

[Cite as *State v. Dawson*, 2017-Ohio-965.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104509

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

UNICE T. DAWSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599535-A

BEFORE: E.T. Gallagher, P.J., S. Gallagher, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 9, 2017

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EILEEN T. GALLAGHER, P.J.:

{¶1} Defendant-appellant, Unice T. Dawson (“Dawson”), appeals from his felonious assault conviction and sentence. He raises the following assignments of error for our review:

1. The state failed to present sufficient evidence to sustain a conviction against appellant.
2. Appellant’s convictions are against the manifest weight of the evidence.
3. The trial court erred when it prevented appellant from cross-examining the victim in this case about her purported sexual activity with another male which caused appellant to assault her.
4. The trial court erred by giving jury instructions as to both aggravated assault and self-defense.
5. The court costs imposed at the sentencing hearing infringed upon appellant’s rights under the Eighth and Fourteenth amendments to the United States Constitution, R.C. 2929.18, R.C. 2929.19(B)(5), and related sections of the Ohio Constitution.

{¶2} After careful review of the record and relevant case law, we affirm Dawson’s convictions and sentence.

I. Procedural and Factual History

{¶3} In October 2015, Dawson was named in a four-count indictment, charging him with rape in violation of R.C. 2907.02(A)(2), with notice of prior conviction and repeat violent offender specifications; rape in violation of R.C. 2907.02(A)(1)(C), with notice of prior conviction and repeat violent offender specifications; kidnapping in violation of R.C. 2905.01(A)(4), with sexual motivation, notice of prior conviction, and

repeat violent offender specifications; and felonious assault in violation of R.C. 2903.11(A)(1), with notice of prior conviction and repeat violent offender specifications.

{¶4} Prior to trial, Dawson waived his right to a jury trial on the notice of prior conviction and repeat violent offender specifications. In April 2016, the matter proceeded to a jury trial where the following facts were adduced.

{¶5} L.D. testified that when she was 12-years old, she began a sexual relationship with Dawson, who was 15-years old at the time. Dawson and L.D. dated for one year before their relationship ended. In September 2014, L.D. went to a bar with her sister, K.P., and her friend, M.Y. to celebrate her twenty-fifth birthday. On the way home from the bar, L.D. and her friends saw Dawson's younger brother, K.A. Thereafter, the group was picked up by Dawson in his vehicle and driven to the apartment of Dawson's mother, Michelle Dawson, where they continued to celebrate L.D.'s birthday.

{¶6} While at Michelle's apartment, Dawson asked L.D. to go into the hallway to talk. Once they were alone, Dawson began making sexual advances. L.D. stated that Dawson "was trying to take me up some steps to the right side and I was like, no, I'm not going to go up there, and then like before I knew it, I was on the opposite side of the steps and I was bent over and he was pulling my pants down." L.D. testified that she fought to keep her pants on but that Dawson overpowered her and forced her to have vaginal sex. L.D. testified that she did not consent to the sexual act. L.D. admitted that she was intoxicated at the time of the incident and that there are "bits and pieces" of the night that she does not remember.

{¶7} When inside the apartment, L.D. immediately told K.A. what Dawson had done to her. She then took a shower to “wash [Dawson] off” of her while K.A. guarded the door from inside the bathroom. L.D. explained that she did not ask K.A. to come into the bathroom but that he wanted to stay in the room with her to keep Dawson from coming inside. After taking a shower, L.D. got dressed in K.A.’s bedroom and told her sister that she was ready to leave.

{¶8} L.D. testified that as she was walking out of the apartment, Dawson “pushed” her face with his hand. Moments later, Dawson attacked L.D. as she was walking down the stairs. L.D. testified, “all I remember is waking up and I’m on the ground and [Dawson]’s punching me in my face and there is blood everywhere.” L.D. was taken back inside Michelle’s apartment. When she looked in the mirror and saw that her nose “was on the other side of [her] face” she ran outside and flagged down a nearby ambulance to take her to the hospital.

{¶9} L.D. completed a rape kit and required surgery to fix her broken nose. While she was recovering in the hospital, L.D. received a Facebook message from Dawson threatening to break her jaw.

