IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 11 555552**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
WARREN CALDWELL	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendant Warren Caldwell was indicted on October 20, 2011. The indictment charged him with 30 offenses, including six counts of rape (counts 11, 12, 16, 17, 22, and 23), two counts of attempted rape (counts 19 and 20), 12 counts of kidnapping (counts 1, 3, 5, 7, 10, 13, 15, 18, 21, 24, 26, and 29), nine counts of gross sexual imposition (counts 2, 4, 6, 8, 9, 14, 25, 27, and 30), and one count of disseminating material harmful to juveniles (count 28). The indictment alleged that 24 of these offenses happened "on or about February 8, 2007 to August 20, 2010." The rape charge at count 11 was alleged to have occurred "on or about February 8, 2007 to February 7, 2008." The rapes at counts 12 and 17 and the attempted rape at count 20 were alleged to have occurred "on or about February 8, 2008 to August 20, 2010." Finally, the kidnapping at count 29 and gross sexual imposition at count 30 were charged with taking place

The case was tried to a jury beginning on March 13, 2012. Just prior to trial, counts 16, 19, and 22 were dismissed on the plaintiff's own motion. During trial, count 20 was amended to conform with the evidence from attempted rape to importuning in violation of section

2907.07(A) of the Ohio Revised Code. After evidence was received, the court dismissed counts 8, 9, 10, 17, 21, and 23 upon motion by the defendant pursuant to Rule 29 of the Ohio Rules of Criminal Procedure. This left the jury to consider two counts of rape, one count of importuning, seven counts of gross sexual imposition, ten counts of kidnapping, and the charge of disseminating material harmful to juveniles.

On March 21 the jury returned not guilty verdicts on nine of the kidnapping charges, all seven gross sexual imposition counts, one rape charge, and the importuning and disseminating material harmful to juveniles counts.

The jury found the defendant guilty of rape as charged in count 12 and kidnapping as charged in count 7.

The defendant has now filed a motion for a new trial pursuant to Criminal Rule 33 and R.C. 2945.79. The state has opposed the motion and this entry follows.

STATEMENT OF FACTS

The complaining witness on each count in the indictment is B.W., a girl born on February 8, 1998. B.W. is the daughter of Sean W. and Nicole Telman. B.W. has two half-brothers, Brandon and Quentin, who are Nicole Telman's children with David Burley.

Telman began dating the defendant around July, 2005. Soon thereafter the defendant moved in with Telman an apartment at 312 Brentwood Drive in Painesville. The five of them lived there for just over a year and then moved together to 48 Chestnut Street in Painesville, where they stayed for about three years. Around the middle of 2010 they moved to 18201 Libby Road in Maple Heights.

B.W. testified that she was eight years old when Caldwell moved in with her family. The defendant moved in after Burley moved out.

B.W.'s first sexual encounter with the defendant happened at the Brentwood apartment when she was nine. Telman and Caldwell were in their shared bed when the defendant called B.W. into the room. Telman was still sleeping and Caldwell told B.W. to "come into the bed." When she did he touched her vaginal area over top of her school uniform trousers. He told her "don't tell nobody." She left and went to the school bus stop without her mother ever waking up.

The next incident also happened while she was still nine and in third grade. She and Caldwell were in the Brentwood living room watching television. He got on the floor next to her and began "touching my vagina area." At the time, she was wrapped in a white blanket and he put his finger not only under the blanket but under her pajamas and underwear directly onto her vagina.

B.W. testified that she told Telman about that incident the next day on the way to a parent-teacher conference at school. But Telman, who also testified at trial, denied that B.W. ever told her about any of these allegations until the incident that led to Caldwell's arrest in August, 2010.

According to B.W.'s testimony, the next offense occurred after the family and Caldwell moved to Chestnut Street. B.W. could not attach a date to this incident other than to say it was around October 1, after Telman had begun to work a third-shift job at Wickliffe Country Place. After B.W.'s mother left for work, Caldwell forced her onto the couch, took off his trousers, and rubbed his penis on her vagina.

The next incident also occurred on Chestnut Street. B.W. testified that "I think I was

it in her vaginal area and then turned on a DVD of adults engaging in fellatio and sexual

intercourse. B.W. testified that the vibrator and the DVD came from the top drawer of the nightstand in her mother's bedroom and that Caldwell warned her not to tell her mother that she knew these items were in the house. She testified that her brothers were asleep in their bedroom during this occurrence.

