[Cite as *State v. Carson*, 2016-Ohio-1126.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103286

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THEBES LOUIS CARSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582886-A

BEFORE: E.T. Gallagher, J., Jones, A.J., and Keough, J.

RELEASED AND JOURNALIZED: March 17, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Thebes Louis Carson ("Carson"), appeals from his convictions following a jury trial. He raises one assignment of error for our review:

> 1. The appellant was denied his right to trial by jury and to present a defense by the trial court's failure to give a jury instruction requiring a finding of sexual gratification or oral stimulation.

{¶2} After careful review of the record and relevant case law, we affirm Carson's convictions.

I. Procedural and Factual History

{¶3} In March 2014, Carson was named in a four-count indictment charging him with rape in violation of R.C. 2907.02(A)(1)(b), with a furthermore specification that the victim was less than ten years old at the time of the offense, rape in violation of R.C. 2907.02(A)(1)(c), gross sexual imposition in violation of R.C. 2907.05(A)(4), and kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motivation specification. In June 2015, the matter proceeded to a jury trial where the following facts were adduced.

{¶4} Minor victim, J.D. (d.o.b. 05/11/04), who was 11 years old at the time of trial, testified that when he was nine years old, he accompanied his mother ("Mother") to a party at the house of a family friend. Later that evening, J.D. fell asleep on the living room couch with a blanket over him. J.D. testified that his brother ("Brother") was playing video games in the living room at the time he fell asleep. At some point in the night, J.D. woke up when he heard Carson talking to Brother. According to J.D., Carson then "went under the covers," "pulled down [his] undies," and began "sucking" on his penis. The following day, J.D. told Mother

about the incident. Mother immediately contacted the police, and J.D. was taken to the hospital where a rape kit was collected.

{¶5} Brother (d.o.b. 01/06/03) testified that he was playing video games in the living room where J.D. was sleeping on the night of the incident. He testified that Carson came into the living room and sat down on the couch where J.D. was sleeping. After a brief conversation with Carson about the video game he was playing, Brother noticed Carson put his head "under the blanket that was covering [J.D.]." Brother clarified, however, that he could not actually see what Carson was doing under the blanket. In addition, Brother did not know how long Carson was under the blanket because he was concentrating on his video game.

{¶6} Brittany Farinacci, a forensic scientist at the Ohio Bureau of Criminal Investigation ("BCI"), performed a forensic analysis on the samples collected in J.D.'s rape kit. Farinacci testified that the swabs taken from J.D.'s penis tested positive for a substance known as amylase, a protein found in body fluids. Although Farinacci testified that she could not be certain what bodily fluid the amylase originated from, she explained that the substance is most commonly found in saliva.

{¶7} Samuel Troyer, a DNA specialist at BCI, testified that he developed a DNA profile from the DNA extracted from J.D.'s penile swab. After comparing the profile to the known DNA standards taken from J.D. and Carson, Troyer determined that the DNA extracted from the penile swab contained a single DNA profile that was consistent with Carson. Troyer testified that he would expect to see this DNA profile in one in every 229,700,000,000,000,000 random unrelated individuals.

{¶8} At the close of the state's case, the trial court granted defense counsel's Crim.R. 29 motion in part, and dismissed the charge of kidnapping and its attendant specification. The defense then rested without presenting any witnesses or evidence.

{¶9} Prior to the jury being charged, defense counsel requested the trial court to instruct the jury that the term "fellatio" requires a showing of (1) penetration and (2) sexual gratification or oral stimulation. The trial court denied defense counsel's request, finding the proposed instruction to be inconsistent with *Ohio Jury Instructions*, CV Section 507.02 ("OJI 507.02"), which defines fellatio as "a sexual act committed with the penis and the mouth."

{¶10} At the conclusion of trial, the jury found Carson guilty of the remaining counts and the furthermore specification that the minor victim was less than ten years old at the time of the offense. Carson was sentenced to life in prison with the possibility of parole after 15 years.

{¶11} Carson now appeals from his convictions.

II. Law and Analysis

{¶12} In his sole assignment of error, Carson argues the trial court abused its discretion by denying his request to instruct the jury that the term "fellatio" requires a showing of "sexual gratification or oral stimulation."

{¶13} A trial court has the broad discretion to determine whether or not the evidence adduced at trial supports a requested jury instruction. *State v. Singleton*, 8th Dist. Cuyahoga No. 98301, 2013-Ohio-1440, ¶ 35. Such a decision will not be disturbed absent a finding that the trial court abused its discretion. The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶14} In this case, Carson was charged with rape in violation of R.C. 2907.02(A)(1)(b) and (c). Those sections provide, in relevant part:

> No person shall engage in sexual conduct with another who is not the spouse of the offender * * *, when any of the following applies:
>
> * * *
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
>
> (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, 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 or because of advanced age.

Under R.C. 2907.01(A), "sexual conduct" includes "fellatio," which is not defined in the statute.

{¶15} In *In re. M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), the Ohio Supreme Court defined "fellatio" as "the practice of obtaining sexual gratification by oral stimulation of the penis." *Id*. at 150, citing *Webster's Third New International Dictionary* 836 (1986). *In re M.D.* involved a 12-year-old girl who had been prosecuted for complicity to commit rape for instructing a five-year-old boy to put his penis in the mouth of a five-year-old girl. *Id*. Applying the foregoing definition, the court disallowed the prosecution of the 12-year-old girl, finding that it was unlikely that either five-year-old child involved could have been physiologically or emotionally capable of sexual satisfaction or of oral stimulation. *Id.* at 152-153. The court explained, "[f]ellatio did not occur here, thus no rape was committed to which appellant could be an accessory." *Id.* at 152.

{¶16} In this case, the trial court instructed the jury on the definition of "fellatio" in accordance with the standard instruction found in OJI 507.02, which provides, "[f]ellatio means a sexual act committed with the penis and the mouth." Relying on the definition applied in *In re*

M.D., Carson argues the trial court's fellatio instruction was incomplete because it did not require the jury to determine whether there was proof of sexual gratification or oral stimulation.

{¶17} After careful consideration, we find no merit to Carson's reliance on *In re M.D.* While we acknowledge the definition set forth in *In re M.D.*, we do not believe the Supreme Court would support Carson's attempt to supplement or supersede the OJI's standard jury instruction on fellatio. Significantly, *In re M.D.* does not address the validity of the instructions provided to the jury. Instead, the case concerned the physiological and emotional limitations of the minor children involved and issues of public policy that are not present in this case. *See State v. Barrett*, 3d Dist. Defiance No. 4-06-04, 2006-Ohio-4546, ¶ 14. Thus, contrary to Carson's position, we are unable to conclude that *In re M.D.* stands for the proposition that the definition of fellatio in OJI 507.02 is deficient.

{¶18} Although we are cognizant that the Ohio Jury Instructions are not binding legal authority, Ohio appellate courts, including this court, have widely upheld the application of OJI 507.02 since its development. *See State v. Arnold*, 8th Dist. Cuyahoga Nos. 51254 and 51288, 1986 Ohio App. LEXIS 9149, * 11 (Nov. 20, 1986) (finding that the trial court's definition in accordance with the standard instruction found in OJI 507.02 was proper.); *State v. Robertson*, 8th Dist. Cuyahoga No. 66510, 1994 Ohio App. LEXIS 5272, * 9 (Nov. 23, 1994); *State v. Murrell*, 2d Dist. Montgomery No. 24717, 2012-Ohio-2108, ¶ 20; *State v. Clark*, 106 Ohio App.3d 426, 429, 666 N.E.2d 308 (3d Dist.1995); *State v. Trevino*, 3d Dist. Seneca No. 13-91-23, 1992 Ohio App. LEXIS 1444, * 9 (Mar. 20, 1992); *State v. D.D.F.*, 10th Dist. Franklin No. 13AP-688, 2014-Ohio-2075, ¶ 14. For these reasons, we find the trial court did not abuse its discretion by providing the jury with the standard jury instruction found in OJI 507.02.

{¶19} Carson's sole assignment of error is without merit and is overruled.

{¶20} 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.

EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR