

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-02-003
 :
 - vs - : OPINION
 : 12/19/2011
 :
 DELBERT W. SCOTT, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI20090041

Stephen J. Pronai, Madison County Prosecuting Attorney, Rachel M. Price, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

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PIPER, J.

{¶1} Defendant-appellant, Delbert Scott, appeals his convictions in the Madison County Court of Common Pleas, for one count of rape and two counts of sexual battery. We affirm Scott's convictions.

{¶2} In 2008, 22-year-old S.B. went to the Madison County Sheriff's Office to report that Scott, her stepfather, had been sexually abusing her since she was eight years old. Scott married S.B.'s mother in 1988 when S.B. was three years old. Scott and S.B.'s mother

had two daughters together after they were married. According to S.B.'s testimony, Scott was a good father and "very good role model" from the time he married her mother, until she turned eight.

{¶3} However, once S.B. turned eight years old, Scott told her that they were going to "play house." Scott "played house" with S.B. by laying with her in either his or her bed, rubbing his penis between her legs until he ejaculated on her stomach or into a towel, performing cunnilingus on her, touching her vagina, digitally penetrating her, as well as forcing her to perform oral sex acts on him, including fellatio. S.B. testified that these acts occurred two to three times a week.

{¶4} During the times that Scott told S.B. that they were going to "play house," S.B.'s mother and her sisters were not at the house, or were asleep in other rooms. Scott told S.B. that if she told anyone about what was happening, she would never see her family again, that her mother would go to jail, and that her sisters would be placed in foster care.

{¶5} S.B. turned 12 in 1997, and the abuse escalated to vaginal penetration. The first time Scott engaged in vaginal intercourse with S.B., he told her to tell her mother that she was ill, and that she needed to stay home from school. Once S.B.'s mother and sisters left the house for the day, Scott began to kiss S.B. and took her upstairs to her bedroom. Scott became aggressive, told S.B. that he was "tired of playing house," and engaged in vaginal intercourse with her. S.B. testified that as Scott held her down, she screamed for him to stop and that she told him she was in pain. After he completed the act, Scott apologized and told S.B. that he loved her. From that day forward, Scott continued to engage in vaginal intercourse with S.B. multiple times a week.

{¶6} As S.B. grew up, Scott became more controlling over her, often forbidding her from having contact with other young people, especially boys. When S.B. had her first boyfriend as a sophomore in high school, Scott would demand that S.B. have sex with him

before he would allow her to see her boyfriend. When S.B.'s boyfriend did come over, Scott supervised the couple, and would not allow them to hold hands or display any affection. S.B. also had to have intercourse with Scott before he allowed her to go to the prom.

{¶7} When S.B. turned 18 and started college, Scott's controlling and abusive behavior continued. He called her on her cell phone before classes started, between classes, when she left campus, and continued to call until she would verify that she was home. This behavior continued when S.B. turned 19 and enrolled in nursing school.

{¶8} After S.B. turned 21, Scott called her on the phone up to 20 times a day to check her whereabouts. She moved out of the home, and into her own apartment, hoping that she could escape Scott's abuse. However, Scott came to S.B.'s home and forced her to have sex with him. Scott continued to threaten S.B. by telling her that he would kill her mother, sisters, and grandmother if she told anyone of his actions. Scott also continued to call S.B. 20-30 times each day, and began to follow her to and from work to make sure that she was not "running around."

{¶9} In 2008, S.B. began dating her co-worker, Travis Gierhart. Gierhart came to S.B.'s apartment frequently, and on one occasion, Scott came to S.B.'s apartment while Gierhart was there. Scott stayed with Gierhart and S.B. until approximately 1:00 a.m. and then engaged in intercourse with S.B. after Gierhart left. Scott continued to call S.B. multiple times a day at work, and Gierhart became suspicious of the relationship between S.B. and Scott.

{¶10} Gierhart confronted S.B. with Scott's obsessive behavior and asked if she had been abused as a child. S.B. verified Gierhart's suspicions, but told him that the abuse had stopped a few years prior because she was fearful that Scott would do something to her mother and sisters, who still lived in Scott's home. Soon after she confided in Gierhart, S.B. told Scott that she was moving to be closer to Gierhart, and he threatened her again. S.B.

then confided the entire truth to Gierhart, and he persuaded her to go to the police.

{¶11} Lieutenant Doug Crabbe from the Madison County Sheriff's Office testified that he received a complaint from S.B. regarding Scott's sexual abuse. Officers tried to locate Scott in order to question him, and attempted to pull him over as he approached S.B.'s apartment. However, Scott fled, and a police chase ensued. Scott ultimately crashed his vehicle into a tree, and was transported to the hospital. Upon his release, he was detained.

{¶12} Lt. Crabbe interviewed Scott after providing *Miranda* warnings, and Scott admitted to having a "close sexual relationship" with S.B. for the past five years. Scott provided a written statement in which he represented that the sexual relationship was consensual and that he had told S.B. that if she wanted to end the intercourse, she "needed to go away and not come back."

{¶13} Scott was indicted on 16 counts, one for each year of abuse that S.B. suffered between the ages of eight and 23. Specifically, Scott was charged with five counts of rape of a person less than 13 years of age, for the sexual acts that occurred when S.B. was between the ages of eight and 12. Scott was also charged with 11 counts of sexual battery, for the sexual abuse that occurred once S.B. turned 13 until the time she reported the abuse.

{¶14} Scott requested a jury trial, and such was held over two days in August 2009. The jury heard testimony from S.B., Gierhart, and Lt. Crabbe. The jury returned guilty verdicts for each count, and the trial court sentenced Scott to an aggregate term of 50 to 100 years. Scott was also classified a Tier III sexual offender, with lifetime reporting requirements.

{¶15} Scott requested appellate counsel be appointed at the end of his sentencing hearing. However, trial counsel did not file a timely notice of appeal, and appellate counsel was not appointed. Scott filed a pro se notice of delayed appeal, but such motion was denied by this court for failure to explain the reason for delay. Scott ultimately obtained

appellate counsel, and filed a motion for delayed appeal, which this court granted. This court will therefore now consider Scott's single assignment of error.

{¶16} "MR. SCOTT'S CONVICTIONS FOR RAPE AND SEXUAL BATTERY, AS INDICTED IN COUNTS FOUR, SIX, AND NINE, ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION; *TIBBS V. FLORIDA* (1982), 457 U.S. 31, 102 S. CT. 2211."

{¶17} Scott argues in his assignment of error that three of his convictions are not supported by sufficient evidence because S.B. did not testify to specific acts of sexual abuse that occurred during the years 1996, 1998, and 2001.

{¶18} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. When addressing sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶19} Scott argues that his convictions for the 1996 rape charge, as well as the 1998 and 2001 sexual battery charges are not supported by sufficient evidence because S.B. did not give enough details regarding any sex acts that occurred during those years. However, it is well-established that, particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity. *State v. Daniel* (1994), 97 Ohio App.3d 548, 556. This is especially true where the crimes involved a repeated course of conduct over an extended period of time. *State v. Mundy* (1994), 99 Ohio App.3d 275, 296; *State v. Robinette* (Feb. 27, 1987), Morrow

App. No. CA-652, 1987 WL 7153. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Robinette* at *3. An "allowance for reasonableness and inexactitude must be made for such cases considering the circumstances." *Id.*

{¶20} In *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, the Eighth District Court of Appeals reversed some of Hemphill's convictions for rape where his victim merely testified to numerical estimates¹ of the sexual conduct and provided no testimony connected to "individual, distinguishable incidents." *Id.* at ¶88. In contrast, this court decided *State v. Morgan*, Brown App. Nos. CA2009-07-029, CA2009-08-033, 2010-Ohio-1720, in which we found sufficient evidence to support Morgan's rape convictions.

{¶21} In *Morgan*, we considered that the victim, C.M., testified that Morgan began engaging in sexual conduct with her when she was five years of age. Morgan would "play a 'guess the candy game' with her, wherein he would blindfold her and place his penis inside her mouth. According to C.M., this conduct occurred 'twice a week' while the family lived on Hoff Avenue. Once the family moved to Felicity, C.M. testified that appellant began to have vaginal sex with her. According to C.M., appellant would 'come in my room when I was sleeping, my mom was gone and stuck his penis in my vagina and do what he wanted to do.' She stated that the rape would last for about five minutes and occurred 'mainly five times a week.' C.M. testified that the intercourse became less frequent, to about three times per week, after appellant got injured by a ladder. Once the family moved to a second home in Felicity, the conduct occurred 'maybe like twice a week.' Thereafter the family moved to Dunbar Road. At that address, C.M. stated that appellant would put his penis in her vagina 'three to four times a week.'" *Id.* at ¶23.

1. The victim testified that Hemphill touched her breasts 33 times, had intercourse with her 33 times, and performed oral sex on her at least twice, but did not offer any other details regarding the instances.

{¶22} After considering C.M.'s testimony, this court found that C.M. "placed the repeated instances of abuse in context with her age, her year in school, and the homes in which she resided. C.M.'s testimony was not merely general, ambiguous claims of abuse as in *Hemphill*." *Id.* at ¶24.

{¶23} After reviewing the record, we find clear contrast between the ambiguous, indistinguishable testimony in *Hemphill* and the case at bar. We find the facts of this case similar to *Morgan* in that S.B. offered specific and unambiguous testimony regarding the abuse she incurred. During the state's case-in-chief, S.B. testified to the sexual acts forced upon her by Scott. The state would reference a particular year, ask questions specific to that year, and S.B. would testify to the conduct that occurred during that time period.

