

[Cite as *State v. Welch*, 2010-Ohio-1206.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93035

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO WELCH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503831

BEFORE: Gallagher, A.J., Dyke, J., and Boyle, J.

RELEASED: March 25, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Mario Welch appeals his convictions from the Cuyahoga County Court of Common Pleas. Finding no merit to the arguments set forth, we affirm.

{¶ 2} On December 4, 2007, a Cuyahoga County grand jury indicted Welch on two counts of gross sexual imposition, in violation of R.C. 2907.01(A)(1). On January 20, 2009, a jury trial commenced.

{¶ 3} At the time of the incident, the victim, Welch's biological niece, was 14 years old. The victim testified that on April 6, 2007, which was Good Friday, she, her brother, and two sisters spent the night at her grandmother's house. The victim's grandmother is Welch's mother. According to the victim and her brother, Welch was also present at the house that evening. The victim testified that while she and her siblings were watching two movies, Welch sat beside her on a loveseat in the living room. She testified Welch touched her thigh and her "privacy," or vaginal region, by placing his hand underneath her nightgown, although not beneath her underwear.

{¶ 4} The first time Welch touched the victim, she pushed Welch's hand off her thigh; however, when he touched her vaginal region, she relocated to the floor and continued to watch the movie alongside her brother and sisters. The victim also testified Welch placed his finger to his lips, which she understood to mean that she should "hush," or not say anything about what he had done. The

victim's brother corroborated her story that at some point during the movie, his sister got up from the loveseat and sat next to him.

{¶ 5} The victim testified that later that evening, she fell asleep on the floor beside her siblings on an air mattress. Welch fell asleep on the loveseat. At some time in the middle of the night, Welch knelt beside the victim and placed his hand on her waist, her side, and on her breast and began rubbing her. The victim testified that she was afraid Welch "was going to try to go further * * * than what was appropriate," so she rolled onto her side away from him, and Welch left her alone. The next morning, Welch gave the victim a \$20 bill, and told her not to tell anyone what had happened the night before. The victim testified she hid the money, and later threw it in the trash. When her mother arrived at the grandmother's house later in the day on April 7, the victim did not tell her mother that Welch had touched her in any way. The victim's mother testified that she saw Welch at the grandmother's house on April 7.

{¶ 6} October 9, 2007, was the first time since the April 2007 incident that the victim confided in someone that her uncle touched her vaginal region and her breast. The victim told her aunt, C.C., what had occurred on April 6 and 7 at her grandmother's house, and C.C. called the victim's mother to tell her what the victim had confided in her about Welch's conduct.

{¶ 7} At that point, the victim, her mother, and her stepfather went to the Newburgh Heights police station and filed a report. While Officer Joseph Szelenyi was taking her statement, the victim became so visibly upset that the

officer had to take several breaks in order to complete the victim's statement. Officer Szelenyi testified that in the process of his investigation, he made several attempts to contact Welch, Welch's wife, and Welch's mother, but was unsuccessful.

{¶ 8} At the close of the state's case, Welch moved the court for a Crim.R. 29 acquittal. Counsel argued that the state failed to introduce evidence on the element of force. The court denied the motion, and Welch proceeded with his case-in-chief.

{¶ 9} Welch presented two witnesses who testified that Welch was not at his mother's house on the evening of April 6 and early morning of April 7. His mother testified via deposition that her son was not at her house at all on Good Friday and, in fact, did not arrive at her house that weekend until after midnight on Sunday, April 8, 2007. N.C., Welch's cousin, testified Welch was with him at his house on the night of April 6 through and until 11:30 a.m. on April 7.

{¶ 10} At the close of the defense's case, defense counsel asked for an instruction on the lesser-included offense of sexual imposition, which the court gave. The jury returned a verdict of guilty on both counts of gross sexual imposition, as charged in the indictment. On February 26, 2009, the court sentenced Welch to 12 months in prison on each charge, to run concurrently, with five years postrelease control. Further, Welch was classified as tier 1 sex offender.

{¶ 11} Welch raises three assignments of error for our review.

{¶ 12} In his first assignment of error, Welch argues the trial court erred in denying Welch's motion for acquittal. Specifically, Welch contends the state failed to establish the element of force, necessary for a conviction on gross sexual imposition. Relying on the facts before us, we are not persuaded.

{¶ 13} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386. "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. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) *Id.*

{¶ 14} R.C. 2907.05(A)(1) states: "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force."

{¶ 15} In *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, the supreme court held: "Force need not be overt and physically brutal, but can be subtle and psychological. * * * In the within case, we are confronted with a child being told to do something by an important figure of authority, and commanded

not to tell anyone about it. * * * The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." (Internal citations omitted.)

{¶ 16} In *State v. Byrd*, Cuyahoga App. No. 79661, 2002-Ohio-661, where there was not a parent-child relationship, but instead an uncle-niece relationship, this court held that psychological force could be inferred from the inherent authority the adult male held over the child.

{¶ 17} In this case, Welch is the victim's uncle. The victim testified several times she was afraid of him, she was scared to tell her mother what her uncle had done to her, and he told her not to tell anyone what had happened. Furthermore, Welch gave the victim twenty dollars when he admonished her to keep quiet.

{¶ 18} Welch further suggests that the victim's failure to report the incident for six months somehow demonstrates insufficient evidence of the elements of gross sexual imposition. While it is true that the victim waited six months from the time of the incident to tell an adult what Welch had done to her, and while it is also true that on the same day she reported the incident, she was caught cutting class, we are not persuaded that this time lapse negates the evidence of the element of force.

{¶ 19} Because the state presented evidence that Welch's authority over the victim was sufficient to establish the element of force, we find that the trial

court did not err in denying Welch's Crim.R. 29 motion. Welch's first assignment of error is overruled.

{¶ 20} In his second assignment of error, Welch argues that his convictions are against the manifest weight of the evidence. Welch argues only that evidence that he "attacked, grabbed, or otherwise touched" the victim is absent.

{¶ 21} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 22} Under R.C. 2907.05(A)(1), the state must prove beyond a reasonable doubt that Welch had sexual contact with the victim, not his spouse, using force or the threat of force. Sexual contact is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.05(A)(1).

{¶ 23} The jury heard the victim's testimony that on one occasion, Welch touched her thigh and vaginal region, and that on a second occasion, he touched

and rubbed her breast. The jury heard the victim testify she was afraid of Welch, that he told her not to tell anyone, and that he paid her to keep quiet. The jury heard testimony from the victim's family members, placing Welch in the house on Good Friday and the following Saturday, and testifying how visibly upset the victim was when she reported the incident. The defense's evidence to the contrary was alibi evidence, i.e., Welch was not present at the his mother's house on the evening of April 6 or early morning hours of April 7.

{¶ 24} Clearly the jury found the victim and her family's testimony more credible than the testimony of Welch's mother and cousin, neither of whom came forward prior to trial to account for Welch's whereabouts that evening. We do not find that the jury lost its way in convicting Welch of both counts of gross sexual imposition. Therefore, we overrule Welch's second assignment of error.

{¶ 25} In his third assignment of error, Welch argues that he was denied a fair trial due to prosecutorial misconduct. Specifically, he argues he was prejudiced by the assistant prosecutor commenting on his failure to testify.

{¶ 26} "The conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial. It must be clear beyond a reasonable doubt that absent the conduct of the prosecution, the jury would still have found the defendant guilty." *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189. "The rule that the state cannot comment regarding a defendant's exercise of his right to remain silent enforces 'the underlying policies of the Fifth Amendment, which is to avoid having the jury

assume that a defendant's silence equates with guilt.” *State v. Alghaben*, Cuyahoga App. No. 86044, 2005-Ohio-6490.

{¶ 27} During his direct examination of Officer Szelenyi, the prosecutor asked first whether he had set up a time with Welch’s wife to meet Welch, and then whether he had interviewed Welch or his wife. To both questions, the witness responded “No.” During his closing remarks, the prosecutor commented that he was unable to reach Welch’s mother or wife during his investigation, and that at no time did any of Welch’s family members come forward with information about Welch or his whereabouts at the time of the incident. In his closing remarks, the prosecutor did not mention Welch’s failure to testify.

{¶ 28} While we agree that a prosecutor should be cautious not to walk so close to the line regarding a defendant’s constitutionally protected right to remain silent, we are not convinced this prosecutor’s questions to the investigating officer or his remarks during closing argument — which specifically referenced the unresponsiveness of Welch’s family, not Welch — rise to the level of prosecutorial misconduct. We find that under a totality of the circumstances, Welch was not prejudiced to the point of having received an unfair trial. Thus, Welch’s third 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR