[Cite as *State v. Johnson*, 2009-Ohio-4367.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91900

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HENRY JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508560

BEFORE: Kilbane, J., Cooney, A.J., and Rocco, J.

RELEASED: August 27, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Henry Johnson, appeals from a jury verdict that found him guilty of three counts of rape and three counts of kidnapping. After a review of the facts and pertinent law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On March 31, 2008, appellant was charged in a ten-count indictment. Counts 1 through 5 charged appellant with rape in violation of R.C. 2907.02(A)(2), with repeat violent offender specifications. Counts 6 through 9 charged appellant with kidnapping in violation of R.C. 2905.01, with sexual motivation and repeat violent offender specifications. Count 9 also contained a firearm specification. Count 10 charged appellant with having a weapon while under disability in violation of R.C. 2923.13.

{¶ 4} Johnson pled not guilty to all charges, and the case proceeded to a jury trial on June 11, 2008. The following testimony was elicited at trial.

{¶ 5} N.J.,[1] appellant's 44-year old cousin, testified that on March 4, 2008, she was living with her 20-year-old daughter, Q.S., and her 21-year-old cousin, L.L., in a home located on Arthur Avenue in Cleveland. That evening, at approximately 9:00 p.m., several family members were playing cards when

[1]The victim herein is referred to by her initials in accordance with this court's established policy of not identifying the victims of sexual violence. The victim's family members are also referred to by initials in order to further conceal the victim's identity.

appellant arrived. Appellant was drinking vodka and wine. N.J. testified that appellant's behavior became increasingly aggressive as the evening progressed. During the course of the evening, appellant entered L.L.'s bedroom several times and touched her legs while commenting that she was his "girlfriend." (Tr. 201.) Appellant also threatened to kill everyone in the house and made gestures indicating he possessed a gun.

{¶ 6} At approximately midnight, appellant decided to go to the store to buy beer. N.J. testified that she joined appellant because she needed to purchase cigarettes. Appellant drove to Double Exposure, a convenience store located near East 93rd Street and Buckeye Avenue in Clevelan d. While inside, appellant and N.J. had a disagreement. Appellant grabbed N.J.'s arm and pulled her out of the store toward his vehicle. N.J. entered the vehicle, assuming appellant would drive her home. The interior passenger side door handle was broken, and it could only be opened using a system of wires that only appellant knew how to operate. Therefore, N.J. was not free to leave the vehicle.

{¶ 7} Appellant pulled up to the front of N.J.'s house on Arthur Avenue, but would not let N.J. out of the vehicle. N.J. testified that, although she was scared of appellant at this point, she was unable to exit the vehicle because of the broken passenger door handle. (Tr. 219.) Appellant drove away from N.J.'s home and underneath a bridge near East 92nd Street and Holton

Avenue. Appellant parked the car and refused to let N.J. out of the vehicle. N.J. testified that appellant turned toward her and placed her in a choke hold. He positioned N.J.'s lower body on the center console, pulled down her pants, and orally and vaginally raped her.

{¶ 8} Appellant drove further down the street and pulled his vehicle under an old carport. He then leaned over N.J., opened the passenger side door using the wires, and shoved her out of the vehicle. Appellant then opened the rear door of the Ford Explorer, pushed N.J. down into the cargo area, and vaginally raped her again.

{¶ 9} N.J. testified she was unable to run from appellant, therefore, she got back into the vehicle with him. Although N.J. believed appellant would now drive her home, appellant instead drove her to his duplex, located on 10623 Greenlawn Avenue, in Cleveland. Appellant lived in the downstairs unit, and their cousin L.J. lived in the upstairs unit.

{¶ 10} Appellant shoved N.J. into the house and then onto his bed. He then pulled down N.J.'s pants and vaginally raped her a third time. N.J. became increasingly upset and began to argue with appellant. N.J. testified that appellant retrieved a gun from his closet and returned to vaginally rape her yet again.

{¶ 11} At approximately 3:00 a.m., appellant dropped N.J. off at her home. N.J. immediately informed her cousin D.J. that she had been

repeatedly raped by appellant. N.J.'s family contacted the police that afternoon and reported the incident. Both Cleveland police and EMS arrived at N.J.'s house, and N.J. was taken to the emergency room.

{¶ 12} Normally when a rape victim arrives at the emergency room, a rape kit is collected by a sexual assault nurse examiner (SANE). A SANE was not available to perform the rape examination at that time. N.J. chose not to be admitted, but rather to go home and return for the exam the following day. She was instructed not to change her clothes or wash herself in order to preserve evidence. She did not abide by the hospital's instructions. She returned the following day where SANE Renee Holtz (Holtz) conducted a rape examination; however, according to the testimony of Detective Ross, the rape collection resulted in no evidence. (Tr. 541.) The only physical injury documented by Holtz was a red mark on N.J.'s neck.

{¶ 13} Detectives investigated the incident, and on March 19, 2008, a warrant was issued for appellant's arrest. Detectives located and impounded appellant's vehicle. Appellant was ultimately convicted of three counts of rape and three counts of kidnapping, receiving a sentence of 45 years of imprisonment.

{¶ 14} Appellant appeals, asserting the following nine assignments of error for our review:

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR CONVICTIONS WHERE AN ADMISSION WAS AVAILABLE AND BY ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE RECORDS OF CONVICTION[,] INCLUDING TESTIMONY OF THE VICTIM AND OTHERS ABOUT UNPROVEN ALLEGATIONS OF THE PRIOR CONVICTIONS WHICH RESULTED IN UNFAIR PREJUDICE, CONFUSION OF THE ISSUES[,] AND DENIED APPELLANT A FAIR TRIAL."

{¶ 15} Count 10 of the indictment charged appellant with having a weapon while under disability. In order to obtain a conviction on this count, the State must prove each element of the charge beyond a reasonable doubt. Here, the State was required to demonstrate under R.C. 2923.13(A)(2) that appellant had previously been convicted of a violent felony. Appellant had prior convictions for involuntary manslaughter, attempted abduction, and aggravated assault.

{¶ 16} Appellant contends the trial court erred by not allowing him to stipulate to the prior convictions, and instead allowed the State to introduce evidence regarding the prior convictions. We disagree.

{¶ 17} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Fisher*, Cuyahoga App. No. 90997, 2009-Ohio-476, at ¶16, citing *State v. Sage* (1987) 31 Ohio St.3d 173, 510 N.E.2d 343, at paragraph two of the syllabus. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401; *Fisher* at ¶18.

{¶ 18} Relevant evidence must be excluded where its "probative value is substantially outweighed by the danger of unfair prejudice." Evid.R. 403. The trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. Id. at ¶16. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 19} Appellant primarily relies on *Old Chief v. United States* (1997), 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574, for the proposition that a defendant is entitled to stipulate to a prior conviction. In *Old Chief*, the defendant was charged with assault with a dangerous weapon and violation of 18 U.S.C. 922(g)(1). Pursuant to 18 U.S.C. 922(g)(1), it is a crime for an individual who has previously been convicted of a crime punishable by a term of imprisonment exceeding one year to possess a firearm.

{¶ 20} The *Old Chief* defendant had been previously convicted of assault resulting in serious bodily injury, and attempted to stipulate to that fact to prevent the jury from hearing the nature of the previous crime. The government refused to do so, and the trial court allowed evidence of the previous crime to be introduced.

{¶ 21} In *Old Chief*, the United States Supreme Court ultimately concluded that the trial court abused its discretion under Fed.R.Evid. 403, which allows a trial judge to exclude relevant evidence if the trial court determines its probative value is substantially outweighed by the danger of unfair prejudice.

{¶ 22} *Old Chief* is clearly distinguishable from the present case. The *Old Chief* court specifically refers only to federal statutes and federal rules of evidence. The court confined its reasoning to the facts of the case. Consequently, this court has previously determined *Old Chief* to be merely persuasive. *State v. McGrath* (Sept. 6, 2001), Cuyahoga App. No. 77896, at ¶15. We have previously held that it is not an abuse of discretion for a court to deny a defendant's request to stipulate to a prior conviction where a prior conviction is an essential element of the underlying charge. *State v. Tisdel*, Cuyahoga App. No. 87516, 2006-Ohio-6763, at ¶41.

{¶ 23} Appellant was charged with having a weapon while under disability in violation of R.C. 2923.13. As appellant's prior convictions were an essential element of the charge, the State was under no duty to stipulate pursuant to appellant's request. *Tisdel* at ¶41. When a previous conviction is an essential element of the offense, the State must produce a certified entry of the conviction and sufficient evidence to demonstrate the defendant named in

the entry is in fact the individual currently on trial. *State v. Galloway*, Richland App. No. 2003-CA-0086, 2004-Ohio-2273, at ¶31.

{¶ 24} Appellant had two previous cases, both involving violent felonies. In 1990, appellant pled guilty to one count of involuntary manslaughter. In 2004, appellant pled guilty to one count of aggravated assault and one count of attempted abduction. Retired Cleveland police officer Gregory Kunz testified that he was the investigating officer in the 1990 case in which appellant was charged with involuntary manslaughter. He identified appellant as the individual he arrested and who pled to the charge. (Tr. 522-525.) Mary Price, the victim of the 2004 aggravated assault and attempted abduction case, testified in the State's case-in-chief. She identified appellant as the offender, and stated that she was present when he entered his plea. (Tr. 503-507.)

{¶ 25} Appellant argues that he was further prejudiced because when Price testified regarding the 2004 case, she stated that it was a rape case. However, upon further questioning, she testified that the case was resolved pursuant to a plea agreement in which appellant pled guilty to one count of aggravated assault and one count of attempted abduction. Appellant cross-examined Price and pointed out that while she may have accused appellant of rape in that case, he was never convicted of such a charge.

{¶ 26} This court has previously determined in *State v. Ware*, Cuyahoga App. No. 82644, 2004-Ohio-1791, at ¶22, that when evidence of a prior

conviction is a necessary element of a charged offense, the state may introduce evidence of the previous conviction. The introduction of numerous prior convictions may be cumulative. However, in *Ware*, this court determined that the introduction of multiple convictions in these circumstances did not rise to a constitutional error and is merely harmless when the conviction is supported by other substantial evidence.

{¶ 27} Although the trial court should not have allowed the State to introduce evidence of *both* of appellant's prior convictions, as it was unnecessarily cumulative, appellant's conviction was supported by substantial evidence in the form of testimony from the victim and numerous other witnesses. Thus, any alleged error was harmless.

{¶ 28} We conclude that the State had no duty to accept appellant's stipulation; therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE OTHER ACTS EVIDENCE CONTRARY TO EVID.R. 404(B)[,] WHICH RESULTED IN UNFAIR PREJUDICE TO APPELLANT."

{¶ 29} Appellant has pointed to several specific instances of testimony that he argues should have been excluded pursuant to Evid.R. 404, which provides, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." The trial court's decision to admit or exclude relevant evidence will not be reversed absent an abuse of discretion. *State v. Conway*, 109 Ohio St.3d 412, 423, 2006-Ohio-2815, citing *State v. Issa*, 93 Ohio St.3d 49, 2001-Ohio-1290.

{¶ 30} Appellant specifically argues that N.J. should not have been allowed to testify regarding appellant's prior record. When asked by the State why she was in fear of appellant, N.J. stated, "the prior record. My–my cousin have [sic] a prior record." (Tr. 257.) Defense counsel properly objected, and the objection was sustained by the court. The jury is presumed to follow the instructions given by the court, absent evidence to the contrary. *State v. Futrell* (Nov. 10, 1999), Cuyahoga App. Nos. 75033, 75034, 75035. There is no evidence the jurors ever considered this statement, as it was properly sustained.

{¶ 31} Next, appellant alleges the trial court improperly allowed L.L. to testify not only about the appellant's inappropriate behavior on the night at issue, but also as to prior inappropriate encounters she had with appellant as a child. L.L. testified that when she was younger, appellant grabbed her thighs and she reported this conduct to her mother. (Tr. 387.) A review of the record demonstrates appellant never objected to this line of questioning.

{¶ 32} If an issue was not raised during trial, it is deemed to have been waived, absent a showing of plain error. *State v. Davidson,* Cuyahoga App. No. 91224, 2009-Ohio-2125, at _¶12, citing *State v. Phillips,* 74 Ohio St.3d 72, 1995-Ohio-91. "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "Plain error exists when, but for the error, the outcome of the trial would have been different." *State v. Warren*, Cuyahoga App. No. 84536, 2005-Ohio-3431.

{¶ 33} We conclude that the brief reference to a previous incident was immaterial. Defense counsel later questioned L.L. in greater detail than had been discussed during her direct examination. (Tr. 369-370.) As the appellant asked numerous questions on this issue himself, he cannot now object to its introduction. A party may not take advantage of an error he induced. Id. at ¶17, citing *State v. Doss,* Cuyahoga App. No. 84433, 2005-Ohio-775. Appellant invited additional error when he cross-examined the witness and elicited further details.

{¶ 34} Appellant also argues that the testimony elicited from Detective Ross regarding threats made by appellant towards his family members was improper. Detective Ross explained the investigative process and expressed that there were safety concerns because the appellant had threatened to shoot several family members on the night of the incident. (Tr. 550.) The

statements showed the manner in which Detective Ross conducted his investigation and were not improperly introduced to show appellant's character.

{¶ 35} Further, on redirect examination, Detective Ross did mention appellant's previous conviction as raising additional safety concerns. Detective Ross specifically stated that he looked for prior convictions in order to determine if the appellant may have had access to a gun. (Tr. 575.)

{¶ 36} Lastly, appellant argues that the trial court erred in allowing testimony about appellant's prior convictions. For the reasons articulated in assignment of error number one, we find this argument is without merit.

{¶ 37} This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

"APPELLANT WAS DENIED HIS FEDERAL AND DUE PROCESS RIGHTS TO NOTICE AND TO BE PROTECTED FROM DOUBLE JEOPARDY AS THE FIVE RAPE COUNTS AND THE FOUR KIDNAPPING COUNTS OF THE INDICTMENT WERE NOT CHARGED WITH SUFFICIENT SPECIFICITY."

{¶ 38} The Sixth Amendment requires that an indictment provide the defendant with sufficient information to defend himself against the charges. *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, at ¶55, citing

Hamling v. United States (1974), 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590. Specifically, the indictment must contain the elements of the charged offense, provide the defendant with adequate notice of the charges, and prevent the defendant from being subjected to double jeopardy. *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, 631.

{¶ 39} Appellant argues that the charges were indistinguishable from one another, making it difficult for him to defend. Appellant primarily relies on *Valentine* to support his contention. Id. In *Valentine*, the defendant was charged with 20 counts of rape and 20 counts of felonious sexual penetration against his eight-year-old stepdaughter. Each charge was identical and contained no distinguishing facts. The court reversed 39 of the 40 convictions, concluding that the date range contained in the indictment was too broad and that there were absolutely no distinguishing facts from which to differentiate the charges. Id. at 632.

{¶ 40} In the instant case, on April 4, 2008, appellant filed a motion for a bill of particulars. On June 11, 2008, the State responded by filing a bill of particulars detailing the charges. Appellant was charged with five counts of rape and four counts of kidnapping. The bill of particulars specifically listed the date of the alleged offenses as March 4, 2008. The locations of the charged crimes were also specifically listed. The first three rapes and three kidnapping counts were specified as occurring near East 92nd Street and

Holton Avenue, Cleveland, as the victim described. The remaining counts were specifically listed as occurring at the house on 10623 Greenlawn Avenue, in Cleveland.

{¶ 41} In *Valentine*, the indictment did not provide dates or locations. This case is clearly distinguishable. A specific date of offense as well as locations were provided to appellant.

{¶ 42} In *State v. Salahuddin*, Cuyahoga App. No. 90874, 2009-Ohio-466, the defendant was charged with 103 counts, including the rape and kidnapping of his stepdaughter when she was between the ages of 11-14 years old. The defendant specifically argued under *Valentine* that the indictment did not provide him with sufficient information with which to defend himself. Id. at ¶7. This court dismissed the defendant's arguments, concluding that the charges were sufficient because the victim testified in great detail and could specifically delineate the incidents. Id. at ¶11-13.

{¶ 43} In the instant case, N.J. testified and provided specific details of each of the alleged acts. The acts could easily be distinguished by the jury. In *Valentine*, the trial court expressed concern that because of the wording of the indictment the verdict would be all or nothing. The verdict in this case proves that was not an issue here, as the jury acquitted appellant of some, but not all of the charges. Further, both *Valentine* and *Salahuddin* involve prolonged abuse that occurred over the period of several years. Here, all of the

acts occurred on one night; therefore, the indictment was sufficient as it stated the specific date of the offenses.

{¶ 44} This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

"THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THE ELEMENTS NECESSARY TO SUPPORT CONVICTIONS FOR RAPE AND KIDNAPPING."

{¶ 45} Appellant argues his convictions were not supported by sufficient evidence, and therefore, the trial court erred when it denied his motion for acquittal pursuant to Crim.R. 29.

{¶ 46} When reviewing an argument based on sufficiency of the evidence, "courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. 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. McDuffie*, Cuyahoga App. No. 88662, 2007-Ohio-3421, quoting *State v. Apanovich* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 47} Crim.R. 29(A) specifically provides, "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in

the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶ 48} At the close of the State's case, defense counsel made an oral motion for acquittal pursuant to Crim.R. 29(A). (Tr. 582.) The motion was summarily denied by the court.

{¶ 49} When viewing the evidence in the light most favorable to the prosecution, we conclude a rationale jury could have found appellant guilty of all of the crimes charged in the indictment. The State's main witness was the victim who testified as to the specific details of each of the acts charged. The victim's testimony was corroborated by that of two other family members, as well as the investigating detective and the nurse who performed the rape examination on the victim.

{¶ 50} Based upon the evidence presented by the State, we cannot conclude the evidence was insufficient as to warrant the granting of appellant's Crim.R. 29 motion. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

"APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 51} A court may determine a conviction to be against the manifest weight of the evidence even when it determined there was sufficient evidence

to allow the case to go to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The Ohio Supreme Court has specifically held:

> **"When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. The court, reviewing the entire record weights the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 387. (Internal citations omitted.)**

{¶ 52} Appellant contends that his convictions were against the manifest weight of the evidence because the crux of the case was based upon the testimony of N.J., whom appellant characterizes as an unreliable witness. We disagree.

{¶ 53} Although the bulk of the State's case was comprised of the testimony of the victim, a rape victim's testimony can be sufficient to support a conviction even where there is no corroborating physical evidence. *State v. Hanni*, Cuyahoga App. No. 91014, 2009-Ohio-139, at ¶22, citing *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404. Further, many of the alleged inconsistencies in the victim's testimony were explained by other witnesses.

{¶ 54} Appellant points to several specific inconsistencies in N.J.'s testimony. Appellant points out that N.J. testified she did not scream inside appellant's vehicle because the windows were rolled all the way up. Later, N.J. testified that she threw her underwear out of the same window. (Tr. 350.) A review of N.J.'s testimony on this issue reveals that at the time she threw her underwear out the window, the window was merely cracked open. Id. There is no indication as to when appellant may have cracked the window, therefore, the window may have been shut earlier during the assault.

{¶ 55} N.J. also stated that she called police shortly after returning home at approximately 4:00 a.m. Danielle Forkapa, a Cleveland EMS paramedic who responded to the call from N.J.'s home, stated that she and her partner arrived at the victim's home shortly after 5:00 p.m. (Tr. 482.) N.J. explained her inconsistent testimony regarding the time she arrived at the hospital. She stated that shortly after she returned home, several members of her family awoke. (Tr. 364.) She spoke with them about the incident. She believes that more time had elapsed than she had initially realized because of the traumatic nature of what had occurred. (Tr. 364-365.)

{¶ 56} Appellant also contends that the victim's testimony that he orally raped her while she was positioned over the center console in the vehicle is completely implausible. However, the victim testified at length as to the details of this incident. (Tr. 224-237.) The jury was shown photographs of

the vehicle, specifically the center console. N.J. testified that it was difficult for the appellant to rape her while in this position. (Tr. 235.) For this reason the attacks that occurred in the front seat were brief, and the appellant drove to another location where N.J. was assaulted in the cargo area of the vehicle. (Tr. 235.)

{¶ 57} Next, appellant asserts that when the paramedics transported the victim to the hospital, there was no evidence of bruising on the victim's chest or neck. This is inconsequential, as the State provided a witness to explain why there may not have been visible injuries at this time. Holtz, the sexual assault nurse examiner, testified that bruises are very unique and can vary in color and size. Holtz further testified that, while one person may bruise within moments of an injury, it may be days before a bruise exhibits itself on another individual. (Tr. 439.) Therefore, N.J. may not have had visible signs of the assault the following afternoon, as some individuals bruise later or not at all.

{¶ 58} Appellant argues the fact that the rape examination performed on the victim revealed no injuries or DNA evidence, rendering the victim's testimony inconsistent. (Tr. 447.) However, Holtz specifically testified that in 85 percent of rape cases there are no vaginal injuries. (Tr. 447.) Further, Holtz stated that vaginal injuries were even less likely to be present in this case because the victim was menstruating at the time of the assault. (Tr. 448.)

{¶ 59} The absence of DNA recovered on the victim was explained by the fact that there was no nurse available to perform the rape kit on the day N.J. first went to the hospital. (Tr. 347.) The rape examination did not take place until the following day. Although N.J. was instructed not to shower or change her clothing, she testified that she was unable to comply because she felt dirty and was unable to maintain herself in that condition for an entire day. (Tr. 277.)

{¶ 60} Finally, appellant contends that the lack of blood in appellant's vehicle is inconsistent with three rapes having occurred there. Appellant argues that if the victim was menstruating during the rapes, substantial amounts of blood would have been recovered from inside the vehicle. However, Detective Ross testified that appellant's vehicle was not towed for approximately two weeks after the incident. (Tr. 533.) Consequently, the vehicle may have been cleaned prior to the police processing it for evidence.

{¶ 61} After reviewing the testimony in this case, we cannot conclude the jury lost its way, as there was sufficient credible evidence to support each of the charged offenses. Therefore, the convictions were not against the manifest weight of the evidence, and this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

"THE TRIAL COURT ERRED BY NOT MERGING THE RAPE AND KIDNAPPING CONVICTIONS AS ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 62} Appellant was convicted of three counts of rape in violation of R.C. 2907.02, and three counts of kidnapping in violation of R.C. 2905.01.

{¶ 63} R.C. 2941.25(A) provides,

> **"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."**
>
> **"(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."**

{¶ 64} Appellant relies on *State v. Green*, Cuyahoga App. No. 90473, 2008-Ohio-4452, for the proposition that when kidnapping occurs incidental to a sexual assault, the crimes must be merged for purposes of sentencing. In *Green*, the defendant was convicted of sexually abusing his girlfriend's son. The trial court merged the kidnapping and rape convictions for sentencing. Appellant urges this court to do the same; however, *Green* is clearly distinguishable.

{¶ 65} In *Green*, the defendant approached the victim where he was seated to rape him. The restraint of the victim's liberty occurred at the same time and place as the assault and was merely incidental to the rape. In the instant case, the acts of kidnapping were independent of the rape; therefore, merger would not be appropriate.

{¶ 66} The trial court specifically addressed the issue of merger during the sentencing hearing when it stated:

> **"There was a substantial amount of testimony in this case that the kidnapping wasn't the mere bodily confinement during a sex act. The abundance of testimony in this case is that this defendant spirited the victim away from the place that she was found, the family party, and took her to a number of locations, via his automobile, that was apparently rigged with a locking mechanism that could only be operated by himself. She was driven to one spot and raped. She was then driven to another spot and raped. She was then transported back to a home and raped. So I do not believe that these kidnapping counts merge with the rape counts. I believe that there is a separate animus or intent for each and every count that this defendant has been convicted of." (Tr. 757-758.)**

{¶ 67} Although appellant did restrain the victim during the actual rapes, the kidnapping charges corresponded to the three separate locations. The victim was assaulted in these three different locations for a period of approximately two hours. (Tr. 735.) The facts here are clearly distinguishable from *Green*, where the victim was not transported, but merely held down.

{¶ 68} As merger would not be appropriate under this set of facts, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SEVEN

"APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS NOT PRESENT DURING PORTIONS OF HIS TRIAL."

{¶ 69} Prior to closing arguments, the trial court had appellant removed from the courtroom. Appellant asserts that his absence during a portion of the trial violated due process and requires reversal of his convictions. We disagree.

{¶ 70} The Ohio Supreme Court has held that an "accused has a fundamental right to be present at all critical stages of his criminal trial. However, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *State v. Hale*, 119 Ohio St.3d 118, 133, 2008-Ohio-3426, citing *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed.

674. A defendant may lose his right to be present during trial if his actions in the courtroom are disruptive. *Snyder* at 107.

{¶ 71} Crim.R. 43(B) provides, "[w]here a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence."

{¶ 72} Appellant had three significant outbursts prior to the trial court removing him from the proceedings. (Tr. 287-291, 507-521, 638-643.) The trial court specifically explained to appellant that he could voice his concerns to his counsel, but he was not to speak out in the presence of the jury. (Tr. 291.) The second time appellant had an outburst in front of the jury, the trial court excused the jury to allow appellant to voice his concerns directly to the trial court. (Tr. 509.) The trial court again instructed appellant he was not to make comments in the presence of the jury, and was warned for the second time he would be removed from the courtroom if it continued. (Tr. 517.)

{¶ 73} Finally, after defense counsel concluded cross-examination of the State's final rebuttal witness, appellant began arguing with the court for the third time. At this point the trial court ordered appellant to be removed from the courtroom and placed in a holding cell. (Tr. 639.)

{¶ 74} Appellant was absent only for closing arguments. Appellant was given several warnings by the trial court that he needed to remain calm and

refrain from speaking out in the presence of the jury. Crim.R. 43(B) clearly allows for the defendant to be removed from the courtroom in such circumstances. A defendant's presence is required only where a fair proceeding cannot be had in his absence. *Hale* at 133. Here, the appellant missed only the summation of the case. He was present during all pertinent portions of the trial, including the cross-examination of the State's witnesses.

{¶ 75} Accordingly, we find appellant was not deprived of due process when the trial court removed him from the courtroom. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER EIGHT

"THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS FOR DISCOVERY VIOLATIONS."

{¶ 76} Appellant contends that the State failed to produce relevant discovery medical reports, witness list, photographs, DNA report, and fingerprint report. Appellant argues that this required the trial court to dismiss the indictment. We disagree.

{¶ 77} Crim.R. 16 requires that, upon motion by the defendant, the State shall disclose all relevant evidence, including photographs to be used at trial, identity of witnesses, and reports of any scientific testing. On April 4, 2008, appellant filed a motion for discovery specifically requesting any photographs,

reports of scientific testing, witness list, and any exculpatory evidence. On June 11, 2008, the State filed its Crim.R. 16 response.

{¶ 78} When addressing a discovery violation, the trial court should impose the least severe sanction while still producing a fair trial. *State v. Saucedo*, Cuyahoga App. No. 90327, 2008-Ohio-3544, at ¶24, citing *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, paragraph two of the syllabus. The trial court's judgment on discovery issues will not be reversed absent an abuse of discretion. *Saucedo* at ¶25. In order for a court to abuse its discretion, it must be "more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore*, supra.

{¶ 79} The trial court specifically addressed the discovery issues on the morning of trial. Defense counsel argued that he had not received the results of the DNA testing until that morning. The State explained that it had been waiting on the results and had just received them prior to delivering them to defense counsel. The results of the test were negative, and therefore, there was no prejudice to appellant in its delay. Further, the trial court ordered the State to turn over the report so the defense may use it if it wished. (Tr. 104.)

{¶ 80} Defense counsel also requested a fingerprint report from appellant's vehicle. There was no fingerprint report because investigators

were unable to recover any latent prints for comparison within the vehicle. (Tr. 101.)

{¶ 81} Defense counsel also requested to examine the victim's clothing. As of the morning of trial, the State did not know the location of the clothing. The trial court ordered the State to attempt to locate the clothing and allow the defense to view it. (Tr. 106.) The State ultimately located the clothing, and it was presented at trial during the direct examination of Detective Ross. Although the record does not indicate whether defense counsel was able to view the clothing prior to its admission, defense counsel failed to object at the time of its admission or demonstrate that appellant suffered any prejudice as a result of the clothing not being available prior to trial. (Tr. 543-547.)

{¶ 82} Appellant argued to the trial court that he had not had the opportunity to review photographs that were to be introduced by the State. The trial court ordered the State to produce all photographs to the defense. The trial court concluded that if the defense were able to demonstrate prejudice because of the delayed viewing of the photographs, they would be excluded. (Tr. 104.)

{¶ 83} The trial court specifically reviewed each item of discovery to determine whether the defense was prejudiced. The trial court concluded that the only discovery that might have prejudiced the defense by its delayed presentation were the photographs. The court addressed this issue by stating

they would be excluded upon a demonstration of prejudice. Appellant never demonstrated any prejudice to the trial court as a result of the delay. Such sanction was appropriate as the trial court should impose the least severe sanction that allows for a fair trial.

{¶ 84} We cannot conclude the trial court abused its discretion. Consequently, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER NINE

"THE TRIAL COURT'S IMPOSITION OF MAXIMUM CONSECUTIVE SENTENCES IS CONTRARY TO LAW AND AN ABUSE OF DISCRETION."

{¶ 85} At the conclusion of the trial, the jury found appellant guilty of three counts of rape in violation of R.C. 2907.02, and three counts of kidnapping in violation of R.C. 2905.01. All counts carried repeat violent offender specifications. On each of the three counts of rape, appellant was sentenced to 10 years in prison, plus an additional 5 years for each of the repeat violent offender specifications. On each of the three kidnapping counts, appellant was sentenced to 10 years in prison, plus an additional 5 years for each of the repeat violent offender specifications. The three counts of rape were to run consecutive to each other, but concurrent to the kidnapping charges, for a total of 45 years in prison.

{¶ 86} Appellant argues that his sentence violated due process because the trial court failed to provide sufficient reasons for his sentence, and failed to consider the proportionality and consistency of the sentence. We disagree.

{¶ 87} The Ohio Supreme Court held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of syllabus, that trial courts may impose any sentence within the statutory range and are not required to make specific findings. A sentence within the prescribed statutory range will not be overturned absent an abuse of discretion. Id.; *State v. Kalish*, 120 Ohio St.3d 23, 28, 2008-Ohio-4912 (plurality opinion).

{¶ 88} While the trial court has considerable discretion, it must still consider the factors outlined in R.C. 2929.11 and 2929.12. *Kalish* at ¶13. The sentence imposed should be consistent with the overall purposes of felony sentencing. Id. at ¶17.

{¶ 89} Although the trial court imposed the maximum sentence on each of the counts, the judge did run the three kidnapping convictions concurrently to the three rape convictions. The trial court had the ability to run all sentences consecutively for a total of 90 years in prison.

{¶ 90} A hearing was held whereby appellant, the victim, defense counsel, and the State were all heard. In its sentencing entry, the court specifically stated it considered all factors required by law, and determined prison to be consistent with the purposes of R.C. 2929.11. Judicial fact-finding is not

required when imposing incarceration within the statutory range. *State v. Moree*, Cuyahoga App. No. 90894, 2009-Ohio-472, at ¶31. Under *Foster*, the trial court had done all it was required to do when imposing a sentence upon appellant.

{¶ 91} However, during the sentencing hearing, the trial court went into detail regarding the reasons he was imposing a 45-year sentence. The trial court stated in pertinent part:

> **"The sentencing statutes clearly indicate that my job at this point is to protect the public and punish the offender. Given this defendant's criminal record, his numerous arrests, his multiple convictions, and convictions that I have mentioned, it is obvious to me that if he is released at any time, he will be a danger and a threat to the community, without any question whatsoever. He is one of the more dangerous criminal offenders that has been convicted in this courtroom. Therefore, I think consecutive prison terms are necessary to adequately reflect the seriousness of this defendant's conduct, to punish this offender, and to protect the public from any future acts of this offender." (Tr. 756-757.)**

{¶ 92} The trial court properly considered the purposes of felony sentencing as outlined in R.C. 2929.11. We conclude the trial court did not abuse its discretion when sentencing appellant. This assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS;
KENNETH A. ROCCO, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

KENNETH A. ROCCO, J., DISSENTING:

{¶ 93} I respectfully dissent from the majority opinion's disposition of appellant's first and second assignments of error. In my view, the trial court abused its discretion in admitting evidence relating to appellant's prior convictions, the evidence tainted the fairness of appellant's trial, and appellant's remaining assignments of error are thus moot.

{¶ 94} Some of the facts relevant to my view deserve elucidation.

{¶ 95} Only count ten of the indictment alleged appellant had been previously convicted of "offenses of violence," to wit: involuntary manslaughter in 1991, and both attempted abduction and aggravated assault in 2004. Appellant sought to stipulate to these prior convictions; however, the state refused to enter into the stipulation.

{¶ 96} The matter was discussed on the record. The trial court noted that "the jury already knows that this guy has been convicted of priors, because we read the NPC * * * and the RVO." On that basis, without addressing either the prejudicial effect of the evidence or Evid.R. 404(B), the court saw nothing wrong with permitting the state to prove its case as it saw fit.[2]

{¶ 97} After most of the witnesses had testified, the state presented the alleged victim from the 2004 case in order to prove one of appellant's "prior convictions." The woman's name, however, did not appear on the journal entry of appellant's conviction in that case. The prosecutor asked her if she were "involved in" case number "446802," and she answered, "Yes." In answer as to her "involvement," she stated, "It was a rape."

{¶ 98} Defense counsel objected, and the objection was sustained. Nevertheless, the prosecutor repeated the question, and the witness also repeated herself.

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[2]Incidentally, the trial court also found no particular fault with the prosecutor's failure to provide to the defense, until just prior to the commencement of trial, either the victim's medical records, a witness list, forensic test results, or photographs taken by police officers. Appellant moved to dismiss the case for these failures, but his motion

{¶ 99} The woman then said she "was the victim," and testified that the case was resolved because "they plea bargained with him." When asked if she saw in the courtroom the man "who committed that offense against" her, she identified appellant. Defense counsel attempted to minimize the damage by asking her if he had been convicted only of lesser offenses.