{¶24} Scott first challenges his conviction for raping S.B. in 1996. Count Four of the state's indictment charged Scott with knowingly engaging in sexual conduct with S.B., who was 11 at the time. According to R.C. 2907.02(A)(1), "no person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: (b) the other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶25} R.C. 2907.01(A) defines sexual conduct as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."²

2. Prior to 1996, sexual conduct was defined as "vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." However, effective September 3, 1996, the definition was changed to include "the insertion, however slight, of any part of the body or any instrument, apparatus, or other

{¶26} When the state broached the subject of sexual conduct during 1995 and 1996, specific to Counts Three and Four, the following exchange occurred.

{¶27} "[Q] All right. Is there any question in your mind, [S.B.], whatsoever that your stepfather performed cunnilingus on you in 1995?

{¶28} "[A] No, there's not.

{¶29} "[Q] Is there any question you performed felatio [sic] at his request on him in 1995?

{¶30} "[A] No, there's not.

{¶31} "[Q] Turning your attention to 1996, which was the second year you were at the house in Orient, did this activity continue?

{¶32} "[A] Yes, it did.

{¶33} "[Q] And specifically what took place?

{¶34} "[A] Oral sex, both he performed it on me and I performed it on him, digital penetration, as well as he put his penis between my thighs until he ejaculated.

{¶35} "[Q] And this was again continuing to take place either in your room or his room?

{¶36} "[A] Yes.

{¶37} "[Q] Any question in your mind that that activity was taking place in 1996?

{¶38} "[A] No question. No."

{¶39} After viewing this evidence in a light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. S.B.'s testimony that Scott engaged in oral sex with her, as well as

object into the vaginal or anal opening of another." Because some of Scott's actions occurred prior to 1996, the trial court gave jury instructions on the original definition of sexual conduct.

digitally penetrated her, constitutes the sexual conduct with a person less than 13 years old prohibited by R.C. 2907.02(A)(1)(b).

{¶40} Scott argues that S.B. failed to testify to any distinguishable or identifiable details that demonstrated she recalled a specific instance of rape from 1996. However, S.B.'s testimony prior to the exchange quoted above included specific details about which house she lived in during the timeframe in question, as well as the layout of the home in relation to where the sexual abuse occurred. She was also able to recall where her mother and sisters were when the abuse occurred, and what threats Scott would use to keep her from reporting the abuse.

{¶41} S.B. placed the repeated instances of abuse in context with her age, the home in which she resided at the time, as well as where in the home the abuse occurred. S.B.'s testimony was, therefore, not merely general, ambiguous claims of abuse.

{¶42} Similarly, Scott claims that his convictions on Count Six for sexual battery in 1998 and County Nine for sexual battery in 2001 were not supported by sufficient evidence. According to R.C. 2907.03(A) "no person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: (5) the offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

{¶43} During the state's direct examination of S.B., the following exchange occurred specific to the sexual abuse in 1998.

{¶44} "[Q] in 1998, you turned 13. Did this activity continue in 1998?

{¶45} "[A] Yes, it did.

{¶46} "[Q] You're still living in Orient at this time?

{¶47} "[A] Yes, I am.

{¶48} "[Q] And now the same activities are taking place with the addition of intercourse?

{¶49} "[A] Right.

{¶50} "[Q] How often is this taking place?

{¶51} "[A] Two to three times a week.

{¶52} "[Q] Where is it taking place within the house?

{¶53} "[A] Either my bedroom or his bedroom.

{¶54} "[Q] So now you have digital penetration, fingers in the vagina, oral sex, him putting his mouth or tongue on your vagina, him inserting his penis into your vagina, and also him putting his penis in your mouth?

{¶55} "[A] Right.

{¶56} "[Q] All of that takes place in 1998?

{¶57} "[A] Yes.

{¶58} "[Q] Any question in your mind that that took place in 1998?

{¶59} "[A] No question."

{¶60} This testimony demonstrates that Scott engaged in sexual conduct with his stepchild in violation of R.C. 2907.03(A)(5). In testimony preceding the quoted exchange above, S.B. provided sufficient details regarding her age, what town she lived in, which acts took place, as well as where they took place in the home. Although the state transitioned into discussing the events in 1998 by referencing continuing activity from 1997, S.B. had provided ample testimony to establish details specific to what occurred in 1998. Moreover, we are reminded that precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity. Even so, S.B.'s testimony was specific to Count 6, that Scott committed sexual battery upon S.B. in 1998.

{¶61} Scott also argues that his conviction for sexual battery in 2001 was not supported by sufficient evidence. However, S.B. testified to specific acts that occurred that year. During S.B.'s direct testimony, the following exchange occurred:

{¶62} "[Q] 2001, the year you turned 16, did this behavior continue with you having vaginal intercourse with your stepfather?

{¶63} "[A] Yes, it did,

{¶64} "[Q] And how often was it happening?

{¶65} "[A] Two to three times a week, if not more.

{¶66} "[Q] Was there anything that you were doing to try to limit the amount of times that this would happen?

{¶67} "[A] At this point, I was a junior. I had just gotten my license as soon as I turned 16. I was at Pickaway-Ross, I was in the nursing school there, and I was working at a grocery store.

{¶68} "[Q] Okay. So you had a job?

{¶69} "[A] I had a job.

{¶70} "[Q] And how many hours were you working at that job?

{¶71} "[A] Almost every day, five days a weeks, [sic] after school.

{¶72} "[Q] Okay. Were you trying to get more hours?

{¶73} "[A] I was there as much as I could.

{¶74} "[Q] Why was that?

{¶75} "[A] On the weekend, just to stay away from home.

{¶76} "[Q] In 2001, was there any question that you had sexual intercourse with your father – stepfather?

{¶77} "[A] No question."

{¶78} While S.B. did not extensively go into detail about where in the home the intercourse occurred during 2001, the prosecutor specifically referenced continuing sexual acts as had occurred throughout 2000. S.B. testified that the 2001 acts were the same as in 2000, a year in which Scott engaged in vaginal intercourse with her. S.B. also testified that in 2000, the family had moved to Williamsport, Scott raped her in either his bedroom or hers, and that she had to have sex with him before she was permitted to spend time with her boyfriend, or even go to the prom. Although S.B.'s testimony was cumulative to testimony regarding previous years, there was sufficient detail to establish that S.B. was referencing specific sexual acts, rather than speaking in generalities. These acts were specific to a time period that S.B. associated with working long hours to avoid being alone with Scott, and that during 2001, Scott vaginally raped her.

{¶79} Throughout her testimony, S.B. was able to specifically relate each count and corresponding sexual act with the year in which it occurred. The first five counts of rape were discussed in detail regarding what home she lived in, where in the house the abuse occurred, what threats Scott used to procure her silence, what Scott would say to her regarding "playing house," and what he did when he was done "playing house." S.B.'s detailed testimony continued, specific to the years after she turned 13 when Scott sexually battered her. This testimony also demonstrated a continuing course of conduct of repeated acts of digital penetration, fellatio, cunnilingus, oral sex, and vaginal intercourse. S.B. described where these acts occurred, what house they lived in at the time, what threats Scott would use to ensure her silence, how the abuse and Scott's controlling nature began to affect her social life, as well as what steps she took to avoid the abuse. This testimony demonstrates that a reasonable trier of fact could have found the essential elements of rape and sexual battery proven beyond a reasonable doubt.

{¶80} Moreover, any fear that Scott has that he was convicted on the 1996, 1998, and

2001 counts with evidence specific to previous years is misplaced because the jury was clearly instructed that each count had to be proven beyond a reasonable doubt, and that the jury had to consider "the evidence separately as it applies to each count in the indictment." The trial court went on to instruct, "the charges set forth in each count of the indictment constitute a separate and distinct matter. You must consider each count of the indictment and the evidence applicable to each count separately, and you must state your findings by verdicts of guilty or not guilty, uninfluenced by your verdict as to any other count."

{¶81} The trial court gave specific instructions to the counts themselves, and correctly stated the law regarding rape and sexual battery. "As to Counts 1 through 4, considering the evidence as it applies to each count separately, if you find beyond a reasonable doubt that the State proved rape as charged respectively in each count, you so find you [sic] would return verdicts of guilty and terminate your deliberations with respect to those counts."

{¶82} The court also stated the law on sexual battery and stated, "if you find that the State has proved beyond a reasonable doubt that the defendant is guilty of sexual battery in any of the respective years, then you must enter a verdict of guilty for the count you so find pertaining to that year."

{¶83} The trial court specifically informed the jury that before they could find Scott guilty of the charges, "you must find beyond a reasonable doubt that there was at least one specific identifiable and discrete act of sexual conduct * * * within the year specified in the indictment for the first four counts of the indictment. As to Counts 5 through 16, you must find beyond a reasonable doubt that there was a specific identifiable discrete act of sexual conduct in the year specified in the counts of the indictment."

{¶84} A jury is presumed to follow the instructions given to it by the trial judge. *State v. Stallings*, 89 Ohio St.3d 280, 286, 2000-Ohio-164. By virtue of their guilty verdicts, the jury found beyond a reasonable doubt that discrete acts of sexual conduct occurred, and that

Scott was guilty of rape and sexual battery. As previously discussed, these convictions are supported by sufficient evidence. Scott's single assignment of error is overruled.

{¶85} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.