

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-VS-	:	
	:	
JAMES JONES, III	:	Case No. 2009CA0104
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No.2008CR630D

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 30, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On October 9, 2008, the Richland County Grand Jury indicted appellant, James Jones, III, on two counts of rape in violation of R.C. 2907.02(A)(1)(c) and (A)(2), two counts of attempted rape in violation of R.C. 2923.02(A) and R.C. 2907.02(A)(1)(c) and (A)(2), and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1). Said charges arose from an incident after a group of young adults enjoyed an evening of drinking and partying.

{¶2} A jury trial commenced on July 29, 2009. The jury found appellant guilty of the lesser included offense of sexual battery in violation of R.C. 2907.03. By judgment entry filed August 4, 2009, the trial court sentenced appellant to four years in prison, and designated him a Tier III sex offender.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

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{¶4} "THE JURY'S VERDICT IN FINDING THE DEFENDANT-APPELLANT GUILTY OF SEXUAL BATTERY WAS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE, THUS THE CONVICTION WAS IN VIOLATION OF ARTICLE I, 10 OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

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{¶5} Appellant claims his conviction for the lesser included offense of sexual battery was against the manifest weight of the evidence as sexual battery did not fit or correlate to the testimony of the witnesses. We disagree.

{¶6} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶7} Appellant was convicted of sexual battery in violation of R.C. 2907.03(A)(2) which states, "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when***[t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."

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

{¶9} "***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."

{¶10} Appellant prefaces his argument by stating that the trial court's jury instruction on substantial impairment essentially told the jury "that for a charge of Sexual Battery to be proven, the victim may still be able to consent but in doing so cannot

accurately appraise what she is doing." Appellant's Brief at 14. The pertinent jury instructions were as follows:

{¶11} "The offense of sexual battery is distinguished from rape by the failure to prove that the victim's ability to resist or consent was substantially impaired, but instead proving that the victim's ability to appraise the nature of her conduct or control her own conduct was substantially impaired.

{¶12} "With rape, the victim has substantially lost the ability to resist or consent to the sexual conduct. With sexual battery, on the other hand, the victim is substantially unable to accurately appraise or control what she is doing. She may still be able to consent, but in doing so cannot accurately appraise what she is doing.

{¶13} "Before you can find Mr. Jones guilty of sexual battery therefore you must find beyond a reasonable doubt that on or about August 31, 2008, in Richland County, Ohio, he engaged in sexual conduct with another person who was not his spouse, and he knew that the other person's ability to appraise the nature of or control her own conduct was substantially impaired." T. at 936-937.

{¶14} The state argues there is sufficient evidence to support the jury's finding that the victim's ability to appraise the nature or control her own conduct was substantially impaired by alcohol and a state of deep sleep.

{¶15} In reviewing the evidence presented, the events as they unfolded on the evening in question into the early morning hours are uncontested. Eight young adults, Stephanie Nichols, Tiffany Morrison, Maggie Konczak, Chris Altis, Mark Dazet, Nathaniel Whinery, appellant, and the victim, all met up and enjoyed an evening of

"hanging out," drinking, and "feeling good and buzzed." T. at 273, 320, 379, 435, 762, 853. Eventually, they all made it back to Mr. Whinery's place.

{¶16} Ms. Konczak went upstairs and fell asleep and the victim fell asleep on the couch. T. at 388, 437-438. The victim was described as being "passed out" on the couch, and both Ms. Nichols and Ms. Morrison testified they were unable to awaken her. T. at 320, 330, 381, 388, 392. Ms. Morrison and Ms. Konczak both described the victim's sleeping habits as being a very heavy sleeper and not able to be aroused whether drinking or not. T. at 381, 460.

{¶17} At some point, Ms. Nichols went into the living room where the victim was on the couch and witnessed appellant fondling the victim's vaginal area through her pajamas. T. at 328-329. Ms. Nichols became very upset and went outside to alert others. T. at 328-330. There wasn't much of a reaction, so Ms. Nichols went back in and attempted to wake up the victim and pick her up, but was unable to do so as she was like "a dead weight." T. at 330. Thereafter, Ms. Nichols left because she did not feel safe, and she knew Ms. Morrison was still there. T. at 331-332. Appellant came out of the house and announced he was ready to leave. T. at 391. Ms. Morrison went into check on the victim and felt uneasy about the accusation. T. at 394. Thereafter, she was under the impression that appellant had left with Mr. Dazet so she left. T. at 395. However, appellant never left. T. at 869. Instead, appellant returned to the living room and observed that the victim's "eyes seemed to be open." T. at 870. Appellant testified they started making out which eventually led to consensual vaginal intercourse. T. at 871-875.

{¶18} The victim testified she remembered sitting on the couch and the next thing "waking up in the morning and feeling pain in my anal area, that's what I remember feeling, wake up feeling excruciating, horrible pain." T. at 478. She looked around and observed appellant attempting to put his erect penis into her anus. T. at 478-479. As soon as she stirred, appellant got off of her and sat in a chair. T. at 479. Thereafter, the victim alerted the household, claiming appellant attempted to put "his dick in my ass." T. at 480, 769. The victim then called 9-1-1. T. at 480.

{¶19} During the victim's examination at the hospital, the sexual assault nurse examiner, Carol Rocks, found three lacerations and bruising to the victim's anus consistent with blunt force and consistent with the victim's version of the incident. T. at 602-603, 606-608. The forensic scientist for the Bureau of Criminal Identification, Sarah Glass, testified samples indicated no semen in the victim, but blood in the anus swabs. T. at 551-552. Another forensic scientist, Kristen Slaper, testified the victim's DNA was consistent with the DNA on the penile swabs taken from appellant. T. at 735.

{¶20} The victim's perception of her relationship with appellant during the evening was different than appellant's. She testified she was not interested in him, while appellant testified they were mutually flirting. T. at 471, 853-854. None of the witnesses observed any "making out" as appellant claimed. T. at 440, 871-872. Appellant testified he did not believe that the victim was intoxicated however, Ms. Nichols and Mr. Dazet testified that she was "heavily intoxicated" and "exhausted" from a long night of partying. T. at 283-284, 320, 862. The victim testified she awoke from a deep sleep to excruciating pain as appellant was placing his penis inside her anus, while appellant claimed there was no anal sex, just consensual vaginal sex. T. at 478-

479, 871-875. Appellant claimed the victim was awake and participating, while the witnesses all agreed she was out cold, passed out, and unable to be awakened.

{¶21} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶22} Upon review, we find there was sufficient, credible evidence to establish beyond a reasonable doubt that anal penetration occurred and that the victim was substantially impaired by alcohol and a deep sleep and was unable to appraise the nature of her conduct.

{¶23} The sole assignment of error is denied.

{¶24} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William G. Hoffman

JUDGES

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMES JONES, III

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 2009CA0104

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William G. Hoffman

JUDGES