

[Cite as *State v. Kemp*, 2005-Ohio-1589.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO :
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 Plaintiff-Appellee : C.A. CASE NO. 2004 CA 10
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 v. : T.C. NO. 03CR216
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 THEODORE KEMP : (Criminal Appeal from
 : Common Pleas Court)
 Defendant-Appellant :
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OPINION

Rendered on the 1st day of April, 2005.

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WOLFF, J.

{¶ 1} Theodore Kemp was found guilty of rape by a jury in the Miami County Court of Common Pleas. He was sentenced to the maximum term of ten years and was found to be a sexual predator. Kemp appeals from his conviction, his sentence, and his designation as a sexual predator.

{¶ 2} The victim is a young woman who suffered a traumatic brain injury in a traffic accident. She is unable to communicate, to move, or to care for herself. The victim was a resident of the Covington Care Center, where Kemp worked as a custodian. On May 19, 2003, the staff of the center reported a possible sexual assault of the victim by Kemp based on the observations of a nurse's aide, who had walked into the victim's room and found Kemp with his arm under the bedding around the victim's mid-section. Kemp subsequently confessed upon being interviewed by a sheriff's deputy.

{¶ 3} Kemp was indicted on one count of rape. He was tried by a jury, which found him guilty as charged, and was sentenced as discussed supra.

{¶ 4} Kemp raises four assignments of error on appeal.

{¶ 5} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIMINAL RULE 29 MOTION IN THAT APPELLANT'S CONVICTION WAS BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND UNSUPPORTED BY SUFFICIENT EVIDENCE."

{¶ 6} Kemp argues that the state failed to present sufficient evidence of penetration to support a conviction for rape. In the alternative, he argues that the conviction was against the manifest weight of the evidence because "Detective Lord, not Appellant, provided every substantive fact upon which the State built its case on the issue of penetration." Crim.R. 29(A) states that the trial court shall enter a judgment of acquittal on an offense charged in the indictment if the evidence is insufficient to sustain a conviction on the offense. "[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to

the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, quoting Black's Law Dictionary (6 Ed.1990) 1433. When reviewing the sufficiency of evidence, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, 1997-Ohio-372, 683 N.E.2d 1096, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 7} A less rigorous standard applies to determine whether the conviction is against the manifest weight of the evidence. When a conviction is challenged on appeal as being against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 8} The state presented the following evidence at trial. The defense did not call any witnesses.

{¶ 9} Pam Martin, the nurse's aide, testified that on the morning of May 19,

2003, she went into the victim's room to get her dressed and found Kemp kneeling on the floor beside her bed "at her waistline." She stated that Kemp "jumped" when he heard her and "his right hand [had been] all entangled in the sheets and he couldn't get it out" in the victim's groin area. According to Martin, Kemp's arm had been under the bedding to a point above his elbow, and he had quickly withdrawn it when he saw Martin. Kemp did not have any cleaning supplies in his hands as if he had been scraping the floor, although his floor buffing machine was in the room. She also stated that the maintenance and housekeeping staff were not permitted to touch the residents. Martin stated that the victim had looked scared.

{¶ 10} Deputy Sheriff Steve Lord, who helped with the investigation by interviewing Kemp at the request of the Covington Police, stated that Kemp had admitted to finding the victim attractive, to touching her vagina and breasts, and to inserting his finger into her vagina at least once. Kemp also knew that the victim had been in a gown with no underwear, although she had been under sheets and blankets.

{¶ 11} During the center's internal investigation, Kemp stated that he had placed his elbow on the victim's bed as he was scraping black marks off the floor. The victim was examined by her nurse, by the facility's medical director, and at the hospital in the hours and days following the incident, but there were no unusual findings.

{¶ 12} The parties stipulated that the victim was substantially impaired and was unable to consent to any kind of sexual conduct.

{¶ 13} Viewing the evidence in the light most favorable to the state, a rational factfinder could have found the essential elements of rape proven beyond a reasonable doubt. Thus, Kemp's conviction was not unsupported by the evidence, and he was not

entitled to a Crim.R. 29 judgment of acquittal.

{¶ 14} With respect to the weight of the evidence, Kemp essentially argues that the jury should not have credited his admissions during the interview with Deputy Lord because Lord had totally dominated the conversation and had provided all of the details of the alleged crime through leading questions. Kemp describes the interview as “a monologue and not a dialogue.” Kemp also implies that Lord misled him with respect to the implications of some of his admissions. For example, Kemp contends that Lord acted as if the distinction between touching the victim and penetrating her with his fingers was insignificant when, in fact, penetration is required for rape.

{¶ 15} By Deputy Lord’s own admission, he did about ninety-five percent of the talking during the interview with Kemp. Lord stated, however, that it was difficult to get Kemp to talk, that Kemp had made gestures that were not picked up on the audio recording of the conversation and upon which the flow of the questioning had been based, and that he had used questioning techniques learned during his training as a interviewer to obtain information from Kemp. Lord also testified that, although the investigation had begun with a suspicion of improper touching, he had suspected penetration, and that, logically, the questioning had covered that issue. He admitted to downplaying the significance of some of Kemp’s admissions, and he described this as an interrogation technique that he had been taught to employ.

{¶ 16} Having listened to Deputy Lord’s interview with Kemp and to the testimony of all of the witnesses, the jury could have reasonably concluded that Kemp had raped the victim by digital penetration. It is undisputed that Kemp was not talkative in his interview with Lord. Having listened to the tape, however, the jury was in a position to

assess whether Kemp had been misled or badgered into answering the questions as he did and to assess whether the answers reflected on the audio tape were sufficient to establish an admission of rape. The jury did not clearly lose its way or create a manifest miscarriage of justice in concluding that Kemp had, in fact, committed a rape.

{¶ 17} The first assignment of error is overruled.

{¶ 18} “THE TRIAL COURT ERRED AND VIOLATED APPELLANT’S RIGHT TO DUE PROCESS BY ADMITTING, OVER DEFENSE OBJECTIONS, IRRELEVANT AND HIGHLY PREJUDICIAL PHOTOS.”

{¶ 19} The state presented pictures of rooms at the Covington Care Center and of the victim in her bed at the center. The purported purpose of the pictures was to show jurors how the furniture was arranged, how the beds were positioned low to the floor for patient safety, and how a body pillow was used to keep the victim from rolling out of bed. Four pictures were admitted in all, only one of which showed the victim. The witnesses acknowledged that these pictures were not taken the day of the alleged rape. We note that Kemp did not object at trial to the pictures that excluded the victim. Thus, we will address only the use of the picture of the victim in her bed.

{¶ 20} Citing Evid.R. 403, Kemp contends that the probative value of this picture was substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. In his brief, he argues that the state had not established that the picture accurately depicted the victim’s positioning in her bed on the morning of May 19, 2003. At trial, Kemp objected to the picture of the victim on the basis that it was intended to promote sympathy.

{¶ 21} In our view, the admission of one picture of the victim – taken from a

sufficient distance to show her entire bed and much of her room – was not unfairly prejudicial. The picture did illustrate how the victim was protected from rolling off the bed by the position of the body pillow and how her bed was low to the ground – both of which were relevant to the testimony that Kemp had been kneeling beside the bed with his hand under the bedding. The trial court did not abuse its discretion in admitting this picture.

{¶ 22} The second assignment of error is overruled.

{¶ 23} “THE IMPOSITION OF A MAXIMUM SENTENCE WAS NOT SUPPORTED BY THE RECORD, OR WAS OTHERWISE CONTRARY TO LAW.”

{¶ 24} Kemp claims that the trial court’s findings that he had committed the worst form of the offense and posed the greatest likelihood of recidivism were not supported by the record and that this matter should be remanded for resentencing.

{¶ 25} R.C. 2929.14(C) provides that, when imposing a maximum sentence, a trial court must explicitly find one of the enumerated bases for doing so. In this case, the trial court based its decision to impose a maximum sentence on two factors: Kemp had committed the worst form of the offense, and he posed the greatest likelihood of committing future crimes. Specifically, the court based its decision on the facts that the victim could not defend herself and that, in the past, Kemp had committed two other offenses against minors, showing a propensity for “picking on people who were *** less able to defend themselves against an adult.” Although the previous offenses were in the 1970s, the court noted “a pattern throughout [Kemp’s] life” of picking on less fortunate people.

{¶ 26} Kemp claims that, at most, “he may have touched [the victim’s] vaginal

area on three separate occasions” and that such evidence simply does not support the court’s conclusion that this was the worst form of the offense of rape. Moreover, he claims that this offense, occurring nearly three decades after the previous offenses cited by the court, does not evince a pattern by which the court could have reasonably concluded that he posed the greatest likelihood to reoffend.

{¶ 27} Considering the fact that the victim’s condition rendered her totally unable to defend herself or to report Kemp’s actions, the trial court did not abuse its discretion in concluding that Kemp had committed the worst form of the offense.

{¶ 28} We find the trial court’s conclusion that Kemp posed the greatest likelihood of recidivism less persuasive, given the interval between his previous offenses and this one, and the fact that his employment gave him an unusual opportunity to abuse the victim. Indeed, the court recognized that the opportunity for this kind of abuse “fortunately does not exist to any extent in the community.” However, because we have found that the court reasonably concluded that Kemp committed the worst form of the offense, we need not address whether he was also the most likely to reoffend. One factor is a sufficient basis for the imposition of the maximum sentence. The likelihood of recidivism will be discussed further with respect to the sexual predator determination, *infra*.

{¶ 29} The third assignment of error is overruled.

{¶ 30} “THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAS A SEXUAL PREDATOR.”

{¶ 31} Kemp claims that the record does not support the trial court’s conclusion that he is a sexual predator.

{¶ 32} The trial court must consider the statutory factors listed in R.C. 2950.09(B)(3) and discuss on the record the particular evidence and factors upon which it relied in making its determination as to whether a defendant should be designated as a sexual predator because he is likely in the future to engage in one or more sexual offenses. *State v. Eppinger*, 91 Ohio St.3d 158, 166, 2001-Ohio-247, 743 N.E.2d 881. The factors to be considered include, but are not limited to, the following:

{¶ 33} “(a) The offender's *** age;

{¶ 34} “(b) The offender's *** prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

{¶ 35} “(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed ***;

{¶ 36} “(d) Whether the sexually oriented offense for which sentence is to be imposed *** involved multiple victims;

{¶ 37} “(e) Whether the offender *** used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

{¶ 38} “(f) If the offender *** previously has been convicted of or pleaded guilty to *** a criminal offense, whether the offender *** completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender *** participated in available programs for sexual offenders;

{¶ 39} “(g) Any mental illness or mental disability of the offender ***;

{¶ 40} “(h) The nature of the offender's *** sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and

whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

{¶ 41} “(l) Whether the offender ***, during the commission of the sexually oriented offense for which sentence is to be imposed ***, displayed cruelty or made one or more threats of cruelty;

{¶ 42} “(j) Any additional behavioral characteristics that contribute to the offender's *** conduct.”

{¶ 43} R.C. 2950.09(B)(3). The court’s sexual predator determination must be supported by clear and convincing evidence. R.C. 2950.09(B)(4).

{¶ 44} The trial court seems to have relied almost entirely on Kemp’s prior convictions involving minors and the vulnerability of the victim in this case in determining that he was likely to reoffend. Based on these factors, the court concluded that Kemp had shown “a pattern throughout [his] life of picking on people less fortunate” than him. The record, however, does not reveal any details about the “assault upon a minor” and “endangering a child” convictions that occurred in 1972 and 1975, respectively. The presentence investigation merely notes the existence of these convictions and lists the details as “unknown.” There is certainly no indication that these offenses had any sexual component. Although the victims were minors, their ages at the time of the offenses are unknown, and it is unclear to what extent Kemp preyed upon their vulnerability in those cases. We note that Kemp himself would have been in his early twenties at the time of these offenses. In our view, the trial court overstated the “pattern” that was shown by these prior convictions, especially in light of the significant period of time separating the offenses, the dearth of evidence that the

previous offenses were sexual in nature, and the uncertainty as to whether the victims' youth made them vulnerable in those cases.

{¶ 45} Considering the other statutory factors, we note that Kemp will be over sixty years of age after he serves his sentence. The particular vulnerability of this victim is entitled to significant weight, but it is somewhat offset by the unlikelihood that Kemp will ever again find himself in a situation affording him access to such a vulnerable individual. Aside from the victim's vulnerability, this was not a particularly cruel form of the offense of rape, and the evidence that Kemp had raped the victim on more than one occasion is thin. He was only convicted of one offense. There is no clear evidence that Kemp had committed any prior sexual offenses against other individuals.

{¶ 46} Considering all of these factors, we conclude that the record does not demonstrate, by clear and convincing evidence, that Kemp is likely to reoffend. As such, the trial court erred in designating him to be a sexual predator.

{¶ 47} The fourth assignment of error is sustained.

{¶ 48} The trial court's determination that Kemp is a sexual predator will be vacated. The judgment of the trial court will be affirmed in all other respects.

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BROGAN, P.J. and GRADY, J., concur.

Copies mailed to:

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