Slip Copy, 2009 WL 4861413 (Ohio App. 10 Dist.), 2009 -Ohio- 6659

Court of Appeals of Ohio,
Tenth District, Franklin County.

STATE of Ohio, Plaintiff-Appellee,

v.

Chad DOUGLAS, Defendant-Appellant.

No. 09AP-111.
Decided Dec. 17, 2009.

Appeal from the Franklin County, Court of Common Pleas.
Ron O'Brien, Prosecuting Attorney, and Richard A. Termuhlen, for appellee.

Keith O'Korn, for appellant.

FRENCH, P.J.

*1 {¶ 1} Defendant-appellant, Chad Douglas ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of three counts of gross sexual imposition. For the following reasons, we affirm.

{¶ 2} The Franklin County Grand Jury indicted appellant on one count of rape, three counts of complicity to rape, and three counts of gross sexual imposition. The charges stem from appellant causing three boys, G.P., J.B., and C.B., to engage in sexual contact with a girl, K.K., who was less than 13 years old. The indictment alleged that the sexual contact occurred "on or about" April 16, 2007.

{¶ 3} Appellant pleaded not guilty, and a bench trial ensued in January 2009 after appellant waived his right to a jury trial. Plaintiff-appellee, the state of Ohio ("appellee"), called G.P. to testify. G.P. was seven years old, and the court held a hearing to determine whether G.P. was competent to testify. G.P. said that the truth means "you don't lie." (Tr. 15.) He knew that lying is wrong. He understood that he is not supposed to lie in court, and he knew that he would get in trouble for lying in court. G.P. also stated that he was going to tell the truth about incidents concerning appellant. He recalled the Christmas presents he received a few weeks earlier. He also mentioned his grade in school and his teacher. Over defense counsel's objection, the court found G.P. competent to testify.

{¶ 4} G.P. testified as follows. G.P. and his brother, C.B ., visited cousins K.K. and J.B. on a day that appellant was present. The children went into a closet. G.P., J.B., and C.B. licked K.K. in her vaginal area. Appellant, who was on a nearby bed, told G.P. to perform the sexual act. Appellant did not go into the closet and did not touch K.K., and appellant did not show G.P. how to touch K.K.

{¶ 5} Appellee called C.B. to testify. C.B. was nine years old, and the court held a hearing to determine whether C.B. was competent to testify. C.B. said that a lie is "[w]here you don't tell the truth." (Tr. 57-58.) C.B. stated that he would get in trouble for lying. He said that it is good to tell the truth and that he will try to tell the truth. C.B. knew he was born on November 11, but he did not know the year. C.B. recalled a Christmas present he received a few weeks prior. C.B. recalled a present he received on his recent birthday. He could not remember what Christmas or birthday presents he received two years ago. He mentioned his grade in school, his teacher, and favorite subject. He revealed his favorite professional and college football

teams and his favorite professional football player. C.B. noted whether the teams won their last games, and he knew the name of the opponent in the last college game. The court found C.B. competent to testify, and defense counsel did not object.

{¶ 6} C.B. testified as follows. C.B. and his brother, G.P ., visited cousins K.K. and J.B. on a day that appellant was present two years ago. Appellant and the children were in J.B.'s room. Appellant was watching television. There was a closet in J.B.'s room, and K.K. and G.P. went into the closet. C.B. did not go into the closet. C.B. saw nothing happen to K.K. while he was in J.B.'s room. On cross-examination, C.B. said that he did not remember previously speaking to someone at a hospital about G.P. watching sexually explicit movies. C.B also said that G.P. started some fires over two years ago, before appellant stayed with Stacie M., who is J.B. and K.K.'s mother.

*2 {¶ 7} Appellee called J.B. to testify. J.B. was eight years old, and the court held a hearing to determine whether J.B. was competent to testify. J.B. said that a lie "ain't the truth and if you're lying, then it is bad." (Tr. 82.) J.B. said people get in trouble for lying. He knew it is important to tell the truth, and he said he was going to try to tell the truth in court. He revealed a Christmas present he received a few weeks earlier. J.B. stated his birthday, school, teacher, and favorite subject. The court found J.B. competent to testify, and defense counsel did not object.

{¶ 8} J.B. testified as follows. G.P. and C.B. visited K.K. and J.B. on a day that appellant was present. Appellant told the children to get into a closet, and "he put us in there." (Tr. 95.) Appellant told G.P., J.B., and C.B. to get on top of K.K. In an angry voice, appellant also told the boys to pull down K.K.'s pants. One of the boys pulled down K.K.'s pants, but J.B. could not remember what happened after that. K.K. did not do anything to him, G.P. or C.B. On cross-examination, J.B. said that he does not have a good memory of what occurred two years ago when appellant was at his house, and J.B. denied seeing sexually explicit movies or pictures.

{¶ 9} J.B. and K.K.'s mother, Stacie M., testified as follows. Appellant lived with Stacie, J.B., and K.K. for two weeks. G.P. and C.B. visited on a day that appellant was at her house. At about 3:30 or 4:00 p.m., K.K. told her that the three boys had done something to her; K.K. did not mention appellant. This occurred "[c]lose to the fall." (Tr. 122.) Stacie took J.B. and K.K. to the hospital on the date of the disclosure and to the Center for Child and Family Advocacy ("Advocacy Center") a few days later. K .K. was born on July 14, 2004.

{¶ 10} Lois Stepney, a medical forensic interviewer at the Advocacy Center, testified as follows. Stepney interviewed J.B. before his medical exam. Stepney said the interview took place on April 20, 2007. Stepney interviewed J.B. with no one else present in the room. Stepney said the purpose of her interview is for medical diagnosis and treatment; she discusses her interview with the medical examiner, and the interview guides the medical examination. Stacie told Stepney that the sex abuse was disclosed to her the Saturday before J.B.'s interview. Defense counsel stipulated to the admissibility of the video-recording of the interview, and the video revealed the following. Stepney told J.B. at the beginning of his interview that he would undergo a medical examination. J.B. first indicated that he did not see anyone engage in sexual touching. Stepney left the room and returned to ask J.B. about appellant. J.B. said that appellant yelled and told G.P. and C.B. to lick K.K. and that those boys did so.

{¶ 11} Paula Samms, a medical forensic interviewer at the Advocacy Center, also testified. Samms separately interviewed G.P. and C.B. on May 4, 2007. The children underwent medical examinations after the interviews. Samms discusses her interviews with the medical examiner because her interviews guide the medical examination. Samms interviews children with no one else present in the room, but the medical examiner, police, and prosecutors can watch the interview. G.P. and C.B.'s interviews were video-recorded. Defense counsel stipulated to the admissibility of the videos, and the videos revealed the following.

*3 {¶ 12} Samms told G.P. at the beginning of his interview that he would undergo a medical examination. G.P. stated that appellant told him and the other two boys to lick K.K. and that appellant licked K.K. first. G.P. denied seeing sexually explicit movies or photographs.

{¶ 13} Samms told C.B. at the beginning of his interview that he would undergo a medical examination. C.B. stated that he saw G.P. lick K.K. At one point, C.B. said that J.B. licked K.K., but he later vacillated on whether he actually saw J.B. do this. C.B. first said that the incident was G.P.'s idea, but later said that appellant told J.B. and G.P. in a mean voice to do it. C.B. said that he did not do anything to K.K. C.B. said that he and G.P. had seen a sexually explicit movie.

{¶ 14} Appellee called Detective David Phillips to testify. Phillips interviewed appellant on July 2, 2007. Phillips identified a waiver form that appellant signed. The form disclosed appellant's *Miranda* rights and stated: "I understand what my rights are. I do not want a lawyer at this time. I am willing to answer questions. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me." (State's Exhibit 3.) The form indicated that appellant had had no alcohol or drugs in the last 12 to 24 hours. The interview was video-recorded.

{¶ 15} The prosecution played the video in court, and defense counsel did not object. The video revealed the following. Phillips told appellant that he was accused of inappropriate sexual activity. Appellant said that he learned of the accusations in early April 2007. Appellant had recently stayed at Stacie's house, but he denied the allegations. Phillips said that he has interviewed people, unlike appellant, who deserve to go to jail for the rest of their lives or receive worse treatment. Phillips mentioned that people are dealt with severely if they do not take responsibility for their actions. Phillips recalled that he had spoken previously with appellant about a prior incident. Phillips said that appellant was treated fairly after he made admissions about the prior incident. Phillips reminded appellant that counseling had been provided to him previously, and appellant alluded to his previously being on probation. Phillips said that appellant could benefit from further help. Phillips said that he had medical and physical evidence to prove the allegations against appellant. Appellant ultimately admitted that G.P., J.B., and C.B. licked K.K. Appellant first denied involvement, but ultimately admitted that he told the boys to do it. Appellant used his fingers and mouth to demonstrate to Phillips how he showed the boys what to do, but said that he did not touch her. Appellant said he was in the closet with the children. Appellant first said K.K. did not sexually touch the boys, but later said that she sexually touched two of the boys. Appellant expressed regret and desired counseling.

*4 {¶ 16} On cross-examination, Phillips admitted that his statement about having evidence against appellant was false. Phillips also recalled learning "something about arson being related to sexual abuse in some manner." (Tr. 176.)

{¶ 17} The prosecution moved to amend the indictment to state that appellant committed the sex offenses between April 1 and April 15, 2007. The defense objected. The court overruled the objection and allowed the amendment. The prosecution rested its case. Appellant moved to dismiss the charges pursuant to Crim.R. 29. The trial court denied the motion.

{¶ 18} Detective Terri Davis testified as follows on appellant's behalf. Davis first met Stacie on April 15, 2007, at the hospital. Davis believed that the sex abuse occurred two or three days before April 15. Police concentrated on appellant as the perpetrator beginning on April 15.

{¶ 19} Appellant testified as follows on his own behalf. Appellant has a learning disability, but he can read and write. Appellant understood his right to remain silent and to have an attorney when he talked to Phillips. Appellant voluntarily signed the *Miranda* rights waiver. Appellant stayed with Stacie for a week. He denied telling G.P., J.B., and C.B. to sexually touch K.K. and denied demonstrating anything to the boys. Appellant made statements to Phillips because he thought he would "just get counseling" if he told Phillips "what he wanted to hear." (Tr. 219, 225.) On cross-examination, appellant admitted that, while incarcerated, he wrote a letter dated August 22, 2007. In the letter, appellant admits to telling G.P., J.B., and C.B. to sexually touch K.K. "sometime in the end of March." (State's Exhibit 6.) Appellant testified that other inmates threatened him into writing the letter. The trial court asked how the prosecution obtained the letter. The prosecution said that an inmate forwarded the letter and that "[n]othing was offered * * * for acquisition of this document." (Tr. 241.) The trial court admitted the letter as impeachment evidence. Defense counsel objected.

{¶ 20} Defense counsel moved for the admission of a psychiatric evaluation of appellant. The psychologist concluded that appellant was competent to stand trial and is neither mentally ill nor mentally disabled. He said that appellant "was able to demonstrate the capability to understand concepts and principles, and to compare the hypothetical outcomes of various options to make a decision that is likely to be in his best interest." (Defense Exhibit A.) The psychologist cautioned that appellant has "Low Average intellectual capabilities" and "may have some difficulty when information is presented to him in complex forms using sophisticated terminology." (Defense Exhibit A.) He indicated, however, that "if explained to him in more simplified terms, he has no difficulty grasping the underlying concepts, facts, and considering the options." (Defense Exhibit A.) He noted that appellant's "passive, compliant style may cause him not to ask for assistance when, in fact, he could benefit from additional explanations." (Defense Exhibit A.) The trial court admitted the document into evidence.

*5 {¶ 21} Defense counsel raised another Crim.R. 29 acquittal motion, but the court denied the motion. After closing arguments, the court found appellant not guilty of rape and complicity to rape. The court found appellant guilty of the gross sexual imposition counts. The court labeled appellant a Tier II sex offender and imposed the maximum sentence of three consecutive five-year prison terms. Defense counsel did not object to the sex offender classification or the sentence.

{¶ 22} Appellant appeals, raising the following assignments of error:

ASSIGNMENT OF ERROR # 1

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE APPELLANT'S INVOLUNTARY CONFESSIONS TO THE POLICE AND IN A WRITTEN STATEMENT MADE TO ANOTHER INMATE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR # 2

THE TRIAL COURT VIOLATED OHIO EVIDENCE LAW AND DENIED APPELLANT HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEEN[TH] AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT FOUND THE CHILD WITNESSES COMPETENT TO TESTIFY.

ASSIGNMENT OF ERROR # 3

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO AMEND THE INDICTMENT DURING THE TRIAL TO INCLUDE A VAGUE DATE RANGE FOR THE ALLEGED CHARGES THEREBY PREJUDICING APPELLANT AND VIOLATING HIS RIGHTS TO FAIR NOTICE OF THE CHARGES UNDER THE DUE PROCESS CLAUSES [OF] THE U.S. AND OHIO CONSTITUTIONS, AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR # 4

APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR # 5

RETROACTIVE APPLICATION OF OHIO'S AWA VIOLATES THE PROHIBITION ON EX POST FACTO LAWS IN ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AND THE

PROHIBITION ON RETROACTIVE LAWS IN ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR # 6

THE RESIDENCY RESTRICTIONS OF THE AWA VIOLATE DUE PROCESS.

ASSIGNMENT OF ERROR # 7

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶ 23} In his first assignment of error, appellant argues that his statements to Phillips and in the August 2007 letter were inadmissible because they were involuntary. We disagree.

{¶ 24} Although appellant objected at trial to the admissibility of the August 2007 letter, appellant did not file a pre-trial motion to suppress pursuant to Crim.R. 12. Thus, appellant forfeited the challenge to the letter. See *State v. Campbell*, 69 Ohio St.3d 38, 44, 1994-Ohio-492. We review the forfeited issue under the plain error standard. See Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.*

*6 {¶ 25} The United States Supreme Court has held that any criminal trial use against a defendant of his involuntary statement is a denial of due process of law. *Mincey v. Arizona* (1978), 437 U.S. 385, 398, 98 S.Ct. 2408, 2416. Coercive police activity triggers the constitutional protections against involuntary statements. See *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515, 522. Appellant testified that inmates coerced him into writing the August 2007 letter, and the record is devoid of evidence that the inmates acted at the request of the police or prosecution. Therefore, constitutional protections against involuntary statements do not apply to appellant's August 2007 letter, and the trial court did not commit plain error by allowing the prosecution to use the letter at trial.

{¶ 26} Appellant's statements to Phillips stem from police activity, and we address appellant's argument that those statements were involuntary. Appellant did not seek to suppress the statements and, therefore, forfeited all but plain error. See *Campbell* at 44. The voluntariness of a defendant's statement is determined from the totality of the circumstances. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 112 (" *Frazier I* "). A defendant's confession is involuntary if it is the product of coercive police activity that overcomes the defendant's will and critically impairs his capacity for self-determination. *State v. Copley*, 10th Dist. No. 04AP-1128, 2006-Ohio-2737, ¶ 30. We consider the following: the age, mentality, and prior criminal experience of the defendant; the length, intensity, and frequency of the questioning; the presence or absence of physical deprivation or mistreatment; and the existence of threat or inducement. *Frazier I* at ¶ 112.

{¶ 27} Appellant notes that Phillips misled him about the evidence police obtained. This conduct did not render appellant's statement involuntary. A defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is. *State v. Bays*, 87 Ohio St.3d 15, 23, 1999-Ohio-216.

{¶ 28} Appellant argues that Phillips rendered his confession involuntary by suggesting that he would receive counseling and lenient treatment if he admitted to the sex offenses. Assurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession, however. See *Copley* at ¶ 32.

{¶ 29} Appellant argues that his low intelligence and learning disability rendered his confession involuntary. The record does not establish that appellant's mental condition led to an involuntary

confession. Although the psychologist who evaluated appellant recognized that appellant has difficulty with complex information and that his "passive, compliant style" may prevent him from seeking needed assistance, he also concluded that appellant has the "capability to understand concepts and principles" and "make a decision that is likely to be in his best interest." (Defense Exhibit A.) Furthermore, the psychologist concluded that appellant is neither mentally ill nor mentally disabled.

*7 {¶ 30} In addition, the totality of the circumstances establishes that appellant's will was not overborne and his capacity for self-determination was not critically impaired when he spoke with Phillips. Appellant testified that he understood his right to remain silent and to have an attorney when he talked to Phillips. Appellant testified that he voluntarily waived those rights. Phillips giving appellant *Miranda* warnings is another factor demonstrating the voluntariness of the confession. See *State v. Barker* (1978), 53 Ohio St.2d 135, 141, fn. 3. When appellant agreed to talk to Phillips, he signed a form verifying the voluntariness of his actions. Appellant's videotaped confession shows that he comprehended Phillips' questions and was able to express his thoughts and recall his actions in a rational manner. Lastly, appellant was not new to the police interview process; Phillips had previously interviewed appellant on a different matter.

{¶ 31} We conclude that appellant voluntarily confessed to Phillips and that the trial court did not commit plain error by admitting the confession into evidence. Having also rejected appellant's arguments against the August 2007 letter, we overrule appellant's first assignment of error.

{¶ 32} We next address appellant's third assignment of error, in which he argues that the trial court erred by amending the date of the offenses in the indictment. We disagree.

{¶ 33} Pursuant to Crim.R. 7(D), a court may amend an indictment due to any variance with the evidence if no change is made in the name or identity of the crime charged. We will not disturb a court's decision to amend an indictment absent an abuse of discretion. *State v. Westerfield,* 10th Dist. No. 07AP-1072, 2008-Ohio-4458, ¶ 16. An abuse of discretion connotes more than an error of law or judgment; it implies a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 34} The original indictment alleged that appellant committed the offenses "on or about" April 16, 2007. The court amended the indictment to allege that the offenses occurred between April 1 and April 15, 2007. Appellant argues that it was improper for the court to amend the indictment to include a range of dates. However, a reasonable degree of latitude and inexactitude is allowed with respect to the timing of a sex offense. See *State v. Crosky,* 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶ 45. Moreover, if the evidence ultimately establishes a variance between the dates alleged in the indictment and the evidence adduced at trial, the court may amend the indictment, pursuant to Crim.R. 7(D), to conform to the evidence absent "an abuse of discretion on the part of the trial court * * * and resulting prejudice to the defense." *State v. Boyer,* 10th Dist. No. 06AP-05, 2006-Ohio-6992, ¶ 12, citing *State v. Beach,* 148 Ohio App.3d 181, 2002-Ohio-2759, ¶ 23. The prosecution's evidence supported the amended dates in the indictment, given appellant's statements about the timing of his stay at Stacie's house and Stepney's testimony about the timing of the allegations. In addition, after the court amended the indictment, defense witness Davis indicated that the offenses occurred within the amended time frame.

*8 {¶ 35} Appellant argues that the amendment resulted in prejudice to him. Appellant states that the new time frame incorporated non-indicted sex offenses mentioned in his August 2007 letter. Appellant is incorrect. The prosecution did not rely on the letter when it sought the amendment, and appellant admits in the letter to activity occurring in March 2007, which does not fall within the amended time frame.

{¶ 36} Appellant also contends that the amendment hindered his defense because he had planned to highlight the contradiction in the prosecution's case that stemmed from Stacie testifying that the sex offenses occurred in the fall. Appellant could have attempted to make this argument even after the amendment. In any event, this argument would have put appellant in an untenable position because his own witness, Davis, testified that the sex offenses occurred within the amended time frame. Accordingly, we

conclude that the trial court did not abuse its discretion when it amended the date of the offenses in the indictment. Therefore, we overrule appellant's third assignment of error.

{¶ 37} We next address appellant's second assignment of error, in which appellant argues that the trial court erred by finding G.P., J.B., and C.B. competent to testify. These children were under ten years old when they testified, and Evid.R. 601(A) provides that every person is competent to testify except children under ten years old "who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." The proponent of testimony from a child under ten years old bears the burden of proving that the witness is competent to testify. *State v. Clark*, 71 Ohio St .3d 466, 469, 1994-Ohio-43. In determining the competence of a witness under ten years old, the court must consider whether the child is able to (1) receive accurate impressions of fact or observe acts about which the child will testify, (2) recall those impressions or observations, (3) communicate what was observed, (4) understand truth and falsity, and (5) appreciate the responsibility to be truthful. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251 (" *Frazier II* "). We will not reverse a trial court's decision on a child's competence to testify absent an abuse of discretion. *Clark* at 469.

{¶ 38} Appellant concedes that the three competence hearings included questions about the fourth and fifth *Frazier* factors, i.e., knowledge of truth and falsity and appreciation of the need to be truthful. Appellant argues that the competence hearings failed to address the first three *Frazier* factors concerning the boys' ability to observe, recall, and communicate accurate impressions or observations of pertinent facts. Although the competence hearing need not involve questions about the alleged sex abuse, the child's ability to recall events from the relevant time period must be established. *State v. Schmidt,* 10th Dist. No. 08AP-348, 2009-Ohio-1548, ¶ 19. Here, the competence hearings involved no questions about whether the boys could observe, recall, and communicate accurate impressions or observations of past events within the time of the April 2007 offenses. Therefore, the hearings failed to establish the boys' competence to testify, and the prosecution, the proponent of the boys' testimonies, did not satisfy its burden.

*9 {¶ 39} A deficiency in a competence hearing may be cured if the witness's subsequent trial testimony established competence. *Schmidt* at ¶ 23. In *Schmidt*, a trial court rejected a defendant's motion to strike a child's testimony for lack of competence. *Id*. at ¶ 5. The competence hearing failed to establish whether a child could recall and relate events that occurred within the time frame of the sex abuse. *Id*. at ¶ 22. This court examined whether the child's testimony established her competence and cured the deficient competence hearing. *Id*. at ¶ 22-26. We noted that the child's testimony differed from her Advocacy Center interview. *Id*. at ¶ 24. We also noted that the child contradicted herself during her trial testimony. *Id*. at ¶ 25. We concluded that, given these conflicts, the child's trial testimony did not cure the deficient competence hearing and, therefore, did not establish the child's competence. *Id*. at ¶ 26-27. Pursuant to *Schmidt,* the testimonies of G.P., J.B., and C .B. did not cure their deficient competence hearings and did not establish their competence if their testimonies are internally conflicting or if their testimonies conflict with their Advocacy Center interviews.

{¶ 40} We first address G.P.'s testimony. G.P. testified that appellant did not sexually touch K.K. and that appellant did not show him how to touch K.K. At the Advocacy Center, however, G.P. said that appellant licked K.K. to demonstrate how to do it. Because G.P.'s testimony conflicts with his interview, G.P.'s testimony did not cure his deficient competence hearing and, therefore, did not establish his competence.

{¶ 41} Although appellant objected to the trial court finding G.P. competent to testify, we review for harmless error the trial court's decision to allow G.P.'s testimony. Crim.R. 52(A); *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 15. Under this review, "[e]rror in the admission or exclusion of evidence in a criminal trial must be considered prejudicial unless the court can declare, beyond a reasonable doubt, that the error was harmless, and unless there is no reasonable possibility that the evidence, or the exclusion of evidence, may have contributed to the accused's conviction." *State v. Jones,* 10th Dist. No. 07AP-771, 2008-Ohio-3565, ¶ 13, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135. " 'Whether [the] error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' "

(Bracketed word sic.) *Id*., quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78. See also *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 62-64 (applying the harmless error standard to the improper allowance of inadmissible evidence and determining whether there was a reasonable possibility that the evidence complained of might have contributed to the defendant's conviction). The prosecution bears the burden of demonstrating harmless error; if the prosecution meets its burden, we need not correct harmless error. *Perry* at ¶ 15.

*10 {¶ 42} Appellee contends that the record demonstrates that the trial court committed harmless error when it allowed G.P. to testify. Generally, when a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average trier of fact. *Jones* at ¶ 13. The reviewing court examines an array of factors, including the importance of the testimony subject to harmless error review, the cumulative nature of the testimony, the scope of cross-examination, the presence or absence of corroborating or contradictory evidence, and the overall strength of the prosecution's case. *Id*. at ¶ 14.

{¶ 43} Here, the trial court explained its verdict on the record, and we look to that explanation in our harmless error review. The court said that it considered the testimony of all three boys and that it believed their testimony. The court did not single out G.P.'s testimony, however. Rather, the court specifically noted J.B .'s demeanor on the stand.

{¶ 44} Moreover, G.P.'s trial testimony was cumulative to other evidence implicating appellant in the abuse of K.K., including appellant's own confession and the Advocacy Center interviews of G.P ., J.B., and C.B. The court said that it considered this other evidence, and as we conclude in appellant's fourth assignment of error, the other evidence supports his gross sexual imposition convictions. In fact, the other evidence is strong given its corroborating nature and that G.P. unequivocally implicated appellant during the Advocacy Center interview.

{¶ 45} Finally, the trial court was persuaded by appellant's confession. Having concluded that appellant confessed out of remorse, the court indicated that it was “influenced * * * substantially” by appellant's lack of credibility when he retracted his confession. (Tr. 265.)

{¶ 46} Because G.P.'s trial testimony was merely cumulative to the other strong and corroborating evidence, including appellant's confession and G.P.'s compelling Advocacy Center interview, because the court was substantially influenced by appellant lacking credibility when he retracted his confession, and because the court did not specifically refer to G.P.'s testimony when it rendered its verdict, we do not discern a reasonable possibility that G.P.'s trial testimony contributed to appellant's convictions. Accordingly, we hold that the trial court committed harmless error beyond a reasonable doubt when it allowed G.P. to testify, and we need not correct the error.

{¶ 47} We next address the testimony of C.B. and J.B. J.B. testified that he could not remember what happened after one of the boys pulled down K.K.'s pants pursuant to appellant's instruction. On cross-examination, J.B. said he does not have a good memory of what occurred two years ago when appellant was at his house. At the Advocacy Center, J.B. first said that he did not see anyone engage in sexual activity with K.K., but ultimately said that appellant told G.P. and C.B. to lick K.K. and that those boys did so. J.B.'s testimony conflicts with his Advocacy Center interview.

*11 {¶ 48} C.B. testified that nothing happened to K.K. and that he did not remember speaking to someone at the hospital about G .P. watching sexually explicit movies. At the Advocacy Center, C.B. said that G.P. and J.B. licked K.K. and that appellant told those boys to do it. C.B. also said that he and G.P. had seen a sexually explicit movie. C.B.'s testimony conflicts with his Advocacy Center interview.

{¶ 49} Pursuant to *Schmidt,* J.B. and C.B.'s testimonies did not cure their deficient competence hearings and, therefore, did not establish their competence. The defense did not object to the trial court finding J.B. and C.B. competent to testify, however. Therefore, appellant forfeited the competence issues, and plain error applies. See *State v. Cameron,* 5th Dist. No.2008-CA-2008, 2009-Ohio-3341, ¶ 22, 56. We need not reverse appellant's gross sexual imposition convictions on plain error if other evidence supports them. See

State v. Brown, 10th Dist. No. 05AP-962, 2006-Ohio-4594, ¶ 25; *State v. Scott,* 10th Dist. No. 05AP-1144, 2006-Ohio-4981, ¶ 27. We turn, then, to appellant's fourth assignment of error, where appellant argues that his gross sexual imposition convictions are based on insufficient evidence. We disagree.

{¶ 50} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶ 51} R.C. 2907.05(A)(4) defines "gross sexual imposition" and states, in pertinent part:

(A) No person shall * * * cause two or more other persons to have sexual contact when any of the following applies:

* * *

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

Sexual contact is "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

*12 {¶ 52} In the interest of justice, and given our discussion of the boys' competence, we review appellant's convictions without considering the boys' testimonies at trial. Appellant confessed to police that he told G.P., J.B., and C.B. to touch K.K., a girl less than 13 years old, and that the boys did engage in the touching. In their Advocacy Center interviews, the boys ultimately implicated appellant in the abuse and corroborated appellant's admissions. We consider the Advocacy Center interviews because defense counsel stipulated to their admissibility, and the issue of the boys' competence to testify has no impact on the admissibility of the interviews. *State v. Muttart,* 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 46. In addition, Stacie testified that K.K. revealed that the boys did something to her, and this testimony corroborated appellant's admission that contact occurred. Moreover, appellant causing the sexual activity to occur in a secluded area indicates furtive conduct reflective of a consciousness of guilt. See *State v. Saleh,* 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 86.

{¶ 53} Appellant argues that there is insufficient evidence that his telling the boys to sexually touch K.K. was what caused the boys to engage in the activity. We are not persuaded. Appellant confessed to demonstrating to the boys how to lick K.K. He used a mean voice and yelled when he, an adult, told the young boys to do it.

{¶ 54} Appellant argues that the evidence failed to establish that the activity was for purposes of his sexual gratification. We may infer sexual gratification from the type, nature, and circumstances of the contact, along with the personality of the defendant. *State v. Stewart,* 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶ 18. Appellant took the initiative to tell the three boys to lick K.K. and also demonstrated how the boys were to do it. We may infer from this evidence that appellant caused their actions for purposes of his sexual gratification.

{¶ 55} Appellant argues that R.C. 2907.05(A)(4) does not contemplate that both persons having sexual contact are minors. Appellant provides no case law to support this argument, and it would lead to an absurd

result to interpret the statute as not applying because he involved more than one minor in the sexual activity. See *State v. Robb*, 88 Ohio St.3d 59, 66, 2000-Ohio-275 (recognizing that courts should not interpret statutes to yield an absurd result).

{¶ 56} Lastly, appellant argues that the evidence failed to prove when the offenses occurred. The evidence established that the offenses happened between April 1 and April 15, 2007, consistent with the properly amended indictment.

{¶ 57} For all these reasons, we conclude that sufficient evidence supports appellant's gross sexual imposition convictions.

{¶ 58} Next, appellant argues that his convictions are against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id*. Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id*., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown,* 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

*13 {¶ 59} Appellant contends that the trial court should have accorded no weight to his confession because Phillips convinced him he would receive counseling if he told Phillips what he wanted to hear. The trier of fact is in the best position to determine witness credibility. *State v. Carson,* 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶ 15. We conclude that appellant's confession was voluntary, and it was within the province of the trial court, as trier of fact, to conclude that appellant was telling the truth when he confessed to Phillips. In particular, we note that appellant demonstrated to Phillips, by placing his fingers up to his mouth, what he told the boys to do. Phillips did not coerce appellant's demonstration in any way. Appellant also notes the lack of DNA evidence, but appellant would have left no DNA evidence on K.K. if, as he contends, he did not touch her.

{¶ 60} Lastly, appellant argues against the weight of the prosecution's other evidence. He notes that G.P., J.B., and C.B. were inconsistent in their testimonies and in their Advocacy Center interviews and that K.K. did not implicate appellant when she disclosed the abuse to her mother. He also argues that the evidence proves that the boys learned about sexual activity through pornographic movies and that G.P. also learned about sexual activity through experiencing sex abuse himself, a conclusion appellant draws from G.P. having started fires. We conclude that the existence of these factors does not weigh heavily against appellant's convictions because the boys' Advocacy Center interviews corroborated appellant's own confession to committing the offenses. Due to this corroborating evidence, we conclude that the trial court did not lose its way in convicting appellant of gross sexual imposition concerning G.P., J.B., and C.B. Therefore, we hold that the convictions are not against the manifest weight of the evidence.

{¶ 61} For all these reasons, we overrule appellant's second and fourth assignments of error. Appellant's fifth and sixth assignments of error concern his Tier II sex offender classification. The trial court made this classification pursuant to the Adam Walsh Act, implemented under S.B. 10. Appellant argues that retroactive application of this law violates the Ex Post Facto Clause of the United States Constitution and the Ohio Constitution's ban on retroactive laws. Appellant also argues that S.B. 10's residency restrictions are unconstitutional. Appellant did not raise these issues in the trial court. A constitutional issue not raised at trial "need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Accord *State v. Franklin,* 10th Dist. No. 08AP-900, 2009-Ohio-2664, ¶ 21. We decline to consider appellant's constitutional arguments because he failed to raise them in the trial court.[FN1] Accordingly, we overrule appellant's fifth and sixth assignments of error.

FN1. This court has held that a defendant does not have standing to challenge S.B. 10 on direct appeal. See *State v. Christian,* 10th Dist. No. 08AP-170, 2008-Ohio-6304, ¶ 7-10, and *State v. Conkel,* 10th Dist. No. 08AP-845, 2009-Ohio-2852, ¶ 8. We need not reach the issue of standing because appellant did not preserve the S.B. 10 constitutional challenges for appeal. See *Franklin* at ¶ 20-21 (declining to consider S.B. 10 constitutional challenges not raised in the trial court). See also *State v. Richey,* 10th Dist. No. 09AP-36, 2009-Ohio-4487, ¶ 12 (" *Richey I* ") (same).

{¶ 62} In his seventh assignment of error, appellant argues that he received ineffective assistance of counsel. We disagree.

*14 {¶ 63} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

{¶ 64} Appellant argues that defense counsel was ineffective for not filing motions to suppress his statements to police and his August 2007 letter. Because we rejected appellant's constitutional challenges regarding the letter and his statements, we conclude that defense counsel's failure to file motions to suppress did not prejudice appellant. Therefore, we conclude that defense counsel was not ineffective for failing to file the motions.

{¶ 65} Appellant argues that defense counsel was ineffective for not objecting to J.B. and C.B.'s competence to testify. It was within the realm of reasonable trial strategy for defense counsel not to raise the competence objections and to allow these boys to testify in order for the trial court, as trier of fact, to hear (1) C.B.'s failure to implicate appellant during his testimony, and (2) J.B. and C.B.'s conflicting testimonies. See *State v. Brown,* 5th Dist. No.2007 CA 15, 2008-Ohio-3118, ¶ 55. Accordingly, we conclude that defense counsel was not ineffective for failing to object to J.B. and C.B.'s competence to testify.

{¶ 66} Appellant argues that defense counsel was ineffective for stipulating to the admission of the boys' Advocacy Center interviews. Appellant claims that the interviews constitute inadmissible hearsay. Evid.R. 803(4) provides an exception to the rule against the admissibility of hearsay and allows the admission of statements made for medical diagnosis or treatment. We have repeatedly applied Evid.R. 803(4) to uphold the admission of children's statements to Advocacy Center personnel. See, e.g., *State v. J.G.,* 10th Dist. No. 08AP-921, 2009-Ohio-2857, ¶ 15; *State v. Arnold,* 10th Dist. No. 07AP-789, 2008-Ohio-3471, ¶ 35-39; *State v. Jordan,* 10th Dist. No. 06AP-96, 2006-Ohio-6224, ¶ 17-21; *State v. Edinger,* 10th Dist. No. 05AP-31, 2006-Ohio-1527, ¶ 53-64. The statements of G.P., J.B., and C.B. are consistent with the statements at issue in those cases. Stepney and Samms informed the boys at the beginning of their interviews that they were going to undergo medical examinations, and Stepney and Samms testified that the boys were medically examined. Stepney and Samms also indicated that their interviews guided the medical examinations and were performed for medical purposes and diagnosis. Accordingly, the statements of G.P., J.B., and C.B. at the Advocacy Center were admissible under Evid.R. 803(4). An objection to the admissibility of the boys' interviews would have been futile, and we conclude that defense counsel did not render ineffective assistance by stipulating to their admissibility.

*15 {¶ 67} Appellant argues that defense counsel was ineffective for not objecting to the sentence that the trial court imposed. Appellant contends that his sentence contravenes R.C. 2929 .11(B), which requires that a sentence be consistent with that imposed for similar crimes committed by similar offenders. The trial court stated the following in its sentencing entry: "The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." This

statement establishes that the trial court fulfilled its requirement under R.C. 2929.11(B). See *Franklin* at ¶ 14. Appellant victimizing multiple young children further justifies his lengthy sentence. See *State v. Hairston,* 10th Dist. No. 07AP-160, 2007-Ohio-5928, ¶ 57 (upholding a lengthy sentence for crimes involving multiple victims). See also *State v. McLemore,* 10th Dist. No. 01AP-497, 2001-Ohio-4270 (concluding that a victim's young age is a factor justifying a lengthy sentence). See also R.C. 2929.12(B) (stating that a court may base its sentence on any relevant factor indicating that an offender's conduct is more serious than conduct normally constituting the offense). Likewise, appellant alluded to being on probation previously, and he has not been successfully rehabilitated given his present sex offenses. This factor demonstrates appellant's recidivism and also justifies his lengthy sentence. See R.C. 2929.12(D); *Franklin* at ¶ 15. Lastly, appellant's prison terms are within the range authorized by statute. See R.C. 2929.14(A)(3). Appellant has not shown that defense counsel was ineffective for not challenging the sentence that the trial court imposed.

{¶ 68} Appellant argues that defense counsel was ineffective for not challenging the constitutionality of S.B. 10's residency restrictions. Appellant is incorrect. The issue is not ripe for consideration because the trial court incarcerated appellant. See *State v. Gilfillan,* 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶ 117.

{¶ 69} Appellant argues that defense counsel was ineffective for not asserting that retroactive application of S.B. 10 violates the federal and state constitutions. These constitutional challenges to S.B. 10 are pending before the Supreme Court of Ohio. See *Franklin* at ¶ 20. This court has not ruled concerning S.B. 10's retroactive application. Virtually every other appellate district in this state has rejected challenges to S.B. 10, however, based on retroactive or ex post facto constitutional challenges. See *Harrod v. State,* 5th Dist. No.2008CA0206, 2009-Ohio-4733, ¶ 18 (listing the cases from other appellate districts). And this court has held that a defendant lacks standing to even challenge S.B. 10 on direct appeal. See fn. 1 above. Given this state of the law, appellant has not demonstrated that constitutional challenges to S.B. 10's retroactive application would have led to a different result in the trial court. Thus, we conclude that defense counsel was not ineffective for failing to raise the constitutional challenges. For all these reasons, we overrule appellant's seventh assignment of error.

*16 {¶ 70} In summary, we overrule appellant's seven assignments of error. Thus, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

Ohio App. 10 Dist.,2009.
State v. Douglas
Slip Copy, 2009 WL 4861413 (Ohio App. 10 Dist.), 2009 -Ohio- 6659

END OF DOCUMENT