[Cite as *State v. Coleman*, 2010-Ohio-5779.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94372

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY COLEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524150

BEFORE: Stewart, J., Rocco, P.J., and Sweeney, J.*

RELEASED AND JOURNALIZED: November 24, 2010

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MELODY J. STEWART, J.:

{¶ 1} Appellant, Timothy Coleman, appeals his convictions for kidnapping and gross sexual imposition. Following review of the record and for the reasons stated below, we affirm.

{¶ 2} On May 2, 2009, the Cuyahoga County Grand Jury returned a three-count indictment against appellant. Count 1 charged kidnapping under R.C. 2905.01(A)(4), a felony of the first degree; Count 2 charged gross sexual imposition under R.C. 2907.05(A)(1), a felony of the fourth degree; and

Count 3 charged gross sexual imposition under R.C. 2907.05(A)(4), a felony of the third degree. Count 1 also contained a sexually violent predator specification. The charges arose out of an incident in March 2009 involving one of the students at the elementary school where appellant worked as a custodian. The state alleges that appellant used his position at the school to trick the student into going into his office where he forcibly held her against her will and touched her buttocks.

{¶ 3} Appellant waived his right to a jury trial and was tried to the bench. At trial, the victim testified that she was going to the office to get a band-aid for her finger. Appellant saw her in the hallway and told her the girls' bathroom was out of toilet paper. He directed her to go to his office to get some. When she got there, she found there was no toilet paper. Appellant then came into the office and closed the door. He told her he wanted to get her away from the cameras to give her a hug. She claimed he wrapped his arms around her, pressed her close to his body, and then rubbed and squeezed her bottom with one of his hands. She said he had a strong smell of liquor on him. After she made a gesture to let her go, appellant released her and she went back to her class. She was upset and told a girl in the class what had happened. A boy in the class overheard and immediately reported the incident to the principal, Joyce Hunter.

{¶ 4} Ms. Hunter pulled the victim from class and, after speaking with her, notified the school's security officers. Hunter testified that she did not speak to appellant that day but that he phoned her days later and apologized, telling her, "that wasn't the kind of person he was." He admitted he had been drinking that day and had hugged the victim, but denied groping her.

{¶ 5} The school district's facilities manager, Larry Bittle, testified that he responded to the allegation of misconduct by appellant, who is under his supervision. He spoke to appellant who explained that he had asked a girl student to go and get some toilet paper for the girls' bathroom, but denied putting his hands on her. He admitted drinking alcohol but claimed he stopped drinking at 3:15 a.m. Bittle took appellant to an alcohol testing facility in accordance with school policies. After the test results showed that at 3:30 p.m. appellant's blood alcohol level was just below the level for legal intoxication, appellant changed the time he claimed to have stopped drinking to 6:15 a.m. Weeks later, at a termination hearing, appellant admitted hugging the victim.

{¶ 6} Appellant took the stand in his own defense. He admitted that he was an alcoholic. He said he had been drinking the night before because he was upset over the death of the mother of a close friend. He admitted asking a girl to go to his office to get toilet paper for the girls' bathroom. He said he was surprised to find there was no toilet paper there and gave the girl

a hug for her help before sending her back to class. He said he thought nothing of the hug because it was innocent. He denied touching the girl on the buttocks and insisted that there was nothing sexual about the hug.

{¶ 7} The trial court found appellant guilty of all three counts but not guilty of the sexually violent predator specification. Appellant was sentenced to a five-year term of community control and classified a Tier III Sex Offender.

{¶ 8} Appellant timely appeals assigning two errors for review, arguing that there is insufficient evidence to support the convictions, and that Senate Bill 10, adopting the Adam Walsh Act, is unconstitutional.

{¶ 9} "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.

{¶ 10} The elements of gross sexual imposition are stated in R.C. 2907.05(A), which provides: "No person shall have sexual contact with

another, not the spouse of the offender; * * * when any of the following applies:

{¶ 11} " (1) The offender purposely compels the other person to submit by force or threat of force.

{¶ 12} " * * *

{¶ 13} "(4) The other person, * * * is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 14} "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. 2907.01(B).

{¶ 15} The elements of kidnapping when the victim is under the age of 13 are stated in R.C. 2905.01(A)(4): "No person, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]" R.C. 2907.01(C) defines "sexual activity" to mean "sexual conduct or sexual contact, or both."

{¶ 16} It is undisputed that on the date in question, the victim was under the age of 13. The victim's testimony establishes that appellant's touching went far beyond that of an innocent hug as appellant claimed. She

testified that she was on her way to the office for a band-aid when appellant sent her to his office for toilet paper. There was no toilet paper in the office when she got there. She said she froze when appellant came in, closed the office door, and told her that he wanted to get her there "away from the cameras" to give her a hug. She testified that appellant, who was "way bigger than me," held her against him with one arm while he rubbed and squeezed her "butt" with his other hand.

{¶ 17} Two of the victim's classmates testified to the victim being upset when she returned to class. The school's principal testified to seeing the victim before the incident when she sent her to the office for a band-aid. She testified that after the incident the victim was "visibly upset," "kind of shaken," as if she had been crying. The principal and several other witnesses testified to appellant being intoxicated that day at school.

{¶ 18} When the trial transcript in this case is reviewed in a light most favorable to the state, the evidence and testimony admitted at trial warrants a reasonable jury in finding that the essential elements of all of the offenses were proven beyond a reasonable doubt. While appellant denied having any sexual intent, the trier of fact could infer from the facts presented that appellant was motivated by sexual desire or gratification. See *State v. Cobb* (1991), 81 Ohio App.3d 179, 610 N.E.2d 1009. Appellant's first assignment of error is overruled.

{¶ 19} For his second assignment of error, appellant claims that "Senate Bill 10, the Adam Walsh Law, is unconstitutional as it imposes an additional punishment in violation of the Double Jeopardy Clause of the Ohio and United States Constitutions as well as the prohibition against cruel and unusual punishment as guaranteed by the Eighth Amendment."

{¶ 20} Appellant acknowledges that past decisions of this court render this assignment of error unviable. He presents it nevertheless to protect his rights going forward. He makes no legal argument in favor of his position, but generally asks this court to reconsider its past decisions. We decline to do so. Based upon prior precedent of this court, appellant's second assignment of error is overruled. See *State v. Bias*, 8th Dist. No. 93053, 2010-Ohio-1977; *Gildersleeve v. State*, Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031; *State v. Acoff*, Cuyahoga App. No. 92342, 2009-Ohio-6633.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES D. SWEENEY, J.,* CONCUR

(*Sitting by assignment: Retired Judge of the Eighth District Court of Appeals)