

[Cite as *State v. Jones*, 2003-Ohio-3240.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19355
vs. : T.C. CASE NO. 01CR2208
VINCENT JONES : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the _____ day of June, 2003.

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GRADY, J.

{¶1} Defendant, Vincent Jones, appeals from his conviction and sentence for rape and domestic violence.

{¶2} On July 8, 2001, Defendant and his former wife, K.T., resided together, with their children, at 181 W. Norman Avenue, Dayton. The relationship between Defendant and K.T. was stormy, at best.

{¶3} At about 2:00 a.m., K.T. was seated on a couch talking on the phone to Eugene Hoover. Defendant came downstairs and

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immediately became angry with K.T., believing that she was talking to a boyfriend.

{¶4} Defendant took the phone from K.T. and threw it against the wall, telling her to never allow that man to call there again. K.T. struck Defendant. He then ripped off her shorts, grabbed her by the neck, and pushed her onto the couch, causing K.T. to hit her head on an end table. Defendant grabbed K.T.'s left leg and bent it back until her knee was near her left ear. Defendant then rammed his fist inside her vagina, causing her to cry out in pain. Defendant then attempted, unsuccessfully, to have vaginal intercourse with K.T.

{¶5} K.T. told Defendant to get off of her, and she struck him and struggled in an attempt to break free. The more she struggled, however, the farther Defendant bent her leg back. That caused K.T. to eventually stop resisting due to her pain.

After his initial attempts at intercourse were unsuccessful, Defendant performed cunnilingus on K.T. and then successfully engaged in vaginal intercourse with her, all the while holding her down. K.T. did not consent to sexual relations with Defendant on that occasion.

{¶6} K.T. subsequently called 911, but Defendant took the phone and hung it up before K.T. finished speaking with the 911 operator. Defendant called 911 back, trying to persuade police to not respond. Police arrived, however, and defendant was arrested after K.T. told them what had happened.

{¶7} Later that morning K.T. went to the police station, where she was interviewed, and then went on to Miami Valley

Hospital where she underwent a sexual assault examination. That examination revealed that K.T. had a cut on her forehead, bruises on both arms, her chest, clavicle and right inner thigh, fresh tears on her vaginal walls, and a red, swollen cervix. These injuries were consistent with a sexual assault.

{¶8} Defendant was indicted on one count of rape, R.C. 2907.02(A)(2), and one count of domestic violence, R.C. 2919.25(A). Following a trial to the court, Defendant was found guilty on both charges and was convicted. The trial court sentenced Defendant to five years imprisonment for rape and six months for domestic violence, the sentences to be served concurrently. The trial court also designated Defendant a sexual predator.

{¶9} Defendant has timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶10} "APPELLANT'S CONVICTION ON THE CHARGE OF RAPE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} A weight of the evidence argument challenges the believability of the evidence; which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶12} "[t]he 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

{¶13} Defendant was convicted of Rape in violation of R.C. 2907.02(A)(2), which provides:

{¶14} "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."

{¶15} "Sexual conduct" includes cunnilingus and vaginal intercourse. R.C. 2907.01(A).

{¶16} K.T.'s testimony, if believed is legally sufficient to support Defendant's conviction for forcible rape. Moreover, the injuries observed on K.T. in her sexual assault examination are consistent with her claim that Defendant raped her, and corroborate her testimony. Defendant did not present any witnesses or offer any exhibits at trial that contradicts his wife's evidence.

{¶17} Defendant suggests that his conviction for rape is against the manifest weight of the evidence because the State's case relies primarily upon the testimony of the victim, K.T. The credibility of this victim, like any other witness, and the weight to be given to her testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶18} Defendant also claims that his rape conviction is against the manifest weight of the evidence because K.T. admitted

that throughout her fourteen year relationship with Defendant they had often engaged in "rough sex," and what happened here bears some resemblance to their past practice. That argument overlooks the fact that whatever sexual practices K.T. and Defendant may have engaged in before, she did not consent to any sexual conduct with Defendant on this occasion. That is quite clear from K.T.'s testimony that she told Defendant to get off of her and that she hit him and struggled trying to stop Defendant from having sexual relations with her.

{¶19} Finally, Defendant asserts that his conviction is against the manifest weight of the evidence because the victim's conduct immediately following the rape is inconsistent with what one would expect from a rape victim. For instance, K.T. did not immediately call police but instead tried to call her father in California. When she did call the police K.T. told the 911 operator about the domestic violence, not the rape. Additionally, K.T. did not go to the hospital for a sexual assault evaluation until police suggested it, several hours later.

{¶20} The assailant in this case was not some stranger, but the father of the victim's three children. It is quite plausible that K.T. wished to speak with her father to seek his advice about whether she should contact authorities. When K.T. did call 911 after she was unable to reach her father, Defendant interrupted that call by taking the phone away from K.T. before she finished speaking with the 911 operator. When police arrived, K.T. told them Defendant sexually assaulted her, and

she pressed charges later that morning.

{¶21} K.T.'s conduct immediately following this rape is a matter going to the credibility of her testimony. Such matters are for the trier of fact, the trial court here, to resolve. *DeHass, supra*. The trial court chose to believe K.T.'s testimony, which it was entitled to do. In reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trial court lost its way, or that a manifest miscarriage of justice has resulted. Defendant's conviction for rape is not against the manifest weight of the evidence.

{¶22} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶23} "THE TRIAL COURT ERRED IN CLASSIFYING APPELLANT AS A SEXUAL PREDATOR WHERE THE EVIDENCE BEFORE THE COURT WAS INSUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT WAS LIKELY TO COMMIT ANOTHER SEX OFFENSE IN THE FUTURE."

{¶24} In *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-247, the Ohio Supreme Court adopted a model procedure for sexual offender classification hearings including basic standards for prosecutors, defense attorneys, and trial courts to follow. The Supreme Court stated the third requirement as follows:

{¶25} "[t]he trial court should consider the statutory factors listed in R.C. 2950.09(B)(2), and should discuss on the record the particular evidence and factors upon which it relies

in making its determination regarding the likelihood of recidivism." *Id.*, at 166.

{¶26} This court has held that the trial court's failure to comply with *Eppinger's* third requirement constitutes reversible error. *State v. Bryant* (Feb. 7, 2003), Montgomery App. No. 18846; *State v. Marshall* (Nov. 16, 2001), Montgomery App. No. 18587.

{¶27} Here, in designating Defendant a sexual predator the trial court stated:

{¶28} "All right. Based upon the Court Exhibits that the Court has reviewed and all the reports contained as a r . . . as a result of that, the Court finds that the Defendant, Mr. Jones, is a Sexual Predator pursuant to Section 2950.09, Subsection 'B' of the Ohio Revised Code."

{¶29} Defendant argues, and the State concedes in its appellate brief, that the trial court violated the third requirement of *Eppinger* because it failed to discuss on the record the particular evidence and factors upon which it relied in making its determination that Defendant is likely to engage in the future in one or more sexually oriented offenses, and is therefore a sexual predator. We agree. Accordingly, the trial court's designation of Defendant as a sexual predator will be reversed and the matter will be remanded for a new sexual offender classification designation. Issues regarding weight and sufficiency of the evidence are premature and will not be considered at this time. *Marshall, supra*.

{¶30} The second assignment of error is sustained.

{¶31} Defendant's convictions for rape and domestic violence will be affirmed. His designation as a sexual predator will be reversed and the matter remanded for a new classification determination consistent with this opinion.

BROGAN, J. and YOUNG, concur.

Copies mailed to:

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