[Cite as *State v. Bacho*, 2010-Ohio-4885.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93828

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN BACHO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510100

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

RELEASED AND JOURNALIZED: October 7, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, John Bacho, appeals from his convictions on two counts of sexual battery with forfeiture specifications. He asserts that the evidence is insufficient to sustain his convictions on these charges and that his convictions contravene the manifest weight of the evidence. Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the crimes of sexual battery to be proven beyond a reasonable doubt. We further find that the jury did not clearly lose its way or create such a manifest miscarriage of

justice that the judgment should be reversed and the case remanded for a new trial. Therefore, we affirm.

Facts and Procedural History

{¶ 2} Appellant was charged in a six-count indictment filed April 29, 2008 with five counts of sexual battery in violation of R.C. 2907.03(A)(7) and one count of possession of criminal tools. Each count contained a forfeiture specification that alleged that appellant was the owner of a 2002 Ford truck that was used or intended to be used to facilitate the offense.

{¶ 3} The case proceeded to a jury trial beginning July 8, 2009. At the conclusion of the trial, the jury found appellant guilty of two counts of sexual battery that occurred on or about November 27, 2007. The jury also found that the state proved the forfeiture specifications on each of these charges. The jury found appellant not guilty of the remaining charges. The court sentenced appellant to concurrent terms of three years of imprisonment on each charge, to be followed by five years of postrelease control. The court further ordered the forfeiture of the appellant's 2002 Ford truck.

{¶ 4} At trial, the state presented the testimony of the victim, S.W., who was a minor at the time these crimes occurred; her friend, Alison Farone; Pamela Nigro, one of S.W.'s supervisors at her place of employment; Gregory Dotson, a Summit County Deputy Sheriff; Jason Shadle, a Pepper Pike police officer and an expert in evidence recovery; and Strongsville Police Detective

Robert Kustis.

{¶ 5} S.W. testified that appellant was her economics teacher during her junior year at Strongsville High School. They became friends because of their common interests in music and movies. She acted as appellant's student aide, a position she described as "kind of just an excuse to hang out with each other."

{¶ 6} At the beginning of the school year in September 2007, S.W. rode the bus to and from school. Beginning in October 2007, appellant began giving S.W. and her friend, Leah Baker, rides home from school in his blue Ford pickup truck. He would drop S.W. off in a parking lot adjacent to her home so that her parents would not become suspicious. S.W. said she also went with appellant to his landscaping jobs a couple of times.

{¶ 7} S.W. testified that beginning in mid-October 2007, she began to see more of appellant outside of school. Once in October, at approximately 8:00 p.m., they went to the cemetery where appellant's mother was buried and talked for 45 minutes to an hour. A police officer approached their car and asked appellant for identification.[1] Appellant also took S.W. to his parents' house on three occasions. Two of these visits included her friend, Leah, but on the third visit S.W. was alone with appellant. S.W. described

[1]Officer Dotson's testimony confirmed that he had an encounter with a man and a girl in a vehicle at All Saints Cemetery in Northfield Center on October 20, 2007 at approximately 9:43 p.m.

the frequent conversations she had with appellant telephonically, in person, and in writing.

{¶ 8} S.W. testified that in late October 2007, she and appellant were passing through the Metroparks on their way home from a landscaping job when appellant pulled into a parking area. They kissed and appellant put his hand inside her underpants and digitally penetrated her. She also testified that during the week after Thanksgiving, appellant picked her up after school and took her to his home. They went to the basement and watched television for a time, then started kissing. Appellant then took her upstairs to his bedroom where they undressed and appellant performed oral sex on her and digitally penetrated her. Later that same week, on a Friday or Saturday, appellant picked S.W. up and took her to his home. They watched a movie in his basement, then appellant took her up to his bedroom. The bedroom was lit with candles. He gave her several small gifts. They kissed and, again, appellant performed oral sex on her and digitally penetrated her.

{¶ 9} S.W. was called to the principal's office in early December. Her friend Leah had written a statement about the relationship between S.W. and appellant. She denied that anything had happened between her and appellant. However, in February 2008, at the prompting of another friend, she informed the police about their relationship.

Law and Analysis

{¶ 10} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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 492, paragraph two of the syllabus.

{¶ 11} Appellant was charged with five counts of sexual battery. One of these (Count 5) concerned the incident in the Metroparks in mid-October 2007. Two concerned the first November incident at appellant's home (Counts 1 and 2), and the remaining two concerned the second November incident at appellant's home (Counts 3 and 4). The jury found appellant guilty only on Counts 1 and 2, so we examine only the sufficiency of the evidence on those counts.

{¶ 12} Appellant was charged with violations of R.C. 2907.03(A)(7), which states: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: * * * (7) The offender is a teacher, administrator, coach, or other person in authority employed by

or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school." "Sexual conduct" is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶ 13} S.W.'s testimony provides ample support for appellant's conviction of these charges. S.W. testified that appellant was a teacher at Strongsville High School, S.W. was a student attending that school, and appellant engaged in sexual conduct with her while she was at his home, specifically, cunnilingus and digital penetration of her vagina. A reasonable fact-finder could have found the essential elements of these crimes proven beyond a reasonable doubt. Therefore, we overrule appellant's challenge to the sufficiency of the evidence.

{¶ 14} Appellant also challenges the weight of the evidence. In his brief, appellant speculates about the reasons why the jury found him not guilty on the other charges, and suggests that there were similar reasons for

rejecting S.W.'s testimony as to these charges as well. We decline to speculate about the jury's reasons for finding appellant not guilty on the other charges.

{¶ 15} The victim's testimony indicated that these events took place between 3:30 and 5:30 p.m. on a weekday, and neither appellant's wife nor his three children nor their nanny was present in the home. Appellant presented testimony indicating that appellant's wife, children and nanny were home that week. While this testimony contradicts the victim's testimony that she believed appellant's wife was out-of-town, it still does not show that appellant's wife and children were at home between 3:30 and 5:30 p.m. that day. In fact, defense evidence that appellant's wife's credit card was used for a purchase at Giant Eagle at 4:54 p.m. on that date, and a series of cellular telephone calls between appellant and his wife at 3:14 p.m., 5:17 p.m., and 5:37 p.m. tend to support the proposition that they were not at home. It was for the jury to determine whether they believed the appellant and his wife when they testified that appellant was shopping with his wife and children at the time.

{¶ 16} We cannot say that the jury clearly lost its way or created such a manifest miscarriage of justice that appellant's convictions should be reversed. Accordingly, we affirm.

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

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR