating around 2004 or 2005. Thomas testified that in the summer of 2006, when H.H. was either eleven or twelve years old, Thomas heard a commotion in an upstairs bedroom of the house and went to investigate. In the bedroom, Thomas found H.H. sitting on the bed and appellant was in the room "zipping up his pants." Thomas questioned appellant, who stated that he was playing a type of checkers game where each party was required to remove an article of clothing every time their checkers piece was jumped. H.H. told Thomas that appellant had exposed himself to her. Although Thomas was upset about the incident, he did not believe anything "sexual" happened.

{¶ 6} Finally, B.K. testified about the hide-and-seek games. B.K. stated that appellant would have B.K. and H.H. take off their pants and underwear and place their faces into a bed while standing. Appellant would then "place his penis" into B.K.'s anus. B.K. stated that this happened to her at least five times and that she believed appellant also penetrated H.H., although B.K. never saw this occur. B.K. also testified that one time, appellant "stuck his penis in my mouth, and told me to move my head up and down." B.K. stated that she believed these events took place in the summer of 2003, when she was eight years old. However, on cross-examination, B.K. admitted that the incidences could have occurred in 2004, but that she was sure she was under the age of ten when she was raped

by appellant. Appellant was charged with six counts of rape as to B.K.

{¶ 7} At the conclusion of the case-in-chief, the state moved to amend the dates in the indictment to correspond with the testimony at trial. As to H.H., the state requested that the indictment be amended from the original time period of 2003 to 2004 to a range of August 2004 to August 2005 for one count of gross sexual imposition and a range of August 2004 to August 2006 for the second count of gross sexual imposition. As to B.H., the state requested that the indictment be amended from the original time period of 2004 to a range of August 2004 to August 2005 for both the count of rape and the count of attempted gross sexual imposition. As to B.K., the state requested that the indictment be amended from the original time period of 2003 to a range of August 2004 to August 2005 for all six counts of rape. Appellant objected to the amendment, arguing that changing the dates would violate his right to prosecution by a grand jury indictment. The trial court granted the motion over appellant's objection.

{¶ 8} The jury returned a verdict finding appellant guilty of five counts of sexual offenses including two counts of gross sexual imposition against H.H., one count of attempted rape and one count of gross sexual imposition as to B.H., and one count of rape as to B.K. Because B.K. was under the age of ten at the time of the rape, the trial court sentenced appellant to life imprisonment with the possibility of parole after 20 years. From this conviction and sentence, appellant appeals, raising two assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} [APPELLANT'S] CONVICTION AND LIFE-SENTENCE FOR RAPE OF A CHILD UNDER 10-YEARS-OLD WAS UNCONSTITUTIONAL.

{¶ 11} In his first assignment of error, appellant argues that his conviction and sentence for the rape of B.K. was unconstitutional for four reasons: (1) no "direct and specific evidence" was presented that appellant raped B.K. between August 2004 and August 2005;

(2) insufficient evidence was presented that appellant raped B.K. while B.K. was under the age of ten; (3) appellant's conviction for raping B.K. while she was under the age of ten was against the manifest weight of the evidence; and (4) appellant's life-sentence with the possibility of parole is unlawful as either arbitrary under due process, cruel and unusual punishment, or both.

Appellant's Rape Conviction

{¶ 12} Appellant's first argument is that the state failed to present "direct and specific evidence" that appellant raped B.K. between August 2004 and August 2005. Specifically, appellant relies on the language of *State v. Simmons* from the Eighth Appellate District that the state must present "direct, specific testimony" that the crime alleged occurred within the time period listed in the indictment. *State v. Simmons*, 189 Ohio App.3d 532, 2010-Ohio-3412, ¶ 24 (8th Dist.). In the absence of this evidence, appellant asserts that his conviction must be reversed for insufficient evidence. However, this court has never adopted the proposition that the time or date listed in an indictment must be proven with direct evidence. On the contrary, this court has routinely held that circumstantial and direct evidence are of equal probative value and that the state can use either direct or circumstantial evidence to prove the elements of a crime. *State v. Durr*, 58 Ohio St.3d 86, 92 (1991); *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, ¶ 13 (12th Dist.); *see also State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus. Therefore, we decline to follow appellant's proposition that the state was required to present direct evidence that B.K. was raped between August 2004 and August 2005 and, instead, interpret appellant's argument as one of sufficiency. As appellant's second argument is also one of sufficiency, these arguments shall be addressed together, along with appellant's third argument regarding manifest

weight.[2]

{¶ 13} When reviewing the sufficiency of the evidence underlying a criminal conviction, the function of an appellate court 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." *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 14} "While the test for sufficiency requires a determination of 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*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 34. In determining whether the conviction is against the manifest weight of the evidence, an appellate court "must weigh the evidence and all reasonable inferences from it, consider the credibility of the witnesses and determine whether in resolving conflicts, 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." *State v. Coldiron*, 12th Dist. Nos. CA2003-09-078, CA2003-09-079, 2004-Ohio-5651, ¶ 24; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "This discretionary power should be exercised only in the exceptional case where the evidence weighs heavily against conviction." *Id*.

{¶ 15} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of

2. The state argues that appellant's sufficiency and manifest weight arguments should be denied due to his reliance upon an uncertified transcript. Although appellant does cite to an uncertified transcript, a certified transcript has been filed in this case and the substance of both transcripts are identical. Appellant's arguments are, therefore, capable of review.

sufficiency." (Internal quotations omitted.) *Wilson* at ¶ 35. "Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id*.

{¶ 16} Appellant was found guilty of raping B.K. in violation of R.C. 2907.02(A)(1)(b), which provides, in pertinent part, that "no person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * the other person is less than thirteen years of age[.]" Pursuant to R.C. 2907.02(B), upon conviction, appellant would be sentenced to life imprisonment for the rape of B.K. if she was under the age of ten at the time of the offense.

{¶ 17} Appellant essentially contends that his conviction must be reversed because the greater weight of the evidence presented at trial indicated that B.K. was not raped between August 2004 and August 2005 and was not under the age of ten at the time of the rape. It should be noted that appellant does not argue that the rape did not occur but, rather, that the rape did not occur at the time alleged in the amended indictment.

{¶ 18} During the trial, B.H. testified that he and H.H. were sexually abused in the summer of 2005. H.H. testified that she believed she was "like nine" years old at the time that she and B.K. were sexually abused, but admitted that she was unsure of the date. B.K. testified that she believed she was raped in 2003 or 2004 and was sure she was under the age of ten at the time. Finally, Thomas testified that the incident he witnessed with H.H. and appellant occurred in the summer of 2006.

{¶ 19} Appellant argues that, because the sexual offenses described took place over one summer and the only adult to testify, Thomas, stated that the incident he remembered took place in the summer of 2006, B.K. must have been over the age of ten at the time she was raped, as her tenth birthday occurred in September of 2005. We find this argument unpersuasive.

{¶ 20} First, the facts do not indicate that the sexual offenses perpetrated by appellant took place in the span of one summer. On the contrary, Thomas's testimony provided that appellant and Rachel dated for approximately two years beginning in 2004 and spanning at least two summers. Furthermore, the mere fact that B.H. and B.K. testified that the sexual offenses that they described occurred over a period of one summer does not mean that these two victims were describing the same summer. B.K. testified that B.H. was never present during the hide-and-seek games that B.K. was involved in and B.H.'s testimony is devoid of any mention of B.K. Therefore, it is possible that the jury inferred that B.H. and B.K. were sexually assaulted during different summers. Finally, Thomas's testimony focused on one occurrence between H.H. and appellant which was unrelated to any hide-and-seek game otherwise described by the victims.

{¶ 21} In reviewing the record, we find competent, credible testimony that the jurors could have reasonably relied upon to determine that B.K. was raped between August 2004 and August 2005 prior to her tenth birthday. Thus, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice as to warrant a reversal of appellant's conviction. As such, appellant's conviction for rape against B.K. was not against the manifest weight of the evidence and was, consequently, supported by sufficient evidence. *See Wilson*, 2007-Ohio-2298 at ¶ 35.

Appellant's Life Sentence

{¶ 22} Appellant also argues that his life sentence with the possibility of parole after 20 years is a violation of his due process rights and his right to be free from cruel and unusual punishment. Specifically, appellant contends that he should not be arbitrarily tried and punished as an adult for crimes he committed while under the age of 18 due to the application of R.C. 2152.02(C)(3).

I. Due Process

{¶ 23} The Ohio Supreme Court has previously addressed appellant's due process arguments in *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011. In *Warren*, the Court determined that a defendant's due process rights were not violated by the imposition of a mandatory term of life imprisonment for rape of a victim under the age of 13 when the defendant was a juvenile at the time of the offense but was not prosecuted until he had passed the age of 21. *Id*. at ¶ 1.

{¶ 24} *Warren* also held that the application of R.C. 2152.02(C)(3) was not a due process violation, as "changing the jurisdiction from the juvenile to the general division of the common pleas court did not involve any substantive right." *Id*. at ¶ 52, citing *State v. Schaar*, 5th Dist. No. 2003CA00129, 2004-Ohio-1631, ¶ 27. R.C. 2152.02(C)(3) mandates that "[a]ny person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act."

{¶ 25} Appellant argues that *Warren* is not applicable in this case due to the United States Supreme Court's more recent decision in *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011 (2010). However, *Graham* addresses the imposition of a life sentence without the possibility of parole on juveniles in the context of the Eighth Amendment. Thus, *Graham* has no effect on the Ohio Supreme Court's decision in *Warren*.

{¶ 26} As *Warren* specifically addresses, and rejects, appellant's due process argument, we overrule appellant's assertions without further analysis.

II. Cruel and Unusual Punishment

{¶ 27} Appellant's second argument is that his life sentence with the possibility of parole is cruel and unusual punishment. In support of this contention, appellant, again, relies on the United States Supreme Court's decision in *Graham*.

{¶ 28} In *Graham*, the Court determined that the imposition of a life sentence *without the possibility of parole* upon a juvenile offender who was not convicted of homicide was cruel and unusual punishment. *Graham* at 2034. However, the Court went on to state that "a State need not guarantee the offender eventual release, but if it imposes a sentence of life [for a non-homicide conviction] it must provide [the offender] with some realistic opportunity to obtain release before the end of that term." *Id*.

{¶ 29} Such an opportunity was provided to appellant in this case, as he was sentenced to life in prison *with the possibility of parole* after 20 years. Thus, the trial court's sentence was in compliance with *Graham* and not a violation of appellant's Eighth Amendment right to be free from cruel and unusual punishment.

{¶ 30} As appellant's conviction and sentence was supported by the greater weight of the evidence and not unconstitutional, appellant's first assignment of error is overruled.

{¶ 31} Assignment of Error No. 2:

{¶ 32} THE TRIAL COURT ERRED BY PERMITTING THE STATE TO AMEND THE INDICTMENT.

{¶ 33} In his second assignment of error, appellant argues that the trial court erred by permitting the state to amend the dates in the indictment to correspond with the trial testimony of the victims. Appellant makes two arguments as to this issue: (1) the trial court violated Crim.R. 7(D) by permitting the state to amend the indictment to alter the timeframe for the rape of B.K.; and (2) the trial court erred in permitting appellant to be tried for offenses that were never presented to the grand jury.

{¶ 34} Appellant first contends that the amendment of the indictment as to the dates of B.K.'s rape was a violation of Crim. R. 7(D). Crim.R. 7(D) provides that a trial court "may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to * * * any variance with the evidence, provided no change is made in

the name or identity of the crime charged." A trial court's decision to allow an amendment is reviewed for abuse of discretion. *State v. Collinsworth*, 12th Dist. No. CA2003-10-012, 2004-Ohio-5902, ¶ 14, citing *State v. Beach*, 148 Ohio App.3d 181, 188, 2002-Ohio-2759. An abuse of discretion is not merely an error of law or judgment, but an implication that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 181.

{¶ 35} In this case, Crim.R. 7(D) gave the state the power to conform the dates of the offenses alleged in the indictment to the evidence presented at trial so long as no change was made to the name or identity of the crimes charged. Appellant was charged with raping B.K. in violation of R.C. 2907.02(A)(1)(b). As we have previously determined in *Collinsworth*, the date and time of an alleged rape is not an essential element of R.C. 2907.02(A)(1)(b). *Collinsworth* at ¶ 24. Furthermore, in this case, as in *Collinsworth*, under either the original or amended indictment, the victim was still under the age of 13. *See id.* at ¶ 26. Therefore, the changing of the dates of the alleged rapes from 2003 to a period between August 2004 and August 2005, as a matter of law, made no change to the name or identity of the crime charged and is, consequently, not a violation of Crim.R. 7(D). As such, the trial court did not abuse its discretion in granting the state's motion to amend the indictment.

{¶ 36} Appellant also argues that the trial court erred in amending the indictment because the amendment permitted appellant to be tried for offenses that were never presented to the grand jury. Specifically, appellant contends that, due to the changes in dates of the indictment, there is a reasonable danger or likelihood that the amended indictment encompassed different sexual offenses than were presented to the grand jury.

{¶ 37} "An indictment compels the government to aver all material facts constituting the essential elements of an offense, the purpose of which is to afford the accused adequate notice and an opportunity to defend, and to enable the accused to protect himself from any

future prosecutions for the same offense." *State v. Murrell*, 72 Ohio App.3d 668, 671 (12th Dist.1991), citing *State v. Sellards*, 17 Ohio St.3d 169 (1985). Ordinarily, specificity as to the time and date are not essential elements of an offense, especially where the crimes alleged in the indictment constitute sexual offenses against children. *Id*.; *Wagers*, 12th Dist. No. CA2009-06-018, 2010-Ohio-2311 at ¶ 17-18. The state's inability to produce specific dates and times with regard to an alleged offense is without prejudice, and without constitutional consequence, when such does not present a material detriment to the preparation of a defense. *Murrell* at 672. As such, in order for appellant's convictions to be reversed due to the amended indictment, appellant must show that his defense had been prejudiced by the amendment. *Id*. at 671.

{¶ 38} First, we note that the amendment to the indictment in this case was proper under Crim.R. 7(D). In addition, appellant did not present any sort of defense, including an alibi defense, which would have been prejudiced by the amendment to the indictment. Therefore, even had the amendment to the indictment permitted appellant to be tried for offenses not reviewed by the grand jury, appellant was not prejudiced by the amendment. Thus, regardless of whether the amendment to the indictment affected appellant's right to prosecution by grand jury indictment, appellant was not prejudiced by the amendment. Consequently, appellant's second assignment of error is overruled.

{¶ 39} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.