

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-69
ERIC E. PERKINS	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court of Common Pleas Case No. 2009-CR-03-0067

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 14, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Eric Perkins, appeals from the judgment of the Tuscarawas County Court of Common Pleas, finding him guilty of two counts of unlawful sexual conduct with a minor, both felonies of the third degree, in violation of R.C. 2907.04(A). The State of Ohio is Plaintiff-Appellee.

{¶2} Appellant pled not guilty to the charges and exercised his right to a jury trial on November 23, 2009. The testimony, as adduced at trial, was as follows.

{¶3} On February 9, 2008, K.B. was a fourteen year old female who resided with her parents in Newcomerstown, Ohio. At that time, Appellant, a thirty-two year old male, was in a relationship with K.B.'s aunt. K.B. had previously met Appellant when she was at her aunt's residence and had been around him at the residence on numerous occasions. K.B. stated that Appellant knew how old she was because he gave her a present on her fourteenth birthday.

{¶4} During the morning hours of February 9, 2008, K.B. told her parents that she was going to ride her bike to a friend's house. Instead, she rode her bike to Appellant's mother's, Deborah Ortt's, house. When K.B. arrived at the house, Mrs. Ortt was present, as was her husband, Marvin. Appellant was also at the residence.

{¶5} K.B. testified that she arrived at the Ortt residence around 11:00 a.m. She stated that Mr. and Mrs. Ortt and Appellant were in the living room of the house when she arrived. After a short conversation with Mrs. Ortt, Mrs. Ortt left the residence for approximately two hours. At that time, Mr. Ortt returned to his bedroom and shut the door. K.B. stated that she and Appellant watched television for a short period of time, and then Appellant led her to the bathroom, closed the door and they engaged in sexual

intercourse. Afterwards, they returned to the living room, where they watched television for a short while.

{¶6} Appellant led K.B. back to the bathroom a second time, approximately twenty minutes after the first time and they engaged in sexual intercourse again. Afterwards, they again returned to the living room. Mrs. Ortt returned to the residence a short time after the two returned to the living room for the second time.

{¶7} K.B. left the Ortt residence a short time later and returned home. At that time, she did not tell her parents what had happened because she did not want to get into trouble. Within the next two days, K.B.'s parents discovered that she had been lying about where she had been on February 9, 2008. They also discovered that K.B. had sexual relations with Appellant and they contacted the Newcomerstown Police Department regarding the incident.

{¶8} K.B.'s mother gathered K.B.'s underwear that she had worn on February 9, and placed them in a ziploc bag and took them with her to the police station. She gave the underwear to Officer Fillman and informed the officer that the underwear had not been laundered since K.B. had worn them on February 9. Officer Tim Miller then testified that he submitted the underwear to the Bureau of Criminal Identification and Investigation ("BCI") for evidentiary analysis. Officer Miller also executed a search warrant and obtained Appellant's buccal swab to submit for comparison to BCI.

{¶9} Raymond Peoples, a forensic scientist at BCI determined that a cutting from the crotch section of K.B.'s underwear contained sperm. A second forensic scientist from BCI, Mark Losko, was able to extract two DNA profiles from the cutting of underwear taken by Mr. Peoples. The first DNA profile was that of K.B. The second

DNA profile was that of Appellant. Mr. Losko testified that the odds of the DNA being contributed to someone other than Appellant were one in thirty four quintillion unrelated individuals. According to Mr. Losko, because the population of the earth is less than ten billion, it would not be expected that anyone else on the earth would have the same DNA profile as Appellant.

{¶10} Appellant gave a statement to Officer Michael Kennedy of the Newcomerstown Police Department regarding the events of February 9, 2008. When Officer Kennedy informed Appellant that there had been allegations of sexual misconduct regarding K.B., Appellant responded, "I don't know what you're talking about. I'm being set up." Appellant then denied seeing K.B. at all the weekend of February 9, 2008, though he admitted to being at his mother's house on Saturday. He also said that he did not talk to K.B. that weekend. Appellant then refused to voluntarily give Officer Kennedy a DNA sample.

{¶11} Deborah Ortt gave a statement to officers and also provided a written statement for them. In her first statement, she said that she was gone for approximately two hours on the morning on February 9, when K.B. was at the apartment with Appellant and Mr. Ortt. She testified at trial that she was only gone one hour and fifteen minutes that morning, that she left at exactly 9:15 a.m. and returned at 10:30 a.m., and that K.B. was not there when she left but that K.B. was there when she returned.

{¶12} Mrs. Ortt stated that she became friends with K.B. when she met K.B. at her aunt's house. She stated that Appellant did not live with her, but that he sometimes spent the night. She also testified that Appellant would sometimes be present at her house when K.B. would come to visit her. She stated that K.B. came to her house two

times on February 9, and again on February 10 and that Appellant was at her residence the entire weekend. She also stated that her husband, Marvin, is hard of hearing, but that he does not wear a hearing aid.

{¶13} Marvin Ortt also testified at trial, and confirmed that he is hard of hearing. Mr. Ortt repeatedly referred to Appellant as his son-in-law, instead of his stepson, and stated that he did not recall talking to the police after the events of February 9, 2008.

{¶14} Mr. Ortt stated that when he woke up on February 9, 2008, his wife, son-in-law (Appellant), and Appellant's "girlfriend" were there. He stated that his wife left the residence one or two times that day, and that she left the first time around 11:00 a.m., the same time that K.B. stated that Mrs. Ortt left the residence. Mr. Ortt also stated that he thought that Appellant's girlfriend was "too young" for him.

{¶15} After hearing all of the evidence, the jury convicted Appellant of both counts of unlawful sexual conduct with a minor. Appellant was sentenced to four years in prison and was classified as a Tier II sex offender. Appellant's sentence was stayed pending this appeal.

{¶16} Appellant raises one Assignment of Error:

{¶17} "I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶18} In his sole assignment of error, Appellant argues that his conviction is against the manifest weight of the evidence and that it is not supported by sufficient evidence. We disagree.

{¶19} When reviewing a claim of sufficiency of the evidence, an appellate court's role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, 175. 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. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶20} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶21} In order to convict Appellant of unlawful sexual conduct with a minor, the State had to prove, under R.C. 2907.04(A), that Appellant engaged in sexual conduct with another who is not his spouse, knowing that the victim was thirteen years of age or older, but less than sixteen years of age, or was reckless in that regard, and that the offender is ten or more years older than the child victim. Sexual conduct is defined in R.C. 2907.01(A), as it relates to the present case, as vaginal intercourse between a

male and a female, and without privilege to do so, the insertion, however slight, of any part of the body into the vaginal opening of another.

{¶22} Viewing the evidence in the light most favorable to the prosecution, sufficient evidence existed to convict Appellant under R.C. 2907.04(A). K.B. testified that she was 14 years old on February 9, 2008, and that Appellant knew her age because he gave her a present for her fourteenth birthday. Evidence was introduced that Appellant was 32 at the time of the offense.

{¶23} K.B. testified that Appellant twice took her into the bathroom at his mother's apartment and pulled down her pants and underwear and inserted his penis into her vagina. Appellant's DNA was found in semen left on the crotch of K.B.'s underwear.

{¶24} Moreover, Appellant's convictions were not against the manifest weight of the evidence. A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St.3d at 386-87.

{¶25} As we have noted in other cases, "absent other eyewitnesses to the attack itself, this case markedly hinged on the credibility levels of victim and defendant. As we have often reiterated, the trier of fact, as opposed to this Court, is in a far better position to weigh the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230." *State v. Baskin* (Nov. 9, 2000), 5th Dist. No. 1999CA00240.

{¶26} K.B. testified that she went to Appellant's mother's residence and that when Mrs. Ortt left the residence, Mr. Ortt retired to his bedroom and Appellant twice took her into the bathroom and had sexual intercourse with her. The presence of Appellant's DNA in K.B.'s underwear corroborates K.B.'s testimony.

{¶27} To the contrary, Appellant stated to police officers that he never saw K.B. that weekend, even though his mother, whom his attorney called to the stand in his defense, testified that Appellant was at the residence on at least two separate occasions that weekend when K.B. was there and that they shared a meal together. Additionally, Mr. Ortt, who referred to K.B. as Appellant's girlfriend, testified that K.B. was at their residence when Appellant was present that weekend.

{¶28} We do not find that the jury lost its way in convicting Appellant based on these facts.

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

{¶30} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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FIFTH APPELLATE DISTRICT

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	:	
-vs-	:	JUDGMENT ENTRY
	:	
ERIC C. PERKINS	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-69
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER