

[Cite as *State v. Clarke*, 2010-Ohio-5010.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94207

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ELMAS CLARKE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521410

BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: October 14, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Elmas Clarke, appeals from the trial court's judgment, rendered after a bench trial, finding him guilty of rape, unlawful sexual conduct with a minor, and gross sexual imposition. Clarke contends that he was denied his right to effective assistance of counsel because although trial counsel filed a notice of alibi, he did not produce the documents regarding Clarke's alibi to the State prior to trial. Clarke also contends that the evidence was insufficient to support his conviction for rape. We affirm.

I. Background

{¶ 2} Clarke was indicted in a multi-count indictment as follows: Count 1, rape in violation of R.C. 2907.02; Count 2, unlawful sexual conduct with a minor in violation of R.C. 2907.04(A); and Counts 3-27, gross sexual imposition in violation of R.C. 2907.05, each with a sexually violent predator specification.

{¶ 3} Clarke pled not guilty, waived his right to a jury trial, and the matter proceeded to bench trial.

{¶ 4} Immediately prior to trial, defense counsel handed the prosecutor several documents that he proposed to use as defense exhibits. The documents purported to verify Clarke's alibi. The prosecutor objected to their admission, arguing that the exhibits had not been timely provided in response to the State's discovery request. The trial judge noted the prosecutor's objection and indicated that he would reserve ruling on the admissibility of the documents until defense counsel sought to introduce them at trial. Counsel subsequently did not move for admission of any of the documents.

{¶ 5} The State presented two witnesses at trial: the victim, M.M., who was 12 years old at the time of the alleged incidents, and the victim's mother, Sonya Clarke. Their testimony indicated that Clarke had been married to Sonya for nine years and acted as a father to M.M., his stepdaughter.

{¶ 6} M.M. testified that she tried out for her school's seventh grade volleyball team in the summer of 2007, but did not make the team. Clarke offered to work out with her so she could get in shape. M.M. said that she would wake up Clarke at approximately 5:30 a.m. and they would work out in the basement for approximately 45 minutes to an hour. For the first several months, nothing untoward happened. But, according to M.M., beginning in January 2008, Clarke would massage her legs and then touch her vagina outside her underwear after they exercised. M.M. stated that this happened almost every day they exercised.

{¶ 7} M.M. testified that in March 2008, during a "movie night" at home with Clarke and her younger brother, Clarke "kept touching" her vagina as she dozed on his leg. M.M. testified further that in June 2008, after exercising one morning, Clarke massaged her legs up to her vagina, then told her to roll over, pulled down her underwear, and put his finger in her vagina. M.M. testified that he kept pushing his finger in and out while she "just laid there." After the incident, Clarke told her not to tell anyone what had happened. M.M. said that she could not remember the exact date of this incident, but knew that it occurred shortly after school ended on June 4, 2008.

{¶ 8} M.M. said that she did not tell anyone about these incidents because she was afraid she would not be believed. On July 21, 2008, she told

her natural father what had happened, and he told her to tell her mother. On July 23, 2008, M.M. wrote a note explaining what Clarke had done and left it on Sonya's bed. Sonya testified that after reading the note, she confirmed with M.M. that she was telling the truth.

{¶ 9} Sonya gave the note to Clarke that night when she saw him at a football practice for their son. Sonya testified that Clarke read the note and then suggested they go home and talk about it, which was not the reaction she expected. Sonya and her children did not return to the home after that evening.

{¶ 10} Clarke testified for the defense and denied ever touching M.M. inappropriately. He testified further that he was out of town on business on June 10, 2008, returning on June 12, 2008. Sonya likewise testified that Clarke was out of town on those dates.

{¶ 11} The trial court subsequently found Clarke guilty of Counts 1 and 2, rape and unlawful sexual conduct with a minor, both charges relating to the incident alleged in the indictment to have occurred "on or about June 11, 2008," and Counts 3 and 4, gross sexual imposition relating to incidents that occurred between January 1, 2008 and May 27, 2008. The trial court found him not guilty of the remaining counts and dismissed the sexually violent predator specifications relating to Counts 3 and 4. The court sentenced him to three years incarceration on Counts 1 and 2 (which merged for sentencing),

and one year each on Counts 3 and 4, to run concurrent with the sentence on Counts 1 and 2, for a total term of three years.

