[Cite as *State v. Sutton*, 2010-Ohio-245.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92771

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRY SUTTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490657

BEFORE: Rocco, P.J., Kilbane, J., and Dyke, J.

RELEASED: January 28, 2010

JOURNALIZED:

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Terry Sutton, appeals from his conviction for sexual battery in the common pleas court. He asserts that his conviction contravenes the manifest weight of the evidence. The trial court did not clearly lose its way in finding appellant guilty of sexual battery. Therefore, we affirm.

Facts and Procedural History

{¶ 2} Appellant was charged in a three-count indictment filed January 3, 2007 with two counts of rape and one count of kidnapping. He waived his right to a jury trial, and the case proceeded to trial before the court beginning September 23, 2008. At the trial, the court heard the testimony of the victim, N.J., Detective Michael Kovach and Patrolman Thomas Butler of the Cleveland Police Department, and the appellant.

{¶ 3} The victim, a 30-year-old mother of three, testified that on July 4, 2006 she attended a barbecue at her boyfriend's uncle's house in Mayfield Heights. At approximately midnight, she went to her boyfriend's mother's house in Cleveland, where she sat on the porch drinking cognac. Appellant, who she knew as "June" or "Chappy," arrived around 12:30 a.m. She had a brief conversation with him and Darion Crenshaw at approximately 1:00 a.m. About an hour later, she, appellant, and appellant's cousin, "Stank," sat

together in Stank's truck and talked about appellant's sister and appellant's job. She did not have any physical contact with appellant, did not show him her tatoos, and did not engage in any sexual banter with him.

{¶ 4} Shortly after this conversation took place, at approximately 2:30 a.m., N.J. went into the house, locked the door, and went to bed. Two other people were also asleep in the house. She closed the bedroom door, turned on the television, and lay down on a mattress on the floor. She was wearing a pink velour zip-up jacket, pink velour drawstring pants, a pink thong, white socks and tennis shoes. Before she went to sleep, she called her mother and asked her to wake her up at 6:45 a.m. to go to work the next day.

{¶ 5} N.J. awakened with "someone positioning theirselves upon me," by which she meant he was having sex with her. She thought it was her boyfriend and told him to stop, but she quickly determined it was not her boyfriend when she felt his face. She grabbed the man by the neck, turned him over, grabbed the back of his shirt, and picked him up. She then walked him over where she could reach a light switch, turned it on, and saw that it was appellant. She said appellant had turned off the television in the room, and had removed her pants.

{¶ 6} Appellant said he was sorry, but N.J. told him he was "goin' to jail" and walked him through the house to the kitchen where there was a telephone. She saw Darion Crenshaw in the living room playing a video

game. Appellant pulled away from her and ran away. She chased him outside, but he got into his truck, a red Denali Yukon, and drove away.

{¶ 7} N.J. returned to the house. She called her employer and told them she would not be coming into work, then went to the hospital, where she reported that she had been raped. She was examined and spoke with a police officer. Several days later, she spoke with a detective. She told the detective that she knew the person who had done this as "June" or "Chappy," but did not know his full name. Later, she saw appellant and his truck on the street and wrote down the license number, which she gave to the detective. The detective asked her to come in the following day, and she picked appellant's photograph out of a photo array.

{¶ 8} Patrolman Butler testified that he interviewed N.J. at the hospital. Detective Kovach testified about the information he obtained from N.J. He said he also spoke with appellant, who declined to give a statement but told Kovach that he and N.J. had had consensual sex.

{¶ 9} Appellant testified that he spoke with N.J. in the driveway at around 10:00 or 11:00 p.m. Later, as he was sitting in his cousin's truck, N.J. came over and sat on his lap, showed him her tattoos, and made sexually suggestive comments to him. Later that night, he said he went into a bedroom where she was watching television. They talked and engaged in "foreplay." She removed her own underwear. He left the room to get a

condom, but was unable to get one. He returned to the bedroom and they had sexual intercourse. Later, they got up and left the bedroom. He went outside, got into his truck and left because he had to go to work that morning.

{¶ 10} Appellant spoke with Detective Kovach and told him the sexual intercourse was consensual. He said that N.J. threatened to have him beaten, and told him that "she didn't want to feel like no ho and she got a reputation to protect."

{¶ 11} At the conclusion of the trial, the court found the appellant not guilty of kidnapping, and not guilty of rape in violation of R.C. 2907.02(A)(1)(c). The court also found appellant not guilty of rape in violation of R.C. 2907.02(A)(2), but guilty of the lesser included offense of sexual battery in violation of R.C. 2907.03(A)(1). The court sentenced him to three years of community control.

Law and Analysis

{¶ 12} Appellant was found guilty of violating R.C. 2907.03(A)(1), which provides that: "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: (1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." Although he seemingly admits that the evidence was sufficient to sustain his conviction for this offense, appellant argues that the manifest weight of the evidence does

not support it.

{¶ 13} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' * * *

{¶ 14} "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 (citations omitted).

{¶ 15} This case turned on the credibility of two persons, appellant and N.J. Appellant complains about the lack of corroborating testimony for N.J.'s version of the events. However, when his attorney asked N.J. whether she had anybody who could testify about the events that night, N.J. testified

that the other people in the house had said "they'd rather stay out of it" because they were friends of both appellant and N.J. This explanation for the lack of corroborating witnesses does not bring N.J.'s credibility into question.

{¶ 16} Appellant also argues that "[N.J.'s] initial testimony under oath completely disregarded the fact that she met with Defendant-appellant [sic] and got into a vehicle with him to watch fireworks." We disagree. On direct examination, N.J. testified that she got into a truck with appellant and "Stank." She denied touching appellant during this encounter.

{¶ 17} This is not "the exceptional case in which the evidence weighs heavily against conviction." *Thompkins*, supra. The victim testified that appellant had removed her underclothing and had sexual intercourse with her while she was asleep after she had been drinking for several hours. When she awoke, she objected. We find nothing in her testimony that leads us to question the credibility of her version of the events. Therefore, we cannot say that the weight of the evidence does not support the conviction.

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 be sent to said 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
ANN DYKE, J., CONCUR