[Cite as *State v. Morales*, 2010-Ohio-3061.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1119

Appellee — Trial Court No. CR0200803911

v.

Louis Morales — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Louis Morales, appeals from a judgment in the Lucas County Court of Common Pleas finding him guilty of sexual battery. For the reasons set forth below, we affirm.

{¶ 2} On January 5, 2009, appellant was indicted on one count of rape in violation of R.C. 2907.02 and one count of sexual battery in violation of R.C.

2907.03(A)(2) and (B). After a jury trial, appellant was found not guilty of rape and guilty of sexual battery.

{¶ 3} On June 7, appellant was at his home with the victim, her fiancé (appellant's son), appellant's cousin, and appellant's wife. Sometime during the later evening hours, appellant began to drink alcohol with the victim, his son, and his cousin. Appellant's wife, who had come home early from work due to an illness, remained in her bedroom over the course of the evening.

{¶ 4} Later, appellant's son fell asleep on the couch. It is unclear from the testimony whether the cousin was sleeping on the floor by the couch or in an unknown location. Appellant and the victim went outside to continue drinking by the fire in the back yard. Later, the victim returned inside the home to sleep with appellant's son on the couch. Appellant testified he returned inside the home and went to bed with his wife.

{¶ 5} At this point, appellant testified that he had second thoughts on whether he appropriately extinguished the fire in the backyard and got out of bed to check. On the way through the living room, he claims the victim was sitting up on the couch smoking a cigarette and he gestured her to follow him outside. When appellant extended his hand, the victim grabbed it and the two headed towards the back of the house. Appellant testified they became sidetracked and instead went into the computer room where the two engaged in consensual sexual intercourse.

{¶ 6} Alternatively, the victim testified she had fallen asleep on the couch and was awakened by appellant. She contends appellant physically pulled her out of the chair

and led her to the computer room where he forcibly removed her pants and engaged in non-consensual sexual intercourse against her will.

{¶ 7} After the incident concluded, the victim immediately left the premises and called her brother. Her brother notified the police, and met the victim at a Speedway gas station a few blocks from the residence. The victim provided the attending officer with her undergarments and subsequently went to St. Luke's hospital for examination.

{¶ 8} Appellant was found guilty of the charge of sexual battery and was sentenced to five years in prison on April 16, 2009. Appellant now appeals setting forth the following assignments of error.

{¶ 9} "I. The trial court erred by giving two different definitions of an essential element of the offense in the jury instructions.

{¶ 10} "II. The trial court abused its discretion by imposing a sentence that was not the shortest authorized and by imposing the maximum sentence allowed."

{¶ 11} In his first assignment of error, appellant contends that including the terms fellatio and cunnilingus in the jury instruction for rape but excluding both terms in the instruction for sexual battery confused the jurors by providing them with two alternative definitions for the term sexual conduct. Initially, we note appellant failed to object to the jury instructions at the time of trial and thus forfeited all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus, *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 12} "Criminal Rule 52(B) provides: 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the

trial court.' Plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Miller*, 2d Dist. No. 2857207, 2009-Ohio-4607 (quoting *Long*, supra, at paragraph three of the syllabus). "In the context of jury instructions, the Ohio Supreme Court has held that failure to 'separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error,' but that under such circumstances plain error review requires the examination of the record in each individual case." Id. (quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 154, and at paragraph two of the syllabus).

{¶ 13} The Ohio Jury Instructions define sexual conduct as follows:

{¶ 14} "Sexual conduct means (vaginal intercourse between a male and female) ([anal intercourse] [fellatio] [cunnilingus] between persons regardless of sex) (without privilege to do so, the insertion, however slight of any [part of the body] [instrument] [apparatus] [object] into the [vaginal] [anal] cavity of another). (Penetration, however slight, is sufficient to complete [vaginal] [anal] intercourse)." 2 Ohio Jury Instructions (2010) 275, Section 507.02(A)(1).

{¶ 15} Here, appellant was charged with one count of rape and one count of sexual battery. For rape, the trial court defined sexual conduct as follows: "Number one, Sexual conduct. Sexual conduct means vaginal intercourse, fellatio or cunnilingus between persons regardless of their sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶ 16} Alternatively, for sexual battery, the trial court defined sexual conduct as follows: "One, engage in sexual conduct. Sexual conduct means vaginal intercourse between a male and female and digital penetration by a male of a female. Penetration, however slight, is sufficient to complete vaginal intercourse or digital penetration."

{¶ 17} In this case, appellant contends that by including the terms "fellatio" and "cunnilingus" in the definition of sexual conduct for rape but not including the terms for sexual battery could potentially lead to confusion amongst the jurors. This argument is without merit.

{¶ 18} "Strict compliance with those model instructions [found in the Ohio Jury Instructions] is not mandatory; a trial court is not required to 'slavishly follow form instructions.' Instead, the instructions are recommended instructions * * * crafted by eminent jurists to assist trial judges with correctly and efficiently charging the jury as to the law applicable to a particular case. Deviation from the model instructions does not necessarily constitute error by the trial court." *State v. Miller*, 2d Dist. No. 2857207, 2009-Ohio-4607 (quoting *State v. Martens* (1993), 90 Ohio App.3d 338, 343).

{¶ 19} Furthermore, "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251. That being the case, here there was no evidence to merit including "fellatio" and "cunnilingus" in the definition of sexual conduct for sexual battery. Without such evidence, the trial court is not required to include such an instruction to the jury. *State v. Durkin* (1981), 66 Ohio St.2d 158.

Therefore, by excluding the terms, the trial court did not commit plain error. Appellant's first assignment of error is found not well-taken.

{¶ 20} In appellant's second assignment of error, he contends the court abused its discretion by sentencing him to the maximum imposable sentence for a third degree felony. In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster* (2006), 109 Ohio St.3d 1, paragraph seven of the syllabus. Thus, an appellate court reviews felony sentences for an abuse of discretion. Id. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619.

{¶ 21} Nonetheless, R.C. 2929.11 and 2929.12, which require consideration of the purposes and principles of felony sentencing and the seriousness and recidivism factors, must still be considered by trial courts in sentencing offenders. *State v. Mathis* (2006), 109 Ohio St.3d 54. R.C. 2929.11(A) provides that when a trial court sentences an offender for a felony conviction it must be guided by the "overriding purposes of felony sentencing." Those purposes are "to protect the public from future crime by the offender

and others and to punish the offender." R.C. 2929.11(B) states that a felony sentence "must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." Finally, R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors. *State v. Silvey*, 6th Dist. No. L-07-1304, 2009-Ohio-1537.

{¶ 22} Appellant in this case was convicted of one third degree felony. Pursuant to R.C. 2929.14(A)(2), the prison term for a third degree felony, such as sexual battery in violation of R.C. 2907.03(A)(2) and (B), shall be one, two, three, four, or five years.

{¶ 23} As appellant's sentence of a five year term was within applicable statutory parameters, we find no abuse of discretion and appellant's second assignment of error is found not well-taken.

{¶ 24} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

JUDGE

Mark L. Pietrykowski, J. _____

Arlene Singer, J. _____

CONCUR.

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.