

[Cite as *State v. Daniels*, 2010-Ohio-899.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92563

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES T. DANIELS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511478

BEFORE: Sweeney, J., Dyke, P.J., and Celebrezze, J.

RELEASED: March 11, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, James T. Daniels (“defendant”), appeals his attempted rape and kidnapping convictions. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On September 12, 2008, a jury found defendant guilty of attempted rape in violation of R.C. 2907.02(A)(2), and kidnapping with a sexual motivation specification in violation of R.C. 2905.01(A)(4), along with firearm specifications. The court sentenced defendant to three years in prison for the firearm specifications, and five years community control sanctions for the attempted rape and kidnapping offenses.

{¶ 3} The following testimony was heard at trial:

{¶ 4} D.N.¹ (“victim”) testified that on the night of December 14, 2007, she was at Skeat’s, a bar on the corner of East 93rd Street and Union Avenue, in Cleveland, when she had a brief conversation with defendant, whom she did not know at the time. She left the bar when it closed and again ran into defendant, who offered to walk her to her car. When they arrived at her car, there was an irate man nearby. Defendant told the victim that he was a licensed firearm carrier and offered to drive the victim around in his truck until the man was gone. The victim accepted the offer.

{¶ 5} Defendant, the victim, and defendant’s cousin got into defendant’s truck and drove around for a few minutes. The victim bought a CD and a bag of

¹Pursuant to court policy, victims of sexual offenses are not identified by name.

marijuana from defendant and defendant showed her his gun. When they arrived back at the victim's car, she realized she did not have her keys. Defendant offered to drive her home after he dropped his cousin off and stopped at his house to let his dogs out. The victim agreed. After taking his cousin home, defendant took the victim to his house in Garfield Heights.

{¶ 6} The victim testified that defendant let the dogs out, then she and defendant went inside, "had a drink * * * [and] rolled up a joint." She further testified that at this point she felt comfortable with defendant. The victim continued about the events that transpired next:

{¶ 7} "Well, maybe 20 minutes went by and he called the dogs. He went and got his dogs. They came back in. And then that's when I was like okay, are you ready to take me home. And he said, I am drunk. I said you are not drunk. Are you about to take me home. He said I am not taking you anywhere. And that's when I was just scared. I didn't know what to do, was he going to harm me. And he told me, no, that he wouldn't as long as I did what he told me to do."

{¶ 8} Asked what happened next, she stated: "Well, I got up. I walked along the counter area and it was some scissors there. And I picked up the scissors and he seen me with the scissors. He was like, are you going to hurt me. I don't like that. Then I just was so scared and I didn't know what to do. I just put the scissors down. I didn't want him to do anything to me, so I just set them down."

{¶ 9} According to the victim, defendant sat her on the couch to calm her down. She used the bathroom and defendant then asked her to remove her clothes. When she hesitated, defendant pulled out his gun. She testified that “[w]hen he pulled the gun out of the small of his back, I just told him to kill me because I don’t want you doing anything crazy to me.” Defendant replied, “I respect that, I respect that.”

{¶ 10} Defendant set the gun on the counter and walked the victim back to the couch, where he began to perform oral sex on her. She testified that she kept looking at him and then looking at the gun. “I just took a chance and just jumped over him and I ran and grabbed the gun, but he was right behind me, so we both had the gun. And I know I am short. He is tall. So I don’t know if he pointed the gun. All I know is that I shot the gun. When the gun went off, I ran out of the house.”

{¶ 11} In the yard, defendant and the victim struggled and fought. The victim, who was naked, repeatedly got away from defendant and ran through the woods until defendant caught up with her again. According to the victim, “every time he would come in contact with me, he would just choke me like he was trying to put me to sleep. He just kept choking me. Every time he would grab me I would get out of it.” She eventually came out of the woods, ran into the lobby of Jennings Hall, a nearby apartment building, and pressed entry buttons until someone buzzed her in. Shortly after this, the police arrived.

{¶ 12} Garfield Heights Police Sergeant James Mendolera testified that at approximately 5:00 a.m., on December 15, 2007, defendant called 911 stating that a female stole his gun and was now running naked in the woods toward Jennings Hall. As he was en route to Jennings Hall, Sgt. Mendolera received another dispatch call that a female needed help at the same location. He assumed that the two calls were referring to the same female.

{¶ 13} Sgt. Mendolera testified that he found the victim in apartment 207 "standing there completely nude except for one sock on. She was wet, full of leaves and numerous scrapes, cuts all over her body." Although she was "hysterical" and "fatigued," the victim gave a coherent account of the events.

{¶ 14} Sgt. Mendolera called the officer who responded to defendant's house and told him to secure defendant. A .40 caliber Glock pistol was found in defendant's driveway and the magazine to this gun was found inside the house on the stove. The glass window in the side entry door was shattered and, upon further inspection, officers found a bullet in the door. The victim's clothing was found in the downstairs bathroom doorway and defendant's wet clothing was found on the floor of the upstairs office. Police also found the victim's keys on the floor of defendant's pick-up truck, behind the front passenger seat.

{¶ 15} Garfield Heights Police Officer David DuPont testified that shortly before 5:30 a.m., on December 15, 2007, he responded to a possible robbery at defendant's residence, after defendant called 911 and stated that a female fled his house with his firearm. Officer DuPont arrived at defendant's house and,

pursuant to Sgt. Mendolera's orders, detained defendant for investigation of felonious assault. Officer DuPont asked defendant what happened and defendant recalled the events as follows:

{¶ 16} Defendant met the victim at a bar and said he would give her a ride home because she lost her car keys. They first dropped his cousin off, then went back to defendant's house to let the dogs out. Defendant and the victim "had some drinks," then "he asked her to disrobe, which she did." Defendant had a firearm on his person. He placed the gun on the counter and the two talked about the gun. At that point, she grabbed the gun and the two struggled. The weapon went off, the victim fled, and defendant chased her outside. He caught her, she struggled free, and she ran through the woods.

{¶ 17} Officer DuPont testified that police found the gun and an earring near the garage. The magazine for the gun was on the kitchen counter. There was debris and glass in the kitchen from where the bullet hit the window in the door.

{¶ 18} Garfield Heights Patrolman Bryan Cwiklanski testified that he arrived at Jennings Hall and found Sgt. Mendolera talking with the victim, who was naked, disheveled, shaking, and crying, and had numerous cuts on her body. He spent most of the time speaking with the elderly tenant of the apartment, who let the victim in from outside. He heard only "bits and pieces" of Sgt. Mendolera and the victim's conversation.

{¶ 19} When the victim was later transported to Marymount Hospital, Ptl. Cwiklanski followed the ambulance there to question her. He testified that the

victim had calmed down by the time she arrived at the hospital, but she was still crying. Ptl. Cwiklanski left statement forms for her to fill out later because "she was obviously exhausted." Ptl. Cwiklanski testified that she did not mention oral sex while he questioned her at the hospital.

{¶ 20} Garfield Heights Police Detective Phillip Herron testified that he spoke with the victim on the morning of December 15, 2007, while she was at the hospital. She denied being "penetrated." Asked if he had any "information at that time with regard to any type of sexual assault," Det. Herron replied, "No." Det. Herron did not order a rape kit or DNA testing based on the victim's recollection of the events; rather, he took pictures of the scrapes and bruises on the lower half of the victim's body and left her with statement forms to complete and return.

{¶ 21} Det. Herron testified that on December 16, 2007, the victim came to the police station to pick up her purse and car keys. The next day, on December 17, 2007, the victim came back to the station to drop off her written statement. Det. Herron testified that, at that time, "[w]e definitely worked on the oral sex issue and why that wasn't divulged to us at the hospital."

{¶ 22} Defendant now appeals his convictions and raises three assignments of error for our review.

{¶ 23} "I. The State of Ohio failed to introduce sufficient evidence to sustain a conviction in violation of appellant's right to due process of law as

guaranteed by Article I, Section 10 of the Ohio State Constitution and the Fourteenth Amendment to the United States Constitution."

{¶ 24} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in the light most favorable to the prosecution, whether any reasonable 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, 273, 574 N.E.2d 492. "The verdict will not be disturbed unless the reviewing court finds that reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Jalowiec* (2001), 91 Ohio St.3d 220, 228, 744 N.E.2d 163 (citing *Jenks*, supra, at 273).

{¶ 25} Revised Code 2905.01 governs kidnapping, and subsection (A)(4) states in pertinent part that "[n]o person, by force, threat, or deception * * * shall * * * restrain the liberty of the other person * * * [t]o engage in sexual activity * * * with the victim against the victim's will * * *."

{¶ 26} Specifically, defendant argues the State failed to establish that defendant restrained the victim's liberty or that he acted with the purpose of engaging in sexual activity.

{¶ 27} Our review of the record shows that the victim testified that defendant refused to take her home, told her she would not get hurt if she did as she was told, pulled out a gun, and then performed oral sex on her. Additionally, the victim testified that, when they were outside, defendant repeatedly grabbed and choked her while she tried to run away. We hold that this evidence is

sufficient to show that defendant restrained the victim's liberty, against her will, to engage in sexual activity with her. See *State v. Evans*, Cuyahoga App. No. 85396, 2005-Ohio-3846 (upholding kidnapping and rape convictions when the defendant approached a woman at a bus stop, grabbed her purse, told her to "come with me," led her into an apartment, pushed her onto the couch, then digitally penetrated her); *State v. Williams*, Ashtabula App. No. 2001-A-0044, 2002-Ohio-6919 (holding that there was sufficient evidence to convict the defendant of kidnapping when the victim voluntarily entered the defendant's truck, the defendant subsequently refused to stop driving or let the victim out of the truck, and "told her he would make it hurt if she chose to jump").

{¶ 28} R.C. 2907.02 governs rape and subsection (A)(2) states as follows: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.01(A) includes oral sex, or cunnilingus, in the definition of sexual conduct. Furthermore, R.C. 2923.02(A) states that an attempt entails purposeful "conduct that, if successful, would constitute or result in the offense."

{¶ 29} In the instant case, defendant argues that the victim's inconsistent statements, the lack of adequate police investigation, and the absence of medical records substantiating the victim's claims result in insufficient evidence to support an attempted rape conviction.

{¶ 30} Although the victim did not initially report a rape, the written statement that she gave police on December 17, 2007, states that the defendant

“sat me down on the couch and began to give me oral sex.” During trial, asked if the oral sex was something that she wanted, the victim replied, “No. I did not want it.” Asked what prevented her from stopping it, the victim replied, “I was scared. The gun was on the counter. I didn’t know what he was really going to do to me. I didn’t want to fight him or upset him and to stay as calm as possible so he wouldn’t harm me, so I just did what he told me to do.”

{¶ 31} We find this evidence sufficient to sustain defendant’s attempted rape conviction. Evidence is sufficient if “any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Jenks*, supra, at 273. We note, however, that defendant’s arguments regarding inconsistent, conflicting, and non-existent evidence are better analyzed under a manifest weight of the evidence theory; therefore, we take them into consideration in his second assignment of error. Defendant’s convictions for kidnapping and attempted rape are supported by sufficient evidence in the record and his first assignment of error is overruled.

{¶ 32} “II. Appellant’s convictions were against the manifest weight of the evidence and, therefore, his convictions were in violation of the Ohio State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.”

{¶ 33} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 34} “The appellate court sits as the ‘thirteenth juror’ and, reviewing the entire record, weighs all the 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* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 35} In *State v. Gaston* (Jan. 11, 1979), Cuyahoga App. No. 37846, this Court set forth various guidelines that apply to a manifest weight of the evidence analysis: a reviewing court is not required to accept the incredible as true; whether the evidence was uncontradicted; whether a witness was impeached; what was not proved; whether the evidence was certain; whether the evidence was reliable; whether a witness was disinterested; and whether the evidence was “vague, uncertain, conflicting, fragmentary,” or does not fit “together in a logical pattern.” (Internal citations omitted.)

{¶ 36} In the instant case, defendant argues that various inconsistencies in the victim’s testimony, conflicts between the victim’s testimony and other evidence, and Sgt. Mendolera’s and Officer DuPont’s lack of credibility caused the jury to lose its way in convicting defendant of attempted rape and kidnapping.

{¶ 37} As to the victim’s credibility, defendant points to the following:

{¶ 38} The victim first testified that when she left the bar, it was closing and there was no “security outside or anyone.” However, the victim subsequently

testified that she left the bar at closing time, and there were “a lot of people coming out.”

{¶ 39} Officer Cwiklanski’s written report, which was based on his questioning the victim while she was at the hospital, states that the victim and defendant “entered the residence and ‘hung out’ and smoked,” after defendant took the dogs out (emphasis in original). However, asked during trial if she told the police officer that she and defendant “hung out and smoked,” the victim testified, “No. I didn’t hang out and smoke. I waited for him while he let his dogs go outside. We had a drink and smoked a joint to pass the time. And he was supposed to take me home. I wasn’t going up [sic] there to hang out with him like we were buddies.”

{¶ 40} Officer Cwiklanski’s report also states that the victim “was able to grab a pair of scissors off of the kitchen counter. [Defendant] then grabbed the scissors from her * * *.” (Emphasis in original.) However, on direct examination, the victim testified that after she picked up the scissors, she “was so scared * * * [she] just set them down.” Asked to explain if defendant grabbed the scissors or the victim set them down, she testified that Officer Cwiklanski’s report was inaccurate.

{¶ 41} Additionally, the victim testified to not remembering “small details,” such as who rolled the marijuana joint or supplied the rolling papers. Defendant argues that because the victim testified to recalling other seemingly “small

details,” such as the scissors she picked up that night had orange handles, there is “serious doubt as to the accuracy of her allegations.”

{¶ 42} Defendant argues the victim made inconsistent statements as to when he brandished his firearm. Officers Cwiklanski and DuPont’s reports state that defendant pulled the gun from the small of his back after the victim grabbed the scissors. However, the victim’s written statement to the police has defendant pulling the gun from his back after he told her to undress while she was in the bathroom. During trial, she testified that defendant pulled the gun from the small of his back after he told her to take her top off and she hesitated.

{¶ 43} While we acknowledge minor inconsistencies in the victim’s testimony, we find these inconsistencies to be peripheral to the elements of kidnapping and rape. She consistently alleged that defendant held her against her will and chased her around the yard. Furthermore, although she did not initially report the oral sex, once she made the allegation, her story remained the same.² “When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.” *State v. Gilliam* (Aug. 12, 1998), Lorain App. No. 97CA006757. Accord, *State v. White* (1968), 15 Ohio St.2d 146, 239 N.E.2d 65 (holding that unless inconsistencies between trial testimony and prior statements are substantial or significant, errors based on them are harmless).

²The victim’s reasoning for not reporting the oral sex as rape is explained elsewhere in this opinion.

{¶ 44} Defendant next argues there are discrepancies in the victim's timeline of the evening's events that leave approximately 30 minutes unaccounted for. Additionally, defendant argues that it is unbelievable that she ran and struggled outside in cold and wet conditions on a pre-dawn December day in Cleveland for approximately one hour while she was naked, "without sustaining any weather-related repercussions including, but not limited to hypothermia, frostbite and/or pneumonia."

{¶ 45} The victim testified as follows: she told defendant she was ready to leave at approximately 3:30 a.m.; the events leading up to, and including, the alleged rape, lasted approximately 30 minutes; by the time she shot the gun and ran outside it was around 4:00 a.m.; and the two fought and ran in the woods for approximately one hour, or until 5:00 a.m. Our review of the record shows that defendant made the 911 call at 5:18 a.m. Contrary to defendant's argument, we do not find discrepancies in the victim's recollection of the timing of events. Additionally, it was within the province of the jury to assess the victim's credibility and believe her testimony that she and defendant struggled in the woods for one hour before she was able to get away.

{¶ 46} Defendant next argues that the victim's testimony conflicts with the medical evidence. The doctor who saw the victim at the hospital reported that "[s]he was not physically assaulted by [defendant], nor sexually." The report also states that she was admitted "because of skin abrasions and scrapes" due to "running through the bramble naked * * *." However, we note that another

medical report of the victim taken by a nurse states as the victim's chief complaint, "Assault at gunpoint at assailant's house * * *." The victim reported a physical assault to the police in her oral and written statements. She also testified to a physical assault at trial. Additionally, the victim reported a sexual offense in her written statement to police and she testified to a sexual offense at trial. We find that a reasonable jury could believe the victim's story, which is in part corroborated by a nurse's report, over what seems to be an incorrect notation in a doctor's report.

{¶ 47} Asked to explain during trial why she did not initially mention oral sex, the victim testified as follows: "I was feeling really stupid. I was feeling, I was scared. I was embarrassed. * * * I just didn't know how to feel. I just, I felt helpless, hopeless. * * * Well, when they kept asking me did he rape me. I figured that, you know they mean penetration with his penis to my vagina. That's what I meant.

{¶ 48} "I really didn't think — I don't know why I didn't think about the oral sex. It didn't even come to my mind that that was a rape. I was just figuring they meant him actually violating my body and just having sex with me. That's what I thought they meant."

{¶ 49} Defendant next argues that Sgt. Mendolera's testimony should be discredited because "he had no direct, personal knowledge as to what transpired on the night in question." Defendant further argues that Officer DuPont's testimony lacked credibility because it "was based on second- and third-hand

observations.” It is undisputed that there were no eyewitnesses to what transpired between defendant and the victim on the night in question, and nobody knows what happened other than the parties themselves. Sgt. Mendolera testified that his role as the supervising officer included reading and signing the other officers’ reports. Officer DuPont testified that he wrote his report after speaking with defendant and the other officers, but not the victim. Defendant offered both reports into evidence and thoroughly cross-examined both officers.

{¶ 50} We reiterate the proposition that “an appellate court should defer to the trial court’s determination of witness credibility because the decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the evidence.” *City of Cleveland v. Bates* (Jul. 24, 2008), Cuyahoga App. No. 90212 (citing *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288).

{¶ 51} In summary, we give substantial deference to the factfinder’s determination of credibility, and despite minor inconsistencies in the evidence, we cannot say that the jury lost its way in convicting defendant of kidnapping and attempted rape. Defendant’s second assignment of error is overruled.

{¶ 52} “III. The trial court erred in allowing Officer Mendolera to render an expert opinion as to the veracity of the victim, essentially acting as an expert juror in determining credibility.”

{¶ 53} In general, it is improper for a witness to comment on the credibility of a victim, as this determination is left exclusively to the trier of fact. See *State*

v. Boston (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220. This Court has held that a “police officer’s testimony cannot violate *Boston*, because jurors are likely to perceive police officers as expert witnesses, especially when such officers are giving opinions about the present case based upon their previous experiences with other cases.” *State v. Mills*, Cuyahoga App. No. 90383, 2008-Ohio-3666 at ¶18.

{¶ 54} In the instant case, Sgt. Mendolera testified that after he spoke with the victim at Jennings Hall, he instructed another officer to secure defendant for further investigation because “[i]t was obvious that [victim] wasn’t the robber.” Sgt. Mendolera also testified that he briefly spoke with defendant that evening: “The defendant said, he just kept saying she robbed me. She took my gun. She robbed me. And I tried to explain, it doesn’t fit. Naked females don’t rob people * * *.

{¶ 55} “* * *

{¶ 56} “I said, naked females don’t — I have been a policeman for 25 years and naked females just don’t rob. They get the male naked and may rob them, but it doesn’t happen the other way. Never seen it.”

{¶ 57} In *Mills*, supra, at ¶17, a police officer “vouched for the credibility of the victims when he testified that he left the incident ‘with a very favorable idea about these two. They were very nice people. They were true victims.’” This Court held that although the testimony was improper, any resulting error was harmless. Similar to *Mills*, we hold that Sgt. Mendolera’s testimony amounted to

him saying that the victim must be telling the truth. As this is improper, we analyze the testimony under the harmless error standard.

{¶ 58} Pursuant to Crim.R. 52(A), “[a]ny error * * * which does not affect substantial rights shall be disregarded.” We cannot say that Sgt. Mendolera’s improper testimony contributed to defendant’s convictions because Ohio courts have consistently held that a rape conviction may rest solely on the victim’s testimony, if believed. “There is no requirement that a rape victim’s testimony be corroborated as a condition precedent to conviction.” *State v. Lewis* (1990), 70 Ohio App.3d 624, 638, 591 N.E.2d 854, 863. See, also, *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70.

{¶ 59} We realize that this case boils down to the victim’s credibility. Notwithstanding Sgt. Mendolera’s comments, a careful review of the record shows that the victim’s story, if believed, supports convictions for attempted rape and kidnapping. The jury, as the finder of fact, was in the best position to believe, or not believe, the victim’s allegations. In the instant case the jury believed her and we are reluctant to disturb this verdict without clear evidence that the jury lost its way.

{¶ 60} Accordingly, defendant’s third and final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR