

[Cite as *State v. Messer*, 2011-Ohio-129.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23779
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-2448
v.	:	
	:	
CHARLES RAY MESSER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 14<sup>th</sup> day of January, 2011.

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BROGAN, J.

{¶ 1} Charles Messer appeals from his conviction in the Montgomery County Common Pleas Court after a jury trial of one count of sexual battery and one count of sexual imposition.

{¶ 2} The victim of Messer's sexual activity was his own mother, Lisa. The

crimes occurred on July 26, 2009 at the home Lisa shared with her husband Howard and their two children. Messer was Lisa's child from a prior relationship. She allowed Messer to stay at her home two weekends a month over her husband's objections.

{¶ 3} On the evening of July 26, 2009, Howard made dinner for the family. Lisa and Charles were both "messed up a bit" because of the prescription medications they had both taken during the day. (Tr. 25.) Lisa could not eat her dinner, was slurring her speech, and could not hold her eyes open. She went into her bedroom and passed out. After dinner, Howard left the home to visit a friend, but later received a call from his daughter, Catherine, to return home. Catherine told her father that Charles was trying to get her mother to go "clubbing," and she was concerned because her mother was in no condition to leave the home. When Howard arrived he went to his bedroom where he observed Charles and Charles' mother undressed. Howard testified he observed the defendant on top of his wife with one hand between her legs. Howard testified that when the defendant saw him he jumped up and slammed the bedroom door.

{¶ 4} Howard then forced his way into the room and a fight ensued with Messer that ended with Howard throwing Messer out of the house. (Tr. 29-37.) When Howard intervened in the incident between Messer and his mother, Lisa was not moving, her eyes were closed, and she was not coherent. (Tr. 29, 31.) Howard observed that Lisa had a "dead look in her face" as if "she wasn't even there," and she stumbled into her daughter's bedroom looking for her own clothes. (Tr. 29.) Messer fled the home.

{¶ 5} Montgomery County Sheriff's Deputy Brian Statzer and paramedics arrived in response to Howard's 911 call. Statzer believed Lisa was still heavily under the influence of drugs when he arrived at the residence. (Tr. 76, 99.) Statzer observed that Lisa's speech was slurred and sometimes unintelligible, her eyes were glassy and sometimes half shut, she could not walk normally, and her demeanor varied between being lethargic and spastic. (Tr. 76-81.) After some discussion with Lisa, she agreed to be transported to a hospital where she remained for three days.

{¶ 6} The following day, Charles returned to Howard and Lisa's home and Howard called the sheriff to remove him from his home. At that time Howard told Deputy Statzer that Charles had sexually assaulted Lisa. Statzer then proceeded to Good Samaritan Hospital and requested that sexual assault nurse examiners conduct an examination to determine whether Lisa had been sexually assaulted.

{¶ 7} Lucille Smith, a registered nurse, conducted a sexual assault examination of Lisa. Lisa told Smith she could not remember any of the events surrounding the alleged assault by her son. She told Smith she remembered Charles bringing tea to her bedroom and nothing after that. She told Smith her daughter, Catherine, told her she saw Charles on top of her and "I didn't have on my clothes." (Tr. 113.) Smith observed no external or internal injuries except a small contusion on Lisa's right lower leg. (Tr. 115.)

{¶ 8} Detective Patrick O'Connell of the Montgomery County Sheriff's Office testified that Charles told him that his mother is the one who initiated the sexual activity by grabbing his penis and fondling it. O'Connell testified that Charles told him he then inserted his penis in his mother's mouth and admitted to O'Connell, "I

know it was wrong.” O’Connell testified Charles admitted he penetrated his mother’s vagina. (Tr. 147.) O’Connell testified that Charles told him he knew his mother was under the influence of prescription pills when he engaged in the sexual activity with her. (Tr. 157.) Charles also told O’Connell he had taken medication earlier in the day. (Tr. 153.)

{¶ 9} At trial, Lisa testified she was the one who initiated the sexual activity with her son and that she performed oral sex upon him. She denied being any more impaired than someone who had a “buzz” from drinking. (Tr. 186.) She said she told the detective and the nurse examiner she did not remember anything because she was afraid her husband would divorce her and take her children from her.

{¶ 10} After the jury found the defendant guilty, the court merged the sexual imposition conviction with the sexual battery conviction and imposed a four-year prison term to be served concurrently with the sentence imposed in Case No. 2008-CR-3526, a receiving stolen property conviction.

{¶ 11} In his first assignment, Messer argues that his conviction is against the manifest weight of the evidence. Messer argues that the evidence presented by the State failed to demonstrate that his mother was “substantially impaired” as required by R.C. 2703.(A)(2) and R.C. 2907.05(A)(5). Messer notes that Howard testified that his wife slurred her speech “a little bit” and was unable to eat her dinner that evening. He notes that Howard testified his wife immediately went to the next room and got dressed after he saw the sexual encounter in the bedroom. He also notes that Deputy Statzer testified that Lisa answered his questions appropriately. Lastly, Messer notes his mother testified she was no more impaired than one who had been

drinking and had a “buzz.”

{¶ 12} The State notes that Howard testified that, prior to the incident, Lisa was “messed up” because of taking prescription medicine, could not hold her eyes open, was stumbling when she tried to walk, was unable to eat her dinner, and finally went to her room where she “passed out” on the bed. (Tr. 25-26.) The State notes that Howard further recalled that when he entered the bedroom and found Messer engaging in sexual activity with Lisa, she was not moving, her eyes were closed, and she was not coherent. And after he intervened, Lisa had a “dead look in her face” as if “she wasn’t even there,” and she stumbled into her daughter’s bedroom looking for her own clothes. (Tr. 29.)

{¶ 13} The State also argues that Detective Statzer presented important testimony regarding Lisa’s level of impairment when he was called out to the residence on July 26, 2009. (Tr. 73.) The State notes that Statzer believed Lisa was still heavily under the influence of drugs when he arrived at the residence. (Tr. 76, 99.) At that time, Statzer observed that her speech was slurred, her eyes were glassy, her gait was abnormal, and her demeanor varied between lethargic and spastic. (Tr. 76, 81.)

{¶ 14} Messer also argues that the State failed to prove that he knew his mother was substantially impaired when he engaged in the sexual activity with her. The State argues that Messer’s voluntary intoxication is not a defense to the crimes charged because of R.C. 2901.21(C) which provides that “voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense.”

{¶ 15} To determine whether a verdict is against the manifest weight of the evidence, “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, citations omitted. “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.* When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the fact-finder’s resolution of the conflicting testimony. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25.

{¶ 16} Sexual battery, as charged in this case, is defined as: “No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: 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.” R.C. 2907.03(A)(2). As charged, gross sexual imposition is defined as: “No person shall have sexual contact with another, not the spouse the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: the ability of the other person to resist or consent \* \* \* is substantially impaired because of a mental or physical condition or because of advanced age.” R.C. 2907.05(A)(5).

{¶ 17} The Ohio Supreme Court has stated that “substantial impairment must

be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct. This is distinguishable from a general deficit in ability to cope, which condition might be inferred from or evidenced by a general intelligence or I.Q. report." *State v. Zeh* (1987), 31 Ohio St.3d 99, 103-104.

{¶ 18} At least one court has held that voluntary intoxication qualifies as a "mental or physical condition" that may be the cause of a victim's substantial impairment. See, *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026, 2000 WL 1145465 (construing R.C. 2907.02(A)(1)(c), which contains language identical to R.C. 2907.05(A)(5)).

{¶ 19} The record in this case supports appellant's conviction of both charges. The jury was in the best position to assess the credibility of the witnesses. There was considerable evidence that Lisa was substantially impaired when the appellant engaged in sexual activity with her. The jury was not required to believe Lisa's testimony that she was not so impaired in light of the testimony given by Howard, Deputy Statzer, and Lucille Smith. Also, the jury was not required to believe that the appellant was so substantially impaired that he could not appreciate what he was doing when he engaged in the sexual activity with his mother. He told Detective O'Connell "he knew what he did was wrong." (Tr. 147.) Also, R.C. 2901.21(C) explicitly provides that voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Intoxication includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug. R.C. 2901.21(D)(4). The appellant's

convictions were not against the manifest weight of the evidence. The first assignment of error is Overruled.

{¶ 20} In his second assignment, Messer asserts the trial court abused its discretion in imposing the four-year sentence upon him. Messer asserts that since these convictions are his first, the trial court should have imposed a one-year sentence upon him, the minimum for a third-degree felony. He acknowledges that he was on intervention in lieu of conviction (ILC) for the offense of receiving stolen property at the time of these convictions. The State argues that the sentence was not unreasonable under all the circumstances surrounding these offenses and in light of appellant's prior contact with the criminal justice system. We agree. The second assignment is likewise Overruled. The judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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