

[Cite as *State v. Gordon*, 2010-Ohio-777.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93059

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES GORDON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511678

BEFORE: Stewart, J., McMonagle, P.J., and Cooney, J.

RELEASED: March 4, 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).

MELODY J. STEWART, J.:

{¶ 1} The grand jury returned a two-count indictment against defendant-appellant, James Gordon, charging him with rape under R.C. 2907.02(A)(2) and (A)(1)(c), respectively. Gordon waived a jury and elected to try the matter to the court. The court granted his Crim.R. 29(A) motion for judgment of acquittal on Count 1, but found him guilty as charged on Count 2 — that he engaged in sexual conduct with another person who had been impaired by medication that caused her to fall asleep, rendering her unable to consent. In this appeal, Gordon complains that the state failed to offer sufficient evidence to prove the rape charge and that the court’s verdict is against the manifest weight of the evidence. We find no error and affirm.

I

{¶ 2} For his first assignment of error, Gordon complains that the state failed to offer sufficient evidence to establish the elements of rape under R.C. 2907.02(A)(1)(c) because it did not offer proof to show that the victim’s ability to consent to sexual conduct had been substantially impaired.

{¶ 3} R.C. 2907.02(A)(1)(c), states that no person shall engage in sexual conduct with another who is not the spouse of the offender when “[t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition * * *.” This court has held that sleep is a mental or physical condition that substantially impairs a person from

resisting or consenting to sexual conduct. See *State v. Clark*, 8th Dist. No. 90148, 2008-Ohio-3358, at ¶21; *State v. Graves*, 8th Dist. No. 88845, 2007-Ohio-5430, at ¶22; *State v. Younger*, 8th Dist. No. 86235, 2006-Ohio-296.

{¶ 4} The victim testified that she had been babysitting a niece and nephew at her mother's apartment where the rape occurred. Suffering from a headache, she took a pain reliever, "Tylenol P.M.," which consisted of a combination of acetaminophen and benadryl. The victim said that Tylenol P.M. always made her sleepy, so she went into her mother's bedroom to sleep.

{¶ 5} About 20 minutes later, Gordon, her half-brother, came to the door. She let him in the apartment and returned to the bedroom with her nephew and again fell asleep. She awoke some time later to find Gordon engaging in intercourse with her. When she realized what was happening, she turned to look at him. Gordon left the bed without saying anything. The victim denied consenting to sexual conduct.

{¶ 6} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 7} Gordon conceded that he engaged in sexual intercourse with the victim, so the sole issue for the court was whether the victim's ability to consent to sexual conduct had been impaired because she had been asleep. The facts presented by the state were, in conjunction with the aforementioned authority from this court, sufficient to allow a rational trier of fact to conclude that the victim's ability to consent had been substantially impaired by medication that made her fall so deeply asleep that she was unaware Gordon had been engaging in sexual conduct with her. Being unaware that sexual conduct had been occurring, the victim was impaired from giving consent.

{¶ 8} Gordon contends that his evidence showed that the victim had been awake when they engaged in sexual conduct, noting that the nephew remained in the bed while they engaged in intercourse and that she yelled at the nephew. This argument is one involving the credibility of the witnesses. Our standard of review for the sufficiency of the evidence precludes us from considering the weight of the evidence because we must view the evidence in a light most favorable to the state. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541. A rational trier of fact could have concluded that the victim had been sleeping at the time Gordon engaged in sexual conduct with her.

{¶ 9} For his second assignment of error, Gordon complains that the judgment of conviction is against the manifest weight of the evidence due to various instances in which the victim lacked credibility. He maintains that his version of events was “just as credible” as the victim’s version of events.

{¶ 10} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009. The use of the word “manifest” means that the trier of fact’s decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to “believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 11} Gordon primarily complains that the victim’s assertions that she did not consent to sexual conduct lacked credibility because she did not immediately report the rape — she did not inform anyone of the crime until

she learned she was pregnant, and further admitted that had she not become pregnant, she would not have reported the crime at all.

{¶ 12} The victim's failure to immediately report the rape may have been a potential mark against her credibility. However, the court could have found her explanation for not immediately reporting the crime convincing — her reticence to report the rape was caused by the taboo nature of the incident. And the evidence showed that she identified Gordon as the father of the child at a point when he completely denied having intercourse with her.

DNA testing of fetal tissue obtained after the pregnancy had been terminated confirmed Gordon's paternity. For his part, Gordon's credibility suffered because he repeatedly denied having intercourse with the victim and only relented once DNA testing irrefutably contradicted that denial. In the end, the issue of whether the victim validly consented to sexual conduct came down to the court's assessment of credibility. It was left to the court to determine whether consent had been impaired. The guilty verdict obviously resolved that matter in the state's favor. We see nothing in the record to show that the court lost its way in doing so.

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. 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.

MELODY J. STEWART, JUDGE _____

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR