**[Cite as *State v. King*, 2009-Ohio-5984.]**

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
| STATE OF OHIO | : | W. Scott Gwin, P.J. |
| | : | William B. Hoffman, J. |
| Plaintiff-Appellee | : | Julie A. Edwards, J. |
| | : | |
| -vs- | : | Case No. 2008 CA 00045 |
| | : | |
| | : | |
| JOHN KING | : | O P I N I O N |

Defendant-Appellant

| | |
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| CHARACTER OF PROCEEDING: | Criminal Appeal from Fairfield County Court of Common Pleas Case No. 08-CR-0076 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | November 6, 2009 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| GREGG MARX<br>Assistant Prosecuting Attorney<br>Fairfield County, Ohio<br>201 S. Broad St., Ste. 400<br>Lancaster, Ohio 43130 | ANDREW T. SANDERSON<br>Burkett & Sanderson, Inc.<br>21 West Church Street<br>Suite 201<br>Newark, Ohio 43055 |

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*Edwards, J.*

**{¶1}** Appellant, John D. King, appeals a judgment of the Fairfield County Common Pleas Court convicting him of one count of rape in violation of R.C. 2907.02(A)(1)(c). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

**{¶2}** Appellant and the victim, S.A., are first cousins. In November of 2006, they both lived with their grandmother and had a good relationship, sharing mutual friends.

**{¶3}** On November 21, 2006, S.A. and appellant went to a party at the home of Cynthia Sarver, who lived across the street from their grandmother's home. The group turned a card game called "Skip-Bo" into a drinking game. S.A. brought a bottle of Crown Royal whiskey from her grandmother's home at appellant's request, and another person at the party brought beer and his "beer bong." A beer bong is a big tube with a funnel. "You pour your beer in there and it pretty much goes down all at once." Tr. 130. The two people who lost the card game had to "do beer bong and a shot" of Crown Royal. Tr. 129.

**{¶4}** S.A. became intoxicated from the drinking game and began wrestling with one of the guests at the party. She began to feel sick and went outside for some fresh air. She then went into an upstairs bathroom where appellant rubbed her back while she vomited. The next thing S.A. remembered was being in a bedroom in Sarver's home with her head on a pillow and her "behind in the air." Tr. 138. She could hear appellant's voice in the room with her. The bedroom was illuminated by a streetlight

and she was able to identify appellant by his ears. S.A. blacked out. When she woke up, appellant was engaging in vaginal intercourse with her.

**{¶5}** S.A. ran from the house screaming that appellant had raped her. She ran first to her mother's home and rang the doorbell repeatedly. When her mother answered the door, she found S.A. sobbing and trembling uncontrollably. S.A. then ran to her grandmother's house, where she called 9-1-1.

**{¶6}** Deputy Michael Myers of the Fairfield County Sheriff's Department responded to the 9-1-1 call. S.A. was distraught and crying and appeared to the deputy to be intoxicated. An ambulance was called and S.A. was transported to the Fairfield Medical Center. S.A. reported to the paramedics that she had a bite mark, her underwear was on backwards and she had no idea how it could have happened.

**{¶7}** While S.A. was transported to the hospital, Deputy Myers interviewed appellant, who he knew from high school. When he told appellant that S.A. had accused him of raping her, appellant said that nothing happened, she was crazy and she had too much to drink. In a written statement, appellant stated that he went upstairs in Sarver's house and saw S.A. sitting with her pants off. He started putting her pants back on her, and she said, "You fucked me." Appellant told her that she was "retarded," threw her pants down, spit on her and walked away. Tr. 578.

**{¶8}** A rape kit was completed on S.A. at the hospital by a nurse. During the exam the nurse discovered a tampon lodged sideways against S.A.'s cervix. Swabs were taken from her vagina for DNA analysis. The DNA profile of appellant was analyzed by Anthony Winston, a forensic scientist from LabCorp. Appellant was determined to be the contributor of DNA in a sperm fraction found on the vaginal swabs

and a sperm fraction taken from S.A.'s underwear. The probability of randomly selecting an unrelated individual consistent with the DNA profile obtained from the sperm fraction is greater than one in 6.5 billion.

**{¶9}** Appellant was indicted by the Fairfield County Grand Jury on March 7, 2008, with four counts of rape. Counts One and Three alleged that appellant compelled S.A. to submit to sexual conduct by force or threat of force in violation of R.C. 2907.02(A)(2). Counts Two and Four alleged that appellant engaged in sexual conduct with S.A. when her ability to resist or consent was substantially altered because of a mental or physical condition in violation of R.C. 2907.02(A)(1)(c). Counts One and Two related to vaginal penetration; counts Three and Four to anal penetration.

**{¶10}** The case proceeded to jury trial in the Fairfield County Common Pleas Court. Appellant did not testify; however, he presented the testimony of witnesses who attended the party in an attempt to prove consent. Cynthia Sarver testified that earlier that evening, she heard S.A. ask appellant what size his cock was and if he wanted to fuck. Tr. 936. She also testified that she saw S.A. put her arms around appellant from behind while he was standing at the sink, and S.A. put her hands on appellant's penis. She stated that appellant told S.A. to get away from him because she was his cousin. Christine Duvall testified that she saw S.A. sitting on appellant's lap, kissing his neck and "grinding" on him. Tr. 1003.

**{¶11}** S.A. maintained at trial that she did not engage in any sexually suggestive behavior toward appellant at the party and that she did not consent to having sexual intercourse with him. She testified that she would not consent because "[y]ou don't have sex with your cousin." Tr. 144. She further testified that she would not consent

because she was "on her period" and "that's gross." Tr. 143. As to the counts alleging anal sex, S.A. said in her statement to police on November 28, 2006, "I don't remember the butt thing." Tr. 195.

**{¶12}** Appellant was acquitted on counts one, three, and four, and on sexual battery as a lesser-included offense of count four. He was convicted of count two and sentenced to seven years incarceration. He assigns two errors on appeal:

**{¶13}** "I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN EXCLUDING EVIDENCE OF PRIOR FALSE ALLEGATIONS OF SEXUAL MISCONDUCT MADE BY THE VICTIM HEREIN FROM THE PRESENTATION OF THE DEFENSE CASE THUS DENYING THE DEFENDANT HIS CONSTITUTIONALLY GUARANTEED RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE AND CHALLENGE HIS ACCUSERS.

**{¶14}** "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN EXCLUDING EVIDENCE OF THE VICTIM'S STATE OF MIND ON THE NIGHT IN QUESTION FROM THE PRESENTATION OF THE DEFENSE CASE THUS DENYING THE DEFENDANT HIS CONSTITUTIONALLY GUARANTEED RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE AND CHALLENGE HIS ACCUSERS."

I

**{¶15}** Prior to trial, appellant filed a motion to allow cross-examination of the victim concerning a prior false allegation of rape against her uncle. The court held an evidentiary hearing on the motion. At the hearing, S.A.'s mother testified that in 2001 when S.A. was on house arrest in Hocking County, she took off her ankle bracelet. As a result, S.A. and her mother met with S.A.'s probation officer. During the meeting, S.A. wrote something on a piece of paper and slid it across the table to the probation officer.

The probation officer later told S.A.'s mother that S.A. claimed her mother's sister's husband molested her when she was five years old. S.A.'s mother never spoke to S.A. about this issue and did not know what to believe.

**{¶16}** S.A.'s grandmother testified that she had heard of the accusation against S.A.'s uncle from S.A.'s mother. She testified that she does not believe the allegation is true because she knows her son-in-law. S.A.'s aunt testified that the person who investigated the complaint against her husband told them that the first incident of molestation allegedly occurred when she was babysitting S.A. on a Saturday and went to work, leaving S.A. with her husband. The other incident allegedly occurred when S.A. was sleeping on their sofa. S.A.'s aunt testified that she never left her sister's children home alone with her husband, and S.A. never slept on the sofa at her home. S.A.'s uncle testified that the accusations were not true.

