

[Cite as *State v. Ciacchi*, 2010-Ohio-1975.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92705

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY CIACCHI

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED, VACATED, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515551

BEFORE: Gallagher, A.J., Dyke, J., and Boyle, J.

RELEASED: May 6, 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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Anthony Ciacchi, appeals his conviction and sentence for gross sexual imposition in violation of R.C. 2907.05(A)(1). For the reasons stated herein, we reverse the judgment, vacate the conviction and sentence for gross sexual imposition, and remand the matter for a new trial.

{¶ 2} Ciacchi was indicted on September 25, 2008, and charged with attempted rape, kidnapping, and gross sexual imposition. Ciacchi entered a plea of not guilty to the charges, and the case proceeded to a jury trial commencing on November 17, 2008.

{¶ 3} At the time of trial, Ciacchi was a 51-year-old divorced man who had recently been diagnosed with colon cancer. He worked part-time cleaning bars. The victim was a 50-year-old widow who was unemployed, but received a monthly widow's benefit from the Veteran's Administration. She is HIV positive. The victim and Ciacchi offered different accounts of an encounter that occurred on September 12, 2008.

{¶ 4} The victim lives in an apartment on Cranford Avenue in Lakewood. She testified that she frequently takes a bus for transportation and she is familiar with some of the individuals she would see standing outside a bar near her bus stop. According to the victim, she was acquainted with Ciacchi, whom she knew as "Tony."

{¶ 5} The victim stated that on the afternoon of September 12, 2008, she was heading home when she saw Ciacchi waiting at a bus stop, holding a Mr.

Hero bag. Because it was raining, she invited him to her apartment for lunch, and he agreed. She denied that sex was mentioned or that she asked him for money.

{¶ 6} When they arrived at the victim's apartment, she went to hang up her sweater in her bedroom. She testified that when she returned to the living room, Ciacchi was undressed and appeared to be masturbating. She told him, "that's not what you're here for." He stated, "yes, it is," grabbed the victim, and pushed her down on the couch, where a struggle ensued. She testified that Ciacchi grabbed at her clothes and breasts, ripped her bra strap, and was purportedly trying to have sex with her. The victim kicked Ciacchi and was able to run out of the door of her apartment. She screamed to a neighbor to call 911. When Ciacchi entered the hallway, she pushed him away, ran back into her apartment, locked the door, and waited for the police.

{¶ 7} Ciacchi's umbrella, cell phone, fanny pack, and underwear were left in the apartment, as well as a condom and a Mr. Hero bag. The victim provided a description of Ciacchi to the police, but did not identify his name as "Tony." She claimed that her knee and hip were injured during the sexual assault. She went to the hospital the next day and was treated.

{¶ 8} Ciacchi testified that he was not acquainted with the victim. He claimed that on September 18, 2008, he was walking to a store to pay his cell phone bill and was approached by the victim. He stated that the rain had stopped and that he was not carrying any food. He had a little over \$140 on him.

{¶ 9} The court sustained objections to questioning and testimony concerning what the victim stated to Ciacchi on the street. Ciacchi was able to testify that the victim propositioned him on the street and that he went to her apartment after paying her \$20 for oral sex. However, he was not able to provide further details of the conversation that occurred on the street.

{¶ 10} Ciacchi testified that when they arrived at the victim's apartment, she told him to go into the bedroom and then asked him to remove his pants. The court sustained an objection concerning testimony as to what the victim asked Ciacchi to do, and his testimony was again limited.

{¶ 11} According to Ciacchi, the victim placed his pants, which had money in them, outside of the room and then instructed him to wait as she excused herself from the room. After a few minutes, the victim ran back into the bedroom screaming rape, and then ran out of the door. Ciacchi testified that he was shocked. He put his pants and shoes on and went out of the door after her, leaving some of his personal items behind. The door locked behind him. He stated that he did not see the victim, and he walked to the corner and waited for the police.

{¶ 12} Ciacchi denied bringing a condom to the apartment, denied the victim's account of what transpired, and denied having any intent to force her to have sex with him. Although he admitted that he left underwear behind in the apartment, he stated that the underwear presented at trial was different from what he wore. No money was found with his belongings.

{¶ 13} The victim's neighbor testified that he heard the victim screaming, "he's trying to rape me[,] please call 911." He stated that the victim's clothes were disheveled, she was trying to cover her breast, and she appeared scared. He also heard Ciacchi yelling, "I ain't done nothing to you." The neighbor went to his apartment and called the police.

{¶ 14} Lakewood police responded to the scene. They described the victim as being very upset. She screamed she had been attacked by a male. After obtaining a description of the suspect, the police located Ciacchi two streets away. When he was asked what happened on "Cranford Avenue," Ciacchi denied knowing where the street was located. The police observed that Ciacchi had been drinking alcohol. Ciacchi testified that he smelled of alcohol because he worked at a bar that morning.

{¶ 15} The police took photographs of the living room of the apartment where the victim stated the sexual assault had occurred. Ciacchi claimed the living room had been staged by the victim. There also were discrepancies in the testimony concerning the clothing that the victim and Ciacchi were wearing. Although the victim stated she had been scratched during the assault, no visible marks were observed or photographed on the victim.

{¶ 16} The trial court denied Ciacchi's motions for acquittal under Crim.R. 29. At the conclusion of trial, the jury found Ciacchi not guilty of attempted rape and kidnapping, but guilty of gross sexual imposition, a felony of the fourth degree. The trial court sentenced him to two years of community control with

conditions, and ordered him to pay a supervision fee of \$200. As a result of the conviction, Ciacchi was designated a tier I sex offender.

{¶ 17} Ciacchi timely appealed his conviction and sentence. He raises seven assignments of error for our review. His first assignment of error provides as follows: “1. The trial court committed prejudicial error, and denied Ciacchi due process and a fair trial, in sustaining the prosecutor’s objections and barring the defendant from testifying about the alleged victim’s statements to him offering sex for money.”

{¶ 18} Ciacchi argues that he should have been permitted to testify about the victim’s statements concerning a solicitation for sex and that the prosecutor and the trial court interfered with his right to defend himself against the charges. Ciacchi was able to testify that the victim propositioned him on the street and that he went to her apartment after paying her \$20 for oral sex. He also was able to cross-examine the victim at trial. However, he was precluded from testifying in detail about what the victim stated to him on the street and while at her apartment. The trial court sustained objections to this line of questioning.

{¶ 19} The state contends that the testimony was properly excluded as hearsay and that the rape shield statute barred Ciacchi from inferring any potential past prostitution of the victim. We disagree.

{¶ 20} The testimony was not hearsay, rather, the statements in question were “verbal acts” that were offered to support the defense theory that the victim

engaged him through an act of prostitution and to prove consent.¹ Verbal acts may be admitted to explain an actor's conduct in reaction to the statements, to show the effect on the hearer, and to show the mental state of the declarant. See *State v. Williams* (1988), 38 Ohio St.3d 346, 348, fn. 4, 528 N.E.2d 910, citing Giannelli, Ohio Evidence Manual (1982) 7-8, Section 801.06.

{¶ 21} Additionally, the testimony was not precluded by Ohio's rape shield law, R.C. 2907.02(D). The statute essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity, with limited exceptions. Ohio courts have recognized that application of the rape shield statute may not unduly infringe upon a defendant's constitutional right of confrontation, right to a fair trial, and right to present a defense. See *State v. Young*, Cuyahoga App. No. 92127, 2009-Ohio-5354; *State v. Gardner* (1979), 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337.²

{¶ 22} To protect a defendant's constitutional rights, courts must "balance the state interest which the [rape shield] statute is designed to protect against the probative value of the excluded evidence." *Gardner*, supra at 17. "The key to assessing the probative value of the excluded evidence is its relevancy to the matters as proof of which it is offered." *Id.*

¹ Certain cases have recognized that offers of sex in exchange for payment are not hearsay because they constitute verbal acts of prostitution. See *People v. Dell* (1991), 232 Cal.App.3d 248, 258, 283 Cal.Rptr. 361; *State v. Connally* (1995), 79 Hawaii 123, 125, 899 P.2d 406.

² We are not presented with a *Crawford* Confrontation Clause question with regard to Ohio's rape shield law.

{¶ 23} In *Gardner*, the Ohio Supreme Court found that “[e]vidence that [the] complainant had a reputation as a prostitute is not sufficiently probative of consent to outweigh the state’s legitimate interests in excluding the testimony, *at least where there is no suggestion in the record that financial arrangements were entered into for sexual activities in this instance.*” (Emphasis added.) *Id.* at 18. On the other hand, where the proffered evidence is offered for more than mere impeachment of credibility, and is directly probative of a material issue in the case, the evidence should not be excluded under the rape shield law. *State v. Williams* (1986), 21 Ohio St.3d 33, 487 N.E.2d 560.

{¶ 24} In this case, the state elicited testimony from the victim indicating a lack of consent. The defendant sought to introduce testimony about the victim’s statements soliciting sex for money on the street and the victim’s statements made at her apartment. This testimonial evidence was related to the specific sexual encounter at issue in the case, was directly probative of the material issue of consent, and was pertinent to Ciacchi’s defense. Therefore, the probative value of the testimony outweighs any interest the state has in exclusion. The exclusion of this testimony was not warranted by the rape shield law.

{¶ 25} Because the proffered testimony was neither hearsay nor properly excluded under the rape shield statute, the trial court erred by refusing to admit the testimony. Further, the omission of this testimony did not amount to harmless error because it affected Ciacchi’s substantial rights. See Crim.R. 52(A). Although Ciacchi was able to provide limited testimony about the

victim propositioning him and was able to cross-examine the victim, he was not afforded his right to present a complete defense. Because the excluded testimony was crucial to the defense theory and directly probative of an element of the crime, Ciacchi was not afforded a fair trial and we cannot say that such prejudicial error was harmless.

{¶ 26} For the foregoing reasons, Ciacchi's first assignment of error is well taken. Ciacchi is entitled to have the judgment reversed and the case remanded for a new trial on the gross sexual imposition charge.

{¶ 27} Ciacchi's remaining assignments of error are moot. Insofar as Ciacchi also raised a sufficiency challenge, although he was not afforded a complete defense, we cannot say from the record before us that he is entitled to an acquittal of the charge.³

³ The remaining assignments of error include the following:

"2. Prosecutorial misconduct deprived Ciacchi of his constitutionally guaranteed right to a fair trial, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article 1 of the Ohio Constitution."

"3. Anthony Ciacchi's conviction for gross sexual imposition is based upon evidence that is insufficient as a matter of law, in violation of Ciacchi's rights to due process and a fair trial as guaranteed by Article I, Sections 10 and 16 of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution."

"4. Anthony Ciacchi's conviction of gross sexual imposition is against the manifest weight of the evidence."

"5. Senate Bill 10 violates the double jeopardy clause of the United States Constitution and Section 10, Article I of the Ohio Constitution."

"6. Senate Bill 10, as applied to appellant, violates the United States and Ohio Constitution's prohibition against cruel and unusual punishment."

"7. Senate Bill 10's residency restrictions violate the due process clauses of the United States and Ohio Constitution."

{¶ 28} Judgment reversed, conviction and sentence for gross sexual imposition are vacated, and case remanded for a new trial.

It is ordered that appellant recover from appellee 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 common pleas court 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;

ANN DYKE, J., CONCURS IN JUDGMENT ONLY