II. Law and Analysis

A. Ineffective Assistance of Counsel

{¶ 12} In his first assignment of error, Clarke contends that he was denied his constitutional right to effective assistance of counsel because his lawyer did not provide timely documentation of his alibi to the State, thereby precluding admission of the documents at trial. Counsel never moved for admission of the documents at trial, however, and the trial court never ruled as to whether the documents were admissible. Hence, we analyze Clarke's ineffective assistance of counsel claim with respect to counsel's failure to timely provide documents demonstrating Clarke's alibi to the State.

{¶ 13} To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance, such that, but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, 761 N.E.2d 18. In short, counsel's errors must be so serious as to render the result of the trial unreliable.

{¶ 14} Even assuming that counsel's failure to timely provide documents demonstrating Clarke's alibi to the State was deficient performance, we do not find that Clarke was prejudiced by counsel's performance.

{¶ 15} It was well established at trial even without the documents that Clarke was out of town on June 10, 11, and 12, 2008. He testified to this fact and Sonya Clarke confirmed that he was in Connecticut on those dates. Thus, the admission of documents confirming his alibi for those dates would have added little to Clarke's alibi defense.

{¶ 16} More significantly, Clarke's absence on those dates was not dispositive of the rape and unlawful sexual conduct with a minor charges. M.M. admitted that she was not sure about the June 11, 2008 date, but testified that she was sure that the incident where Clarke inserted his finger in her vagina occurred within a week or two after school let out on June 4, 2008. Thus, as permitted by law,¹ the indictment charged that the alleged rape and unlawful sexual conduct with a minor occurred "on or about June 11, 2008"; it did not state that the offenses occurred only on June 11, 2008.

¹"There are many instances when the State is unable to supply exact times and dates, especially in cases involving victims who are young children who may not be able to remember exact dates or when the crimes involve several instances of abuse spread out over an extended period of time. In such cases, the prosecution must set forth a time frame in the indictment and charge the accused with offenses which reasonably fall within that period." *State v. Rogers*, 12th Dist. No. 2006-03-055, 2007-Ohio-1890, ¶25 (Internal citations omitted).

{¶ 17} Accordingly, the trial court could have found beyond a reasonable doubt that the offenses occurred “about June 11, 2008,” even though Clarke was out of town on June 10, 11, and 12, 2008. Therefore, we find nothing to demonstrate that the outcome of the trial would have been otherwise had the documents verifying Clarke’s alibi for June 10, 11, and 12, 2008 been timely produced and admitted at trial. Having failed to demonstrate prejudice, Clarke’s ineffective assistance of counsel claim fails.

{¶ 18} Appellant’s first assignment of error is overruled.

B. Insufficiency of Evidence

{¶ 19} In his second assignment of error, Clarke contends that his conviction for rape was not supported by sufficient evidence.

{¶ 20} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 21} Clarke was convicted of rape in violation of R.C. 2907.02(A)(2), which provides that “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or

threat of force.” He contends that insufficient evidence of force or threat of force was presented to support his conviction.

{¶ 22} “Force” is defined as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A). However, “[t]he force and violence necessary to commit the crime of rape depends upon the age, size, and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not required upon a person of tender years, as would be required were the parties more nearly equal in age, size, and strength.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58, 526 N.E.2d 304. The Ohio Supreme Court has specifically recognized “the coercion inherent in parental authority when a father sexually abuses his child,” and concluded that in such cases, “force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.” *Id.*, citing *State v. Martin* (1946), 77 Ohio App. 553, 68 N.E.2d 807.

{¶ 23} In this case, the State presented sufficient evidence of both physical and psychological force against M.M. to support Clarke’s rape conviction. M.M. testified that Clarke pulled her underwear down before he inserted his finger in her vagina. This court has held that pulling down a

child victim's underwear "can only be accomplished by the application of physical force," even though such force requires only "minimal physical exertion." *State v. Sullivan* (Oct. 7, 1993), 8th Dist. No. 63818.

{¶ 24} Further, M.M. testified that she did not "feel free" to get away from Clarke as he violated her and that when he was finished, he told her not to tell anyone what had happened. Under such circumstances, we find nothing unreasonable about a finding that M.M.'s will was overcome and that consequently, the forcible element of rape was established. See *Eskridge*, supra; *State v. Fowler* (1985), 27 Ohio App.3d 149, 154, 500 N.E.2d 390.

{¶ 25} Appellant's second assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR