[Cite as *State v. Simpson*, 2009-Ohio-4599.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1232

Appellee — Trial Court No. CR-2006-2667

v.

Billy Ray Simpson — **DECISION AND JUDGMENT**

Appellant — Decided: September 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a jury trial, found appellant, Billy Ray

Simpson, guilty of rape, in violation of R.C. 2907.02(A)(2), a felony of the first degree, and kidnapping, in violation of R.C. 2905.01(A)(4), a felony of the first degree. Appellant was determined to be a sexually oriented offender and was sentenced to seven years incarceration as to the rape conviction and five years incarceration as to the kidnapping. The terms of incarceration were ordered to be run consecutively.

{¶ 2} Appellant timely appealed his conviction and raises the following assignments of error on appeal:

{¶ 3} 1. "Simpson's conviction for kidnapping and rape were against the manifest weight of the evidence."

{¶ 4} 2. "Simpson's convictions were not supported by competent and sufficient evidence so the trial court erred by not granting his Rule 29 motion."

{¶ 5} 3. "The trial court erred when it did not require Simpson's co-defendant, against whom charges were nolled by the state, to testify at least to limited yet significant matters that could not have incriminated him."

{¶ 6} 4. "Simpson's Fifth Amendment right to due process of law and Sixth Amendment right to compulsory process were violated because the state wrongfully threatened the former co-defendant that he could still be charged if he testified on behalf of Simpson."

{¶ 7} 5. "The trial court abused its discretion and prevented Simpson from receiving a fair trial by removing Simpson from the courtroom during voir dire, and by

not dismissing the jury panel as requested when one of the jury panel stated that Simpson was incarcerated."

{¶ 8} The following relevant evidence was adduced at trial on May 1-4, 2007. The victim in this case, who was 40 years old at the time of the incident, was addicted to crack cocaine and living in her parents' home. On July 16, 2006, the victim left her parents' home, without their knowledge, and went to Ronald Porter's house because he always had crack cocaine, or could get some from appellant, for her and Porter to smoke. The victim rode a bicycle for five to seven minutes to Porter's home, which was only a couple of blocks from her parents' home. The victim's family believed she was staying at Porter's house, but, at the victim's request, Porter and appellant lied to the family and told them that the victim was not there.

{¶ 9} The victim testified that she stayed in Porter's home smoking crack cocaine for three days, never sleeping, until July 19, 2006. She testified that only she and Porter were smoking crack cocaine, appellant was not. During that time, she, Porter and appellant got along fine. However, after she smoked $120 worth of crack cocaine that she did not have the money to pay for, she testified that she was cut off and appellant became violent. On the evening of July 19, 2006, appellant and Porter drove the victim in Porter's pickup truck to a truck stop on Alexis Road so the victim could make some money, by means of prostitution or theft, to pay off her debt. The victim testified that she went into the truck stop to use the bathroom, but did not want to prostitute herself or

steal, so she left the truck stop and went to a nearby McDonald's. Porter and appellant drove over to the McDonald's and picked the victim up near the drive-thru area. The evidence was clear that the victim did not want to stay at the truck stop, but was unclear as to whether the victim wanted to return to Porter's or was forced to do so.[1] Regardless, the three individuals returned to Porter's.

{¶ 10} The victim testified that appellant was unhappy and "had an attitude" about her not getting any money. At Porter's, both appellant and Porter were drinking alcohol. About an hour after returning from the truck stop, Porter appeared to pass out, fall asleep, or pretend to do one or the other, on the couch in the living room. At that time, appellant threatened the victim with a knife and told her to go upstairs. The victim testified that the knife had been brought into the living room by Porter at some point that evening and laid on the coffee table, where appellant later retrieved it. A knife was recovered by the police at Porter's house, laying on the coffee table in the living room. The victim testified that Porter never threatened her with the knife, or otherwise, but also did not intervene when appellant threatened her.

{¶ 11} The victim testified that she went upstairs because she feared for her safety and believed that appellant was going to kill her. Once upstairs, the victim testified that appellant made her undress in the larger of the two bedrooms and then take a shower. Wrapped in a towel, the victim testified that she attempted to go downstairs, but appellant

[1]The victim testified at trial that she was forced to get back into the pickup; however, she had told Jane Reeder, a sexual assault nurse examiner ("SANE") at St. Vincent Mercy Medical Center, that she suggested that they return to Porter's.

told her to get her "ass up there." The victim then sat in the larger of the two bedrooms while appellant spoke on his cell phone for 10 to 20 minutes. The victim testified that she thought about trying to run, but did not because appellant was upstairs and Porter was downstairs, and she did not know how she would get past them. She was also unsure whether the handle on the front door, an antique glass knob, had been removed, which would have prevented her from being able to open the door. Because she was afraid and did not know what was going on downstairs, she felt that she had no option but to stay and, therefore, she did not attempt an escape. She stated, "If I would have screamed or acted out, it would have come back on me."

{¶ 12} After appellant's phone call, the victim testified that he made her go into the smaller of the two bedrooms upstairs. Appellant told the victim to lie face down on the bed. The victim testified that she struggled with appellant at this point, but that he "attacked" her and "literally tried to snap [her] neck." She then lay on the bed and he tied her hands and feet to the corner posts of the bed. The victim testified that Porter did not assist appellant with tying her down and holding her against her will and that, if she told police that Porter held a knife on her while appellant tied her down, she had misspoken, probably due to the fact that "there was so much going through [her] mind and emotions."

{¶ 13} The victim's wrists were bound with men's ties and her feet with Velcro straps. A tie was found by police on the floor by the head of the bed, tied in a "binding knot," rather than a necktie knot, and black Velcro straps were found under the mattress

at the foot of the bed. At the time of the incident, appellant wore a knee to ankle brace that was secured with Velcro straps.

{¶ 14} Once bound, appellant retrieved rubbing alcohol from a cupboard in the hallway, poured it over the victim's anal and vaginal areas, and returned the bottle to the cupboard. A bottle of rubbing alcohol was recovered by the police in the cupboard. Although the victim did not testify at trial that appellant squirted lotion on her prior to penetrating her, she had told police this fact on the day of the incident and a bottle of lotion was recovered from a table next to the bed where the victim indicated it could be found.

{¶ 15} The victim testified that appellant penetrated both her anal and vaginal cavities with his penis, and bit her very hard on her ear. She estimated that the assault went on for approximately six hours, until early morning. She was crying, screaming and begging him to stop. When she would scream, move, or squirm, he would bite her on her back, "like a dog," or punch her, and would tell her not to move and that she would "be dead by morning." At trial, the victim did not know whether appellant ejaculated in her, but she believed that he had "whipped" his ejaculate into a wastebasket in the room that had a plastic bag in it. Police recovered a wastebasket liner from the room that had fluoresced, indicating that some substance was present therein; however, no DNA was found on the liner. The victim believed Porter came upstairs at one point, because she

saw the hall light under the doorway, but appellant covered her mouth with his hand, and Porter did not intervene.

{¶ 16} Although appellant did not tell her the assault was about money, the victim testified that the assault ended when she convinced appellant that she could get him $120 from her parents. Appellant made the victim take a shower after the assault and then allowed her to dress. The victim testified that there was a tie around her wrist, but did not recall what she did with it while she was in the shower, although she recalled that the shower was brief. She also could not recall whether appellant was in the bathroom while she showered. The victim testified that she tucked the tie up her sleeve before leaving Porter's and did not attempt to remove it because she did not want to waste the time to get it undone since she "was wanting to get out of there, especially when he was willing to take [her] to [her] parents'." While waiting for appellant to get ready to leave, the victim recalled smoking a cigarette, but did not remember whether she smoked inside or on the porch, or whether anyone was outside.

{¶ 17} At approximately 6:00 a.m. to 6:30 a.m., on July 20, 2006, appellant drove the victim in Porter's truck to the victim's parents' home. Appellant stayed right behind the victim when she approached the house. The victim testified that she did not have a key to the front door and, although she approached it, she did not knock because she wanted to get into the house and away from appellant, who was right behind her. The victim went around to the side of the house, with appellant following her, and, because

there was no gate through which she could have gone, she went over the six to eight feet tall privacy fence that surrounded the backyard. Appellant stayed on the side of the house. The victim testified that appellant did not choke her while she was alongside her parents' house.

{¶ 18} The victim entered the house through a sliding glass door, which was not locked. When asked if she intended to give appellant $120, the victim stated, "I was going to my parents' to get the money. But I was – it was more of a mind game, you know what I mean? I want – whatever it took for me to get out of that house, I was willing to do that." The victim's brother was asleep in the living room and awoke when she entered the house.

{¶ 19} The brother testified that the victim told him there was someone on the side of the house. Thinking that it was "just another drug deal gone bad," he went out and told appellant to leave. The brother testified that, within a matter of seconds he was back inside and the victim, who was holding her neck, unable to speak, "squeezes out, 'He raped me.'" Seeing "the look in her face" and the silver necktie hanging from her wrist, the brother testified that he became angry and went outside to confront appellant. Appellant got into the pickup truck and sped in reverse down the street away from the parents' house. The brother testified that he never saw appellant choking the victim alongside the house and denied having been awoken by any commotion outside.

{¶ 20} The victim testified that she was hysterical when she got home, "crying, balling," and that she had been awake for approximately 96 hours at that point. She was sore "front and back" and her ear felt "raw" where he had bitten her. The victim's mother testified that the victim was hysterical, "very shook-up," and was "scared and crying." The mother testified that the victim had a necktie tied to her right wrist and that the victim told her that she had been sexually assaulted, "tied up for hours," and got away because she knew that the mother would give her money so that "she could pay them off." The victim testified that her family assisted her with taking the tie off of her wrist.

{¶ 21} The police were called and the victim was eventually taken to the hospital where she was interviewed by Jane Reeder, a SANE nurse, and Detective Ron Permar, with Toledo Police Department's Sexual Assault Unit. With respect to that interview, the victim testified that she did not say that appellant choked her against her parents' house or that she only "pretended" that the front door was locked. Also in response to defense counsel's questions concerning inconsistencies between the victim's testimony and the statement she gave Reeder, the victim testified that she did not recall Reeder reviewing her notes with her prior to leaving the hospital to give the victim an opportunity to make corrections.

{¶ 22} Reeder testified at trial that the victim was triaged at 8:15 a.m. and appeared "very tearful" and "very upset." When taking the victim's medical history, Reeder stated that the victim told her the following:

{¶ 23} "She had told me that the night before she had been with a friend of hers, and that they proceeded to hookup with another person. She states her friend's name was Ron Porter, and that they met up with Ron's friend Billy [appellant] and that they had been together for a while then went to a McDonald's next to a truck stop, where she was told to go in to get money. * * * She went inside to use the bathroom, came back out and told them no, she wouldn't get any money. She was supposed to get money from truck drivers. And then when she didn't, they went – she wanted to go back to Ron's house, and they went back to Ron's house is what she told me, and that [appellant] had told her to go upstairs and to get undressed."

{¶ 24} The victim also told Reeder about going from one bedroom to another, being tied to a bed, being raped repeatedly anally and vaginally and that, when she resisted, he would bite her. Reeder testified that, in correlation with the victim's account, "there were round circular marks with bruising in the middle and all the way around" on her back, including the back of her arms. No bite marks, however, were found on the front of the victim's body. The victim's ear was "very reddened" and there was "a semi-circular mark around the back of her ear." No fluids were found on the victim's body; however, Reeder testified that the victim had indicated that she was told to shower, "[s]o it's possible that if there was fluid it was washed off." Nevertheless, swabs were done on the victim's earlobe, vagina and rectum, for DNA analysis.

{¶ 25} Reeder testified that the victim had "multiple tearing," i.e., more than two or three tears in the skin around her anus, and was experiencing a great deal of pain in that area. Reeder stated that the tears were not consistent with the presence of hemorrhoids in that area. Reeder also testified that the victim had "a sizeable bruise on her cervix," which could be caused by penile penetration, "but it would be awfully rough to cause that type of bruising." Reeder found multiple tears at the base of the vaginal opening which were similar to the tears around the anus, "paper-cut-type tearing," and there was a bloody discharge in the victim's vaginal area, which Reeder believed to be caused by the trauma in that area.

{¶ 26} Reeder further testified that the victim had purplish-red marks around her neck. Reeder stated that the victim told her that, at one point, when she was taken home and tried to run, "her assailant choked her, put his hands around her throat, which correlates with the red marks that would be on her throat."

{¶ 27} On cross-examination, Reeder acknowledged that, even with consensual sex, trauma could occur, depending on the length of the sexual activity and the size of the man's genitalia. Other matters highlighted by the defense included the fact that (1) the victim asked to return to Porter's when leaving the truck stop; (2) the victim never mentioned being threatened with a knife; (3) the victim told Reeder that appellant had ejaculated inside her and then finished in his hand and put the fluid in a wastebasket; (4) the victim only told Reeder about having taken one shower, not two; (5) the victim told

Reeder that appellant sat in the bathroom, "on the toilet," while she showered; (6) the victim told Reeder that she put some soap on the shower floor in hopes that "if the perpetrator got into the shower with her or after her, he might slip on the soap" so she could try to get away; (7) the victim never mentioned having the tie around her wrist while she was in the shower and, instead, told Reeder that she took the tie and put it in the pocket of her shorts before leaving; and (8) the victim told Reeder that she "pretended" that the front door was locked before going around to the side of the house, where she was then choked by appellant. Reeder also testified on cross-examination that before the victim left the hospital, after being there over four hours, Reeder read her notes back to the victim to make sure that she understood what the victim was telling her. Reeder testified that the victim made no corrections to her verbal recitation of the facts. The victim never was given an opportunity to review Reeder's written report.

{¶ 28} Gabriel Felter, with the State of Ohio Bureau of Criminal Identification and Investigation, testified that saliva was found on the swab taken from the victim's ear, and that her underwear, vaginal swab, and rectal swab, were all positive for semen. Linsey Hail, also with the State of Ohio Bureau of Criminal Identification and Investigation, testified that the DNA results from the vaginal swab and ear swab were consistent with appellant's DNA profile.

{¶ 29} Officer John Mattimore, Toledo Police Department, and Officer Troy Meyers went out to the parents' home on the morning of July 20, 2006. Mattimore

interviewed the victim and her brother, but Meyers heard some of the interview conducted. Mattimore described the victim as "physically and emotionally drained, like she was really tired." He also testified that she had red marks around her neck, bruising about her body, and she was "moving very slowly, having a hard time talking to me and getting around." Mattimore testified that it seemed like the victim was "having a hard time getting things out."

{¶ 30} As a result of the interview, Mattimore and Meyers testified that they believed the victim had been smoking crack cocaine with both suspects over a three-day period, that the suspects would not allow her to leave, and that they still wanted their money from her after the rape. The officers also believed that appellant choked the victim against her parents' house and that her brother came outside after hearing noises from the choking commotion. Mattimore testified that the victim's brother was holding the tie, but that Mattimore never touched it, so he did not know whether it was wet.

{¶ 31} Mattimore testified that the victim's brother and father were yelling during the interview for the police to go arrest the suspects. Mattimore also testified that he did not take notes contemporaneously while being told facts about the incident, but jotted notes down afterwards. On redirect, Mattimore testified that he assumed that the victim meant that both guys smoked crack with her when she told him that "we smoked crack cocaine," although she never specifically indicated such. Mattimore also testified that he

did not ask any specifics about who, or at what time, prevented her from leaving, but had only specifically asked her who had raped her.

{¶ 32} Detective Permar was then called by the state and testified that he interviewed the victim at the hospital on the day of the incident. Before questioning the victim, Permar told her that she needed to be as accurate as she could. The victim told him that she had been at Porter's house since Sunday, most of the time with Porter, but that Simpson was in and out. On July 19, 2006, appellant arrived at Porter's house around 10:00 p.m. and discussed the money that the victim owed for the drugs she had used during her stay. Prior to appellant's arrival, the victim told Permar that money had never been mentioned. The victim told him that the men took her to Petro, a truck stop, on Alexis Road, wanting her to either prostitute herself or steal from the truckers. She told Permar that she was forced to be there, but that she neither prostituted herself nor stole money. The men then got her back into the truck over by McDonald's and took her back to Porter's home in Point Place.

{¶ 33} The victim told Permar that, upon their return to Porter's around 11:00 p.m., appellant was still angry about the money that was owed and that he forced her upstairs while Porter pretended to be passed out on the couch. The victim told Permar she complied with his demands because she feared for her safety. Appellant told her to go in the big bedroom, where he had her undress, and then appellant got a phone call. Permar testified that the victim did not tell him that she was made to shower prior to the assault.

The victim indicated that "at some point she wanted to leave the room," but appellant "kind of made a gesture that she was to sit back down." He then took her into the smaller bedroom and told her to lie on the bed and that, when she resisted, he became more angry and forced her to lie down and proceeded to tie her hands and feet to the rails of the bed. The victim then described for Permar appellant's use of rubbing alcohol, lotion, and the penile penetration, both anally and vaginally. Throughout the assault, the victim told Permar that she begged appellant to stop, but that he would threaten her family and comment on the money she owed. She told Permar that it ended when appellant ejaculated and threw his ejaculate into the trash can, which was in the room off to the side of the bed.

{¶ 34} According to Permar, in order to get away, the victim told appellant that she could get the money from her parents' house. Appellant agreed, untied her, and forced her back into the shower area, where he also cleaned himself. She dressed and he drove her to her parents' house. Once there, when she couldn't get into the front door, she felt that "if she jumped their privacy fence at the house it would provide her distance to get away from [appellant]." Once inside, she stirred her family and appellant fled in Porter's vehicle.

{¶ 35} Police knocked on Porter's door for four hours, but no one answered the door or left the premises. At 11:00 a.m., Permar obtained a search warrant. After gaining access to the house, Permar testified that he saw "a large knife sitting right by

where [appellant] was sitting on the couch." No drugs or drug paraphernalia was found in the house, but rubbing alcohol was found in the hall closet and lotion was found in the small bedroom, both where the victim indicated they could be found. A man's tie and Velcro straps were also found in the smaller bedroom, where the victim had told Palmer the assault took place. Permar did not recall asking the victim if any weapon had been used during the assault and was not aware that the victim had told police that a knife had been used until several days later. He never followed up with the victim regarding the use of a knife. Permar testified that he did not seek to have the knife checked for fingerprints because the presence of fingerprints would only have established who touched the knife, not whether it was used to threaten the victim, and the police already knew that appellant and Porter both had access to the knife.

{¶ 36} Permar interviewed appellant on July 20, 2006, regarding the allegations. Appellant stated that he never had sex with the victim, consensual or otherwise and did not do any of the things the victim told the police had occurred, such as, forcing her to shower, pouring rubbing alcohol on her, or putting lotion on her. Appellant, however, did tell Permar that the victim owed him and others money from stealing or smoking other people's crack cocaine. He said that the victim was always saying how she was going to get money, but that she never followed through. Appellant told the victim that if she wanted to make a quick $200, he knew where she could go and then they could "party." He and Porter took the victim to the Petro truck stop to have her prostitute

herself or steal, but appellant stated that the victim was afraid or embarrassed because the Petro guy saw her and she left. She went over to the McDonald's and appellant stated that he decided they should all just leave.

{¶ 37} When they returned to Porter's, appellant said that he went to sleep in the larger bedroom around 1:00 a.m., or later, and that he caught the victim around 6:30 a.m. going through the pockets of his shorts. He believed that she had previously taken $120 during the night and had come back looking for more money. He said that he pinned her down with his forearm on the back of her neck and that he bit her ear and back a couple of times out of anger. He asked her if the money was in the house and said that she indicated it was in her bedroom at home and that she could get it for him. He surmised that she must have left with his money, gone home to her parents' to hide the $120, and then returned to Porter's. He said he didn't care where she got his money from, he just wanted it back.

{¶ 38} Appellant told Permar that he got up and took the victim to her parents' home. The victim tried the front door, but couldn't get in, so she went around to the side of the house and went over the privacy fence. The victim's brother then came out the front door, followed by the victim, and yelled at appellant. Appellant presumed that the victim's brother acted in such a manner because he was prejudiced against black people. Appellant then left and returned to Porter's, where he went upstairs to go back to sleep in

the larger bedroom. He heard loud knocking on the door, but did not answer the door because it was Porter's house. He denied telling Porter at any point not to open the door.

{¶ 39} Following Permar's testimony, the state rested and the defense called Detective Michael Riddle, Toledo Police Department, who testified that he spent approximately five minutes speaking with the victim on the morning of July 20, 2009. From talking with the victim, Riddle believed that the victim had been smoking crack cocaine with both men, not just Porter, that Porter held the knife on her while appellant tied her up, that appellant choked her against the side of her parents' house, and that the victim's bother saw appellant choking her through a window. Riddle testified that his interview was cursory, he took "very limited notes," and did not write his report until seven days after the incident. Although he could not recall whether he told Permar about the knife on the morning of July 20, 2006, he included it in his report as he specifically recalled the victim saying that the white guy held the knife while the black guy tied her up.

{¶ 40} Defense recalled the victim on direct and reviewed with her the grand jury transcript from July 28, 2006, wherein she implicated Porter in the assault with the following statements:

{¶ 41} "Then we went over back to their house and they held a knife to me and told me to go upstairs."

{¶ 42} " Ron had the knife and then Billy had the knife, they switched – exchanged basically."

{¶ 43} "They wanted me to go upstairs and undress."

{¶ 44} "And then Billy – Billy slammed me down on the bed and they did my arms."

{¶ 45} When asked if Porter held her or held a knife to her while appellant tied her up, the victim stated, "He probably – well, then later then he ended up coming upstairs and they body slammed me to the bed – * * * – both of them."

{¶ 46} Although the victim made the above statements during her testimony to the grand jury, she also specifically testified before the grand jury that appellant, not Porter, forced her on the bed and tied her up; that Porter was downstairs, pretending to sleep, when she was forced on the bed and tied up; that Porter held the knife on her after they returned from the truck stop, but only appellant forced her to go upstairs; and that Porter never came upstairs until some point during the night when she saw the hallway light underneath the bedroom door.

{¶ 47} When questioned about these inconsistencies, the victim testified at trial that, although she said those things, she "had things going through [her] mind," and she was "emotionally, physically and mentally disturbed by him." Upon being examined by the state, the victim testified that prior to giving her trial testimony, no one had reviewed her grand jury testimony with her and she testified to the best of her memory. The victim

also testified that when she spoke to the grand jury on July 28, 2006, she was still using crack cocaine. She testified that she only had a ninth grade education, had trouble reading, and, although she knew the difference between saying "he" and "they," she sometimes was lazy with the use of her pronouns. She clarified that when she said, "[a]nd then Billy slammed me on the bed face down" and "they did my arms," she did not mean that both Porter and appellant tied her, she was actually talking just about appellant.

{¶ 48} The defense also called Porter's neighbor, Catherine Cooper, who testified that she typically left her house between 5:20 a.m. and 5:30 a.m. to go to work. On July 20, 2006, when she came out to get into her car, she noticed the victim sitting on Porter's front step, alone, smoking a cigarette. When she pulled away in her car, she did not recall making eye contact, but she was approximately ten feet from the victim and did not notice anything in her demeanor that made Cooper think she needed assistance. Cooper knew who the victim was, but did not know her personally. Cooper testified that she noticed that the victim had been wearing the same blue jean shorts and yellow sleeveless shirt the entire time the victim was at Porter's house that week.

{¶ 49} On appeal, in his first and second assignments of error, appellant argues that his conviction was against the manifest weight and sufficiency of the evidence. In particular, appellant argues that the discrepancies between the alleged victim's statements to police, grand jury testimony, trial testimony, and other witnesses' testimony weighed in favor of acquittal.

{¶ 50} Crim.R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. As such, the issue to be determined with respect to a motion for acquittal is whether there was sufficient evidence to support the conviction. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 51} "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. In making this determination, an appellate court must determine 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.

{¶ 52} When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. The court reviews 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 court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387,

quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. Id.

{¶ 53} Appellant was convicted of rape and kidnapping. R.C. 2907.02(A)(2) states that "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. 2905.01(A)(4) states that "No person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

{¶ 54} Upon reviewing the trial testimony in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the offenses of rape and kidnapping proven beyond a reasonable doubt. Accordingly, the trial court did not err in denying appellant's Crim.R. 29 motion.

{¶ 55} With respect to appellant's argument that the evidence was against the manifest weight of the evidence, we find that, although some of the victim's statements could have been construed as being inconsistent with her trial testimony, the victim's testimony, statements to the police, and the SANE nurse, were consistent that appellant forced her on the bed, tied her down, and engaged in sexual activity with her against her will. Moreover, the physical evidence supported her testimony. As described by the

victim, restraints were found in the smaller bedroom, rubbing alcohol was found in the hall closet, and lotion was in the room where the assault took place, as was a wastebasket with a liner. Further, appellant's DNA was found on and in the victim's body, she appeared to have been bitten repeatedly, and there was significant tearing and trauma to both her anal and vaginal openings. The victim explained to the jury that she had been up for 96 hours when she was interviewed following the rape, had been using crack cocaine for days, and still was using at the time she gave her grand jury testimony, and that she was very emotional and upset throughout.

{¶ 56} Defense counsel argued to the jury that the victim's injuries could have occurred during consensual sexual contact and that her action of smoking a cigarette following the alleged assault and allowing appellant to drive her home, were inconsistent with her having been brutally raped throughout the night. Defense counsel also argued that the victim's credibility was at issue because of her use of crack cocaine and the apparent inconsistencies between her statements to authorities and her trial testimony. Based on the jury's verdict, the jury apparently did not agree with the defense's arguments.

{¶ 57} Accordingly, we find that the victim's trial testimony, in addition to the physical evidence and testimony of the police and SANE nurse, provided substantial evidence upon which the jury reasonably could have relied in concluding that the state proved the offenses of rape and kidnapping beyond a reasonable doubt. We further find

that the jury did not clearly lose its way or create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Appellant's first and second assignments of error, therefore, are found not well-taken.

{¶ 58} Appellant argues in his third assignment of error that the trial court erred when it did not require Porter, appellant's former codefendant, to testify as to matters that could not have incriminated him. Appellant asserts that Porter could have addressed the victim's behavior and the facts surrounding the kidnapping allegation, and could have confirmed that he and appellant did not destroy any evidence at the house and were surprised by the victim's allegations. Appellant argues that Porter did not have a broad-based right to refuse to answer all questions; rather, he "could have offered a great deal of testimony that would not have implicated him on a drug abuse case."

{¶ 59} The record reflects that Porter had been charged with kidnapping, but it was dismissed by the state prior to appellant's trial. Appellant wanted to call Porter as a defense witness; however, Porter invoked his Fifth Amendment Right against self-incrimination and did not testify at trial. The state would not grant Porter immunity and Porter's attorney advised him against testifying on the grounds that he may incriminate himself. Specifically, Porter's counsel noted that Porter was still subject to potential criminal liability emanating from this incident. The prosecutor stated that Porter's role in the case included drug abuse, permitting drug abuse, drug trafficking, promoting prostitution, and, because Porter did not intervene while the victim was screaming and

being raped in his home, what involvement Porter actually may have had with respect to the victim's rape and kidnapping.

{¶ 60} Appellant insists that Porter could have testified about many issues in the trial without implicating himself; however, the state responds that, while this is true, if Porter testified, he would have been subjected to cross-examination on all relevant matters and matters affecting credibility, and that the state would not be limited to cross-examining Porter only on matters raised during the direct examination. The state asserts that Porter's relationship with appellant, his criminal conduct and the extent of his participation in the crimes alleged in the indictment are all matters affecting Porter's credibility. Moreover, if Porter had testified consistently with the proffered testimony, Porter, at a minimum, would have implicated himself in permitting drug abuse and drug trafficking.

{¶ 61} A person's Fifth Amendment right against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States* (1951), 341 U.S. 479, 486. The privilege afforded by the Fifth Amendment not only extends to answers that would in themselves support a conviction, but likewise embraces responses which would furnish a link in the chain of evidence needed to prosecute. Id.

{¶ 62} This protection, however, "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Id., citing, *Mason v.*

United States (1917), 244 U.S. 362, 365. A witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself; rather, it is for the trial court to determine whether his silence is justified. Id., citing *Rogers v. United States* (1951), 340 U.S. 367. The witness only should be required to answer if it is "perfectly clear, from a careful consideration of all the circumstance in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency" to incriminate. Id. at 489, quoting *Temple v. Commonwealth* (1880), 75 Va. 892, 898. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 487.

{¶ 63} In appraising the privilege, the trial court "'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" Id., quoting *in Ex parte Irvine* (1896), 74 F. 954, 960. "The ends of justice require discharge of one having such a right whenever facts appear sufficient to sustain the claim of privilege." *Hoffman*, 489. "Whether there is a sufficient hazard of incrimination is a question for the court which is asked to enforce the privilege." *Cincinnati v. Bawtenheimer* (1992), 63 Ohio St.3d 260, 266.

{¶ 64} Based upon the facts and circumstances in this case, and after having reviewed the taped interview between Porter and Permar on July 20, 2006, we find that it

was not perfectly clear that Porter would not incriminate himself were he to testify on behalf of the defense. We find that there was sufficient evidence to support Porter's claim of privilege. Accordingly, we find that the trial court did not abuse its discretion when it did not force Porter to testify in this case. Appellant's third assignment of error is therefore found not well-taken.

{¶ 65} Appellant argues in his fourth assignment of error that his "Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process were violated because the state wrongfully used the possibility of additional charges against Porter to prevent his testimony on Simpson's behalf." The Sixth Amendment preserves the right of a defendant to present his own witnesses in establishing a defense, which is a fundamental component of due process. *Washington v. Texas* (1967), 388 U.S. 14, 19. In this case, appellant asserts that the state's "vague threats of possible drug charges being filed against Porter" was a "charade" and done solely to prevent Porter from testifying on appellant's behalf.

{¶ 66} It is well established that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." *United States v. Little* (C.A.9, 1984), 753 F.2d 1420, 1438. "A defendant alleging such interference is required to demonstrate misconduct by a preponderance of the evidence." *United States v. Vavages* (C.A.9, 1998), 151 F.3d 1185, 1188.

{¶ 67} Contrary to the cases cited by appellant in his brief, *Vavages*, supra, and *United States v. Blackwell* (C.A.D.C., 1982), 694 F.2d 1325, in this case, Porter was not threatened that a prior plea agreement he had entered into would be revoked if he testified on appellant's behalf and was not threatened with charges of perjury. Porter had entered no plea agreement and charges were not currently pending against him at the time of appellant's trial. However, as discussed above, Porter was faced with a real risk of being indicted on felony charges if he made incriminating statements regarding the incidents in this case or implicated himself as having had some role in the victim's kidnapping and rape. Accordingly, we find that appellant failed to establish by a preponderance of the evidence that the state or trial court substantially interfered with appellant's right to call Porter as a witness in his defense. Appellant's fourth assignment of error is therefore found not well-taken.

{¶ 68} Appellant argues in his fifth assignment of error that the trial court abused its discretion and prevented appellant from receiving a fair trial when it removed appellant from the courtroom during voir dire, and for failing to declare a mistrial when one of the jury members advised the other jurors that appellant was incarcerated.

{¶ 69} With respect to appellant's removal from the courtroom during voir dire, we note that "[a] judge is at all times during the sessions of the court empowered to maintain decorum and enforce reasonable rules to insure the orderly and judicious disposition of the court's business." *State v. Clifford* (1954), 162 Ohio St. 370, 372. In this case, on

April 30, 2006, when the case was scheduled to proceed to trial, appellant sought to delay the start of trial by arguing that he had not had sufficient opportunity to view certain state evidence and prepare a defense in response thereto. Appellant's counsel, however, indicated that the evidence had been reviewed with appellant and that counsel was prepared to go forward with trial. Appellant threatened that he was "not coming to trial" and questioned how the trial court could "hold a trial without me." The trial court stated that appellant could be placed in the obstreperous defendant's room, connected to the courtroom, so he could see what was occurring during trial. Appellant stated that he was "not going to be able to hold myself together," and said that he was going to yell and "kick on something" if the trial court attempted to place him in the other room. He also stated that he was "not going to be able to restrain [himself], because [he was] getting upset * * * just hearing" what the state had to say about the case. Because defense counsel preferred to have appellant beside him in court during voir dire and trial, the matter was continued to the following day, May 1, 2006, for trial to commence.

{¶ 70} On May 1, 2006, the trial court again discussed appellant's ability to control himself in front of the jury, and appellant indicated that he could. However, because of his statements the previous day that he would not be able to "restrain" himself and, in fact, when he had been taken to the obstreperous defendant's room on April 30th, was "flailing his arms" and being loud. Based on these factors, the trial court and court

security determined that appellant should remain in leg and belly chains while in the courtroom.

{¶ 71} The jury was called into the courtroom and even before the potential jurors could be sworn in, appellant stood up and said, "I don't want to be in here. Can I leave out of here for a while?" The trial court asked him to sit, to which he responded, "Please, no, because I feel they're not trying to help me. They're trying to hurt me. They're trying to use these things to hurt me, and they haven't given me a chance." He was asked again to be seated, and he replied, "Please let me leave out of here. Miss Dartt, would you please help me. I'm trying to do the best I can. I don't know how to ask for help, Miss Dartt." Appellant was then removed to the obstreperous defendant's room during voir dire. The trial court instructed the potential jury panel that "[t]he fact that the defendant has chosen not to be present during the trial is not any evidence of his guilt or innocence and it may not be considered by you for any purpose." Based upon the facts in this case, we find that the trial court did not abuse its discretion in placing appellant in leg and belly chains and, upon his own request, putting him into the obstreperous defendant's room during voir dire.

{¶ 72} Appellant, however, also argues that he was denied a fair trial when a potential juror stated that she knew appellant from having had contact with him in the jail:

{¶ 73} JUROR: "I feel I can't because I have had contact with the – with the accused just being at the jail, being a counselor."

{¶ 74} PROSECUTOR: "Did you have professional contact with him?"

{¶ 75} JUROR: "Yes."

{¶ 76} PROSECUTOR: "Then you can't serve; right? I mean you –"

{¶ 77} JUROR: "I've spoken to him."

{¶ 78} PROSECUTOR: "Then you can't serve. I don't think Mr. Kaplan would dispute that."

{¶ 79} DEFENSE COUNSEL: "No, of course not. I would agree."

{¶ 80} Defense counsel moved to have the entire panel disqualified because of the above statements. Counsel stated, "If the jurors weren't aware before, they now know * * * that not only is she familiar with the defendant from the Lucas County jail * * * [the juror] informed the prospective jurors that she has counseled and that Mr. Simpson has received counseling services while at the jail, two thing which I think are arguably prejudicial and inappropriate for any potential juror to be aware of." The state pointed out that due to appellant's behavior in front of the jury panel, and his removal from the courtroom, the jurors should already have known that appellant was "under some form of confinement." Defense counsel responded that besides knowing that he was in custody, the jurors were also informed that the appellant "has received some counseling services

while at the jail, which might suggest in certain jurors' minds that he's not stable, combined with the behavior they saw in the court."

{¶ 81} The trial court ruled that dismissing the jury at that time was premature and the potential prejudicial affect of this information on the balance of the jury panel could be explored during voir dire. The trial court also indicated that it was willing to give a cautioning instruction if defense counsel wished; however, none was requested.

{¶ 82} "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. "The granting or denying of a mistrial under Crim.R. 33 rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 182. The discretion of the trial court will not be disturbed "absent a showing that the accused has suffered material prejudice," and that the trial court's decision was arbitrary, unreasonable, or unconscionable. Id., citing *State v. Long* (1978), 53 Ohio St.2d 91, 98; and *State v. Nichols* (1993), 85 Ohio App.3d 65, 69.

{¶ 83} We find that appellant's own actions demonstrated to the jury that he was in restraints, i.e., in custody, and that the juror's statements therefore only confirmed what was already known to the jury. With respect to whether the knowledge that appellant had been in counseling while in custody would bias the jury, we agree with the trial court that any potential prejudice in this regard could have been explored during the continuing voir dire of the prospective jury pool. Also, we note that a curative instruction was offered to

the defense, if requested, which it was not. Based upon the foregoing, we find that the trial court did not abuse its discretion in denying appellant's motion for a mistrial. Appellant's fifth assignment of error is therefore found not well-taken.

{¶ 84} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR. JUDGE