No. 22580 - State of West Virginia v. Dee Hottinger

Cleckley, Justice, concurring, in part, and dissenting, in part:

I concur in most of what the majority opinion says, and I agree this defendant violated the criminal laws of the State of West Virginia. I cannot agree, however, that the evidence is sufficient to support a conviction of second degree sexual assault.[1] Thus, I write separately to express my opposition to Part III of the majority's opinion. Accordingly, I respectfully dissent from that part of the opinion; in all other respects, I concur.

In Part III, the majority concludes the evidence was sufficient to sustain the defendant's conviction of second degree sexual assault. W. Va. Code, 61-8B-4 (1991). When reviewing the sufficiency of the evidence, an appellate court should view all evidence, whether circumstantial or direct, in the light most

[1]There are many issues that were not raised on this appeal that in my judgment should have been raised. Mindful of what the United States Supreme stated in Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3313, 77 L.Ed.2d 987, 994 (1983) ("[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues"), I cannot condemn appellate counsel for limiting this appeal to the issues addressed.

favorable to the prosecution, with all reasonable and credibility choices to be made in support of the jury's verdict. The evidence is sufficient to support a conviction if a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. State v. Guthrie, ___ W. Va. ___, ___ S.E.2d ___ (No. 22710 7/19/95).

In my judgment, the defendant correctly contends the evidence was insufficient to permit any rational trier of fact to find beyond a reasonable doubt that he knew the victim was being forced or coerced into having sexual intercourse with him, which is a critical and material element of sexual assault in the second degree. During the trial of this case, the State stipulated that the defendant did not personally use forcible compulsion against the victim. Instead, the prosecuting attorney remarked that the State was relying upon intimidation imposed by the victim's mother's paramour, George Miller. Specifically, the prosecuting attorney said:

> "[W]e will be perfectly willing to stipulate--there's no allegations against this [defendant] that he threatened [the victim] with bodily harm or that he threatened to kidnap her; that he threatened to kill her. This is a case where we're relying upon intimidation, because this girl is under sixteen, and it can be intimidation by any person, not necessarily this defendant. The case is, there was intimidation by George Miller in this case, . . . we're not alleging that against the defendant."

The jury was instructed that forcible compulsion of a child under sixteen years of age is fear "caused by intimidation, expressed or implied, by another person four years older than the victim and of which the Defendant had knowledge." See W. Va. Code, 61-8B-12(a) (1984). The prosecuting attorney argued that although the defendant did not cause the intimidation of the victim, the evidence proved the defendant was aware or should have been aware of the victim's age and the intimidation imposed by Mr. Miller.

W. Va. Code, 61-8B-12(a), provides:

> "In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, . . . it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions."

Considering the evidence in the light most favorable to the prosecution, the only evidence supporting the State's theory is that the victim testified the defendant had been to her house about twice a month for the last three or four years. She stated the defendant would come to the house to speak with Mr. Miller. The defendant admitted he had known George Miller "off and on for about ten years," but contended he first met the victim approximately two years ago. The defendant only could recall having a conversation with the victim on one occasion when they were talking about some VCR tapes he was borrowing from Mr. Miller.

On the evening the defendant had sexual intercourse with the victim, the victim testified the defendant was drunk when he arrived at her house to speak with Mr. Miller about arranging to have sexual intercourse with the victim's mother. The victim stated both she and her mother were in a separate room from the defendant and Mr. Miller, but she could overhear the conversation between the two men. After the defendant left, the victim's mother refused Mr.

The defendant testified he saw the victim a total of about eight times, four of which were in her home.

The defendant denies he went to the victim's house. He maintains the victim and Mr. Miller just showed up at his house and Mr. Miller asked him if he would like "a little strange" in exchange

Miller's request that she have sexual intercourse with the defendant. Thereafter, Mr. Miller told the victim she would have to go. The victim stated neither she nor her mother said anything before the defendant left. The victim further testified she went to the defendant's house with Mr. Miller because Mr. Miller threatened to beat her up if she did not go. Significantly, the threats did not take place in the presence of the defendant nor was he told about them.

The victim said that once she and Mr. Miller arrived at the defendant's house she went into the bedroom and took off her clothes. She asserted the defendant treated her roughly and ripped off her bra; however, in the State's brief, it is conceded the defendant did not threaten or physically injure the victim in any way. The victim also stated the defendant did not know she was being compelled to have sexual intercourse with him at the direction of Mr. Miller, and she never told the defendant she did not want to have sex with him. The defendant testified he thought the victim was about eighteen years old on the evening he had sexual intercourse

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for some beer money.

with her. He based his belief on her appearance and because he "knew that she was supposed to be getting married[.]"

At the close of the State's evidence, the defendant moved for a directed verdict of acquittal. The trial court denied the motion stating, in part:

> "The Court believes that the apparent closeness of [the defendant] to the family would indicate to the jury, if they elect to find it, that he would have known that George Miller was not only giving this girl--forcing this girl but his own now wife--into these acts, and the Court would further find that the act of force is as counsel for Defendant has argued, one that must exist but not necessarily on the part of the defendant, so long as he had knowledge of and took advantage of it, and if that is the situation, the Court believes that the evidence is sufficient here to warrant the jury to adopt that conclusion; that is not to say that under the evidence this Court either would or would not reach that conclusion, but the Court is not the fact finder and believes there is adequate evidence in the file to permit the jury to reach that conclusion if it is so minded."

Likewise, the trial court denied the defendant's post-trial motion finding, in part, "there was evidence that was sufficient, although

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At first, the victim testified the defendant knew how old she was because Mr. Miller told everyone her age. However, upon objection by defense counsel, she said she never heard Mr. Miller and the defendant discuss her age.

circumstantial, to allow the matter to go to the jury on that issue of forcible compulsion and knowledge[.]"

I do not quarrel with the majority's position that the defendant knew the victim was under age, and, for that reason, I concur in finding the defendant guilty of third degree sexual assault. Nevertheless, there is simply no evidence of any kind, direct or circumstantial, that shows the defendant knew the victim was being coerced by a third person to have sex with him. The majority opinion cites no facts, but contends generally that the defendant should have known what was going on because of his acquaintance with the victim's stepfather. The issue is not whether the defendant knew the stepfather, but whether he knew the stepfather coerced the victim into having sex with the defendant; on this issue, the record is totally barren of any supporting facts. This case could not survive the preponderance of evidence standard, and it certainly cannot withstand the beyond a reasonable doubt standard.

The problem is not one of the nature of the evidence--whether circumstantial or direct--but is one of its quantity. A defendant's participation in a crime certainly can be proven by circumstantial evidence, if there is enough of it. Until

today, however, the decisions of this Court squarely and consistently held that mere suspicion was insufficient to prove someone's guilt beyond a reasonable doubt.

The element of "knowledge" is not a loophole or technicality designed to benefit persons accused of sexual assault. Instead, it serves to protect against unfair or unjustified convictions of an offense where knowledge is a material and distinguishing element. Only the Legislature should be able to make inroads in the element of knowledge of coercion in second degree sexual assault cases. To be clear, no one should have the right to coerce another into having sexual intercourse. But the law provides and should continue to provide for the requirement that the prosecution not only establish but prove beyond a reasonable doubt that the victim was under age and that the defendant was aware of the coercion by a third person before he can be found guilty of second degree sexual assault. That is what the reasonable doubt standard is all about.

As a society, we have given much to the war against sexual assault on our citizens, which is the way it should be. But one thing we should not sacrifice is the fundamental constitutional

principle that no man or woman may be convicted of a crime except upon proof beyond a reasonable doubt.

Accordingly, I must regrettably, but most respectfully dissent.