

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-09-023
- vs -	:	<u>OPINION</u> 6/15/2009
SCOTT R. ALKIRE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2008CR-03-029

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Shannon M. Treynor, 63 North Main Street, P.O. Box 735, London, Ohio 43140, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Scott Alkire, appeals his rape conviction in the Madison County Court of Common Pleas. We affirm the decision of the trial court.

{¶2} The jury heard testimony from two sisters, Teri R. and Tara R., that in 2007, when they were 15 and 17 years old respectively, Alkire sexually assaulted them.

At the time of the incident, Alkire was 42 years old. Before hearing Tara's account of the incident, the court considered her competency to testify, as she had been diagnosed

as mildly retarded.¹

{¶13} Before the trial, and because of her condition, Tara received aid from social services was subjected to various tests in order to determine if she would need continuing support once she reached the age of majority. Doctor Douglas Pawlarczyk, the physician who performed the tests, testified at trial as to Tara's condition and the results of her examination. According to Pawlarczyk, the tests determined that Tara's I.Q. was 55, which was at the bottom end of the mild range of mental retardation, or one point above the moderate range of mental retardation. Pawlarczyk also diagnosed Tara with having a mood disorder, ADHD, and a disruptive behavior disorder. After testing Tara's life skills, Pawlarczyk determined that she functioned at a four to six-year-old level in communication, and acted as a three year old would in interpersonal relationship skills. Her high-water mark was in domestic skills, such as cleaning the house or washing clothes, in which she scored at the skill level of a ten year old. Pawlarczyk ultimately questioned Tara's ability to recall the past accurately, and to tell the truth.

{¶14} Because of her mental condition, the trial court questioned Tara before allowing her to testify before the jury. After asking several questions, the court noted the "broad gap between clinical analysis and ability to testify," and determined that she was competent to testify. Therefore, in addition to Teri's version, the jury heard Tara's account of the incident.

{¶15} In the early evening of June 21, 2007, Tara and Teri arrived at Alkire's apartment in order to ask Alkire for a ride to London so that Teri could visit her boyfriend. Instead, the three began drinking King Cobras (a 40-ounce bottle of beer) and Smirnoff (a clear malt beverage). Alkire also provided the sisters with cigarettes.

1. "Mildly retarded" and "retardation" are terms used under Ohio law. Therefore, any references to Tara's condition will mimic the language found in Ohio's case law and statutory scheme.

{¶6} According to Teri's testimony, after the alcohol ran out, Alkire left twice to get more. Before Alkire went to get more alcohol and cigarettes the second time, Teri testified that Tara was in the bathroom, and she was sitting on the floor. Alkire approached her and put his hand inside her pants and touched her vagina, though he did not penetrate it with his fingers. Teri testified that she had not consented to the touching, and said nothing to Alkire regarding the act. Instead of leaving, Teri testified that she and Tara stayed in order to drink the alcohol Alkire was bringing back.

{¶7} At some point in the evening, Teri asked Alkire if she could use his phone to call her boyfriend, and eventually, went into Alkire's bedroom to make the call. According to Teri's testimony, she was in the bedroom for approximately 25 minutes. When she exited the room, she testified that she saw Alkire on top of her sister and that he jumped off of her when he heard Teri approach. According to Teri, Tara was crying and Alkire told them to leave because they were being "disrespectful kids."

{¶8} According to Tara's testimony, after Teri went into the bedroom to call her boyfriend, Alkire came over to where she was laying on the couch and put his fingers inside her vagina. Tara stated that when Alkire asked her if it felt good, she replied "no." Tara testified that after Alkire digitally penetrated her, he also performed cunnilingus on her and that she pushed away his head and said no. Although Alkire initially stopped, Tara testified that he "kept going back at it more." Alkire eventually stopped after Tara started crying and her sister exited the bedroom.

{¶9} After the sisters left Alkire's apartment, the Mount Sterling Police Department received a call that two intoxicated girls were walking the streets. Patrolman Keith Jones and his partner saw the sisters stumbling along the street and pulled over in order to approach them. Jones testified that the girls were visibly intoxicated, crying loudly, and holding each other up in order to walk. When Jones

came closer to the girls, he detected a strong alcohol odor on their persons.

{¶10} Jones took the sisters to the police station, located a short distance away. Once there, Teri told the officers that Alkire had raped Tara. At that point, Jones drove the sisters to their home and discussed the situation with their mother. The police contacted Children's Services and took the girls to Children's Hospital for medical evaluations.

{¶11} At the hospital, the sisters were belligerent and uncooperative at times, but agreed to speak to a social worker who questioned Tara and Teri in order to determine what treatment the girls required. Tara told the social worker that she had been raped and Teri stated that Alkire had digitally penetrated her. According to hospital policy, consent is required before administering a sexual abuse examination, and the staff had to wait until Tara was sober enough to provide her consent. After multiple hours at the hospital, Tara consented, and the hospital completed the examination. As a result, the hospital turned over the rape kit to the police department who then forwarded it to the crime lab in order to analyze the evidence collected during the examination.

{¶12} In the months between the incident and when the lab results came back, Mount Sterling Police investigated the matter. They began by asking Alkire to come to the station for questioning. Alkire agreed, signed a waiver of his rights, and participated in an interview with members of the police department, including Sergeant Kevin Smith, and social services.

{¶13} During the hour-long interview, Alkire vehemently denied giving the girls alcohol, discussing sex with them, or touching them in any manner. Alkire stated that the girls were not even in his apartment that night, and that while Teri did use his phone, she stood outside the entire time she made the phone call. Alkire then stated that he may have let one sister in to use the bathroom, but that neither spent any time in his

apartment. When asked what his response would be to Tara's accusation that he had performed cunnilingus on her, he said "I would say to her, what have you been smoking?" Alkire expressed his desire to "get to the bottom" of the accusations and offered to provide his DNA in order to clear himself. The police accepted the invitation and sent Alkire's sample to the lab for comparison to evidence taken from Tara the night of the incident.

{¶14} Multiple times during the interview, Smith asked Alkire if there were any answers he wanted to change or any explanation he wanted to offer. Alkire did not change his story or offer any explanation. After completing the interview, Alkire left the station, and the police continued the investigation.

{¶15} In order to verify the sisters' story, Smith went to the gas stations they identified as those Alkire visited in order to get more alcohol the two times he left his apartment. There, Smith viewed video playback and verified that Alkire purchased King Cobras at the first gas station and Smirnoff at the second gas station. After verifying the sisters' story regarding the alcohol purchases, Smith received the DNA results in November 2007. The lab report confirmed a match between Alkire's DNA and a bodily fluid² found in Tara's panties. Soon thereafter, Sergeant Smith asked Alkire to come to the station for a second interview. Again, Alkire appeared at the station voluntarily.

{¶16} During the second interview, Smith told Alkire about the video of him buying the alcohol, to which Alkire responded that he was allowed to buy beer. In response to the DNA evidence, Alkire stated that he was being framed.

{¶17} Alkire was later indicted on two counts of rape and one count of unlawful sexual conduct with a minor. At trial, the sisters maintained their story, except that Teri

2. The lab found amylase (a chemical component found in saliva as well as other bodily fluids) in the crotch of Tara's panties, and determined that the chance of anyone other than Alkire matching the sample was one in 50 million.

testified that Alkire touched her vagina, but did not penetrate her with his fingers, as she had told the social worker the night of the incident.

{¶18} Alkire, however, changed his entire story. He testified that he lied to the police during his two interviews because he was distrustful of the Mount Sterling Police Department because of a supposed connection between an officer there and his ex-wife. During his testimony, and on cross-examination, Alkire presented his account of the incident. Alkire began by stating that the evening began when the sisters came to his apartment in order to escape their parents. Alkire testified that he let the sisters into his apartment, that they kept drinking his beer, and that he told them multiple times to stop. He later admitted to leaving twice to obtain more alcohol, and that Teri drank the Smirnoff and Tara drank most of the King Cobras.

{¶19} Regarding the sexual contact, Alkire testified that he never touched Teri but admitted to sexual contact with Tara. Alkire stated that before Teri went into the bedroom to talk to her boyfriend, the sisters starting "horseplaying" by lifting their shirts and exposing their breasts to each other as a joke. Alkire stated that while Teri was in the bedroom, he and Tara started to talk. He testified that he asked Tara why she and Teri "dressed like sluts," to which Tara replied that by doing so, she received attention because she had a good looking body. Alkire then responded by saying "I can't tell from where I am," at which time Tara stood up and exposed her breasts to him. Alkire testified that he said that she "didn't look too bad" and asked her "what does the rest look like?" According to Alkire, Tara responded by pulling her shorts sideways and exposing her vagina to him.

{¶20} Alkire then stated that he told Tara "he wouldn't mind having some of that" and that she replied, "if you want it, have it." At that time, he approached Tara and began to "look at it" and "play with it," by inserting the tip of his finger into her vagina.

According to Alkire, when Tara said that his fingers were not enough, Alkire rubbed his penis on the edge of her vagina for approximately 30 seconds, but then thought better of penetrating her and stood up at the moment Teri exited the bedroom. Alkire testified that the entire exchange was consensual and that at no time did Tara tell him no or to stop what he was doing.

{¶21} The jury found Alkire guilty of raping Tara under two statutory theories, but acquitted him of the unlawful sexual conduct with a minor charge stemming from Teri's accusation that he touched her vagina. The trial court merged the two rape convictions and sentenced Alkire to nine years in prison. Alkire now appeals his conviction, raising four assignments of error.

{¶22} Assignment of Error No. 1:

{¶23} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE VICTIM TARA [R.] TO TESTIFY AFTER THE EXPERT TESTIMONY SUGGESTED THAT SHE WAS INCAPABLE OF APPRECIATING HER RESPONSIBILITY TO TELL THE TRUTH."

{¶24} In his first assignment of error, Alkire argues that the trial court abused its discretion by finding Tara competent to testify. This argument lacks merit.

{¶25} According to Evid.R. 601(A) and R.C. 2317.01, "all persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶26} According to R.C. 1.02(C), "of unsound mind" includes all forms of mental retardation. Therefore, "those persons classified as mentally retarded are presumed incompetent as witnesses and must have their competency to testify determined by the court." *State v. Ortiz* (Nov. 14, 1996), Cuyahoga App. No. 69958, *1. Once a court

determines the competency of a witness, that decision will not be reversed absent an abuse of discretion. *State v. Hanselman* (Aug. 12, 1985), Brown App. No. CA84-11-016. More than mere error of judgment, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶27} As stated by the Ohio Supreme Court, "a person who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind." *State v. Wildman* (1945), 145 Ohio St. 379, paragraph three of the syllabus.

{¶28} The trial court found Tara competent to testify, and did not abuse its discretion in doing so. While we are aware that Dr. Pawlarczyk expressed his reservations regarding Tara's ability to recall past experiences and to relate the truth, he never claimed that Tara was incompetent to testify. The trial court, after hearing all that Dr. Pawlarczyk had to say, performed its own voir dire of Tara during which it specifically asked questions in order to elicit Tara's competency to testify.

{¶29} During voir dire, the court asked Tara her age, her birthday, questions regarding Tara's school, if she understood the significance of taking an oath to tell the truth, and whether or not she understood the repercussions of not telling the truth. The court also asked Tara if she understood why they were in court and if she remembered the incident and was able to discuss the details. After Tara answered all of the court's questions, and indicated that she was able and willing to accept the oath and to tell the truth, the court ruled that she was competent to testify despite her disability.

{¶30} Because the court determined that Tara was able to correctly state matters within her perception with respect to the rape, and appreciated and understood the

nature and obligation of an oath, its decision to allow Tara to testify was not arbitrary, unreasonable, or unconscionable. See *State v. Pflug*, Ottawa App. No. OT-05-060, 2007-Ohio-2037, ¶52 (affirming trial court's decision that a 17-year-old mentally retarded witness was competent to testify where "she was able to perceive, recall, and relate facts truthfully").

{¶31} Having found no abuse of discretion, Alkire's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE STATE TO INTRODUCE HEARSAY STATEMENTS OF THE VICTIM MADE TO A SOCIAL WORKER."

{¶34} In his second assignment of error, Alkire asserts that the trial court improperly admitted hearsay statements during his trial. There is no merit to this argument.

{¶35} A court's ruling on evidentiary issues will not be reversed unless the court has clearly abused its discretion "and the defendant has been materially prejudiced thereby." *State v. McCroskey*, Stark App. No. 2007CA00089, 2008-Ohio-2534, ¶36. According to Evid.R. 801(C), hearsay is a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶36} Alkire asserts that Sarah Saxbe, the social worker who interviewed Tara and Teri at Children's Hospital, should not have been able to testify as to what the sisters told her because such statements are hearsay. While the statements would normally be inadmissible as hearsay, there exists an exception that allows the proper admittance of the testimony.

{¶37} According to Evid.R. 803(4), "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are excepted from the hearsay rule. While Alkire argues that Saxbe was collecting evidence instead of making a medical evaluation, we disagree.

{¶38} The Ohio Supreme Court recently upheld the admissibility of a child's statement to a social worker and other medical personnel regarding the sexual abuse she experienced because the statements fell within the Evid.R. 803(4) exception. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. In doing so, the court noted several factors a trial court should consider when ruling on the purpose of a victim's statements. In order to determine that the statement was truly made for purposes of medical diagnosis, and therefore admissible as an exception to the hearsay rule, the court should consider: "(1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a 'bitter custody battle'; and (3) whether the child understood the need to tell the physician the truth. In addition, the court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse." *Id.* at ¶49. (Internal citations omitted.)

{¶39} Saxbe testified that as a social worker for Children's Hospital, she assesses abuse cases and interviews the children who may have been victims of sexual or physical abuse. She later stated that the purpose for her interviews was for "medical evaluation and treatment of the patient." According to Saxbe, after taking a report of the victim's medical history and abuse claim, the information becomes part of the patient's

medical record. The record is then read by the medical team "so that they know how to proceed with their part of the treatment of the child."

{¶40} While Saxbe and the hospital are legally required to report abuse allegations to the appropriate authorities, the central purpose for interviewing the patient is to aid in the medical diagnosis and treatment, not to collect evidence.

{¶41} The trial court, after Alkire objected to Saxbe's testimony as hearsay, overruled the objection and allowed Saxbe to testify as to what Teri and Tara told her regarding their experience with Alkire. The court noted Saxbe's testimony regarding her purpose for taking Teri and Tara's statements, and found that the testimony fell within the medical diagnosis exception found in Evid.R. 803(4). In doing so, the trial court's decision was not arbitrary, unreasonable, or unconscionable.

{¶42} Instead, and after considering the *Muttart* factors, the evidence suggested that Teri and Tara knew they were in a medical setting at the time they discussed the evening's events with Saxbe. There is no evidence that Saxbe elicited the statements in a leading manner or that there was any reason to fabricate the statements. Saxbe also testified that the medical team treating Teri and Tara used her report in order to diagnose and treat the sisters. We are therefore satisfied that the trial court did not abuse its discretion in finding that Teri and Tara's statements were made for the purposes of medical diagnosis.

{¶43} While not specifically raised by Alkire, we do note that Saxbe's testimony and the admittance of the hearsay statements do not violate Alkire's right to confront his accusers as set forth in the Sixth Amendment and analyzed by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354. Instead, the court in *Muttart* clearly held that "statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even

remotely related to the evils that the Confrontation Clause was designed to avoid." 2007-Ohio-5267 at ¶63.

{¶44} As the trial court properly held that Saxbe's testimony was admissible as an exception to the hearsay rule, Alkire's second assignment of error is overruled.

{¶45} For ease of discussion, we will discuss Alkire's final assignments of error together.

{¶46} Assignment of Error No. 3:

{¶47} "THE TRIAL [sic] ERRED BY OVERRULING THE DEFENDANT'S RULE 29 MOTION FOR AQUITTAL AS TO COUNT 2 WHERE THE STATE PRODUCED INSUFFICIENT EVIDENCE OF USE OF FORCE OR THREAT OF FORCE."

{¶48} Assignment of Error No. 4:

{¶49} "THERE IS NO DISCERNABLE DISTINCTION BETWEEN RAPE UNDER 2907.02(A)(1)(C) AND SEXUAL BATTERY UNDER 2907.03(A) AS APPLIED TO THE FACTS IN THIS CASE."³

{¶50} In his third and fourth assignments of error, Alkire asserts that his conviction was against the manifest weight and sufficiency of the evidence. There is no merit to either of these arguments.

{¶51} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, an appellate court applies the same test it would in reviewing a sufficiency of the evidence argument. *State v. Rucker*, Butler App. No. CA2001-04-076, 2002-Ohio-

3. According the Alkire's brief, "while this Assignment of Error presents an argument regarding the difference between rape and sexual battery as applied in this factual situation, [Alkire] takes no issues with the propriety of including the instruction. Rather, what is really present is a manifest weight of the evidence argument ***." Because Alkire states that he takes no issue with the jury instructions, we will instead focus on the argument that his conviction was against the manifest weight of the evidence. Even so, we note that the jury instructions on rape and sexual battery were proper. Sexual battery under R.C. 2907.03(A) is a lesser included offense of rape under R.C. 2907.02(A)(1)(c), since rape carries the additional element that the offender both knew and had reasonable cause to know of the victim's impairment. *Matter of Sechler* (Aug. 29, 1997), Trumbull App. No. 96-T-5575. Therefore, the jury received the proper instructions and we will analyze its finding of guilt specific to rape.

172, *4. When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. "The relevant inquiry is 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} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact 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. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶53} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson* at ¶35, citing *State v. Lombardi*, Summit App. No. 22435, 2005-Ohio-4942, fn. 4.

{¶54} Alkire was convicted of one count of rape in violation of R.C. 2907.02(A)(2), which states "no person shall engage in sexual conduct with another person when the offender purposely compels the other person to submit by force or threat of force." According to R.C. 2901.01(A), force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶55} Alkire first claims that the state failed to prove that he used any force or a

threat of force on Tara so that there is insufficient evidence to convict him of rape. However, the jury heard Tara testify that she repeatedly pushed Alkire away, yet he "kept going back at it more." Tara also testified that Alkire jumped on top of her when Teri went into the bedroom to make the call, and proceeded to digitally penetrate her despite her protestations. Tara also testified that she began crying when Alkire continued to have sexual contact with her after she told him multiple times to stop. Based on this testimony, the jury could reasonably have inferred that Alkire used force in order to facilitate sexual contact with Tara after she protested and pushed him away. See *State v. Nicodemus* (May 15, 1997), Franklin App. No. 96APA10-1359, *13 (Affirming conviction where appellant repeatedly fondled the victim, "despite being pushed away repeatedly. Thus, the jury could reasonably have found that appellant used force in compelling sexual activity ***").

{¶56} In order to demonstrate that his conviction was against the manifest weight of the evidence, Alkire asserts that the sisters fabricated the story, possibly because he had been involved in evicting their older sister from a neighboring apartment. He also explained his changing story and lies to the police as a product of his fear that the Mount Sterling Police Department would treat him unfairly. However, the jury convicted Alkire of raping Tara, thereby rejecting these claims.

{¶57} Instead, the jury heard testimony from Teri, Tara, two members of the Mount Sterling Police Department, the social worker from Children's Hospital, the sexual assault nurse who performed a rape-kit examination on Tara, the lab technician who identified Alkire's amylase in Tara's panties, as well as Alkire in his own defense. "Upon acknowledging that such extensive testimony will inevitably produce some inconsistent or conflicting assertions, we recognize the sound principal that the trier of fact is best positioned to weigh the credibility of the individual witness and reach a conclusion based

on the totality of the evidence." *State v. Dunn*, Lorain App. No. 04CA008549, 2005-Ohio-1270, ¶10.

{¶58} The state produced Tara's testimony, recounting the events of the rape, her unwillingness to engage in sexual activity with Alkire, and her resistance. Multiple times on direct and cross-examination, Tara testified that she told Alkire "no" and that she pushed his head away when he performed cunnilingus on her. Tara also testified that she began crying when Alkire would not stop, and Teri and Officer Jones testified that they both saw Tara visibly upset and crying after the incident.

{¶59} In rape cases such as this, "courts have consistently held that the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration." *Id.* at ¶11. Even so, Tara's version is supported by physical evidence such as the video of Alkire purchasing King Cobras and Smirnoff at the gas stations, as well as the DNA match taken from Tara's panties.

{¶60} Therefore, after reviewing the entire record and weighing the evidence and all reasonable inferences, including the credibility of the witnesses, we cannot say that 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. Alkire's third and fourth assignments of error are overruled.

{¶61} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.