**{¶17}** Before she was cross-examined at trial, the court allowed counsel for appellant to conduct a voir dire examination of S.A. on this issue. S.A. testified that she made the accusation when she was 15 or 16 years old and in the custody of a Hocking County probation officer. She testified that the molestation occurred twice at her grandma's summer house when she was 5 or 6 years old. She maintained that the accusations were true, and that it took her 10 years to get the courage to talk about what happened.

**{¶18}** The court overruled appellant's motion to cross-examine the victim on this issue, citing *State v. Boggs* (1992), 63 Ohio St.3d 418, 588 N.E.2d 813.

**{¶19}** Appellant argues that we should not review the court's decision under the abuse of discretion standard we normally apply to the admission or exclusion of

evidence. Rather, he argues that we should conduct a de novo review of the record because the trial court denied him his constitutional rights to present a defense, to receive due process of law and to confront his accuser. Appellant relies for this proposition on *State v. Williams* (1986), 21 Ohio St.3d 33, 487 N.E.2d 560.

**{¶20}** In *Williams*, the victim testified on direct examination that she never consents to sex with men. The defendant proffered evidence which directly refuted this contention. The Ohio Supreme Court first found that the proffered evidence was inadmissible under the rape shield law, codified in R.C. 2907.02(D), which provides in pertinent part:

**{¶21}** "Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

**{¶22}** The Ohio Supreme Court held that because the contested issue in the case was consent and the testimony proffered directly refuted this contention, the evidence was submitted for more than impeachment of the victim's credibility and was offered to negate the implied establishment of an element of the crime charged, i.e. that the victim did not consent. Id. at 36. For that reason, the probative value of the testimony outweighed any evidence the state had in its exclusion and application of the rape shield law violated *Williams'* Sixth Amendment right of confrontation. Id.

**{¶23}** In the instant case, the evidence was not offered to directly refute an element of the crime. While appellant maintained before trial that he did not have sexual intercourse with the victim, at trial his defense appeared to be consent because he presented several witnesses to testify that S.A. engaged in sexually suggestive activity toward him earlier in the evening. Evidence that the victim had previously made an accusation of sexual impropriety against another family member based on an event that occurred when she was 5 or 6 years old was offered solely to impeach her credibility and did not negate an element of the offense. Unlike the testimony in *Williams,* the evidence had no probative value on the issue of consent. Therefore, *Williams* is inapplicable to the instant case.

**{¶24}** Further, appellant was acquitted of the two counts alleging violations of R.C. 2907.02(A)(2), engaging in sexual conduct while purposely compelling S.A. to submit by force or threat of force. He was convicted solely of a violation of R.C. 2907.02(A)(1)(c), engaging in sexual conduct with S.A. when her ability to resist or consent was substantially impaired because of a mental or physical condition, and he knew or had reasonable cause to believe that her ability to resist or consent was substantially impaired because of a mental or physical condition. Therefore, consent does not negate an element of the crime of which appellant was convicted, and this case is distinguishable from *Williams*, supra.

**{¶25}** The trial court relied on *Boggs*, supra, in excluding the evidence. *Boggs* concerned the use of prior false accusations of sexual activity to impeach the victim's testimony. The Ohio Supreme Court held that false accusations, where no sexual activity is involved, do not fall within the rape shield statute. 63 Ohio St.3d at 421.

Therefore, under Evid. R. 608(B), a defendant is permitted in the court's discretion to cross-examine the victim regarding such accusations if clearly probative of truthfulness or untruthfulness. Id. Evid. R. 608(B) provides in pertinent part:

**{¶26}** "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

**{¶27}** Thus, if defense counsel inquires of an alleged rape victim as to whether she has made any prior false accusations of rape, and the victim answers no, the trial court has discretion to determine whether and to what extent defense counsel can proceed with cross-examination on the issue. *Boggs* at 421. However, if the alleged victim answers in the affirmative, the trial court must conduct an in camera hearing to determine whether sexual activity had been involved. Id. If the trial court determines that the accusations were entirely false, the trial court has discretion to determine whether to permit defense counsel to proceed with cross-examination of the alleged victim. Id. The trial court must be satisfied that the prior allegations of sexual misconduct were actually false or fabricated. Id. at 423. If sexual activity took place, the rape shield statute prohibits any further inquiry into this area. Id. Only if it is

determined that the prior accusations were false because no sexual activity took place would the rape shield law not bar further cross-examination. Id.

**{¶28}** In the instant case, the court held an in camera hearing and allowed appellant to question the victim on the issue during a voir dire examination at trial. The evidence did not establish that the prior allegations of sexual misconduct were false or fabricated. The accused uncle testified that he didn't do it, as did his wife. However, S.A. maintained that the sexual activity did in fact occur. Therefore, appellant failed to demonstrate that the prior allegations were in fact false or fabricated and the court did not err in excluding the evidence under the rape shield law.

**{¶29}** Further, even if the allegations were determined to be false or fabricated, appellant has not demonstrated that the court would have abused its discretion in not allowing him to proceed with cross-examination of the victim on this issue. The court found the issue to be so inflammatory that it would run the risk of impairing justice by allowing questioning on this issue. Tr. 181. The *Boggs* court held that the court has discretion to determine whether to allow cross-examination under Evid. R. 608(B) concerning prior false allegations of sexual misconduct. Id. at 421. In the instant case, the allegation was made by S.A. seven years before trial, the allegation was not made against appellant, and the alleged activity occurred approximately seventeen years before trial when she was five or six years old. The court did not abuse its discretion in failing to allow appellant to inquire on this issue.

**{¶30}** The first assignment of error is overruled.

II

**{¶31}** Appellant argues that the court erred in excluding evidence concerning S.A.'s sexual advances toward other people at the party. He relies on *Williams*, supra, arguing that this evidence was admissible to show that the victim was "in possession of her faculties and making sexual advances that she knew or hoped would entice others." Brief of appellant, page 10. He argues the court precluded him from "directly attacking the 'too drunk to say no' aspect of the government's case." Id. at 12.

**{¶32}** Prior to Cynthia Sarver's testimony in appellant's case-in-chief, appellant proffered her testimony. During the proffer, Sarver testified that during the party S.A. put her hands on each side of her breasts and shook them at Sarver. This behavior toward Sarver occurred before S.A. began drinking. She testified that she heard S.A. asked appellant "the size of his cock and she asked him if he'd like to fuck." Tr. 916. She stated that while appellant was at the sink, she observed S.A. wrap her arms around him from behind and "put her hands right on his cock." Tr. 917. She further testified that people were getting upset with S.A.'s behavior toward the boyfriends of other women because S.A. was dancing and "grabbing their ass." Tr. 918.

**{¶33}** The court ruled that the incident where S.A. shook her breasts at Sarver did not have probative value as to her ability to consent after she had been drinking because the conduct occurred before she started drinking. However, on direct examination, Sarver was permitted to testify as to S.A.'s behavior and comments in the kitchen toward appellant. Tr. 936, 938. She further testified that she and appellant took S.A. into a bedroom to lay down after S.A. became sick, and S.A. tugged at appellant's arm and begged him not to leave her. Tr. 940-941. Christine Duvall was permitted to

testify on appellant's behalf that she saw S.A. sitting on appellant's lap, kissing his neck and grinding on him. Tr. 1002-1003.

**{¶34}** Appellant was not denied his constitutional right to confrontation by the court's exclusion of testimony concerning S.A. shaking her breasts at Cynthia Sarver. As noted by the court, this incident took place before S.A. started drinking and, therefore, had limited probative value as to her ability to consent after she started drinking. The court admitted all evidence concerning S.A.'s behavior toward appellant which was more probative on the issue of her ability to consent.

**{¶35}** The second assignment of error is overruled.

**{¶36}** The judgment of the Fairfield County Common Pleas Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/r0820

**[Cite as *State v. King*, 2009-Ohio-5984.]**

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| JOHN D. KING | : | |
| Defendant-Appellant | : | CASE NO. 2008 CA 00045 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES