[Cite as *State v. Cloud*, 2001-Ohio-3396.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 98 CO 51
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	O P I N I O N
	)	
LAWRENCE E. CLOUD, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas, Columbiana County, Ohio Case No. 97 CR 178

JUDGMENT: Affirmed in Part; Reversed and Remanded in Part

APPEARANCES:

For Plaintiff-Appellee:
Atty. Robert L. Herron
Prosecuting Attorney
Atty. Timothy McNicol
Asst. Prosecuting Attorney
105 South Market Street
Lisbon, Ohio 44432

For Defendant-Appellant:
Atty. R. Eric Kibler
37½ North Park Avenue
Lisbon, Ohio 44432

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 26, 2001

WAITE, J.

{¶1} This timely appeal arises out of Appellant's jury conviction in the Columbiana County Court of Common Pleas on one count of sexual battery. Appellant, Lawrence Cloud, Jr., argues that he was entitled to jury instructions on voluntary intoxication and alibi. He claims that he was unconscious at the time of the crime and thus, the state cannot prove that he committed a voluntary act, which is an essential element of every crime. Appellant also argues that the trial court did not make the findings required in order to sentence him to the maximum sentence. Appellant's arguments with regard to sentencing are meritorious, and the matter is reversed and remanded for resentencing only. The judgment is affirmed in all other respects.

{¶2} Appellant was convicted of committing a sexual battery on January 4, 1997, against his stepdaughter. The victim was fifteen years old at the time. The victim, her mother and Appellant lived together in a trailer near New Waterford, Ohio.

{¶3} The record reveals that the victim went to bed at approximately 3:00 a.m. on the morning of January 4, 1997. (Tr. p. 231). Her mother and stepfather had been out drinking earlier the previous evening at the Country Rock Tavern near East Palestine, Ohio. Sometime during the early morning hours Appellant returned to the trailer, but left again to go to a

party. (Tr. p. 230). It is not clear when Appellant or the victim's mother returned to the trailer after the party.

{¶4} The victim awoke to find Appellant laying across her right leg, with one hand on her thigh and the other hand on her breast. (Tr. p. 232). Appellant moved the hand that was on his stepdaughter's thigh to her crotch area, moved her underpants out of the way and inserted his finger into her vagina. (Tr. p. 232). The victim immediately ran to her mother, but was unable to awaken her. Later that day, the victim contacted the East Palestine Police Department and reported the crime. She was immediately removed from her mother's custody and placed with an aunt.

{¶5} Appellant was indicted on June 6, 1997, on one count of sexual battery in violation of R.C. §2907.03(A)(5), a third degree felony. Appellant was convicted by jury on April 28, 1998.

{¶6} On June 26, 1998, the trial court imposed a five-year prison sentence on Appellant, which is the maximum prison term available for a third degree felony. R.C. §2929.14(A)(3). We cannot discern from the record whether Appellant served any prison terms prior to being sentenced to prison in this case. The trial court did not make the finding required by R.C. §2929.14(B) that the shortest prison term would demean the seriousness of Appellant's conduct or would not adequately protect the public from future crime. The court also did not make the findings

required by R.C. §2929.14(C) when it imposed the maximum prison term.

{¶7} The trial court appointed counsel for purposes of appeal, and Appellant filed a timely notice of appeal. Thereafter, Appellant failed to file a brief after this Court granted six extensions. On September 9, 1999, Appellant's counsel filed a motion to withdraw. The motion was granted on October 14, 1999, and substitute counsel was appointed. Appellant was granted two more leaves to file his brief, with a final date set for February 13, 2000. Appellant filed a brief on February 14, 2000, along with a request for oral argument. Appellee filed its brief on April 7, 2000.

{¶8} On June 22, 2000, Appellant filed a motion for bond with this Court.

{¶9} On December 1, 2000, Appellant filed a pro se motion instanter to supplement his brief. On February 21, 2001, Appellant's counsel also filed a supplemental brief. This Court, by journal entry, sustained the motion to supplement and accepted both briefs on appeal.

{¶10} On February 21, 2001, Appellant also filed with this Court a motion seeking bail and requesting a stay of execution of sentence, which was overruled.

{¶11} Appellant's three briefs present a total of eight assignments of error. They will be evaluated out of order for

ease in analysis.