{¶10} Prior to L.D.’s cross-examination, defense counsel suggested that he intended to question L.D. about allegations that she performed oral sex on K.A. while they were alone in the bathroom in order to prove that Dawson’s assault of L.D. was provoked. Following a discussion on the record, the trial court determined that defense counsel was precluded from questioning L.D. about any purported sexual activity with

K.A. pursuant to the Ohio rape shield statute. During her cross-examination, L.D. admitted that she had engaged in consensual sex with Dawson in the past but that she did not consent on the night in question. L.D. further testified that Dawson's attack was completely unprovoked.

{¶11} K.P. testified that on the night of the incident, she was celebrating L.D.'s birthday. K.P. testified that the group later went to Michelle's apartment with K.A. to continue the birthday celebration. At some point in the night, K.P. observed L.D. go into the hallway with Dawson. Approximately 15 minutes later, she saw L.D. come back inside. K.P. testified that L.D. was upset and immediately went into the bathroom.

As they were leaving Michelle's apartment, L.D. yelled at Dawson and he responded by pushing her down and began punching her in the face while she was on the ground. During her cross-examination, K.P. admitted that she told detectives that Dawson was upset with L.D. based on accusations that L.D. had performed oral sex on K.A. while they were alone in the bathroom. M.Y.'s testimony corroborated K.P.'s version of the incident.

{¶12} Forensic Scientist, Jeffery Oblock, of the Cuyahoga County Regional Forensic Science Laboratory, testified that Dawson was the source of the DNA obtained from certain items in L.D.'s rape kit.

{¶13} Michelle testified on behalf of the defense. Michelle testified that L.D. arrived at her apartment at approximately 10:00 p.m. to celebrate L.D.'s birthday. Michelle testified that she had a drink with L.D. and then went to bed while the rest of

the guests continued to celebrate. At some point, Michelle was woken up by K.A., who informed her that L.D. had “sucked his pee-pee” and that she wanted permission to take a shower. Michelle explained that K.A. is under the age of majority and has cognitive skills of an eight or nine year-old.

{¶14} Despite what K.A. had told her, Michelle testified that she immediately went back to sleep before she woke up to the sound of L.D. and Dawson arguing in the kitchen.

When she went into the kitchen, she observed L.D. and Dawson yelling at each other. Michelle testified that Dawson was very upset and was yelling at L.D. about her alleged sexual activity with K.A. At that time, Michelle saw L.D. hit Dawson and Dawson responded by hitting L.D.

{¶15} At the conclusion of trial, the jury found Dawson not guilty of rape and kidnapping as charged in Counts 1, 2, and 3 of the indictment. Dawson, however, was found guilty of felonious assault as charged in Count 4. Subsequently, the trial court found Dawson guilty of the accompanying notice of prior conviction and repeat violent offender specifications. At sentencing, the trial court imposed an eight-year term of imprisonment and ordered Dawson to pay court costs.

{¶16} Dawson now appeals from his conviction and sentence.

II. Law and Analysis

A. Ohio’s Rape Shield Law

{¶17} For the purposes of judicial clarity, we review Dawson’s assignments of error out of order.

{¶18} In his third assignment of error, Dawson argues the trial court erred when it prevented defense counsel from cross-examining L.D. about her purported sexual activity with K.A. pursuant to the Ohio rape shield statute. Dawson contends that evidence of L.D.'s sexual activity with K.A. would have demonstrated that Dawson's assault of L.D. was provoked. Thus, Dawson argues that the excluded evidence would have supported a conviction for the inferior offense of aggravated assault.¹

{¶19} "It is within the trial court's sound discretion to determine the relevancy of evidence and to apply the rape shield law to best meet the purpose behind the statute." *State v. Miller*, 63 Ohio App.3d 479, 483, 579 N.E.2d 276 (12th Dist.1989). However, we review the constitutional challenges to the application of the rape shield statute de novo. *State v. Holmes*, 8th Dist. Cuyahoga No. 91948, 2009-Ohio-3736, ¶ 35, citing *State v. Brisco*, 8th Dist. Cuyahoga No. 76125, 2000 Ohio App. LEXIS 3835 (Aug. 24, 2000).

{¶20} R.C. 2907.02(D), commonly known as the rape shield statute, states in pertinent part:

Evidence of *specific instances of the victim's sexual activity*, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it

¹ Aggravated assault is an inferior offense of felonious assault. Its elements are identical to felonious assault except its nature and penalty are mitigated by one or two mitigating circumstances, i.e., sudden passion and/or a sudden fit of rage brought on by serious provocation occasioned by the victim. See, e.g., *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph four of the syllabus; *State v. Williams*, 8th Dist. Cuyahoga No. 98210, 2013-Ohio-573, ¶ 21; *State v. Searles*, 8th Dist. Cuyahoga No. 96549, 2011-Ohio-6275, ¶ 18.

involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(Emphasis added.)

{¶21} The statute essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity, with limited exceptions. Ohio courts have recognized that application of the rape shield statute may not unduly infringe upon a defendant's constitutional right of confrontation, right to a fair trial, and right to present a defense. *See State v. Young*, 8th Dist. Cuyahoga No. 92127, 2009-Ohio-5354; *State v. Gardner*, 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337 (1979).

{¶22} To protect a defendant's constitutional rights, courts must "balance the state interest which the [rape shield] statute is designed to protect against the probative value of the excluded evidence." *Gardner* at 17. Where the proffered evidence is offered for more than mere impeachment of credibility, and is directly probative of a material issue in the case, the evidence should not be excluded under the rape shield law. *State v. Williams*, 21 Ohio St.3d 33, 487 N.E.2d 560 (1986).

{¶23} In this case, the challenged evidence pertains to "specific instances of the victim's sexual activity" and does not relate to evidence concerning the origin of semen, pregnancy, disease, or L.D.'s past sexual activity with Dawson. Thus, the trial court did not abuse its discretion in finding that the evidence falls within R.C. 2907.02(D) and is not admissible under the rape shield statute.

{¶24} With respect to Dawson’s constitutional claim, we are unable to conclude that the trial court’s exclusion of the challenged evidence unduly infringed on Dawson’s right to confront the witness against him. Under the circumstances presented in this case, we find the evidentiary value of the testimony that would have been gathered from defense counsel’s cross-examination of L.D. about her purported sexual activity with Dawson’s brother would not have outweighed the protections the rape shield statute was designed to protect. This is particularly true where defense counsel was not prevented from procuring testimony from other witnesses concerning Dawson’s alleged motive for assaulting L.D.

{¶25} We note that this is an unusual case where, on appeal, the defendant suggests that the evidence of the victim’s sexual activity was not intended to disprove an element of rape, but was necessary to establish a mitigating circumstance in a separate offense. While we recognize the basis of Dawson’s argument, we are mindful that the trial court issued its ruling at a point in the trial where L.D.’s allegations of rape had yet to be determined by the trier of fact. Thus, regardless of the ultimate verdict, Dawson’s argument relies on foresight that was not available to the trial court at the time of its evidentiary ruling. In our view, it is unreasonable to assume defense counsel would have limited its cross-examination of L.D. about her purported sexual activity with K.A. to the issues concerning the lesser offense of aggravated assault and Dawson’s motive to assault L.D. Undoubtedly, had the trial court permitted defense counsel to cross-examine L.D. about her interaction with K.A. on the night in question, counsel

would have attempted to use such testimony to invalidate L.D.'s allegation of rape, a circumstance that clearly violates the intent of R.C. 2907.02.

{¶26} Accordingly, Dawson's constitutional challenges to the application of the rape shield statute are without merit. Dawson's third assignment of error is overruled.

B. Sufficiency and Manifest Weight of the Evidence

{¶27} In his first and second assignments of error, Dawson argues his conviction is not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶28} When reviewing a challenge of the sufficiency of the evidence, an appellate court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A sufficiency challenge requires us to review the record to determine whether the state presented evidence on each of the elements of the offense. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. "The court, reviewing the entire record, weighs the evidence and all reasonable

inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury 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.”

Thompkins at 387, quoting *Martin* at 175.