{¶ 100} The state then called retired Det. Gregory Kunz. He testified he investigated the 1990 murder of Andrew Lee, obtained a suspect with appellant's name, who was the victim's brother-in-law, and arrested him; he identified appellant as the man he arrested. He also testified appellant was indicted and convicted in that case of involuntary manslaughter.

{¶ 101} After Kunz's testimony, the state called Det. Ross, who investigated the instant case. The court permitted him to state, over objection, that he had concerns for the victim's safety because his information about appellant indicated "prior use of violence against family members." Ross further identified the journal entries of appellant's prior convictions.

{¶ 102} After the foregoing witnesses' testimony, and in spite of his trial counsel's advice to the contrary, appellant felt impelled to testify in his own behalf. The prosecutor cross-examined appellant extensively with respect to his prior convictions. Then, on rebuttal, the prosecutor recalled the victim of the 2004 case to testify regarding the details of that case. In his closing argument, the

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was denied.

prosecutor pointed out the similarities in the victims' descriptions of appellant's behavior in the two cases. Thus, the prosecutor argued appellant acted in this case in conformity with his previous convictions.

{¶ 103} The record reflects that, after receiving the case, the jury had some difficulty in arriving at a verdict. Eventually, the jury found appellant not guilty of two counts of rape and one count of kidnapping, but found appellant guilty of three counts of rape and three counts of kidnapping, with the NPCs, the RVOs, and sexual motivation specifications, and not guilty of either any firearm specifications or count ten.

{¶ 104} Based upon my review of the record, I believe the facts presented in this case are thus similar to those considered in *State v. Henton* (1997), 121 Ohio App.3d 501.

{¶ 105} In that case, Henton offered to stipulate that he was the person convicted in one prior case, which was all the state needed to prove the element of the second-degree felony of which he was accused. The state, however, wanted to prove Henton twice had been convicted. The trial court allowed the state to introduce evidence of both prior convictions. The appellate court decided this was error in light of *Old Chief v. United States* (1997), 519 U.S. 172.

{¶ 106} "[B]ecause the defendant had offered to stipulate to the prior conviction, 'the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction,'"

therefore, the trial court abused its discretion in admitting the evidence "when an admission was available." *Henton*, quoting *Old Chief*. (Emphasis added.)

{¶ 107} The *Henton* court was "ill prepared to state" that Evid.R. 403 "would allow the risk of a verdict tainted by improper considerations." Thus, the trial court abused its discretion in rejecting the defendant's stipulation. Moreover, in light of the record, the error could not be deemed harmless, since the "evidence of guilt was not so overwhelming" otherwise.

{¶ 108} Our own court has cited *Henton* with approval, but has distinguished it. Thus, allowing evidence of prior convictions is not considered an abuse of discretion when a defendant is accused of only carrying a concealed weapon and having a weapon while under disability, and the evidence establishes an element of the "disability" but not the other count. *State v. Tisdel*, Cuyahoga App. No. 87516, 2006-Ohio-6763, ¶41.

{¶ 109} Similarly, allowing evidence of prior convictions is not considered an abuse of discretion when the defendant refuses to stipulate, the evidence is provided for its limited purpose, and the evidence is not "misused in any way to argue [the defendant's] guilt on the [other counts]." *State v. Ware*, Cuyahoga App. No. 82644, 2004-Ohio-1791, ¶22.

{¶ 110} None of the exceptions applies in this case.

{¶ 111} Recently, in *State v. Baker*, Summit App. No. 23840, 2008-Ohio-1909, the Ohio Ninth District found no error in the admission of such evidence. However, *Baker* contains facts that are distinguishable: defendant's

counsel offered to stipulate to a prior conviction, but did not state which one, the only evidence the state introduced were copies of the judgment entries, defense counsel raised no objection to the exhibits, and the record failed to reflect "undue prejudice" resulted from the introduction of the evidence.[3]

{¶ 112} This case presents a different situation. The prosecutor in this case used the evidence of the prior convictions to suggest appellant must have acted in conformity with them, in spite of the stricture contained in Evid.R. 404(B). Defense counsel strenuously argued the evidence was overly prejudicial, and objected to it.

{¶ 113} In addition, the prosecutor made his point about appellant's criminal "character" several times, in his examination of his witnesses, his cross-examination of appellant, presenting his rebuttal evidence, and his argument to the jury.

{¶ 114} Based upon my review of the record, therefore, the trial court abused its discretion in allowing this evidence, since its admission tainted the fairness of appellant's trial. I do not believe that the evidence of his guilt was so overwhelming as to overcome the prejudicial nature of the manner in which it was used.

{¶ 115} Accordingly, I would sustain appellant's first and second assignments of error; his others would be moot pursuant to App.R. 12(A)(1)(c).

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[3]Moreover, *Baker* may not be cited as authority. *State v. Baker*, 121 Ohio St.3d 1233, 2009-Ohio-1675.

{¶ 116} I would reverse appellant's convictions and remand this case for further proceedings.