{¶12} Appellant's second assignment of error asserts:

{¶13} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S CR. R. 29(A) MOTIONS TO ACQUIT MADE AT THE CLOSE OF THE STATE'S CASE, AND AT THE CLOSE OF ALL EVIDENCE, FOR THE REASON THAT THE STATE FAILED TO PRESENT A PRIMA FACIE CASE AS TO SEXUAL BATTERY."

{¶14} Appellant argues that he was asleep or unconscious when the sexual contact between himself and his stepdaughter took place. Appellant contends that an essential element of sexual battery is that the accused committed a voluntary act. Appellant asserts that an unconscious act is not voluntary, and therefore he could not have committed an essential element of the crime. Appellant claims that he made a timely Crim.R. 29(A) motion to acquit and that the trial court should have granted it based on the state's failure to present evidence as to one of the essential elements of the crime.

{¶15} Appellee responds that the victim testified that Appellant moved his hand up her thigh, moved her panties out of the way, and inserted his fingers into her vagina. (Tr. p. 232). Appellee contends that this testimony is sufficient to show that Appellee's actions were voluntary, and that the trial court correctly denied the Crim.R. 29(A) motion to acquit.

{¶16} The standard of review of a denial of a Crim.R. 29(A) motion to acquit is the same as the standard of review for sufficiency of the evidence. *State v. Bridgeman* (1978), 55 Ohio

St.2d 261, at syllabus. In reviewing the sufficiency of the evidence to support a criminal conviction, the relevant inquiry for the appellate court, "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 beyond a reasonable doubt." *State v. Waddy* (1992), 63 Ohio St.3d 424, 430.

{¶17} Appellant was convicted on one count of sexual battery in violation of R.C. §2907.03(A)(5), which states:

{¶18} "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶19} " * * *

{¶20} "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, or custodian, or person in loco parentis of the other person."

{¶21} An essential element of every crime is the defendant's *actus reus*, or criminal act. This requirement has been codified in R.C. §2901.21 which states, in pertinent part:

{¶22} "(A) Except as provided in division (B) of this section, *a person is not guilty of an offense unless both of the following apply*:

{¶23} "(1) *His liability is based on conduct which includes either a voluntary act, or an omission to perform an act* or duty which he is capable of performing.

{¶24} "(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." (Emphasis added).

{¶25} Ohio courts have generally concluded that a defendant's claim that his actions were involuntary because he was asleep or unconscious is in the nature of an affirmative defense. *State v. LaFreniere* (1993), 85 Ohio App.3d 840, 849; *State v. Robinson* (May 27, 1986), Montgomery App. No. 9547, unreported; *State v. Murray* (April 18, 1990), Lorain App. No. 89 CA 004648, unreported. Affirmative defenses includes those defenses which are, "peculiarly within the knowledge of the accused." R.C. §2901.05(A)(1). The burden is on the accused to prove an affirmative defense by a preponderance of the evidence. R.C. §2901.01(A). Whether Appellant met this burden involves the weight and credibility of the evidence, which are primarily for the trier of fact to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of syllabus.

{¶26} Appellant relies on his testimony at trial that he went to bed in his own bedroom in the early morning hours of January 4, 1997, and woke up around 8:00 a.m. that same morning. (Tr. pp. 339-341). He also raises the point that the victim, in the course of testifying about the events of that morning, stated that Appellant did not appear to be conscious *after* the crime was committed. (Tr. p. 236). The jury apparently did not believe Appellant's testimony, and the victim's testimony that Appellant was not conscious after he assaulted her does not negate the conclusion that Appellant was awake at the time of the assault.

The jury could have inferred from the remaining circumstantial evidence at trial that Appellant was awake and that his actions were voluntary. The trier of fact may rely on circumstantial evidence and all reasonable inferences arising therefrom in arriving at its verdict. *State v. Jenks* (1991), 61 Ohio St.3d 259, 265. The factfinder is also free to believe some, all, or none of the testimony of any witnesses. *Domigan v. Gillette* (1984), 17 Ohio App.3d 228, 229.

{¶27} The jury weighed the evidence and it was within their province to determine if Appellant had established by a preponderance of the evidence that he was asleep at the time of the crime. The victim's testimony is otherwise very specific as to Appellant's actions constituting the offense. (Tr. pp. 232-233). A rationale trier of fact could have found that Appellant's actions were voluntary and that he did not meet his burden of proving the affirmative defense of unconsciousness. On this basis, the trial court correctly denied the Crim.R. 29(A) motion to acquit.

{¶28} Appellant's first assignment of error and third pro se assignment of error allege:

{¶29} "THE JUDGMENT AND VERDICT OF GUILTY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶30} "APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶31} Appellant's arguments are similar to those made in the

previous assignment of error, except that he argues that the manifest weight of the evidence does not support the conclusion that his actions were voluntary. Reviewing courts will not reverse a decision on manifest weight grounds unless (after evaluating the record, weighing the evidence and reasonable inferences arising therefrom and considering witness credibility) the reviewing court determines that the trial court, "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. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. In contrast to a sufficiency review, an appellate court is not required to view the evidence in a light most favorable to the prosecution but rather should determine whether the parties have carried their burdens of persuasion. *Id.*

{¶32} Once again, the issue depends on the credibility of Appellant's testimony that he was asleep during the time that the sexual battery took place. It would be perfectly reasonable for a jury to believe that a man who moved his hand along a woman's thigh, moved her underpants out of the way and inserted his fingers in her vagina, did so consciously and under his own volition. The jury cannot be said to have clearly lost its way in coming to such a conclusion, and therefore, the manifest weight of the evidence does not contradict the jury decision.

{¶33} Appellant's third assignment of error and first pro se assignment of error allege:

{¶34} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST FOR A JURY INSTRUCTION ON THE DEFENSE OF ALIBI.

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT TO INSTRUCT THE JURY ON THE POSSIBILITY THAT APPELLANT'S INTOXICATION NEGATED FORMATION OF THE SPECIFIC INTENT, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE OHIO CONSTITUTION."

{¶36} Appellant argues that he timely filed a notice of alibi, presented alibi testimony at trial and relied on an alibi as his sole defense. Appellant asserts that under these circumstances, the trial court was required to give the jury an instruction on alibi and that such an omission rises to the level of plain error, citing *State v. Bridgeman* (1977), 51 Ohio App.2d 105, in support.

{¶37} Appellee argues that if a criminal defendant does not adduce evidence tending to show that he was elsewhere when the crime occurred, a jury instruction on alibi is not warranted, citing *State v. Mitchell* (1989), 60 Ohio App.3d 106, in support.

{¶38} Appellee's argument is persuasive. R.C. §2945.11 requires the trial court to instruct the jury with all the law required to return a verdict. "Where a defendant does not adduce evidence tending to show that he was elsewhere when the crime occurred, a jury instruction on alibi is not warranted."

Mitchell, supra, at 108; *City of Parma v. Cosic* (Mar. 30, 2000), Cuyahoga App. No. 76034, unreported; see also *State v. Melchior* (1978), 56 Ohio St.2d 15, 21.

{¶39} Alibi has been defined as follows: "[t]he defense of alibi means that the defendant claims he was at some place other than the scene of the crime at the time the crime was taking place, and hence could not have taken part." *State v. Payne* (1957), 104 Ohio App. 410, 414; *State v. Rickard* (Sept. 25, 1992), Mercer App. No. 10-91-5, unreported. Appellant contends that he was in another room in the trailer at the time the crime occurred. Appellant did not testify that he was in another place in which it would have made it impossible for him to have committed the crime. Therefore, no instruction on alibi was warranted and the trial judge did not err in failing to instruct the jury on alibi.

{¶40} Appellant also argues pro se that there was evidence that he was intoxicated during the time that the crime occurred, and that voluntary intoxication is a defense to a specific intent crime such as sexual battery, citing *State v. Hicks* (1989), 43 Ohio St.3d 72, 75. Appellant further argues that the trial court committed plain error in failing to instruct the jury on the intoxication defense.

{¶41} Plain error has been defined as, "an obvious error which is prejudicial to an accused, although neither objected to nor affirmatively waived, which, if allowed to stand, would have a

substantial adverse impact on the integrity of and public confidence in judicial proceedings." *State v. Craft* (1977), 52 Ohio App.2d 1, paragraph one of the syllabus. The error must be obvious on the record, palpable and fundamental, and in addition it will occur only in exceptional circumstances where the appellate court acts in the public interest because the error affects the fairness, integrity or public reputation of judicial proceedings. *Id.* at 7.

