[Cite as *State v. Hardman*, 2018-Ohio-2062.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105810

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEAFRED C. HARDMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585663-B

BEFORE: Stewart, J., Kilbane, P.J., and Jones, J.

RELEASED AND JOURNALIZED: May 24, 2018

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MELODY J. STEWART, J.:

{¶1} A jury found defendant-appellant Deafred C. Hardman guilty of compelling prostitution and having unlawful sexual conduct with a minor. On appeal, he complains about the sufficiency and weight of the evidence, that the court denied him his right of compulsory process, and that the court allowed the state to offer evidence that had not been disclosed in discovery. We find no error and affirm.

I. Sufficiency of the Evidence

{¶2} We review the evidence supporting a conviction by viewing the facts and inferences derived therefrom in a light most favorable to the state to see if a rational trier of fact could find that they established the essential elements of the offense beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶3} The offense of unlawful sexual conduct with a minor requires the state to prove that the defendant engaged in sexual conduct with another, who is not the spouse of the offender, "when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard." R.C. 2907.04(A). A person is "reckless" when "with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶4} The evidence showed that the victim was 15 years old at the time of the offenses. She had run away from home and met people who were friends with Hardman. She used a fake name and told everyone that she was 20 years old. What followed was a two-week odyssey where the victim consumed drugs and alcohol and engaged in sexual conduct with numerous people, including Hardman. Hardman listed the victim on a website where she offered massage and "escort" services. He created an ad for her services, describing her as "five-three, 150 pounds." Hardman told the victim to take pictures of herself, but rejected them, telling her "they needed to be more sexy." She took additional pictures of herself wearing only a bra and underwear.

{¶5} The state conceded that the victim told everyone involved that she was 20 years old, but argued that Hardman was reckless for believing that given the victim's youthful appearance and manner. By alleging that Hardman acted recklessly by ignoring visual indications of the victim's real age, the state necessarily asked the jury to draw inferences that we cannot review. For example, we have no way of assessing how old the victim appeared, either physically or mentally, to the jury when she testified at trial. The record contains the pictures the victim took of herself and posted with the ad for her services as an escort, but the pictures are grainy photocopies that do not assist our review one way or the other. To the extent that people could disagree about whether the pictures show the victim as appearing younger than her stated age, that disagreement shows that it would not be irrational for the jury to find that Hardman disregarded a known risk that the victim was less than 16 years old.

{¶6} Hardman next argues that the state did not present sufficient evidence to prove that he engaged in sexual conduct with the victim. He does not deny that the victim testified that she had "vaginal and oral" sex with Hardman, but argues that the state failed to elicit evidence of penetration.

{¶7} "Sexual conduct" is an essential element of the offense of unlawful sexual conduct with a minor. Sexual conduct is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex[.]" R.C. 2907.01(A). For purposes of vaginal or anal intercourse, "[p]enetration, however slight," is sufficient to complete those acts. *Id*.

{¶8} Notably, R.C. 2907.01(A) does not state that penetration is required to complete an act of oral sex. *State v. Bailey*, 78 Ohio App.3d 394, 395, 604 N.E.2d 1366 (1st Dist.1992); *State v. Ickes*, 5th Dist. Tuscarawas No. 1999AP080052, 2000 Ohio App. LEXIS 2670, 5 (June 13, 2000). For this reason, we reject Hardman's argument that the state failed to offer evidence of penetration on the count alleging that he engaged in oral sex with the victim.

{¶9} Although the victim did not testify to actual vaginal penetration, that fact can be inferred from the evidence. *State v. Watson*, 9th Dist. Summit No. 25915, 2012-Ohio-1624, ¶ 13. The victim testified that she engaged in sexual conduct not only with Hardman, but with a number of other people during her association with him. Some of that sexual conduct consisted of prostitution compelled by Hardman. Given this background, the jury could rationally infer from the victim's testimony that by engaging in "vaginal" sex with Hardman, it meant that Hardman actually penetrated her in a manner constituting sexual conduct.

II. Manifest Weight of the Evidence

{¶10} Hardman next argues that his convictions for unlawful sexual conduct with a minor and compelling prostitution were against the manifest weight of the evidence.

{¶11} Hardman's argument with respect to the unlawful sexual conduct with a minor count restates without additional discussion the same arguments he made when complaining that there was insufficient evidence to support that count; namely, that the victim told everyone she was 20 years old and that there was no evidence of penetration. The Ohio Supreme Court has repeatedly noted that "manifest weight" and "legal sufficiency" are "both quantitatively and qualitatively different." *See State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. Although Hardman's recitation of applicable precedent notes the distinction between the sufficiency and weight of the evidence, his argument does not develop this distinction. We summarily overrule it on the authority of App.R. 16(A)(7). *See State v. Thigpen*, 2016-Ohio-1374, 62 N.E.3d 1019, ¶ 7 (8th Dist.).

{¶12} With respect to compelling prostitution, Hardman does develop an argument that his conviction for that count is against the manifest weight of the evidence — he maintains that the jury lost its way by finding that he created or helped the victim to create the ad for her escort services.

{¶13} To find Hardman guilty of compelling prostitution as charged in this case, the jury had to conclude that he induced, procured, encouraged, solicited, requested, or otherwise facilitated her engagement in sexual activity for hire. *See* R.C. 2907.21(A)(2)(a). The victim testified that Hardman not only created the ad for her escort services, he took her to a motel room where a man appeared for her services. She testified that Hardman told her to "make sure they put the money on the dresser, on the bed. You grab it and put it up and just do what they want." After the man left, Hardman asked the victim for the money, taking more than half of it.

{¶14} The jury did not lose its way by accepting this testimony as proof that he facilitated her work as a prostitute. The jury could reject as irrelevant Hardman's assertions that there was no physical evidence to prove that he set up the ad for escort services. The victim's testimony that Hardman coached her on how to pose for pictures to be used in the ad and that he took a share of the money the victim earned was persuasive proof that Hardman encouraged and facilitated the victim in engaging in sexual activity for hire.

III. Compulsory Process

{¶15} In preparation for the originally assigned trial date, Hardman issued a subpoena to codefendant, Charles Bullard, to compel his testimony at trial. Trial was continued however, and Bullard did not respond to the subpoena (he was apparently on trial in a different case). Hardman, who was representing himself,[1] had a no-contact order with Bullard that he said prevented him from directly contacting Bullard. In response to Hardman's request that the court compel Bullard's presence, the court issued a material witness warrant. Nevertheless, it told Hardman that "I will allow you to make efforts, whatever you need to do to contact Mr. Bullard, to have him here Monday morning. I would encourage you to have him here at 8:30." Hardman contacted Bullard, who said that he "didn't want to necessarily come down here because he has other legal matters going on and he is afraid." Hardman complains that the court, having signed a material witness warrant, wrongly shifted the duty of executing the warrant onto him.

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[1] This was Hardman's second trial. In the middle of his first trial, he told the court that he was unhappy with defense counsel's cross-examination of the victim. The court told Hardman that he could self-represent. Hardman eventually executed a form containing a waiver of his right to counsel and assigned counsel was dismissed. On direct appeal from his conviction, we found that the court violated Hardman's Sixth Amendment right to counsel by not affording him standby counsel. *State v. Hardman*, 2016-Ohio-498, 56 N.E.3d 381, ¶ 28 (8th Dist.).

{¶16} The Compulsory Process Clause of the Sixth Amendment to the United States Constitution grants a criminal defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial. The right to compel process is not absolute. "The Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him compulsory process for obtaining *witnesses in his favor*." (Emphasis sic.) *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982). "When an accused seeks to establish a violation of the right to present a defense, the accused must show (1) the evidence was material and exculpatory, (2) there was bad faith on the part of the state, and (3) the lack of fundamental fairness." *State v. Abdelhaq*, 8th Dist. Cuyahoga No. 74534, 1999 Ohio App. LEXIS 5573, 11 (Nov. 24, 1999), citing *Buie v. Sullivan*, 923 F.2d 10, 12 (2d Cir.1990). In other words, the testimony must plausibly be shown to be material and favorable to the defense. *Id*., citing *Valenzuela-Bernal* at 867.

{¶17} Even assuming that the court erred by failing to compel Bullard's appearance at trial, Hardman has not shown that the error was prejudicial because he did not establish that Bullard's testimony was material and favorable to his defense. Hardman proffered statements Bullard made in a recorded police interview indicating that the victim had been engaging in acts of prostitution before she met Hardman. Even if true, that fact was immaterial to the question of whether Hardman later compelled the victim to engage in different acts of prostitution. As the state noted at the time, "[t]he fact that [the victim] was prostituted out by another person doesn't mean that she cannot be prostituted out then by this defendant." Bullard's testimony, as represented by Hardman, would not have been exculpatory, so we find no violation of Hardman's right to compel the attendance of witnesses.

IV. Discovery Violation

{¶18} During the first trial, Hardman introduced his own dental records into evidence without objection from the state. During retrial, a police detective testified that a telephone number given in conjunction with the ad for the victim's escort services was the same number appearing on Hardman's dental records. Hardman claims that the records were inadmissible because the state did not disclose those dental records to him in pretrial discovery and the state reneged on its representation to the court that it would not introduce any exhibits from the first trial.

{¶19} The state did not promise that it would not introduce any exhibits from the first trial. As part of his motion in limine, Hardman asked that the state be precluded from introducing his testimony from the first trial because he would not be testifying in the second trial. The state told the court that it "does not have any intention of introducing any past testimony in its case in chief." At no point did the state agree not to introduce any exhibits that were admitted at the first trial. Indeed, an agreement to that effect would have doomed the state's case — it would have prohibited the state from introducing the ad for escort services, a crucial piece of evidence.

{¶20} Hardman's claim that the state did not produce the dental records in discovery is equally without merit. The point of pretrial discovery is to prevent unfair surprise. *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978). Not only did the dental records belong to Hardman, he introduced them in the first trial. We are hard-pressed to understand how Hardman would have been surprised that the state used them in the second trial.

{¶21} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, SR., J., CONCUR