{¶29} In evaluating a manifest weight claim, “the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶30} In this case, Dawson was convicted of violating R.C. 2903.11(A)(1), felonious assault, which provides, in part, that “no person shall knowingly * * * cause serious physical harm to another.” “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

{¶31} In challenging the sufficiency of the evidence, Dawson reiterates many of the arguments raised in his third assignment of error. Specifically, Dawson “submits that there is insufficient evidence to sustain a conviction for felonious assault because the

jury was not able to hear all the potential evidence” because the trial court prevented Dawson from cross-examining L.D. about her purported sexual activity with K.A.

{¶32} As discussed, the trial court did not err by preventing defense counsel from exploring L.D.’s sexual activity on cross-examination. Moreover, the record reflects that defense counsel presented testimony from other witnesses regarding the allegations that Dawson assaulted L.D. because he was upset that she allegedly performed oral sex on his 16-year-old brother. The trier of fact, however, simply rejected defense counsel’s suggestion that Dawson acted with a “sudden fit of rage brought on by serious provocation occasioned by the victim.” Regarding the elements of R.C. 2903.11(A)(1), L.D., K.P., and M.Y. each testified that as they were leaving Michelle’s apartment, Dawson pushed L.D. to the ground and began punching her in the face. As a result, L.D. suffered a broken nose and required surgery to repair the fracture.

{¶33} Viewing all of the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence supporting Dawson’s felonious assault conviction.

{¶34} Moreover, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against Dawson’s conviction. In challenging the weight of the evidence, Dawson reiterates his sufficiency arguments and does not dispute the jury’s resolution of conflicts in evidence. Therefore, we conclude there is nothing in the record to suggest the trier of fact lost its way such that Dawson’s conviction constituted a “manifest miscarriage of justice.”

{¶35} Accordingly, Dawson’s first and second assignments of error are overruled.

C. Jury Instructions

{¶36} In his fourth assignment of error, Dawson argues the trial court committed “plain error when it instructed the jury as to both the inferior offense of aggravated assault and the affirmative defense of self defense.”

{¶37} A trial court’s decision to grant or deny a requested jury instruction is reviewed under an abuse of discretion standard. *State v. Williams*, 8th Dist. Cuyahoga No. 90845, 2009-Ohio-2026, ¶ 50. A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. A trial court is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶ 72. Jury instructions must be viewed as a whole to determine whether they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436, 469 N.E.2d 939 (8th Dist.1984).

{¶38} Under the invited-error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced. *State v. Armstrong*, 8th Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 69. In this case, defense counsel requested jury instructions on aggravated assault and self-defense, arguing that the jury was capable of resolving the alternate theories of the case. Thus, to the extent any error occurred, Dawson invited it.

{¶39} Dawson’s fourth assignment of error is overruled.

D. Court Costs

{¶40} In his fifth assignment of error, Dawson argues the trial court abused its discretion by ordering him to pay court costs without considering his future ability to pay.

{¶41} The imposition of court costs is governed by R.C. 2947.23, which states in relevant part: “In all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs.” Thus, a sentencing court must include the costs of prosecution in the sentence and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. “A defendant’s financial status is irrelevant to the imposition of court costs.” *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 3.

{¶42} Dawson cites R.C. 2929.19(B) for the proposition that the trial court was required to consider his present and future ability to pay the court costs imposed, and therefore, must consider evidence on that issue. However, court costs are not financial sanctions. Accordingly, R.C. 2929.19 has no application to the imposition of court costs. A trial court need not consider a defendant’s ability to pay, as required by R.C. 2929.19 for the imposition of financial sanctions, before imposing court costs. *State v. Stevens*, 8th Dist. Cuyahoga No. 95011, 2011-Ohio-729, ¶ 11. *See also State v. Fuller*, 2d Dist. Montgomery No. 25380, 2013-Ohio-3274, ¶ 19.

{¶43} Under these circumstances, we find no abuse of discretion in the court's decision to impose court costs as part of Dawson's sentence. *State v. Drake*, 8th Dist. Cuyahoga No. 97319, 2012-Ohio-2198.

{¶44} Dawson's fifth assignment of error is overruled.

{¶45} Judgment affirmed.

It is ordered that appellee recover from appellant the 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. Case remanded to the trial court for execution of sentence.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR