

[Cite as *State v. Pullen*, 2009-Ohio-6941.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Sheila G. Farmer, P.J.
	:	W. Scott Gwin, J.
Plaintiffs-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2009 CA 00064
	:	
	:	
RODNEY V. PULLEN	:	<u>OPINION</u>
	:	
Defendants-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2008 CR 2189
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	December 29, 2009
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Rodney V. Pullen, appeals a judgment of the Stark County Common Pleas Court convicting him of sexual battery in violation of R.C. 2907.03(A)(2) and/or (A)(3) and sentencing him to five years incarceration, with an additional sentence of one year incarceration for violating post release control. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} At about 2:00 in the afternoon on September 7, 2008, Denise Wilson woke up in her apartment hallway wearing nothing but a bra. She was covered with a blanket and felt funny. She found her wet clothes in her bathroom. Her cell phone, car keys and money were missing from her pocket.

{¶3} She got dressed and went outside to look for her car, which was gone. She began walking to her mother's house, and her cousin drove by and gave her a ride. She did not remember anything from the night before after she left a bar called Sticks and Stones at 2:30 a.m. with her friend from work, Tracey Dearth.

{¶4} Denise called the police and was told to go to the hospital. A rape kit examination was performed at the Alliance Community Hospital. Semen was found in her vagina. A urine sample was also collected. Upon analysis at the Stark County Crime Lab, the drug Hydrocodone, a narcotic analgesic like Vicodin, was found in her urine. The crime lab also found an alcohol level of .09 in her urine sample and determined that some twelve hours before testing her alcohol level was .33.

{¶5} Although Denise could not remember what happened after leaving Sticks and Stones, she pieced the events of the night together with the help of her friend,

Tracey Dearth, who worked with her at a nursing home in Alliance, Ohio. On September 6, Wilson was off work, but Dearth worked until 11:00 p.m. She went to Wilson's apartment after work, and the pair met a friend of Dearth's at Hang Out, a bar in Alliance. After staying there a short time they moved on to a bar called Sticks and Stones.

{¶6} At Sticks and Stones, Dearth talked to a friend, while Wilson mingled with her cousins. They stayed until closing at 2:30 a.m. They then moved to an after-hours bar located in a boy's basement. Wilson was driving Dearth's van. Dearth was not comfortable at the "bar" and left on foot with her friend Britney after about 20 minutes, leaving Wilson with her van. Dearth called her boyfriend to pick her up. Dearth stayed at her boyfriend's until 5:30 a.m., when she called Wilson to ask for her van back.

{¶7} Dearth started walking down the street to meet Wilson. Wilson showed up in the van with appellant driving. Dearth recognized appellant as "Sporty," a man who used to visit his girlfriend, who was a resident, at a nursing home where Dearth worked. "Sporty" would often flirt with the nurses and tried to get one nurse to go out with him. Dearth perceived him to be a ladies' man and did not like seeing him with her friend.

{¶8} Appellant drove Dearth back to her boyfriend's house. They argued in the car because Dearth did not want appellant hanging around Wilson. Wilson did not react to the fight and slept with her hand on her head. According to Dearth, Wilson was out of it. Dearth offered to take Wilson home with her, but Wilson asked to go to her apartment. Dearth's boyfriend, who was driving at this point in time, dropped Wilson off at her apartment building. Appellant got out of the van and went into the apartment building with Wilson.

{¶9} Alliance police received appellant's name from Dearth, who called around to find out his real name. Detective James Jones went to appellant Pullen's home to discuss the rape allegations. Appellant first told Jones that he left the after-hours bar with a man named Jay Nice. He then admitted that he left with Wilson and planned to have sex with her, but did not because "some dude" was at her apartment. He told police that Wilson was "nasty drunk, but not drunk drunk." Tr. 145. He allowed police to swab his mouth to collect a DNA sample.

{¶10} The Stark County Crime Lab compared the DNA from the swabs taken from appellant's mouth to the semen found in Wilson's vagina and determined that appellant was the source of the semen. Appellant was arrested for the crime of sexual battery. During the booking process following his arrest, appellant admitted that he had sex with Wilson on the night in question, but claimed it was consensual.

{¶11} Appellant was indicted by the Stark County Grand Jury with one count of sexual battery in violation of R.C. 2907.03(A)(2) and/or (A)(3). The case proceeded to jury trial in the Stark County Common Pleas Court. Appellant did not testify, but his defense at trial was that Wilson consented to the sexual contact. Wilson testified that she would not be interested in the 43-year-old appellant because, "That's older than my mom." Tr. 107.

{¶12} Appellant was convicted as charged and sentenced to 5 years incarceration. He received an additional term of one year incarceration for violation of post release control. He assigns a single error on appeal:

{¶13} "THE APPELLANT'S CONVICTION FOR SEXUAL BATTERY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶14} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, ‘weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 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*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶15} Appellant was convicted of sexual battery in violation of R.C. 2907.03(A)(2) and/or (A)(3):

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

{¶17} “(2) The offender knows that the other person’s ability to appraise the nature of or control the other person’s own conduct is substantially impaired.

{¶18} “(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.”

{¶19} Appellant’s sole argument is that Wilson’s testimony, that she did not remember anything after leaving Sticks and Stones, conflicts with Dearth’s testimony that she was able to speak with Wilson after leaving the bar, and that Dearth allowed Wilson to drive her van to the after hours party. He argues that Dearth never testified that Wilson was too drunk to know what she was doing.

{¶20} Appellant’s argument is without merit. Analysis of Wilson’s urine sample revealed that her blood alcohol level would have been about .33, 12 hours before the

sample was tested at the hospital as part of the rape kit. Urinalysis further revealed the presence of Hydrocodone, an analgesic similar to Vicodin in her system. Wilson testified that she was not taking any prescription medication at the time and had no idea how the drug got in her system. According to Dearth, when she saw Wilson at about 6:00 a.m. on September 7th, Wilson was very lethargic and out of it, sleeping all the time. She testified that Wilson sat in the passenger seat with the seat reclined and her hand on her head, sleeping through a heated argument between Dearth and appellant. Appellant told police that Wilson was “nasty drunk.”

{¶21} The jury did not lose its way in finding that Wilson was unable to appraise the nature of or control her conduct, or that she submitted to having sex with appellant because she was unaware that the act was being committed. The judgment is not against the manifest weight of the evidence.

{¶22} The assignment of error is overruled.

{¶23} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

S/JULIE A. EDWARDS

S/SHEILA G. FARMER

S/W. SCOTT GWIN

JUDGES

JAE/r1005

