[Cite as *State v. Felton*, 2010-Ohio-4105.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92295

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HERBERT FELTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500337

BEFORE: Cooney, J., McMonagle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Herbert Felton ("Felton"), appeals his conviction for sexual battery. Finding no merit to the appeal, we affirm.

{¶ 2} In September 2007, Felton was charged with two counts of rape. Following a bench trial, Felton was found guilty of sexual battery. The trial court sentenced him to community control sanction and found him to be a Tier III sexual offender.

{¶ 3} Felton now appeals, raising four assignments of error.

{¶ 4} In the first assignment of error, Felton argues that the evidence is insufficient to support his conviction, and in the second, that the conviction is against the manifest weight of the evidence. We address these two assignments of error together as they involve the same evidence, although the standards of review differ.

{¶ 5} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency:

{¶ 6} "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[t]he 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.' *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."

{¶ 7} The Ohio Supreme Court restated the criminal manifest weight standard and explained how it differs from the sufficiency standard in *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25:

{¶ 8} "The criminal manifest-weight-of-the-evidence standard was explained in * * * *Thompkins* * * *, [in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and

disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 9} Felton was convicted of sexual battery under R.C. 2907.03(A)(2), which provides, "No person shall engage in sexual conduct with another * * * 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."

{¶ 10} R.C. 2901.22(B) defines, "knowingly," as follows:

{¶ 11} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 12} In attacking both the sufficiency and manifest weight of the evidence, Felton argues that the trial court imposed a "should-have-been-aware" element although the statute contained none.

{¶ 13} The trial court heard the following evidence. On July 22, 2007, Felton and the victim, J.D., attended a graduation party where they consumed alcohol. Felton was drinking but was not intoxicated, and J.D. was intoxicated. Over the course of the evening, J.D. consumed more than twelve beers and several shots of alcohol. Another guest at the party, Adam Nichols

("Nichols"), testified that he observed Felton in the presence of J.D., and J.D. was "obnoxiously drunk," but still functioning. J.D. testified that he did not know whether Felton saw him consuming alcohol or becoming intoxicated.

{¶ 14} Danielle Denninger ("Denninger") and Nick Alexander ("Alexander") also attended the party and testified that J.D. appeared highly intoxicated. Denninger testified that J.D.'s eyes appeared glassy, he was walking unsteadily, and he was slurring his words. Alexander testified that J.D. "passed out" on the couch "like he was dead," because he had consumed a significant quantity of alcohol. J.D. went to sleep in the basement.

{¶ 15} Around 1:00 a.m., the party host's father told the guests to leave. Denninger observed J.D. sleeping on a couch, Thomas Bogomolny ("Bogomolny") sleeping on a futon, and Felton sleeping on the floor in the basement. Denninger tried unsuccessfully to wake J.D. She left with Nichols and Alexander to go to a restaurant.

{¶ 16} J.D. testified that he awoke to find his pants unzipped, and Felton performing oral sex on him. He testified that he pushed Felton away and screamed at him to get off of him. J.D. ran upstairs to find his friends. He called Denninger who informed him that they were at the restaurant.

{¶ 17} J.D. went to the restaurant and frantically told his friends that he had awakened to Felton performing oral sex on him. J.D. screamed that he

was going to kill "that nigger." Denninger observed that J.D. was not wearing shoes. J.D. picked up a steak knife, started waving it around, and continued to scream. The group drove him to Nichols's home and tried unsuccessfully to calm J.D. When Nichols called Felton to ask about J.D.'s accusations, Felton denied having done anything.

{¶ 18} J.D. proceeded to his mother's house. He reported the incident to police and went to the hospital for a sexual assault examination.

{¶ 19} Bogomolny testified to a different version of events. He knew both J.D. and Felton. He observed that some guests at the party were intoxicated. After the host's father asked the guests to leave, Bogomolny, J.D., and Felton remained in the basement where the three fell asleep. The next thing Bogomolny remembered was waking up to J.D. and Felton talking in a calm manner and looking for J.D.'s shoes. Felton then fell asleep on the futon. When Bogomolny perceived him reaching over and lifting his blanket, he asked Felton what he was doing. Felton pretended to be asleep.

{¶ 20} The following day, Felton made a statement to the police indicating that he, Bogomolny, and J.D. had been sleeping in the basement. He admitted that he and J.D. were "in between tipsy and drunk." He told the police that the lights were off, and he needed to use the restroom so he woke up J.D. to ask the location of the restroom. J.D. slurred the word "fag" and

grabbed Felton's hand. Felton fell on top of him, and the two kissed. Felton claimed that J.D.'s penis was out of his pants and that Felton manipulated it. J.D. asked if Felton wanted to have sex, and Felton began to perform oral sex. Then the two kissed, and Felton went upstairs to use the restroom. By the time Felton returned, J.D. had gotten up and was searching for his cell phone.

{¶ 21} Felton admitted that he and J.D. were not friends and that they did not really like one another. He believed that J.D. accused him of rape because he was embarrassed and did not want anyone to know what really happened.

{¶ 22} Officer Gary McKee ("McKee") interviewed J.D. and Felton regarding the events that night. Felton initially denied any sexual contact with J.D. but later admitted that he and J.D. had kissed. He stated that at approximately 1:45 a.m., he nudged J.D. to ask where the restroom was. J.D. responded by calling him "fag" and pulling Felton on top of him. Then the two kissed. Finally, Felton knelt next to J.D. and began to manually stimulate his penis. Later he licked his penis.

{¶ 23} Based on the foregoing, the evidence is sufficient to support Felton's conviction. Felton admitted engaging in sexual conduct with J.D. and knowing that J.D. was "in between tipsy and drunk." Several other party guests testified that J.D. appeared extremely intoxicated. On these facts, the

trial court could have reasonably found that Felton knew that J.D.'s ability to appraise the nature of or control his own conduct was substantially impaired.

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

{¶ 25} We also do not find the conviction is against the manifest weight of the evidence. Although the trial court may have referred inaccurately to the necessary mens rea — "should have known" instead of "knowingly" — in finding Felton guilty of the offense, we find the error harmless. In finding Felton guilty, the trial court stated as follows:

> "At issue is how much time did the victim and defendant spend together in order to establish, beyond a reasonable doubt, the required [sic] knowledge that the defendant, Herbert Felton, knew or had reasonable cause to believe that John Doe's ability to resist or consent was substantially impaired because of a mental or physical condition or advanced age.
>
> "It is further obvious from the testimony that the victim and the defendant were not friends and would not seek each other out. Thus, any time that they spent in the presence of each other was limited. The testimony from every other witness was that the victim was highly inebriated. They drew this conclusion because they spent time in the presence of victim. Given the status of the relationship between the victim and the defendant the defendant would not, beyond a reasonable doubt, have had the opportunity to effectively assess the state of intoxication of the victim.
>
> "This leads the Court to the consideration of a lesser included offense of sexual battery. In this particular instance, the indication from the statement of the defendant is that he approached the victim in order to find the location of a bathroom * * * At that point he says he was pulled towards the victim and kissed. Inasmuch as there was no love lost between the victim and the defendant, it is at this point in time, in the Court's mind,

> that the defendant *should have been aware* of the victim's inability to appraise the situation.
>
> "This Court is going to find the defendant guilty of a lesser included offense of sexual battery, the same being a Tier 3 sex offense." (Emphasis added.)

{¶ 26} We find the trial court's error to be harmless because the evidence supports the conviction. Because Felton knew that J.D. was "in between tipsy and drunk," and because he knew that J.D. did not like him, he must have known that J.D.'s capacity to appraise the nature of or control his own acts was substantially impaired. Several witnesses testified that for a significant portion of the party, J.D. was extremely intoxicated and passed out on the couch. Although the evidence does not conclusively prove that Felton observed J.D. consuming a large quantity of alcohol, at the very least, Felton knew that J.D. had been sleeping just before the sexual encounter. This court has held that sleep "constitutes a mental or physical condition that substantially impairs a person from resisting or consenting to sexual conduct." *State v. Clark*, Cuyahoga App. No. 90148, 2008-Ohio-3358, ¶21. We may conclude that a sleeping person also cannot appraise the nature of or control his or her conduct. Additionally, before commencing the sexual acts, Felton heard J.D. "slur" the word, "fag," indicating that J.D. was still intoxicated. In sum, we find that the trial court did not lose its way in finding Felton guilty of sexual battery.

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

{¶ 28} In the third assignment of error, Felton argues that the trial court erred in concluding that sexual battery is a lesser included offense of rape. The trial court found Felton guilty of sexual battery under R.C. 2907.03(A)(2), which it found was a lesser included offense of rape under R.C. 2907.02(A)(1)(c).[1]

{¶ 29} The Ohio Supreme Court explained the three-part test used to determine lesser included offenses in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, holding:

> "The three-part test we set forth in [*State v.*] *Deem* [(1988), 40 Ohio St.3d 205, 533 N.E.2d 294] provides: 'An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.' *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus. We have repeatedly stated that '[i]n determining whether an offense is a lesser included offense of the charged offense, "the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense."' *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, ¶11, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 26, 759 N.E.2d 1240, quoting *State v. Kidder*, 32 Ohio St.3d at 282, 513 N.E.2d 311. See also *State v. Koss* (1990), 49 Ohio St.3d 213, 218-219, 551 N.E.2d 970. *Deem*

[1]In *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303, the Ohio Supreme Court explicitly found sexual battery [by coercion] under R.C. 2907.03(A)(1) to be a statutorily lesser included offense of forcible rape under former R.C. 2907.02(A)(1), which is substantively identical to R.C. 2907.02(A)(2).

> was intended to require analysis of the statutory elements conducted in the abstract without reference to the specifics of any individual case."

{¶ 30} Felton was convicted of sexual battery, a third degree felony, under R.C. 2907.03(A)(2), which provides, in pertinent part:

> "No person shall engage in sexual conduct with another * * * 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."

{¶ 31} Felton had been charged with rape, a first degree felony, under R.C. 2907.02(A)(1)(c), which provides:

> "No person shall engage in sexual conduct with another * * * when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * *."

{¶ 32} The offenses meet the first prong of the *Deem* test because the penalty for a third degree felony is less severe than for a first degree felony. The second element of the test requires us to determine whether every instance of rape under R.C. 2907.02(A)(1)(c) necessarily results in sexual battery under R.C. 2907.03(A)(2). The crime of rape under R.C. 2907.02(A)(1)(c) requires that the state prove that the offender (1) engaged in sexual conduct with the victim, (2) while knowing or having reasonable cause to believe that the victim's ability to resist or consent was substantially

impaired, and (3) the victim's ability to resist or consent was substantially impaired.

{¶ 33} The crime of sexual battery under R.C. 2907.03(A)(2) requires the state to prove that the offender (1) engaged in sexual conduct with the victim, (2) while knowing that the victim's ability to appraise the nature of or control the victim's own conduct was substantially impaired.

{¶ 34} We find the Tenth District's reasoning in *State v. Stricker*, Franklin App. No. 03AP-746, 2004-Ohio-3557, persuasive. The court stated:

"[S]exual battery under R.C. 2907.03(A)(2) does not require that the offender act with 'actual knowledge.' Rather, the statute merely requires that the offender act 'knowingly.' R.C. 2901.22(B) defines 'knowingly' as follows:

"A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"Because 'knowledge' as defined above requires no more than a person's belief that a set of circumstances 'probably' exist, rather than the person's absolute or actual knowledge that the circumstances are in fact true, the mental state attributable to the offender in both the sexual battery and the rape statute at issue is the same, i.e., knowledge. See *In re Sechler* (Aug. 29, 1997), Trumbull App. No. 96-T-5575. Thus, the mens rea element for rape under R.C. 2907.02(A)(1)(c) is not lesser than the mens rea for sexual battery under R.C. 2907.03(A)(2)." Id. at ¶31.

{¶ 35} The *Stricker* court found sexual battery under R.C. 2907.03(A)(2) to be a lesser included offense of rape under R.C. 2907.02(A)(1)(c). We agree. Rape requires that the offender knew or had reason to believe that the victim's

ability to consent to or resist the offender's acts was substantially impaired, while sexual battery requires that the offender knew the victim's ability to appraise or control his or her own conduct was substantially impaired. If an offender knew that a victim could not appraise or control his or her own acts, then the offender would certainly know that the victim could not consent to or resist another's advances. Thus, the second prong of the *Deem* test is met. The third prong of *Deem* is met for the same reason; rape requires proof of an additional element, that the victim could not resist or consent to the offender's acts. Sexual battery does not require proof of this element.

{¶ 36} Therefore, the court correctly found sexual battery to be a lesser included offense of rape. The third assignment of error is overruled.

{¶ 37} In the fourth assignment of error, Felton argues that his classification as a Tier III sex offender under the Adam Walsh Act ("AWA") is unconstitutional because the AWA is an ex post facto law and retroactively enhances a criminal penalty.

{¶ 38} The Ohio Supreme Court has struck down only the reclassification scheme of the Adam Walsh Act as violative of the separation-of-powers doctrine. *State v. Bodyke,* __ Ohio St.3d ___, 2010-Ohio-2424; *In re Sexual Offender Reclassification Cases,* Slip Opinion No. 2010-Ohio-3753, ¶9. Since Felton has not been reclassified, his constitutional challenge fails.

{¶ 39} Judgment is 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., CONCURS IN JUDGMENT ONLY.