{¶42} While R.C. §2901.21(C), effective October 27, 2000, no longer allows a criminal defendant to use the defense of voluntary intoxication, this defense was available to Appellant. However, it was within the sound discretion of the trial court to determine whether the evidence is sufficient to require a jury instruction on intoxication. *State v. Wolons* (1989), 44 Ohio St.3d 64, paragraph two of the syllabus; *State v. Fox* (1981), 68 Ohio St.2d 53, 56. Evidence of intoxication is sufficient to raise the intoxication defense only where, if believed, it would support acquittal. *State v. Hicks*, 43 Ohio St.3d at 72, 75. Appellant does not point to anything in the record which shows that he was so intoxicated that he could not have had the specific intent to commit the crime. The *Hicks* court recognized that, "[t]he issue of intoxication is not raised as a defense to the element of purpose * * * merely because the evidence suggests reduced

inhibitions, impaired judgment or blurred appreciation by the defendant of the consequences of his conduct." *Id.* at syllabus.

{¶43} Appellant testified that he had some beers at the Country Rock Tavern and at a subsequent party at a friend's home. (Tr. p. 337). Appellant also testified that he walked back to the trailer after the party, and that it was a half-hour walk. (Tr. p. 337). Appellant testified that after arriving at the trailer he spent some time trying to get warm, remembered leaving an outside light on and turned it off, looked to see if any dirty dishes needed to be washed and thought about making himself a sandwich but decided against it. (Tr. pp. 337-338). Appellant's admitted actions and thought processes are inconsistent with a theory that he was so intoxicated that he could not appreciate the consequences of his actions. Therefore, we find no error in the failure of the trial court to give the jury an instruction concerning voluntary intoxication.

{¶44} Appellant's fourth and fifth assignments of error assert:

{¶45} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM SENTENCE, AS THE COURT DID NOT FIND THAT THE PARTICULAR ACT OF SEXUAL BATTERY WAS THE 'WORST FORM' OF THE OFFENSE, PURSUANT TO R.C. SECTION 2929.14, NOR DID THE COURT GIVE ITS REASONS FOR IMPOSING THE MAXIMUM TERM AS REQUIRED BY R.C. SECTION 2929.19.

{¶46} "THE TRIAL COURT ERRED IN NOT IMPOSING THE MINIMUM SENTENCE."

{¶47} Appellant argues that the trial court failed to make the

specific findings required by R.C. §2929.19(B)(2)(d) when it imposed the maximum sentence of five years imprisonment for a third degree felony. Appellant also argues that because he had not previously served a prison sentence he was entitled to receive the minimum prison sentence pursuant to R.C. §2929.14(B), unless the court found on the record that the shortest prison term would demean the seriousness of the crime or would not adequately protect the public from future crime. Appellant argues that the trial court made no such findings on the record. Appellant concludes that he should have been sentenced to the minimum term of one year in prison for a third degree felony. R.C. §2929.14(A)(3).

{¶48} Appellee argues that the record supports the imposition of the maximum sentence because Appellant was convicted of sexual battery against his stepdaughter and because he had two prior convictions of domestic violence. Appellee argues that under the relatively new sentencing statute as defined by 1995 Am.Sub.S.B. No. 2, effective July 1, 1995, a reviewing court may only modify or vacate a sentence if it finds by clear and convincing evidence that the record does not support the sentence or that the sentence is otherwise contrary to law. R.C. §2953.08(G). Appellee contends that the record supports the sentence and should be affirmed.

{¶49} Appellant's argument on this issue is partially meritorious and the matter should be remanded for resentencing.

{¶50} R.C. §2929.14(B) provides in pertinent part:

> **{¶51}** "(B) Except as provided in division (C), (D)(2), (D)(3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and *if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense* pursuant to division (A) of this section, *unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime* by the offender or others."

{¶52} A sentencing court must include certain statutory findings if the offender has not previously served a prison term. R.C. §2929.14(B). These were highlighted in *State v. Edmonson* (1999), 86 Ohio St.3d 324, where the court ruled that, "the record of the sentencing hearing must reflect that the court found either or both of the two statutorily sanctioned reasons for exceeding the minimum term warranted the longer sentence." *Id.* at 326. The sentencing court, however, need not provide reasons for its findings. *Id.* at syllabus.

{¶53} A court of appeals no longer applies an abuse of discretion standard when reviewing a felony sentence. *State v. Pickford* (Feb. 22, 1999), Jefferson App. No. 97-JE-21, unreported,

6. The standard of review is now governed by R.C. §2953.08(G), which states, in pertinent part:

> **{¶54} "(G)(1) The court hearing an appeal of a sentence under division (A) * * * of this section may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds any of the following:**
>
> **{¶55} "(a) That the record does not support the sentence;**
>
> **{¶56} "* * *
>
> **{¶57} "(d) That the sentence is otherwise contrary to law."**

{¶58} R.C. §2953.08(A) provides grounds by which a defendant may appeal his or her sentence as of right, including appeals based on the imposition of the maximum sentence or the imposition of a sentence that is contrary to law.

{¶59} The record is unclear whether Appellant served a prior prison term. The presentence investigation report is not in the record. The transcript of the sentencing hearing indicates that Appellant had one or possibly two previous convictions for domestic violence, but does not indicate that he served a prison term as part of his prior sentencing. This Court has held that it will no longer presume from a silent record that a trial court considered the statutory sentencing factors found in R.C.

§2929.14(B). *State v. Pickford* (Feb. 22, 1999), Jefferson App. No. 97-JE-21, unreported; see also *State v. Gray* (Mar. 4, 1999), Cuyahoga App. No. 72940, unreported. Without some indication in the record that Appellant actually served a prior prison term, his sentencing is governed by the presumption, absent certain findings, that he should have received the minimum prison sentence pursuant to R.C. §2929.14(B).

{¶60} The record does not contain one of the findings required by R.C. §2929.14(B), namely, that the shortest prison term would demean the seriousness of the offender's conduct or that it would not adequately protect the public from future crime. Therefore, the sentence was contrary to law and Appellant's fourth assignment of error has merit, in part. The record reveals that the trial court did not consider the possibility that Appellant should receive the minimum sentence pursuant to R.C. §2929.14(B), thus, we must remand the case to permit the trial court to make a determination which complies with R.C. §2929.14(B).

{¶61} Similarly, R.C. §2929.14(C) dictates that a maximum sentence can only be imposed upon offenders who commit the worst form of the offense, who pose the greatest likelihood of recidivism, or who can be identified as major drug offenders or repeat offenders as defined in other parts of the statute. R.C. §2929.19(B)(2)(d) also requires that the trial court make findings

and give its reasons for imposing a maximum sentence. *Edmonson, supra,* 86 Ohio St.3d at 329.

{¶62} The trial court failed to make any of the findings required by R.C. §2929.19(B)(2)(d), and failed to gives its reasons for imposing the maximum sentence. The trial court imposed the five-year maximum sentence without any explanation. (6/26/98 Tr. p. 11). Thus, the sentence is also contrary to the law governing maximum sentences and Appellant's fifth assignment of error has merit. Because of the above sentencing errors, we must reverse the sentence and remand the matter for resentencing.

{¶63} Appellant's second pro se assignment of error alleges:

{¶64} "APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION."

{¶65} Appellant argues that his counsel was ineffective because he refused to request a jury instruction on voluntary intoxication. As analyzed above, Appellant was not entitled to such an instruction because his own testimony negated the possible conclusion that he was so intoxicated that he could not appreciate the consequences of his actions. *Hicks, supra,* 43 Ohio St.3d at syllabus.

{¶66} Reviewing courts begin with a strong presumption that

counsel's representation was effective. *State v. Bradley* (1989), 42 Ohio St.3d 136, 138. In determining whether an attorney's representation was ineffective, this Court must determine whether that representation was deficient due to serious errors and, if so, whether the deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Because counsel's failure to request a jury instruction on voluntary intoxication was not in error, counsel's performance does not appear to be at all deficient and cannot be the basis for an ineffective assistance of counsel challenge.

CONCLUSION

{¶67} Appellant's argument that he was unconscious at the time of the crime is an issue involving the weight and credibility of the evidence and is without merit. Appellant's argument that the jury should have been instructed about an alibi defense is also meritless because he presented no evidence that he was in another location at the time of the crime. Likewise, Appellant's contention that the jury should have been instructed on the defense of voluntary intoxication must fail because his own testimony was inconsistent with a theory of voluntary intoxication. Appellant's argument as to ineffective assistance of counsel has no merit because Appellant's counsel did not err in failing to request an instruction concerning voluntary

intoxication.

{¶68} Appellant's assignments of error as to the imposition of the maximum sentence and failure to impose the minimum sentence are persuasive, in that the trial court made no findings with regard to either. The sentence is hereby vacated and the case remanded for resentencing on those two issues.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.