

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1034

Appellee

Trial Court No. CR-2007-2553

v.

Rizharr D. Holmes

DECISION AND JUDGMENT

Appellant

Decided: November 20, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} Appellant, Rizharr D. Holmes, was indicted for one count of aggravated burglary and two counts of rape, each felonies of the first degree. A jury convicted him of aggravated burglary and one count of rape. On the second count of rape, the jury convicted him of the lesser included offense of attempted rape, a felony of the second

degree. Holmes was sentenced to eight years incarceration for each first degree felony and six years incarceration for the second degree felony. The terms were ordered to be served consecutively, for a total sentence of 22 years incarceration. Holmes was also classified as a Tier III sex offender.

{¶ 2} The evidence presented at trial established the following facts relevant to this appeal: On July 13, 2007, at approximately 3:30 a.m., the victim was awoken by a man crawling through her bedroom window. The window had been opened, but the screen was down and the shades were drawn. She told the man to leave. Instead, he entered her bedroom and started looking around. The man asked her for money, and the victim replied that she had no money. The man then told the victim that he was going to have to kill her.

{¶ 3} The man then stripped the victim of her underwear and shirt. As related by the victim, the man forced the victim to lie on her back and penetrated her vaginally. He then forced the victim to lie on her stomach and attempted to penetrate her anally. While he was unable to "fully" penetrate, the victim testified that "just the tip" of the attacker's penis penetrated her anally.

{¶ 4} The victim had multiple sclerosis and wore a medical alert necklace. When she was rolled onto her stomach, she was able to push her medic alert button. The victim next recalled seeing red lights through her window, and a police officer talking to her. She told the officer that the man was probably still in her apartment. The man had, however, fled; police found the apartment's rear door standing open. Police found that

the victim's bedroom window screen had been bent upwards, but found no sign of forced entry on the apartment's doorways.

{¶ 5} The victim was taken to a hospital, where a sexual assault nurse examiner completed a rape kit. The nurse testified to the pictures she took of abrasions around the victim's genital area, and to the fluid swabs taken from the victim's vagina and anus. On cross-examination, the nurse asserted repeatedly that the injuries to the genital area could not have been caused by anything other than a sexual assault.

{¶ 6} Fingerprints lifted from the outside of the victim's living room window were matched to a law enforcement database of inked fingerprints. Three detectives separately confirmed a match of the lifted fingerprints to Holmes' inked fingerprints. One fingerprint, lifted from the inside of the victim's bedroom window, did not match Holmes' fingerprint. Once the database linked the living room window fingerprints to Holmes, detectives created a photo array of six photographs, including Holmes. The victim was unable to identify Holmes from that photo array.

{¶ 7} Laboratory testing revealed the presence of seminal fluid on the anal swabs from the rape kit. The Bureau of Criminal Investigation tested a sample of the swabs and concluded that the sample was insufficient to yield DNA for testing purposes. The state had a separate laboratory, Reliagene Technologies, Inc., also test the swabs. Reliagene compared the anal swabs to a DNA standard taken from Holmes. Its report concludes that the "8-locus partial haplotype" produced from the anal swab matched the DNA standard taken from Holmes and that, therefore, Holmes and all his male paternal

relatives were not excluded as a donor of the sample. 99.8% of the population was excluded as donors of the partial haplotype.

{¶ 8} Holmes was questioned at the police station. He waived his Miranda rights by executing a written waiver. The questioning officer asked Holmes if he entered an apartment without permission. Holmes denied having done so, but did say that he used to climb into windows when he was a juvenile in order to take money; he asserted that he did not do things like that anymore. When the officer confronted him with the fingerprint evidence, Holmes admitted entering the apartment to look for money because he needed money. Holmes did not, however, admit to having sex with the victim.

{¶ 9} Holmes' trial counsel objected to the portion of the taped interview where Holmes said that he had, in the past, gone into other residences to steal. The trial court overruled the objection and did not give a curative instruction.

{¶ 10} The defense offered the testimony of an independent DNA diagnostician, who tested the anal swabs from the victim. The diagnostician found no amplifiable male DNA on the anal swabs; however, this particular diagnostician was the fourth in a chain of testers that had taken samples of the swabs for testing. On the state's cross-examination, the diagnostician acknowledged that her testing was neither inconsistent with nor did it disprove Reliagene's testing results.

{¶ 11} After the jury instructions were given and the jury retired to deliberate, the jury sent two questions to the trial judge. In this appeal, Holmes takes issue with the trial court's handling of the first question: Whether "contact" could be "considered slight

penetration." Holmes' trial counsel asked the court to instruct the jury that the definitions were provided to them in the jury instructions.

{¶ 12} The trial court then brought the jury back into the courtroom, and addressed the question by stating:

{¶ 13} "First question, is contact considered slight penetration. I cannot answer that question without going back to the jury instructions. You do have the jury instructions. I'm just going to point to two different places in the jury instructions as relates to the issue raised by your question. As it relates to count two of the indictment, I indicated the sexual conduct includes vaginal intercourse between a male and a female. I defined for you vaginal intercourse means penetration of the penis into the vagina. Penetration however slight is sufficient to complete vaginal intercourse.

{¶ 14} "I also defined for you in count three of the indictment, sexual conduct including anal intercourse between persons. Anal intercourse means penetration of the penis into the anal opening of a man or woman. Penetration however slight is sufficient to complete anal intercourse.

{¶ 15} "Further going to point you to the area where I talked about lesser included offenses. You must consider the offense charged in the indictment. If you find that the state proved beyond a reasonable doubt all of the essential elements of the offense of rape as relates to count two or count three, your verdict must be guilty as charged according to your findings. However, if you find that the state failed to prove beyond a reasonable doubt all the essential elements of the crime of rape, then your verdict must be not guilty

of that offense and in that event you will continue your deliberations to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of attempted rape."

{¶ 16} Holmes' trial counsel preserved an objection to the trial court's response to the jury question. The jury found Holmes guilty of aggravated burglary and vaginal rape. However, it found Holmes not guilty of anal rape, but guilty of attempted anal rape. At sentencing, after the trial judge had imposed terms of incarceration for each conviction, given credit for time served, notified him of his sexual offender reporting requirements, and postrelease control, the trial judge stated in closing:

{¶ 17} "Mr. Holmes, not only did you violate the 68 year-old lady, but you violated her a second time by forcing us to go to trial in this case. This is something that probably should have worked out. The evidence was very strong against you, and you forced this lady to come into court, which is very offensive to me.

{¶ 18} "I've been working in this court house for 35 years. I've tried hundreds and hundreds of cases, and this is the first time that something like this has happened in my courtroom. I hope it doesn't happen again."

{¶ 19} In this appeal as of right, Holmes raises the following errors for review:

{¶ 20} "I. There was insufficient evidence to support defendant's conviction of attempted rape.

{¶ 21} "II. The trial court erred in denying defendant's motion for acquittal as to count three.

{¶ 22} "III. The trial court violated defendant's constitutional right to due process by jury instructions that improperly emphasized conviction.

{¶ 23} "IV. Defendant was denied his constitutional right to a fair trial when the court reprimanded him for exercising his right to trial.

{¶ 24} "V. The trial court erred by admitting other acts in at trial about the defendant."

{¶ 25} For the following reasons, we find each assignment of error not well-taken. For ease of analysis, we address assigned errors out of order.

{¶ 26} In his third assignment of error, Holmes argues that the trial court's instruction to the jury given in response to a question during deliberations was prejudicial error. Holmes takes specific issue with the trial court's response to the question regarding the definition of "penetration." "[W]here, during the course of its deliberations, a jury requests further instruction, or clarification of instructions previously given, a trial court has discretion to determine its response to that request. A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion." *State v. Carter* (1995), 72 Ohio St.3d 545, 553.

{¶ 27} The trial court acted within its discretion by reiterating the jury instructions regarding what constitutes penetration. The neutral reiteration of instructions – or the neutral supplementation of instructions – does not, without more, constitute an abuse of discretion. *State v. Maupin* (1975), 42 Ohio St.2d 473, paragraphs three and four of the

syllabus. As the trial court placed no unfair emphasis on the element of penetration, this assignment of error is not well-taken.

{¶ 28} In his fourth assignment of error, Holmes asserts a violation of his constitutional right to a fair trial by alleging that the trial judge improperly reprimanded him at sentencing for exercising his right to a jury trial. Holmes cites *State v. Scalf* (1998), 126 Ohio App.3d 614, and *State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, for the rule that "[a]ny increase in the sentence based upon the defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper." *Id.* at ¶ 10, quoting *State v. Morris*, 159 Ohio App.3d 775, 2005-Ohio-962, ¶ 12.

{¶ 29} In *State v. Ambriez*, 6th Dist. No. L-03-1051, 2004-Ohio-5230, this court addressed the issue with the following analysis:

{¶ 30} "[T]he law has developed the following dichotomy by which the impropriety of a sentence turns on the articulated rationale for that sentence. 'A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor.' *United States v. Stockwell* [(C.A.9, 1973), 472 F.2d 1186, 1187]. However, 'it is improper for a trial judge to impose a heavier sentence as a penalty for the exercise of the right of jury trial, or as an example to deter others from exercising the right.' *United States v. Derrick* [C.A.6, 1975), 519 F.2d 1, 4]."
Ambriez, 2004-Ohio-5230, ¶ 21.

{¶ 31} *Ambriez* then continued by examining whether the trial court's observations regarding the defendant were or were not justified under Ohio's sentencing guidelines:

{¶ 32} "In other words, the issue is whether the trial judge was unable to give a lighter sentence for want of a genuine admission of guilt under R.C. 2929.12(E)(5) or whether the trial judge gave a harsher sentence as a penalty for standing trial because there was no genuine remorse under R.C. 2929.12(D)(5).

{¶ 33} "R.C. 2929.12(D)(5) and R.C. 2929.12(E)(5) mirror each other. If the 'offender shows no genuine remorse for the offense' the trial court must consider that as an indication that the offender will commit future crimes under R.C. 2929.12(D)(5). If the 'offender shows genuine remorse for the offense,' however, then the court must consider that as an indication that the offender will not commit future crimes under R.C. 2929.12(E)(5)." *Ambriez*, 2004-Ohio-5230, ¶ 21-22.

{¶ 34} Here, in contrast to *Ambriez* and the cases which it examined, the trial court made its comments *after* sentencing, *without* indicating whether its considerations were tied to the sentence. Because of this, we do not find any inference that Holmes' sentence was increased *because* he chose to stand trial. Due to the lack of a connection between the imposition of sentence and the trial court's expression, we find this assignment of error not well-taken.

{¶ 35} In his first assignment of error, Holmes argues that insufficient evidence supports his conviction for attempted rape.

{¶ 36} "In reviewing the sufficiency of evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'

(Emphasis sic.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319." *State v. Biros* (1997), 78 Ohio St.3d 426, 446.

{¶ 37} Here, Holmes argues that the state failed to prove that he penetrated the victim's anal cavity. This argument is not well-taken. Holmes was convicted of attempted anal rape, not anal rape. Holmes admits that the evidence at trial may have met the elements of attempted rape. The nurse who performed the rape kit on the victim testified that there was attempted anal penetration. The victim testified that "slight" anal penetration took place. DNA taken from the victim's anal region was tested and was found to support an inference that it was Holmes' DNA. Holmes admitted to being in the victim's apartment when the attempted rape occurred.

{¶ 38} "[T]here is sufficient evidence of anal intercourse, for purposes of the crime of anal rape under R.C. 2907.02, where the trier of fact finds that the defendant penetrated, however slightly, the victim's anus with any part of the defendant's body, or with any instrument, apparatus, or other object. If the evidence shows that the defendant made contact only with the victim's buttocks, there is not sufficient evidence to prove the defendant guilty of the crime of anal rape. As a corollary, where the evidence shows that the defendant attempts to penetrate the victim's anus, and, for whatever reason, fails to do so and makes contact only with the buttocks, there is sufficient evidence to prove the defendant guilty of the crime of attempted anal rape." *State v. Wells* (2001), 91 Ohio St.3d 32, 34.

{¶ 39} The testimony of the victim on this point was corroborated by the DNA evidence and the testimony of the examining nurse. Regardless, "corroboration of victim testimony in rape cases is not required." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 53, citing *State v. Sklenar* (1991), 71 Ohio App.3d 444, 447; *State v. Banks* (1991), 71 Ohio App.3d 214, 220; *State v. Lewis* (1990), 70 Ohio App.3d 624, 638; *State v. Gingell* (1982), 7 Ohio App.3d 364, 365. Sufficient evidence, as reviewed supra, supports Holmes' conviction for attempted anal rape. This assignment of error is not well-taken.

{¶ 40} In his second assigned error, Holmes argues that the trial court should have granted his motion for acquittal, pursuant to Crim.R. 29(A), as to the charge of attempted anal rape. A trial court should not grant a motion for acquittal if, given the evidence, reasonable minds can reach different conclusions as to whether each element of the charge has been proved beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 2601, syllabus. This is the same standard used to review challenges to the sufficiency of the evidence. *State v. Carter* (1995), 72 Ohio St.3d 545, 553-554. Because we find that Holmes' conviction for attempted anal rape was supported by sufficient evidence, the trial court properly denied the motion for acquittal. This assignment of error is not well-taken.

{¶ 41} In his fifth assigned error, Holmes argues that the trial erred in admitting "other acts" evidence and further erred in failing to give a curative instruction to ignore the other acts evidence. Specifically, Holmes points to portions of his taped interview,

heard by the jury, wherein he made statements to an officer indicating that he had, in the past, wrongfully entered other residences in order to steal.

{¶ 42} Evid.R. 404(B) provides:

{¶ 43} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 44} "This rule, commonly referred to as the 'propensity rule,' constitutes a standing bar, upon the ground of irrelevancy, to any attempt to prove the commission of the crime charged by evidence of a like previous act. * * * While ordinarily not rising to the level of constitutional significance, the introduction of such evidence may be highly prejudicial (Evid.R. 403) when the former crime or act is utilized in a subsequent trial which has, as its central issue, the question of whether the defendant committed the same kind of act." *State v. Zuern* (1987) 32 Ohio St.3d 56, 59.

{¶ 45} Having reviewed all of the evidence, including the taped interview, we find no prejudice to Holmes resulted from the introduction of these statements. The propensity rule, as stated in *Zuern*, finds prejudice resulting from improper evidence when the trial has "as its central issue" the question of whether the defendant committed the same kind of act. Here, the taped interview was introduced with the intention to show Holmes' admission that he wrongfully entered *this victim's* apartment. His admission rendered superfluous any attempt by the state to create an inference that Holmes

committed this crime *because* he committed past crimes. Further, because, in that same interview, Holmes admitted that he committed this burglary, any hypothetical error would be harmless. Therefore, the fifth assignment of error is not well-taken.

{¶ 46} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
