[Cite as *State v. Robertson*, 2011-Ohio-325.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94527

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MELVIN ROBERTSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516228

BEFORE: Sweeney, P.J., Jones, J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

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JAMES J. SWEENEY, P.J.:

{¶ 1} Defendant-appellant Melvin Robertson ("defendant") appeals his conviction for rape with notice of prior conviction, and sexually violent predator and repeat violent offender specifications. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In September of 2008, B.S. and S.S. [1] became friends on MySpace.com, a social networking website. Both B.S. and S.S. are females;

[1] In accordance with this court's policy, the victims are referred to by initials only.

B.S. was 16 years old at the time, and S.S. was 17 years old. On September 19, 2008 at 10:00 p.m., B.S. and defendant, who was B.S.'s boyfriend, picked S.S. up and took her back to their house in Newburgh Heights. Defendant was 36 years old at the time.

{¶ 3} Between approximately 2:30 a.m. and 3:30 a.m. on September 20, 2008, defendant and S.S. had sexual intercourse. On September 23, 2008, S.S. went to the police, alleging that defendant had raped her. On October 3, 2008, defendant was indicted for rape and kidnapping. The case went to trial in August of 2009 and resulted in a hung jury. In October of 2009, a second trial began, and on October 15, 2009, the jury found defendant guilty of rape as indicted and not guilty of kidnapping. Additionally, the court found defendant guilty of the sexually violent predator and repeat violent offender specifications. The court sentenced defendant as follows: ten years in prison for the rape, to run consecutive to eight years in prison for the repeat violent offender specification, and life in prison for the sexually violent predator specification. Defendant's aggregate sentence is 18 years to life in prison.

{¶ 4} Defendant appeals and raises six assignments of error for our review. We address the first two assignments of error together.

{¶ 5} "I. The trial court erred in denying appellant's Criminal Rule 29 motion for acquittal when there was insufficient evidence to prove the elements of rape."

{¶ 6} "II. Appellant's conviction for rape was against the manifest weight

of the evidence."

{¶ 7} Specifically, defendant argues that S.S.'s "character * * * and the nature of her testimony left the prosecution's evidence so unreliable that no reasonable juror could have found that Apellant compelled [S.S.] to submit to intercourse by force or threat of force." Defendant's arguments under these two assignments of error are essentially identical — that the jury's finding of "force or threat of force" was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶ 8} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in a light most favorable to the prosecution, whether any reasonable 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, 273, 574 N.E.2d 492.

{¶ 9} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 10} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 11} Defendant was convicted of rape in violation of R.C. 2907.02(A)(2),

which states 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."

{¶ 12} At trial, S.S. testified as follows: As S.S. and B.S. were watching T.V., S.S. received a text message from defendant, who was in the other room, stating that he thought S.S. was sexy, and asking her to come into the room with him so she could get to know him better. S.S. sent defendant a text message telling him no, she would not go into the room with him, but he could come out and talk to her. B.S., who was sitting next to S.S. on the couch, got up and went into the other room, and defendant came out and sat next to S.S. Defendant asked for a hug, started "talking weird," and touched S.S. S.S. testified that she "wanted to leave" and that she felt "very uncomfortable and like scared." S.S. texted a friend of hers and "told him to keep texting me because I feel like [defendant]

{¶ 13} is trying to do me."

{¶ 14} Defendant told S.S. to put her phone in her purse and put her purse behind the couch. After she did as she was told, defendant started kissing S.S. on the neck. According to S.S., she told defendant not to do this:

{¶ 15} "I was giving him like everything I could say to him for him to just stop because at the time I was — at the time I was on my period, so I told him, no, don't. It's nasty. Just don't. You don't want to do that. I told him like just don't do anything to me because I don't want my mom to like — I don't know.

{¶ 16} "* * *

{¶ 17} "Like I would have to go home and tell her if he did anything.

{¶ 18} "* * *

{¶ 19} "Because I don't want my mom to know stuff like that.

{¶ 20} "* * *

{¶ 21} "Because it should have never happened after I was telling him no. But I don't want her to feel like embarrassed, so I was just telling him, please, just don't do this right now. I was crying to him.

{¶ 22} "He looked like he was getting mad, but by the look on his face because he kept going like that, I told him I am not trying to make you mad. I just don't want to do this. I don't know you. And I am not the type of person that just goes around and sleeps with everybody that I don't know. I don't know you. You are a lot older than me."

{¶ 23} S.S. testified that she never wanted to have sex with defendant. Asked if she told defendant this, S.S. replied, "I told him plenty of times. I gave him every excuse I could possibly think of for him not to do that to me."

{¶ 24} Defendant told S.S. to go to the bathroom and remove her feminine pad. S.S. testified that she did not feel free to leave. Rather, she felt threatened, and she did as she was told. S.S. went back to the couch, and defendant took off her underwear and put a condom on his penis. S.S. testified that she was still telling defendant no, she did not want to do this, and she was crying. Defendant had sexual intercourse with S.S. twice, and when he was

done he insisted that S.S. take a shower.

{¶ 25} S.S. testified that she did not ask B.S. to help her or call the police because she was embarrassed and in shock. S.S. slept on the couch for approximately two hours after the incident. She recalled defendant coming out of the bedroom and staring at her on more than one occasion. The next morning S.S. asked B.S. for a ride home. B.S. told S.S. no because defendant took the car. When defendant came back, S.S. asked him to take her home, but defendant convinced S.S. to stay for breakfast. According to S.S., "I was acting as if nothing happened so he wasn't going to think that I was going to say anything because if I acted like scared and all, please take me home now, crying and being dramatic, he was going to think something of that, so I acted like everything was fine. * * * Because I don't know what he could do. I don't know either of them. I didn't know if they were going to do something."

{¶ 26} Before they took S.S. home, defendant and B.S. told S.S. to sing along with some music, and they videotaped her, although S.S. did not know it at the time. Asked why she sang for them, S.S. testified to the following:

{¶ 27} "I don't know. Anything that I could do to make them just not do anything, anything that I could — just act like everything was fine, anything I could say or do just to make them think that I wasn't going to say anything or — * * *.

{¶ 28} "Q: Was everything fine?

{¶ 29} "A. No."

{¶ 30} Records from S.S.'s cellular phone were introduced at trial during S.S.'s testimony, and they show that on September 20, 2008 between 1:13 a.m. and 1:55 a.m., the following text messages were exchanged between defendant and S.S.:

{¶ 31} "i think you hot. its me mel.

{¶ 32} "really ?

{¶ 33} "Yes. r u a virgin

{¶ 34} "nope

{¶ 35} "Can me and u b alone

{¶ 36} "uummm?

{¶ 37} "B wont mind. first time 4 everything right. a blk guy

{¶ 38} "ya but I dono.

{¶ 39} "Its cool. trust me.

{¶ 40} "why u want me alone?

{¶ 41} "u not a virgin. you kno

{¶ 42} "see I don't do stuff wit people i dont really no.

{¶ 43} "It's a way 2 get 2 kno eachother. i want u.

{¶ 44} "thats not the only way.

{¶ 45} "I kno but u are so sexy and im sure we would enjoy eachother

{¶ 46} "I cant even do it.

{¶ 47} "Come in here."

{¶ 48} At 2:16 a.m., S.S. sent the following message to a friend: "u need to

keep textin me right now k cuz i have a problem." A subsequent message stated, "im here @ my friends and this kid is tryna fuck me but anyways wat u doin?" S.S. testified that she did not tell her friend what was happening because she was in shock and embarrassed.

{¶ 49} During S.S.'s cross-examination, defense counsel pointed out various inconsistencies between S.S.'s testimony and the written statement she gave to the police on September 23, 2008. For example, in the statement, S.S. did not mention that defendant came out of the room and stared at her after the incident or that she slept for an hour or two. Additionally, S.S.'s statement to the police alleged that defendant took off her shirt, bra, and pants. However, at trial S.S. testified that she took off her shirt and bra after defendant told her to, and defendant took off her pants.

{¶ 50} S.S. also testified during cross-examination about messages on MySpace.com between her and B.S. in September of 2008, arranging a night when S.S. would go to B.S. and defendant's house to "chill." On September 16, 2008, S.S. and B.S. agreed that S.S. would spend the night at B.S.'s house on September 19, 2008. B.S. posted the following: "k. I'll let my dude know what's up. think he hangin wit the fella's. wat time u want me to pick u up?" B.S. also referred to the upcoming night as "a 2 gurl slumber party."

{¶ 51} On September 18, 2008 — the day before S.S. went to B.S. and defendant's house — B.S. and S.S. posted a string of messages containing sexual references on MySpace.com, which we reviewed.

{¶ 52} Defendant argues that the communication among defendant, S.S., and B.S. "leading up to the events of September 19, 2008 leaves no question about [S.S.'s] understanding and intentions," and "no reasonable juror could have found that [defendant] compelled [S.S.] to submit to intercourse by force or threat of force."

{¶ 53} While these text messages and internet postings may have been provocative, they are in no way evidence of consent to sexual conduct. If anything, S.S.'s messages are evidence of her unwillingness to participate. More importantly, S.S. testified that she told defendant, "No" multiple times, both immediately before and during the sexual intercourse. This testimony, if believed, is enough to convict defendant of rape. Ohio courts have repeatedly held that "[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Blankenship* (Dec. 13, 2001), Cuyahoga App. No. 77900. See, also, *State v. Daniels*, Cuyahoga App. No. 92563, 2010-Ohio-899. Additionally, a jury is free to believe all, part, or none of a witness's testimony at trial. *State v. Harriston* (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144. As the jury is in the best position to view witness credibility, we cannot say that this jury lost its way in finding defendant guilty of raping S.S. Defendant's first two assignments of error are overruled.

{¶ 54} In defendant's third assignment of error, he argues as follows:

{¶ 55} "III. The trial court erred in admitting certain other acts evidence."

{¶ 56} Defendant argues that the court should have excluded evidence that

he lived, and had a sexual relationship, with B.S., who, in September of 2008, was 16 years old and six months pregnant with defendant's child. We review the admissibility of evidence for an abuse of discretion. *Peters v. Ohio State Lottery Comm*. (1992), 63 Ohio St.3d 296, 587 N.E.2d 290.

{¶ 57} Pursuant to Evid.R. 403(A), relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Furthermore, Evid.R. 404(B) states that "[e]vidence 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." See, also, R.C. 2945.59.

{¶ 58} In the instant case, the court denied the state's notice of intent to use evidence of prior acts. This ruling excluded evidence of defendant's 1992 conviction for gross sexual imposition and felonious assault, for which he served 15 years in prison, as well as multiple incidents of "sexually deviant" and "sociopathic" behavior during his incarceration. Also excluded from trial were allegations that defendant coerced B.S. to live with him upon his release from prison, that he impregnated her when she was 15 years old, and that he and B.S. had brought other minor females "into their bedroom for his sexual desires." It is undisputed that none of this evidence was admitted or proffered at trial.

{¶ 59} Nonetheless, the evidence that defendant argues was improperly

admitted via S.S.'s testimony consists of the following: S.S. recalled seeing pictures of B.S.'s "pregnant belly" on MySpace.com; B.S. introduced defendant to S.S. as "my boyfriend"; B.S.'s MySpace.com screen name was "Brandy [* * *]&Mel 4eva;" and MySpace.com messages posted by B.S. stating "with the baby on the way and all its not good to drink while being pregnant" and "right now me and my b.d. [defendant] stay on Harvard (east) but we bought a house on west 18th."

{¶ 60} The evidence about B.S.'s screen name, her posting about "the baby," and her posting about where she and defendant lived was elicited by defense counsel on cross-examination. In *State v. Hartford* (1984), 21 Ohio App.3d 29, 31, 486 N.E.2d 131, this court held that any objection to Evid.R. 404(B) prior acts testimony is waived when the defendant opened the door to this evidence. Defendant's position in the instant case was consistent throughout trial — that S.S. knew exactly what she was doing when she spent the night at B.S. and defendant's house, and the sex was consensual.

{¶ 61} As to the evidence that B.S. was pregnant and that she referred to defendant as her "boyfriend," we question whether this amounts to other *acts* by defendant. Regardless, this evidence could lead to a reasonable inference by the jury that defendant engaged in prior sexual acts with a minor. However, as stated earlier, the defense that the sex was consensual relies on S.S.'s allegedly agreeing to stay overnight with B.S. and her boyfriend, defendant, and the "expectation of what was very likely to come of her rendezvous on September 19,

2008." Accordingly, we cannot say that the probative value of this evidence was outweighed by the danger of unfair prejudice, and defendant's third assignment of error is overruled.

{¶ 62} Defendant's fourth assignment of error states as follows:

{¶ 63} "IV. Appellant was denied a fair trial as a result of prosecutorial misconduct."

{¶ 64} Defendant alleges that the prosecutor harassed B.S. and intimidated her into testifying. Defendant filed a "Request for Order to Investigate Factual Basis of Witness Tampering by Assistant Prosecuting Attorney Jennifer Driscoll" and a motion for a new trial, which the court denied after a hearing.

{¶ 65} Pursuant to Crim.R. 33(A)(2), the court may grant a defendant's motion for a new trial based on prosecutorial misconduct that materially affects his substantial rights. We review motions for new trials under an abuse of discretion standard. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76, 564 N.E.2d 54.

{¶ 66} At the hearing, defense counsel read into the record a letter allegedly written by B.S. on June 17, 2009, stating that the prosecutor wanted her "to testify to something other than the truth." The letter also claimed that the prosecutor threatened B.S. by telling her that if she did not cooperate, she would go to jail and her son would be taken away. B.S. claimed that as a result of the prosecutor's statements, she was intimidated into exercising her Fifth Amendment right not to testify in the instant case.

{¶ 67} The state, on the other hand, presented evidence that B.S. was being prosecuted as a co-defendant in juvenile court for the offenses against S.S. Additionally, B.S. was a named victim in other criminal cases against defendant. See Cuyahoga Common Pleas Case Nos. CR-521706 and CR-525798. It was in association with these cases, and not the instant case, that the state sought her cooperation. A subpoena was issued for B.S. to testify, however, B.S. failed to appear in juvenile court on more than one occasion. Subsequently, a warrant was issued for her arrest. The prosecutor contacted B.S.'s mother, who agreed to take B.S. to her next court appearance. B.S. spent the night before her court date at her parent's house. However, when B.S.'s mother awoke the next morning, B.S. was gone. Authorities located B.S., who was with defendant's sister. B.S. was arrested and put in jail; her parents took temporary custody of her son. Given this evidence, we cannot say that the court abused its discretion in denying defendant's motion for a new trial based on prosecutorial misconduct, and defendant's fourth assignment of error is overruled.

{¶ 68} Defendant's fifth assignment of error states that:

{¶ 69} "V. Appellant was denied a fair trial as a result of the state's failure to disclose exculpatory evidence or Brady material."

{¶ 70} Specifically, defendant alleges that there was a video recording on his cellular phone of S.S. "singing romantically" to him a few hours after the alleged rape took place. Defendant argues that he was denied access to this evidence and "[e]ither the phone itself or an electronic storage device with the

contents of the phone should have been given to [him] for use at trial."

{¶ 71} To warrant a new trial under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the state must have suppressed material evidence favorable to the defendant, and the suppression must have "undermine[d] confidence in the outcome of the trial." *Kyles v. Whitley* (1995), 514 U.S. 419, 506, 115 S.Ct. 1555, 131 L.Ed.2d 490 (internal citations omitted).

{¶ 72} In the instant case, defendant's cellular phone was confiscated. The Cuyahoga County Prosecutor's Office Internet Crimes Against Children Task Force's forensic investigation revealed that various files were deleted from the phone before the phone was in the state's possession. The state alleged that among the recovered files was illegal child pornography, thus, the phone was not returned to defendant. The state did, however, make the phone available to defendant for an independent examination of the phone's contents. The state also gave defendant an electronic copy of the files recovered from the phone, including pictures and two videos taken of S.S. and B.S. on September 20, 2008, which were introduced at trial.

{¶ 73} At trial, S.S. testified about why she sang for defendant the morning after the alleged rape, and why she appeared to be acting "normally" when the pictures and videos of her were taken. Given S.S.'s explanation that she was acting as if everything was fine out of shock and fear, we cannot say that an alleged video of her singing would have been favorable to defendant, nor would the alleged suppression of this video materially prejudice defendant.

Accordingly, defendant's fifth assignment of error is overruled.

{¶ 74} In defendant's sixth and final assignment of error, he argues as follows:

{¶ 75} "VI. The trial court erred in convicting and sentencing appellant of the sexually violent predator specification."

{¶ 76} R.C. 2971.01(H)(1) defines a "sexually violent predator" as "a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."

{¶ 77} In the instant case, the court convicted defendant of the sexually violent predator specification after a hearing and sentenced defendant to a maximum term of life in prison, as required under R.C. 2971.03.

{¶ 78} On February 5, 1992, defendant pled guilty to gross sexual imposition and felonious assault, and he served 15 years in prison for these offenses. Defendant argues that this prior conviction cannot be used as the predicate offense for the sexually violent predator specification, because the offense was committed before 1997. However, in reviewing the hearing regarding this matter, we find that the court used defendant's rape conviction in the instant case as the underlying offense for the sexually violent predator specification. We find that this conviction satisfies the first part of R.C. 2971.01(H)(1), namely, that defendant committed a sexually violent offense on or after January 1, 1997. See *State v. Mitchell*, Cuyahoga App. No. 94287, 2010-Ohio-5775 (holding that a first-time sex offender can be found to be a

sexually violent predator).

{¶ 79} Additionally, the court must find that a defendant is likely to engage in future sexually violent offenses. Pursuant to R.C. 2971.01(H)(2), the court may take the following into consideration:

{¶ 80} "(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense * * *.

{¶ 81} "(b) The person has a documented history from childhood, into the juvenile development years, that exhibits sexually deviant behavior.

{¶ 82} "(c) * * * the person chronically commits offenses with a sexual motivation.

{¶ 83} "(d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

{¶ 84} "(e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

{¶ 85} "(f) Any other relevant evidence."

{¶ 86} In making this finding in the instant case, the court took into consideration the following: Defendant was convicted of gross sexual imposition and felonious assault in 1992, when he was 19 years old. The facts surrounding the 1992 conviction involve defendant severely beating his girlfriend/victim with an electrical extension cord and a metal hanger, punching her in the face, and kicking her. Defendant then forced the victim to have vaginal intercourse with

his friend. Defendant then urinated on the victim's face and in her mouth, and anally raped her. The victim accused defendant of beating her since she had defendant's first child when she was 16 years old.

{¶ 87} Defendant spent 15 years in prison for this 1992 conviction, and the disciplinary reports from his incarceration show dozens of incidents of violent and sexually deviant behavior, including rape of inmates and consensual sex with inmates in violation of prison regulations. A Clinical Risk Assessment of defendant conducted by the Ohio Parole Board showed "problematic sociopathic behavior," anger management problems, and unsuccessful sexual offender treatment, indicating that "similar predatory behaviors would continue after his incarceration." Upon his release from prison, defendant impregnated the then 15-year-old B.S. and subsequently raped 17-year-old S.S. in his home.

{¶ 88} In light of this evidence, the court did not err in finding that defendant is a sexually violent predator, and defendant's sixth and final assignment of error is overruled.

Judgment 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.

JAMES J. SWEENEY, PRESIDING JUDGE

LARRY A. JONES, J., and
KENNETH A. ROCCO, J., CONCUR