[Cite as *State v. Clay*, 2009-Ohio-5608.]

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 08CA33**
vs.	**:**	**T.C. CASE NO. 07CR518**
JAMES H. CLAY	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 23rd day of October, 2009.

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GRADY, J.:

{¶ 1} Defendant, James Clay, appeals from his conviction, following a jury trial, of the offense of sexual battery, R.C. 2907.03(A)(7), and a five year prison sentence imposed for that offense pursuant to law. Finding no merit in the errors Defendant assigns on appeal, we affirm his conviction and sentence.

{¶ 2} Defendant was a teacher and football coach at Troy Christian School in 2006 and 2007. J.D. was then a fifteen year old student of the school. Because J.D. was troubled by her parent's divorce, J.D.'s mother asked Defendant to coach J.D. and to mentor her in bible study classes Defendant conducted in his home. Defendant agreed to do that.

{¶ 3} In the fall of 2006 until February of 2007, J.D. assisted Defendant in coaching the school's football team. On Wednesday nights, after football practice, J.D. would accompany Defendant to his home, where they ate dinner and participated in bible study. Following that, J.D. slept overnight at Defendant's home and returned with him to the school the next day.

{¶ 4} J.D. testified at Defendant's trial that on multiple occasions when she spent the night with Defendant they engaged in consensual sexual conduct. That conduct included attempted vaginal intercourse, fellatio, cunnilingus, and Defendant's digital penetration of J.D.'s vagina. J.D. also testified that Defendant made a recording of several provocative love songs that he gave to J.D., one of which he called "their song." J.D. also testified concerning a telephone call she made to Defendant that police recorded, in which J.D. asked Defendant about videotapes he had made of J.D. masturbating. Defendant replied that the tapes "were gone."

{¶ 5} The State offered other evidence that included the record of the song that Defendant gave J.D., and the testimony of other coaches and co-workers at Troy Christian School concerning Defendant's close relationship with J.D., and concerns those witnesses had expressed to Defendant about that. Defendant's father-in-law testified that he found Defendant and J.D. together on a couch, with J.D. lying on top of Defendant. J.D.'s mother testified concerning the numerous opportunities Defendant and J.D. had to engage in the sexual activity to which J.D. had testified. The officer who investigated the case testified concerning how adult sexual predators "groom" vulnerable teenagers, connecting Defendant's conduct to that activity.

{¶ 6} The jury returned a guilty verdict on the single indicted charge of sexual battery, R.C. 2907.03(A)(7), a third degree felony. That section provides, in pertinent part: "No person shall engage in sexual conduct with another, not the spouse of the offender, when . . . [t]he offender is a teacher, administrator, coach, or other person in authority employed by . . . a school . . ., the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school."

{¶ 7} The trial court sentenced Defendant to a five year prison term, the maximum available for a third degree felony

offense. R.C. 2929.14(A)(3). Defendant filed a notice of appeal from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SET ASIDE THE VERDICT AND DISMISS THE INDICTMENT."

{¶ 9} Following the jury's guilty verdict, Defendant moved to set aside the verdict and dismiss the indictment charging him with sexual battery in violation of R.C. 2903.07(A)(7). Defendant argued that the indictment was defective, per *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, because it failed to allege a culpable mental state necessary to find him criminally liable of the offense of sexual battery. The trial court overruled Defendant's motion on a finding that R.C. 2907.03(A)(7) is a strict-liability offense, and therefore per R.C. 2901.21(B) does not require proof of a culpable mental state in order to find criminal liability.

{¶ 10} Defendant's motion was an objection based on an alleged defect in the indictment. Such motions must be made prior to trial. Crim.R. 12(C)(1). Failure to raise the objection at that time constitutes a waiver of the objection concerned. Crim.R. 12(H); R.C. 2941.29. However, the court for good cause shown may grant relief from the waiver. Crim.R. 12(H). The fact that the court ruled on the merits of the objection instead of dismissing it as untimely demonstrates

that the court found good cause to grant relief from the waiver.

{¶ 11} Proof of a culpable mental state otherwise required by R.C. 2901.21(A)(2) to establish criminal liability is not required when the section defining an offense does not specify any degree of culpability and plainly indicates a purpose to impose strict criminal liability for the conduct the section describes. R.C. 2901.21(B). Culpability constitutes "mens rea," or criminal intent. Strict liability offenses omit a mens rea requirement because their overriding purpose is protection of the public welfare, imposing punishment for conduct prohibited by the section, irrespective of the actor's intent. However, where no degree of culpability is specified by a statute, strict liability cannot merely be assumed. The court must find that the statute plainly indicates the legislature's purpose to impose strict liability. R.C. 2901.21(B); *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395.

{¶ 12} R.C. 2903.07(A)(7) does not specify any degree of culpability. In finding that the section by its terms plainly indicates the General Assembly's intent to impose strict liability for its violation, the trial court relied on decisions of several other appellate districts: *State v. Sheriff*, Logan App. No. 8-08-4, 2008-Ohio-5192; *State v. Singleton*, Lake App.

No. 2002-L-077, 2004-Ohio-1517; and *State v. Hannah* (June 10, 1986), Franklin App. No. 85AP-896. Those decisions held that division (A)(5) of R.C. 2907.03, which applies to parents or other persons in loco parentis of the other person, is a strict liability offense. We agree that the rationale of those holdings support a finding that R.C. 2903.07(A)(7), which applies instead to teachers and coaches, is likewise a strict liability offense.

{¶ 13} The conduct proscribed by R.C. 2903.07(A)(7) consists of two distinct elements. The first is that the offender engaged in sexual conduct with another person. Sexual conduct is defined by R.C. 2907.01(A) to include any of the acts with another person described therein. Each of those is a voluntary act, the actor's intent being the sexual gratification of the actor or the other person or persons. Culpability in engaging in the act is not at issue in finding that it occurred.

{¶ 14} The second element is that the other person is not the spouse of the offender, when the offender is a teacher, administrator, or coach at a school in which the other person is enrolled or attends, and the offender is not enrolled in and does not attend that school. Those are specific factual circumstances which do not present an issue regarding the actor's intent when engaged in sexual conduct with the other person. Again, the actor's culpability is not in issue.

{¶ 15} For the foregoing reasons, we find that, when the General Assembly acted to pass R.C. 2903.07(A)(7), it plainly indicated its intention to impose strict liability for engaging in the conduct that section prohibits, and that R.C. 2903.07(A)(7) is therefore a strict liability offense for which no proof of a culpable mental state is required in order to find its violation.

{¶ 16} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 17} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL."

{¶ 18} Defendant moved for a mistrial following voir dire, relying on *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. Defendant argued that he had been denied his rights to equal protection and due process of law because the method of selecting jury venires from the list of registered voters used in his case systematically excludes African-Americans from jury service, resulting in their under-representation in the venire from which the jurors were selected. Defendant is African-American.

{¶ 19} The trial court conducted a hearing on Defendant's motion. The deputy jury commissioner testified that potential jurors are selected from voter registration lists and that their race is unknown when potential jurors are selected and called.

Of the forty-four people in the venire called for Defendant's trial, none were African-Americans. The court found that purposeful discrimination was not demonstrated, and on that basis denied Defendant's motion for a mistrial.

{¶ 20} ***Batson*** **involved a claim of purposeful racial discrimination in the use of peremptory challenges to strike individuals from petit jury service. We addressed Defendant's particular claim in** ***State v. Humphrey*****, Clark App. No. 02CA0025, 2003-Ohio-2825, at ¶ 42, in which we wrote:**

{¶ 21} "The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to have a jury chosen from a fair cross section of the community. ***Duren v. Missouri*** **(1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579;** ***State v. Puente*** **(1982), 69 Ohio St.2d 136, 431 N.E.2d 987. In order to ensure this constitutional guarantee, the jury must be selected without the systematic or intentional exclusion of any cognizable group.** ***State v. Buell*** **(1985), 29 Ohio App.3d 215, 217, 504 N.E.2d 1161. In order to establish a violation of the fair cross section requirement, Defendant must demonstrate three things: (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) the**

under-representation is due to systematic exclusion of the group in the jury selection process. *Duren, supra; Puente, supra.*"

{¶ 22} Defendant points to census figures demonstrating that the proportion of the population of Miami County who are African-Americans is approximately two percent. On that basis, a jury venire comprised of forty-four persons, as Defendant's was, may or may not include any persons who are African-Americans. The Ohio Supreme Court has approved the use of lists of registered voters to draw jury venires. *State v. Johnson* (1972), 31 Ohio St.2d 106. Defendant failed to demonstrate that the alleged under-representation of African-Americans in the venire called for the trial of his case was due to systematic exclusion of such persons.

{¶ 23} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCLUDE FROM THE TRIAL A RECORDED TELEPHONE CONVERSATION BETWEEN APPELLANT AND THE ALLEGED VICTIM."

{¶ 25} J.D. testified about four occasions when Defendant directed her to masturbate, adding that he videotaped her on two of those occasions. She further testified that, one of those two times, Defendant then put down his video camera and inserted his fingers into her vagina, after which he attempted sexual intercourse with her.

{¶ 26} Police recorded a telephone conversation between Defendant and J.D. in which J.D. asked Defendant whether he still had videotapes he had made. Defendant replied, "they're gone." J.D. told Defendant she didn't want anyone else to see them. Defendant told J.D., "I wouldn't do that." (State Exhibit 6).

{¶ 27} The trial court admitted the recorded telephone conversation between J.D. and Defendant concerning videotapes in evidence, over Defendant's objection. Defendant argues that the trial court erred in doing so, for two reasons. First, because the evidence of their conversation tends to prove uncharged criminal conduct, pandering obscenity involving a minor, R.C. 2907.321(A)(1). Second, because the evidence violates the prohibition in Evid.R. 404 against admission of evidence for the purpose of proving conforming conduct.

{¶ 28} Notwithstanding the fact that evidence of a matter collateral to the criminal conduct charged may also demonstrate commission of another crime or conforming conduct, evidence of a defendant's other acts which tend to show his scheme, plan, or system in committing the crimes with which he is charged is admissible when his alleged scheme, plan, or system is a matter material to issues of his guilt or innocence of the crime charged. R.C. 2945.59; Evid.R. 404(B). Other act evidence is then admissible for that purpose "when it forms the immediate

background of the offense alleged and it would be difficult to prove that the accused committed the crime alleged without also introducing evidence of other acts. When the other acts demonstrate criminal conduct they should be 'so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged.'" *State v. Smith* (1992), 84 Ohio App.3d 657, 667 (Internal citations omitted).

{¶ 29} J.D.'s conduct in engaging in masturbation that Defendant directed her to perform and then videotaped forms part of the immediate background of the sexual conduct between them on that occasion that J.D. described. It would be difficult to prove the criminal conduct that occurred on that occasion without also introducing evidence of the acts that preceded it, including the masturbation that Defendant videotaped, because proof of one incidentally involves the other and explains its circumstances. The trial court did not abuse its discretion when it admitted State's Exhibit 6, the recording of the telephone conversation between Defendant and J.D., in evidence.

{¶ 30} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 31} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION

TO EXCLUDE THE TESTIMONY OF JEFFREY CASE, ROLAND FANCHER, RONNIE FANCHER AND WILLIAM DAVIS."

{¶ 32} The State offered the testimony of four witnesses, William Davis, who is Defendant's father-in-law, Jeffrey Case, Ronnie Fancher, and Roland Fancher. Each testified concerning their observation of Defendant's frequent interactions with J.D. Defendant objected that the testimony was "other act" evidence that does not fit the exceptions in Evid.R. 404(B). The court overruled the objection. Defendant likewise relies on Evid.R. 404(B) on appeal to argue that the trial court erred.

{¶ 33} Evid.R. 404(B) sets out exceptions to the prohibitions of Evid.R. 404(A) against admission of evidence of a person's bad character or a trait of character when offered to prove he acted in conformity therewith on a particular occasion.

{¶ 34} Jeffrey Case, Ronnie Fancher, and Roland Fancher testified concerning the close associations between J.D. and Defendant they observed, and to several admonitions made to Defendant that those associations were inappropriate. William Davis testified that, on one occasion, while he lived at Defendant's home, he discovered J.D. lying on a sofa in a position between Defendant's legs at about 1:00 a.m.

{¶ 35} Even if these episodes are probative of Defendant's bad character or a trait of his character that is bad, we find

that, in relation to the crime alleged, they fit the "scheme, plan, or system" exception of Evid.R. 404(B) and R.C. 2945.59 for the reasons discussed in connection with the third assignment of error.

{¶ 36} The fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 37} "THE TRIAL COURT ERRED BY ADMITTING EXPERT TESTIMONY INTO EVIDENCE REGARDING APPELLANT'S 'GROOMING' OF THE ALLEGED VICTIM FOR FUTURE ACTS OF SEXUAL BATTERY."

{¶ 38} The lead investigator in the case, Deputy Mark Slater, testified that perpetrators of sexual offenses often "groom" their victims, who are typically younger and lacking in self-esteem, by showering them with praise and attention to make them more vulnerable to sexual activity. When asked whether, based on his education, training, and experience, and his position as lead investigator, Deputy Slater "recognize(d) anything that you termed grooming in this case," he replied in the affirmative, explaining:

{¶ 39} "A Again, in my experience and training, eighteen years in law enforcement, I felt in my opinion this was a textbook case of grooming. Here was a young lady who in the months prior to her meeting with Mr. Clay had went through a painful divorce with her parents.

{¶ 40} "As you heard her indicate to you that there had been

issues that she felt left out, there was vulnerability, her self-esteem was extremely low, and she was searching for something.

{¶ 41} "And although albeit reluctantly, the Defendant agreed to mentor her, using religious scriptures and symbols as a basis to maker her feel better, to let her know it was all right, to let her know that she could trust him, and as you heard her indicate in her testimony that she needed to expose herself fully to him to be vulnerable to him to allow her to become a better person.

{¶ 42} "Q Textbook example?

{¶ 43} "A It was a textbook example from beginning to end. Low self-esteem, mental anguish, mental problems, building up self-esteem, showering with compliments, both physical and religious, and it culminated in a sexual relationship." (T. 275-276).

{¶ 44} Defendant argues that Deputy Slater's testimony constitutes the form of opinion evidence "profiling" him as a sexual offender that we rejected in *State v. Smith* (1992), 84 Ohio App.3d 647, because it is mere proof of propensity prohibited by Evid.R. 404(A). We agree that it is. However, Defendant failed to object to that evidence, and therefore has waived all but plain error in its admission. *State v. Wickline* (1990), 50 Ohio St.3d 114. Plain error does not exist unless

it can be said that but for the error, the outcome of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91. We cannot find that the error in admitting Deputy Slater's testimony satisfies the plain error standard.

{¶ 45} The fifth assignment of error is overruled.

SIXTH ASSIGNMENT OF ERROR

{¶ 46} "THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29."

{¶ 47} In *State v. Baker*, Montgomery App. No. 22136, 2008-Ohio-3000, at ¶26-28, we stated:

{¶ 48} "When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the state and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 49} "A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v.*

Thompkins, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 50} "'An appellate 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. 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.'"

{¶ 51} To prove that Defendant was guilty of sexual battery in violation of R.C. 2907.03(A)(7), the State was required to prove that Defendant engaged in sexual conduct with J.D., that J.D. is not Defendant's spouse, that Defendant is a coach employed by Troy Christian School, but does not attend that school as a student, and that J.D. is a student who attends Troy Christian School.

{¶ 52} Sexual conduct is defined in R.C. 2907.01(A):

{¶ 53} "'Sexual Conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body

or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶ 54} Defendant claims that the evidence presented at trial was insufficient to sustain his conviction for various reasons. For example, J.D.'s testimony regarding the incidents of sexual battery was uncorroborated, and J.D.'s testimony was inconsistent because, at trial, she testified to nine incidents, while she mentioned only four incidents to her youth pastor. Further, at no time between September 2006 and February 2007 did J.D.'s mother observe any conduct on the part of either J.D. or Defendant that suggested to her that they were having a sexual relationship. Also, despite J.D.'s testimony that one of the incidents occurred in a motel near Troy, Ohio, that Defendant had checked into, police were unable to confirm that during the relevant time period Defendant checked into any motel near Troy, Ohio.

{¶ 55} Defendant also points out that despite J.D.'s testimony about numerous phone calls, voice mails and text messages between her cell phone and Defendant's cell phone, police did not act to obtain or review those phone records. J.D. testified that Defendant made her a compact disc on his computer containing love songs with sexually provocative lyrics. The C.D.'s file log, however, indicates that the song

tracks were burned onto the C.D. on December 31, 1994. Moreover, the State never introduced any physical evidence connecting Defendant to that C.D. Finally, police did not search Defendant's home, the alleged site of most of the sexual encounters between Defendant and J.D., or even examine Defendant's home computer for evidence of these crimes.

{¶ 56} J.D. testified at trial that she has never been married, that between September 2006 and February 2007, she was a fifteen year old sophomore at Troy Christian School, and that Defendant was a coach at Troy Christian School. According to J.D., between September 2006 and the end of January 2007, she participated on nine separate occasions in consensual acts of sexual conduct with Defendant that included attempted vaginal intercourse, fellatio, cunnilingus, and the insertion of Defendant's fingers into J.D.'s vagina. Most of these incidents occurred at Defendant's home, following their bible study sessions.

{¶ 57} J.D. testified that Defendant had made a C.D. of several provocative love songs on his computer and gave it to her. One of the songs Defendant called "their song." J.D. also testified about a phone call she made to Defendant that police tape recorded, wherein J.D. asked Defendant about videotapes he made of her masturbating. Defendant said those tapes "were gone." The evidence presented by the State included

the C.D. Defendant made for J.D. and the taped telephone conversation between Defendant and J.D.

{¶ 58} Viewing the totality of the evidence in a light most favorable to the State, as we must, we find that a rational trier of facts could find beyond a reasonable doubt all of the essential elements of sexual battery in violation of R.C. 2907.03(A)(7). Defendant's conviction is supported by legally sufficient evidence, and the trial court properly overruled Defendant's Crim.R. 29 motion for acquittal.

{¶ 59} Defendant's sixth assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J. concur.

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