The next offense also happened in the Chestnut Street living room. B.W. testified that she was in fifth grade. She said that Caldwell was on the living room couch and told her to get on top of him. Caldwell then took off her pajamas and pulled down his boxer underwear and penetrated her vagina with his penis. B.W. "felt it go in and it hurt." This went on while B.W.'s brothers were a few feet away on the living room floor watching television, and only ended when one of her brothers turned around to look at B.W. and Caldwell on the couch.

The next offense happened sometime in B.W.'s fifth or sixth grade year while still living on Chestnut Street. Caldwell was speaking to B.W. in her bedroom when he made her manually manipulate his penis. In trying to pinpoint exactly when this occurred, B.W. testified it was not long after a Lake County Department of Job and Family Services investigator visited the house. B.W. did not tell that investigator about the ongoing sexual abuse.

Some time after the defendant had B.W. masturbate him, he offered candy to B.W. if

did not persist. That testimony provided the evidentiary basis for the importuning charge.

The next two incidents happened on separate occasions when her uncles Ryan and Rocco Telman were in the house. The first happened when Ryan Telman was visiting while B.W. was in the fifth or sixth grade. She testified that the defendant came into her bedroom, undid his trousers, and made her touch his penis, all while Ryan Telman and his girlfriend were nearby on the living room couch. Later, but still in her fifth or sixth grade year, Rocco Telman

was over when the defendant and B.W. were on the couch watching television. Caldwell again made her touch his "private area."

B.W. testified that the next incident occurred on the love seat in the Chestnut Street living room. She said that the defendant took off all of her clothes and "he stuck it in me." This apparently happened during B.W.'s sixth grade year. She testified that she again told Telman about the abuse but that her mother brushed off the allegations, saying they had already been handled.

Another incident happened while B.W. was still in the sixth grade. She testified that the defendant was touching her chest with his hands in the living room on Chestnut Street. A steak knife was on a nearby couch. B.W. leaned over and grabbed the knife, threatening the defendant with it. However, the defendant was able to grab it from her hands and she was left defenseless.

In the summer of 2010, the family and Caldwell moved to Maple Heights because Telman got a job at MetroHealth Medical Center in Cleveland.

B.W. could not say exactly when the first incident happened in Maple Heights but did testify that school was not yet in session and her mother was working when the defendant came to her room. She and the defendant sat cross-legged facing each other with a blanket over their laps. The defendant then pulled aside her underwear and "put his private area on mine" but without penetrating her vagina.

B.W. testified that a few days later she told "Linda" what Caldwell had been doing to her. Linda was the girlfriend of Warren Gardener, the defendant's father. Linda suggested that B.W. tell her mother. B.W. did and Telman confronted the defendant, accusing him of being a

insisted that B.W. was lying. B.W. was sent to her room while

Telman and the defendant continued to argue. B.W. listened from her room and heard Telman telling Caldwell to "stop choking me." Yet it was Caldwell who called the Maple Heights police to the scene, accusing Telman of assault.

The police came to investigate the possible domestic violence but were never told that Telman and Caldwell's argument started because B.W. alleged sexual abuse. Caldwell was arrested that night and later convicted of domestic violence, spending about three months in jail.

While Caldwell was in jail, B.W. sent him letters expressing dismay at his absence and wishing for his quick return home. But B.W. testified that she was forced to send those "nice loving letters" by Telman.

As the jail term neared its end, B.W. found out that Caldwell would be coming home soon. She also heard that Telman and Caldwell planned to get married around the time of her next birthday.

Deasia Watts was an eighth grader at Milkovich Middle School at the time of the trial. She testified that she became acquainted with B.W. at the start of seventh grade when they were partners in a science class. Early in the school year, B.W. told Deasia that she had a secret to tell: that Caldwell had raped and abused her. Deasia testified that she told B.W. to tell an adult. About two or three months later a school acquaintance named McKenna described her own history of sexual abuse to B.W. After hearing McKenna's story, B.W., on November 16, 2010, told the school guidance counselor Pamela Ralston that Caldwell had raped her.

Ralston reported B.W.

Family Services and an investigation ensued.

In connection with the investigation, B.W. was examined by Mark Feingold, M.D. Dr. Feingold is the director of MetroHealth's Alpha Clinic. The Alpha Clinic specializes in evaluating children who allege sexual abuse. Dr. Feingold examined B.W. in late November or early December, 2010.

The physical examination at the Alpha Clinic was essentially normal. However, during the history portion of Dr. Feingold's examination, B.W. told the doctor that at one point she had burning upon urination. He considered this significant because pain on urination can be a symptom of rape, yet it is not so well-known as a symptom that a child inventing a story of sex abuse would know enough to claim it to give credence to her allegation.

Telman's testimony about what she was told and when contradicted her daughter's. She said that B.W. never told her that Caldwell touched her until the night in August, 2010 when Caldwell was arrested. Telman testified that B.W. told her that night that Caldwell had touched her chest. Once she heard that from her daughter, Telman immediately confronted Caldwell and the argument that resulted in his arrest followed. The first time Telman heard about anything other than the claim by B.W. that Caldwell touched her chest was when Telman was interviewed by social worker Lakisha Scott on November 16, 2010. At that interview, Telman "freaked out" when Scott told her that B.W.'s allegations not only stretched back several years but included rape.

Caldwell testified at trial. He denied the charges.

LAW AND ANALYSIS

Summary of the d arguments for a new trial

In his motion for a new trial, the defendant offers four reasons justifying a new trial. First, he asserts that he was prejudiced by the admission of hearsay testimony elicited by the

state from Telman that B.W.'s brothers saw the rape on the couch. Second, he claims that when an absent regular juror was replaced by an alternate the jury should have been instructed to "start its deliberations anew."[1] Third, he posits that the evidence was insufficient as a matter of law to support the guilty verdicts. Last, he argues that the guilty verdicts are against the manifest weight of the evidence.

Motion for a new trial

Criminal Rule 33[2] provides, in pertinent part, as follows:

> **RULE 33. New Trial**
>
> **(A) Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. . .;
>
> (5) Error of law occurring at the trial.

The hearsay testimony

By claiming as grounds for a new trial the improper admission into evidence of Telman's statements about what her sons saw, the defendant invokes several of Criminal Rule 33's provisions: abuse of discretion by the court in admitting the evidence (Rule 33(A)(1)), misconduct of the prosecuting attorney by eliciting the testimony (33(A)(2)), surprise because

[1] Motion for new trial, page 8.
[2] R.C. 2945.79 sets forth essentially the same grounds.

he was not prepared for the boys' observations coming into evidence (33(A)(3)), and an error of law in admitting the testimony (33(A)(5)).

The defendant's motion does not detail the objectionable testimony, instead only describes it as "evidence that B.W.'s brother's (*sic*) allegedly witnessed one incident."[3] But the court has reviewed a transcript of the testimony of Nicole Telman. The transcript shows that Telman had been examined on direct by counsel for the defendant, on cross examination by the prosecutor, by the court with questions from the jury and on re-direct examination without any mention of what her sons might have witnessed. That subject came up for the first time on re-cross examination, but was brought up not by the prosecutor but by Telman herself. The prosecutor was questioning Telman about whether she really never heard about the rape allegations until B.W. detailed them to the social worker Scott and the following exchange took place:

> TELMAN: I questioned [B.W.] if anything else had happened to her besides the breast grab.
>
> PROSECUTOR: Right.
>
> T: Once Lakisha Scott came to my home and said these things, I had never asked my daughter another question or my boys until I – except for – let me restate that. Except for when I asked the boys "Did you watch Warren rape your sister on the couch?" Or I said, "Have sex on " you know, "naked on top of each other." They wouldn't know what rape is.
>
> P: And again, would you agree that the way you would ask the question to the boys, it would be very important as to the tone of your voice?
>
> T: Yes.
>
> P: Thank you.
>
> T: I was very – I just asked them. I wasn't mad or anything, because Quentin looked at me and was like, "What?"

[3] Mtn. for new trial, p. 6.

P: I didn't ask you their response.

T: Oh.

P: I'm just asking about you asking them.

T: Yeah. But I asked them in a nice, monotone voice.

P: But Lakisha Scott, you will agree that Lakisha Scott told you that she had interviewed your boys and what they said, correct?

T: Yeah. She said they had seen it.

DEFENSE COUNSEL: Objection.

T: And they didn't.

Not only did the witness raise the subject of what the brothers might have seen, it was clear that the prosecutor was trying to keep away from any testimony to that effect when she told Telman "I didn't ask for their response." Yet Telman, the defense witness, proceeded to imply that her sons told her they hadn't witnessed anything by testifying she asked them in a "nice" way, not an angry or intimidating way, if they had seen anything. Thereupon the prosecutor, in essence, questioned whether Scott had also asked the brothers for their version of events. The prosecutor did not ask what they told Scott. Nevertheless, Telman answered the question put to her "yeah," the boys were interviewed by Scott and added, on her own and not in response to any question by the prosecutor, "she said they had seen it."

The testimony does not support the defendant's claim that the "prosecutor erred in seeking to admit. . .evidence that B.W.'s brother's (*sic*) allegedly witnessed one incident of assault."[4] Although evidence about what the brothers said they saw, if offered for the truth of the matter, is inadmissible hearsay, the prosecutor did not elicit that evidence. It was proffered, albeit probably unexpectedly, by the defendant's own witness. Not only that, but the witness

[4] Id.

went on to say that the boys told her they did not see anything. Her testimony about the inconsistent statements of her sons likely minimized any consideration the jury gave to the testimony that the boys told Scott they had witnessed something.

Nor does the hearsay testimony constitute "surprise" requiring a new trial. Telman was the defendant's witness. Ordinary prudence in trial preparation would have included a reminder to Telman to testify only to her personal knowledge and not to things her sons, who were not called to testify, witnessed.

Substitution of jurors

Tuesday, March 20, was the sixth day of trial. That morning, the court was informed that one of the 12 regular jurors was sick with a migraine headache and could not continue her service. The sick juror was replaced with an alternate before the trial resumed on Tuesday morning. The record shows that the substitution occurred before the jury was charged on the law and given closing arguments. Therefore, the defendant's contention that it was error to substitute for the alternate juror "without instructing the jury to start its deliberations anew"[5] is unsupported by the evidence.

Additionally, the record reflects that before the regular juror was replaced with the alternate the court inquired of defendant's counsel whether he had any suggestions for what to do about the sick juror and he concurred that "the only resolution would be to let the alternate take her place." He did not go on to ask that the jurors be told to begin deliberations fresh, most likely because they had yet to begin deliberations at all.

[5] Id., p. 8.

Sufficiency of the evidence

Caldwell last contends that his convictions[6] are not sustained by sufficient evidence and are against the manifest weight of the evidence. These are related, but discrete, concepts.

[A] court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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*, 61 Ohio St.3d 259 (1991), syllabus two. 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. *Id*.

The elements the state was required to prove rape as charged in count 12 are that the defendant 1) engaged in sexual conduct 2) with B.W., not his spouse, 3) whose age at the time was less than 13, 4) whether or not Caldwell knew her age. R.C. 2907.02(A)(1)(b). Additionally, the state also alleged that the defendant purposely compelled B.W. to submit by force or threat of force. By the indictment, the state alleged that count 12 was committed between February 8, 2008 and August 20, 2010, inclusive.

B.W. testified that she was born on February 8, 1998, which means she turned thirteen on February 8, 2011, well after August 10, 2010, the latest date the crime could have been committed. No evidence was offered that B.W. was Caldwell's spouse. The sexual conduct alleged in count 12 was Caldwell's penetration of B.A.'s vagina with his penis. B.W. described two such events: on the Chestnut Street living room couch with her brothers nearby when she was in fifth grade, and on the Chestnut Street love seat during sixth grade. As to both of these incidents B.W. described, in less clinical terms, the defendant's penis penetrating her vagina.

[6] The court will refer to the guilty verdicts as convictions even though the defendant has yet to be sentenced.

The fact that count 11 alleges B.W.'s age at the time of the offense as less than ten suggests that it refers to the rape she described as happening on the couch when she was in fifth grade, so count 12 must refer to the sixth grade rape on the love seat. In any event, B.W.'s testimony by itself establishes each element of the offense and, if believed, is thus legally sufficient to allow "any rational trier of fact" to find the defendant guilty.

The same reasoning applies to the evidence on the kidnapping charge. If credited by the jury, B.W.'s testimony that Caldwell, her mother's live-in boyfriend, had sex with her without her consent is sufficient to establish a restraint of her liberty for the purpose of having sexual conduct with her against her will. The jury was instructed that the restraint of liberty could be for any amount of time and by any means. In the absence of direct evidence that a defendant physically restrained a rape victim, a jury could always conclude by circumstantial evidence that a restraint of liberty was inherent in the act of having sex with her against her will. Additionally, in this case the jury could have found that the restraint was psychological, through the coercive nature of an order to a child from an authority figure.

There is no question that the state's evidence here, if believed, is sufficient as a matter of law to support the two convictions. That leaves the defendant's claim that the verdicts were not supported by the manifest weight of the evidence.

As an initial matter, it is doubtful that the trial court can even consider a manifest weight of the evidence claim in the context of a motion for new trial. Nothing in Criminal Rule 33 or R.C. 2945.79 provides as grounds for a motion for a new trial a challenge to the manifest weight of the evidence. By contrast, manifest weight is a specific basis for a new trial granted to civil litigants by Rule 59(A)(6) of the Ohio Rules of Civil Procedure. However, a guilty verdict on a charge that the state failed to prove by the manifest weight of the evidence

may fall under the rubric of "contrary to law," a ground for a new trial listed in Criminal Rule 33(A)(4). Additionally, the gist of Criminal Rule 33 is that a defendant may be entitled to a new trial where a guilty verdict was unjust, and a trial court has inherent authority to correct an injustice. Hence, the court will consider the defendant's argument.

In deciding a defendant's claim that a jury verdict is against the manifest weight of the evidence, a court, 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 and a new trial ordered. *State v. Thompkins*, 78 Ohio St. 3d 380, 387 (1997). But that is not to say the court should grant a new trial simply because the court disagrees with the jury. A jury's decision on the facts is entitled to great deference. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

The essence of the defendant's argument on the manifest weight of the evidence is that the proof in this case depended entirely on the credibility of the complaining witness, B.W., and since her testimony was not credible or, to use the defendant's terms, her testimony was "nonsensical,"[7] inconsistent,"[8] and "uncorroborated"[9] – the verdict is against the weight of the evidence. And it is correct that, even accounting for her young age, much of B.W.'s testimony can charitably described as improbable. For example, her claim to have grabbed a knife from a table several feet away and confronted the defendant with it, only to have Caldwell take it from her. Or her testimony that the defendant maneuvered his penis onto her vaginal area while the two were seated cross-legged and facing each other. Even the claim that Caldwell called her

[7] Mtn. for new trial, p. 5.
[8] Id., p. 6.
[9] Id.

over, invited her into bed, and touched her vagina, all while Telman slept uninterruptedly next to them.

But testimony that is not credible to defense counsel, or even the court, can be believed by the jury. That is the core of the jury's job: to discern the facts. The jurors were instructed that in deciding what the facts really are they could believe all, some or none of the testimony of any witness. The mixed verdicts strongly suggest that they took that instruction to heart and did believe, beyond a reasonable doubt, some, but not all, of B.W.'s testimony.

Moreover, the defendant's description of B.W.'s testimony as "uncorroborated" is not strictly accurate. Dr. Feingold described a physical complaint — burning on urination — that can be a symptom of rape. There is circumstantial evidence that B.W. would not have known to invent that symptom to provide verisimilitude to a bogus claim of rape. Although it is impossible to know exactly why the jury reached the verdicts it did, a verdict of guilty on only one rape count implies that, although the jury found B.W.'s testimony generally credible, some corroborating evidence (e.g., the symptom of painful urination) was needed by the jury to support a guilty verdict beyond a reasonable doubt.

The defendant has also failed to point to irreconcilable conflicts in the evidence. The only countervailing evidence is Caldwell's testimony that he did not do what B.W. accused him of doing. But a jury does not lose its way by believing one witness over another. If that were the standard then every defendant would be entitled to a new trial where conflicting testimony is admitted. The jury did not clearly lose its way and the two guilty verdicts are not against the manifest weight of the evidence.

CONCLUSION

For all of these reasons, the defendant's motion for a new trial, filed April 3, 2012, is denied. A sentencing hearing will be set by a separate entry.

IT IS SO ORDERED:

_____ Date: August 24, 2012

SERVICE

A copy of this journal entry was sent by email, this 24th day of August, 2012, to the following:

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