

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

State of Ohio/City of Toledo

Court of Appeals No. L-12-1123

Appellee

Trial Court No. CRB 11 13975

v.

Robert J. Ackerman

DECISION AND JUDGMENT

Appellant

Decided: June 28, 2013

* * * * *

David Toska, Chief Prosecutor, City of Toledo, and Michelle
Turvey-Albert, Assistant Prosecutor, for appellee.

William F. Hayes, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Toledo Municipal Court, which found appellant guilty of one count of sexual imposition offensive contact, in violation of R.C. 2907.06(A)(1), a misdemeanor of the third degree. Appellant was convicted following a jury trial in which the state presented detailed testimony from the victim.

That testimony was corroborated by an eyewitness coworker. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} On September 6, 2011, appellant, Robert Ackerman, was charged with sexual imposition offensive contact, in violation of R.C. 2907.06(A)(1). The charge in the instant case arises from an August 25, 2011 workplace incident in which appellant engaged in unlawful sexual contact with a female subordinate's breasts while both were on duty during third shift at the Northwest Ohio Psychiatric Hospital in Toledo.

{¶ 3} On February 7, 2012, a jury trial was held. The victim furnished detailed testimony of the incident. In addition, collaborating testimony was submitted by two additional witnesses, including the investigating officer and an eyewitness coworker. The jury found appellant guilty of the charge. On May 2, 2012, this appeal ensued.

{¶ 4} On appeal, appellant sets forth the following four assignments of error:

I. The trial court erred in denying Ackerman the right to confront and cross-examine witnesses, a fair trial, and due process of law, in violation of his Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, §§10 and 16 of the Ohio Constitution, when it improperly limited cross-examination to preclude evidence motive by the alleged victim.

II. The trial court violated Ackerman's right to due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution when it

upheld the jury verdict as it was not supported by the sufficiency of the evidence and was against the manifest weight of the evidence.

III. Ackerman was denied his constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

IV. The defendant appellant's right to a fair trial under his Fifth, Sixth, and 14th Amendments to the U.S. Constitution was denied because of cumulative errors committed during the trial of this case by the court and counsel.

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. At the time of these events, appellant was employed as a nursing supervisor at the Northwest Ohio Psychiatric Hospital in Toledo. The victim was employed at the same facility and assisted nurses in her capacity as a therapeutic program worker. Both individuals worked third shift at the hospital. Significantly, appellant also served as the victim's supervisor.

{¶ 6} On August 22, 2012, the victim returned to third shift following maternity leave. Several days later, the victim encountered appellant in the normal course of her employment. During their initial interaction, appellant inexplicably inquired of the victim if her nipples had gotten darker as a result of her pregnancy. The victim became nervous and walked away.

{¶ 7} Toward the end of the same shift, appellant, the victim, and another coworker were seated at a nurse's station. At this point, appellant continued his improper barrage of sexually charged statements directed at the victim. Appellant crudely remarked to the victim, "So do you get wet now. I mean, are you tight." Subsequently, the wholly improper scenario escalated from verbal to physical. Appellant grabbed the victim's post-birth stomach and proceeded to ask the victim how big her breasts had gotten during her pregnancy. Appellant volunteered that he had his own way of checking breast size. At this point, as witnessed by a coworker, appellant placed his hands on the victim's right breast and began rubbing it. Appellant then walked away. All of this occurred within a few feet of the eyewitness coworker.

{¶ 8} The victim promptly reported the incident internally within the department. No action was taken. Accordingly, during the victim's next shift, she reported the assault to a different supervisor. That second report initiated the investigation which led to the underlying charges being filed against appellant on September 6, 2011.

{¶ 9} During the course of the trial, three witnesses were presented on behalf of the state to establish the offense. The witnesses included the victim, the coworker who was an eyewitness, and the officer who subsequently investigated the incident. The victim furnished detailed, persuasive testimony regarding appellant's unlawful conduct. In describing precisely what occurred when appellant touched her breast, the victim stated, "he picked it up and rubbed it like a mammogram type feel. Made me feel very weird." Significantly, the victim's coworker provided ample collaborating testimony.

She testified that she directly heard many of the inappropriate sexual comments made to the victim by appellant. More significantly, she also witnessed touching of the victim's breasts by appellant. The witness testified that she was so appalled by what she observed that as she witnessed appellant's hand moving away from the victim's breast, she exclaimed, "Oh, my God, Bob."

{¶ 10} In response, the defense provided the testimony of appellant and several witnesses on his behalf. Although not directly denying the events, the defense witnesses suggested that the victim fabricated her story because appellant would not give her money. Testimony was furnished suggesting that appellant had a reputation of giving money to coworkers without requesting repayment.

{¶ 11} During the cross-examination of the victim, appellant's attorney questioned the victim about the foreclosure status of her house. In conjunction with this, appellant's attorney attempted to introduce foreclosure documents. The trial judge barred admission of the victim's foreclosure documents determining their probative value to be outweighed by the risk of misleading and confusing the jury.

{¶ 12} The jury ultimately found the testimony of the victim and her coworker more persuasive than the defense theory the improper sexual commentary and contact by appellant was manufactured in connection to financial difficulties of the victim. Appellant was found guilty. This appeal followed.

{¶ 13} In the first assignment of error, appellant asserts that the trial court violated his constitutional rights by limiting cross-examination of the victim. In support of this

assertion, appellant maintains that documents regarding the foreclosure status of the victim's home should have been fully admitted into the proceedings. After careful examination of the record, we do not agree.

{¶ 14} During trial, appellant's attorney sought to establish the financial need of the victim by asking her, "[w]as your house in foreclosure?" The victim replied, "[n]o. It was in modification." Counsel for appellant attempted to use previously undisclosed foreclosure documents to impeach the victim by demonstrating that the victim's home was in mortgage loan foreclosure, not mortgage loan modification, status. Appellee's counsel objected. The trial court judge determined that any potential probative value from the disputed documents would be outweighed by the confusion it may cause the jury. Pursuant to Evid.R. 403(A), the trial judge excluded the information. Given the complex nature of the nuances of legal distinctions between modification and foreclosure in the context of the understanding of same on the part of laypersons, we find no abuse of discretion in this evidentiary ruling. The record further reflects that appellant failed to disclose the foreclosure documents to appellee prior to trial. Based upon all of the foregoing, we find appellant's first assignment of error to be not well-taken.

{¶ 15} In the second assignment of error, appellant asserts that the jury verdict was against the manifest weight of the evidence and that it was not supported by sufficient evidence. In support of this claim, appellant relies on R.C. 2907.06(B), which states, "[n]o person shall be convicted of a violation of this section solely upon the victim's

testimony unsupported by other evidence.” Appellant claims that the testimony of an eyewitness coworker did not sufficiently support the finding of guilty. We do not concur.

{¶ 16} The term “sufficiency” of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry in such cases 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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 17} “In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion.” *State v. Davis*, 6th Dist. No. WD-10-077, 2012-Ohio-1394, ¶ 17, citing *Thompkins, supra*, at 387. In making this determination, the court of appeals sits as a “thirteenth juror” and, after “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.” *Thompkins* at 386.

{¶ 18} Upon our review and consideration of the record, we find that the unequivocal collaborating testimony of the eyewitness, coupled with the testimony of the victim, constitutes sufficient evidence that appellant committed the offense. The victim testified, “he actually picked my breast up and mooshed it and pushed on it to where I felt

very violated.” Later in the record the victim stated, “[i]t was not a tap, it was like a mammogram.” The testimony of the victim’s coworker convincingly corroborates this occurrence. In her testimony, the coworker stated, “I looked away and within a few seconds looked back and his hand was moving away from her chest. It was right in front of her chest. Right in front of her right breast actually and moving away.”

{¶ 19} Contrary to appellant’s assertions, the bulk of the evidence reflects that a rational trier of fact could find that the evidence satisfied the elements of the crime. We are persuaded that the jury did not lose its way so as to cause a manifest miscarriage of justice. Wherefore, we find appellant’s second assignment of error to be not well-taken.

{¶ 20} In the third assignment of error, appellant asserts that he was denied effective assistance of counsel. In support, appellant cites to the fact that his counsel did not file a Crim.R. 29 motion for acquittal at the end of appellee’s presentation of the case.

{¶ 21} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard proof requires appellant to satisfy a two-pronged test. First, appellant must show that the counsel’s representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel’s perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also State v. Plassman*, 6th Dist. No. F-07-036, 2008-Ohio-3842. This burden of proof is high given Ohio’s

presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶ 22} Based on our finding in response to the second assignment of error, this third assignment of error is likewise without merit. The evidence in the case was clearly sufficient to sustain a conviction. Attempting to file an unwarranted motion for acquittal would not have changed the outcome of the trial. Wherefore, we find appellant's third assignment of error to be not well-taken.

{¶ 23} In the final assignment of error, appellant asserts that he was not provided a fair trial as a result of cumulative errors. The Supreme Court of Ohio has held, "[a]lthough violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987). We have carefully analyzed the record in this case. In light of our findings regarding appellant's previous assignments of error, we find that no reversible cumulative errors occurred given that we have determined that none of the actions complained of constituted error. As such, we find appellant's fourth assignment of error not well-taken.

{¶ 24} The judgment of the Toledo Municipal Court is hereby 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.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>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.</p>
