[Cite as *State v. Brisbon*, 2018-Ohio-2303.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105591

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDDIE JAMES BRISBON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597672-A

BEFORE: Keough, J., Laster Mays, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: June 14, 2018

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Eddie James Brisbon, appeals his convictions. For the reasons that follow, we affirm.

{¶2} In August 2015, Brisbon was named in a 13-count indictment charging him with eight counts of rape, two counts each of felonious assault and kidnapping, and one count of aggravated robbery. All counts contained one- and three-year firearm specifications, and a majority of the counts included a sexually violent predator specification.

{¶3} Dissatisfied with his assigned counsel, Brisbon moved to disqualify counsel. His assigned counsel also requested to withdraw from the case. The trial court granted counsel's request and appointed new counsel. However, in March 2016, Brisbon moved to disqualify his new counsel. After his request was denied, Brisbon filed a voluntary waiver of right to counsel. The trial court ordered Brisbon to undergo a competency evaluation to ensure he was competent to waive counsel. Following the evaluation, the trial court granted Brisbon's request to proceed pro se, and appointed standby counsel.

{¶4} On January 9, 2017, a bifurcated trial commenced, with the sexually violent predator specifications being tried to the bench. Following the close of the state's case, the state dismissed Count 7 — one of the rape charges. The jury returned guilty verdicts on all remaining counts and firearm specifications. The trial court found Brisbon guilty of all sexually violent predator specifications. After merging all relevant counts, the court sentenced Brisbon to a term of incarceration of 38 years to life.

{¶5} Brisbon now appeals, raising three assignments of error.

I. Facts

{¶6} In the early morning hours of June 12, 2015, the female victim was late for work and missed her normal bus. She called her boss and told him that she would catch the bus from a different location. While on the phone with her boss a second time, an unknown man approached her. The victim's boss testified that he heard a muffled voice and then the phone went dead.

{¶7} The victim testified that the unknown man, later identified as Brisbon, demanded her purse at gunpoint. Brisbon took her purse and started walking away. However, he turned around and demanded that she come with him. Fearful because he had a gun, she walked along with him. Video surveillance from the area corroborated the victim's testimony.

{¶8} Under the cloak of darkness, Brisbon led her to an area near some bushes where he forced her to perform fellatio. She testified that Brisbon punched her during the rape. After this sexual and physical assault, Brisbon led the victim to another area along Euclid Avenue where he anally raped her and forced her again to perform fellatio. Thereafter, Brisbon held the victim's hand, forcing her down the street to an abandoned warehouse while threatening that he would slit her throat with a razor. After hearing a noise and believing someone was present, Brisbon forced her to another abandoned warehouse in the area where he vaginally raped the victim on a pile of wooden pallets.

{¶9} The victim described the warehouse as dirty with tree branches, rocks, and wooden sticks everywhere. Following this assault, Brisbon forced her to another area with wooden pallets. There, he vaginally raped the victim and forced her to perform fellatio. During this sexual assault, Brisbon began physically assaulting the victim. She testified that he hit her with his belt and told her that she "wasn't doing it right." During this exchange, she tried to escape by pushing Brisbon and then running. However, Brisbon caught her, causing her to fall to the

ground. As they were struggling, Brisbon struck the victim with a wooden 2 x 4, and ripped out her glued-in hair weave. Brisbon then forced the victim to crawl through the warehouse, while he continued to hit her with his belt.

{¶10} When they approached another set of wooden pallets, Brisbon forced the victim again to perform fellatio. During this assault, Brisbon punched her and questioned why she would try to escape. The victim testified that she kept telling him that she wanted to go home to her son. The victim stated that Brisbon beat her and stood over her pretending he was going to strike her again with the wooden stick. During this assault, Brisbon ejaculated, which the victim spat on the dirty floor. Brisbon then sprayed hand sanitizer all over the victim's body, telling her that it would get rid of DNA. He also told her that he was going to put dirt in her underwear and make her eat dirt.

{¶11} Afterward, Brisbon told the victim to get dressed and forced her outside. When they approached a tree with berries, he made her eat them, telling her the berries would help get rid of any DNA. He then walked her to East 55th Street and Superior Avenue and told her to "keep walking" and "don't look back and don't tell anyone" or he would kill her and her son. Brisbon fled with the victim's employment name badge, and the victim went to a nearby store and called the police. She testified that Brisbon terrorized her from approximately 2:30 a.m. until sometime after 9:30 a.m.

{¶12} Sergeant Margaret Buttner testified that she responded to a call for a female sexual assault victim. According to Sergeant Buttner, the victim was very upset, crying, and shaken up. The jury was able to view the victim's demeanor through the recorded body camera video. Sergeant Buttner testified that prior to being transported to the hospital, the victim was able to take the officers to the locations where she was physically and sexually assaulted.

{¶13} Detective John Riedthaler testified that he collected evidence from the warehouse and took several photographs. He described the warehouse as "creepy, stripped, dirty, and filled with garbage and dusty pallets." The jury viewed pictures of an abandoned and filthy warehouse containing wooden pallets, piles of dirt and debris, and trash covered in layers of dirt. In those pictures, a clean belt was on the ground next to a group of pallets, and a nearby spot appeared wet. In another picture, a female's hair piece was on a pallet and a cell phone enclosed in a pink case was within view nearby. The victim identified the case as her phone.

{¶14} Dr. Bryan Baskin testified that he treated the victim at MetroHealth Hospital for a concussion and contusions on her left leg and abdominal wall. The victim was also evaluated by a sexual assault nurse examiner ("SANE"). Although there were no injuries to the victim's vaginal or anal areas, the swabs taken from other areas of the victim's body and clothing revealed DNA foreign to the victim on both her breast and underwear. At the time of testing, no suspect was identified.

{¶15} Detective Liz Galarza testified that Brisbon became a suspect after a lead was developed from the coroner's office. Thereafter, the victim identified Brisbon in a photo array. Based on that information, a warrant was issued to obtain buccal swabs from Brisbon. According to Salesha Baksh, a forensic DNA analyst, Brisbon was a possible contributor to both the foreign DNA found on the victim's breast and underwear.

{¶16} Brisbon testified in his defense, denying that he engaged in sexual activity with the victim on June 12, 2015. He stated that he met the victim in May, but denied ever having sexual relations with her. He claimed the victim had scrapes on her body because he pushed her down in May 2015, the last time he saw her. Detective Galarza, however, testified that Brisbon told her during his interview that he had relations with the victim in an abandoned house nine days

prior to the attack. Despite these "relations," Brisbon did not know the victim's actual name and could not physically describe her.

II. Lesser Included Offenses

{¶17} In his first assignment of error, Brisbon contends that the jury should have been instructed on gross sexual imposition or sexual battery as lesser included offenses of rape, and assault as a lesser included offense to the felonious assault charge in Count 10.

{¶18} A trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on a lesser included offense; we will not reverse that determination absent an abuse of discretion. *State v. Henderson*, 8th Dist. Cuyahoga No. 89377, 2008-Ohio-1631, ¶ 10, citing *State v. Wright*, 4th Dist. Scioto No. 01 CA2781, 2002-Ohio-1462. An abuse of discretion may only be found where the decision of the trial court is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶19} In *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6, the Ohio Supreme Court succinctly stated the process under which a lesser included instruction is warranted.

> The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13. The first tier, also called the "statutory-elements step," is a purely legal question, wherein we determine whether one offense is generally a lesser included offense of the charged offense. *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). The second tier looks to the evidence in a particular case and determines whether "'a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense.'" *Evans* at ¶ 13, quoting *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, at ¶ 11. Only in the second tier of the analysis do the facts of a particular case become relevant.

{¶20} The court must view the evidence in a light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense. *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). An instruction is not warranted, however, every time "some evidence is presented on a lesser included offense." *State v. Smith*, 8th Dist. Cuyahoga No. 90478, 2009-Ohio-2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

{¶21} Brisbon first contends that the trial court abused its discretion by failing to instruct the jury on the offense of sexual battery by coercion and gross sexual imposition as lesser included offenses of rape. We disagree.

{¶22} The law is well settled that both sexual battery by coercion and gross sexual imposition could be lesser included offenses of forcible rape. *See, e.g., State v. Cain*, 10th Dist. Franklin No. 06AP-1252, 2007-Ohio-6181, ¶ 8 (sexual battery committed by use of coercion may be a lesser-included offense of forcible rape); *State v. Johnson*, 36 Ohio St.3d 224, 522 N.E.2d 1082 (1988) (gross sexual imposition could be a lesser-included offense of forcible rape). However, the evidence presented at trial in this case would not support both an acquittal on the rape offense and a conviction on the lesser offenses of sexual battery or gross sexual imposition.

{¶23} In this case, Brisbon offered a complete defense to the rape offenses by testifying that he did not engage in sexual intercourse with the victim. (Tr. 1005.) Even when a complete defense is offered, if the state's evidence could be interpreted as supporting only a lesser included offense, a lesser included charge to the jury is appropriate.

> If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves would sustain a conviction upon a lesser included offense.

State v. Wine, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 25, quoting *State v. Wilkins*, 64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980). Thus, Brisbon's complete defense does not necessarily preclude a lesser included offense instruction. In fact, Brisbon contends that the jury could have disbelieved the victim that *sexual conduct* occurred, but believed her that only *sexual contact* occurred — thus warranting a gross sexual imposition charge.

{¶24} The Ohio Supreme Court has held that a "defendant is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to 'sexual conduct' * * * and, at the same time, consistently and reasonably believe her testimony on the contrary theory of mere 'sexual contact,' * * *." *Johnson*, 36 Ohio St.3d at paragraph two of the syllabus, 522 N.E.2d 1082.

{¶25} In this case, Brisbon offered a complete defense to the rape offenses. He did not attempt to argue that he may have participated in or committed lesser gradations of sexual conduct or contact with the victim. Instead, he argued that no sexual contact or conduct occurred, whereas the victim's testimony indicated that Brisbon committed multiple acts of forcible rape. Based on the evidence presented — that Brisbon's DNA was a possible contributor to the foreign DNA found on the victim's breasts and in her underwear — the jury could not reasonably find Brisbon not guilty of rape, and only guilty of gross sexual imposition or sexual battery. Accordingly, a jury instruction for any lesser included offenses would have been inappropriate because the evidence did not, even when considered in the light most favorable to the appellant, present a fact pattern that would have resulted in an acquittal of the rape charges but a conviction for any lesser included offense. The trial court did not abuse its

discretion in denying Brisbon's request for a lesser included jury instruction on the rape offenses charged in Counts 1-6 and 8.

{¶26} Brisbon also argues on appeal that the court should have instructed the jury on the lesser included offense of assault regarding the felonious assault offense. The record reflects that Brisbon never asked for a lesser included instruction on the felonious assault offense and, therefore, he has waived all but plain error on appeal. In order to prevail under a plain error analysis, the appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the alleged error. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus; Crim.R. 52(B).

{¶27} Although assault is a lesser included offense of felonious assault, the instruction was not warranted based on the evidence. Notwithstanding that Brisbon's complete denial of any culpability in this case, the evidence at trial would not reasonably support an acquittal on the offense of felonious assault because the jury heard testimony that Brisbon repeatedly struck the victim with his belt and a large piece of wood he found in the warehouse when the victim attempted to run away. Dr. Baskin testified that the victim complained of head, leg, and abdominal pain, suffered a concussion, and contusions to her left leg and abdominal wall. The victim also had abrasions and cuts to her hands, knees, and elbows. Finally, the victim testified that Brisbon pointed a firearm at her and threatened to "slit [her] throat." (Tr. 502.) The victim's injuries and Brisbon's threats were sufficient to prove serious physical harm; thus, an acquittal on the felonious assault charge was not reasonable and a lesser included instruction of

assault, was not warranted. Accordingly, the trial court did not commit any error, plain or otherwise, for not instructing the jury on the lesser included offense of assault.

{¶28} Brisbon's first assignment of error is overruled.

III. Access to Law Library

{¶29} In his second assignment of error, Brisbon contends that the trial court committed reversible error by denying him adequate access to legal research materials to adequately represent himself, in violation of his due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

{¶30} Brisbon admits that the trial court ordered that he be given reasonable access to the Cuyahoga County Jail Law Library. (Tr. 1156-1157, 1162-1163.) He also admits that the trial court was not aware of any delay in her order being implemented until sentencing. A review of the transcript reveals that Brisbon did not make his request for access to the library until after the jury returned its verdict and prior to the bench trial on the sexually violent predator specification. The trial court was not made aware of any difficulties in accessing the law library until the court asked the parties to brief an issue during the bench trial portion of the case. (Tr. 1156.) Brisbon then advised the court that there was difficulty in accessing the law library. (Tr. 1156.) It was only during this conversation that the trial court was made aware of any difficulties Brisbon may have had with access to the law library.

{¶31} Accordingly, Brisbon's argument on appeal falls under the invited error doctrine. *State v. Gumins*, 8th Dist. Cuyahoga No. 90447, 2008-Ohio-4238, ¶ 18 (under the doctrine of invited error, a litigant may not take advantage of an error that he invited or induced). A court cannot remedy an error or manifest injustice unless it is made aware of such denial of due process during the trial proceedings. Failing to bring the error to the trial court's attention

denied the trial court the opportunity to remedy any error, and results in a failure to preserve the issue for appeal. Generally, an error must be brought to the attention of the trial court at a time when it can be corrected and may not be raised for the first time on appeal. *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986).

{¶32} In this case, once the trial court was made aware of Brisbon's difficulties in accessing the jail law library, the trial court issued an order directing that he have access. Therefore, the trial court did not deny Brisbon any access to the library. Despite Brisbon's admission that the court was not aware of the difficulties he was having prior and during trial, he maintains that "a right to access legal research materials in conjunction with proceeding pro se [should] be protected under the U.S. Constitution so that future defendants proceeding pro se have a meaningful chance to understand procedure and file meaningful motions and briefs." Appellant's brief, at p. 13. Insofar as Brisbon is attempting to pave the way for future defendants proceeding pro se, or asking this court to expand the law on access because of advancements in legal research through technology, we decline to do so in a case where the defendant has not preserved the issue on appeal. Morever, this court will not render advisory opinions on how future pro se litigants should proceed.

{¶33} Accordingly, Brisbon's second assignment of error is overruled.

III. Allied Offenses

{¶34} In his third assignment of error, Brisbon contends that the trial erred in failing to merge the rape charge in Count 1 with the kidnapping charge in Count 12.

{¶35} Under R.C. 2941.25, Ohio's multicount statute, where the defendant's conduct constitutes two or more allied offenses of similar import, the defendant may be convicted of only one offense. R.C. 2941.25(A). A defendant charged with multiple offenses may be convicted

of all the offenses, however, if (1) the defendant's conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶13. Thus, to determine whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id*. at paragraph one of the syllabus.

{¶36} Brisbon argues that the rape conviction in Count 1 and the kidnapping conviction in Count 12 were allied offenses of similar import that should have merged for sentencing because "the kidnapping was only committed to facilitate rape. The offenses are of similar import, occurred together, and with the same animus." Appellant's brief, p. 14.

{¶37} In Count 1, Brisbon was charged with rape for forcing the victim to perform fellatio under some bushes near a parking lot. In Count 12, Brisbon was charged with kidnapping. Relating to that charge, the indictment and bill of particulars stated that Brisbon restrained the victim for the purpose of engaging in sexual activity "in the parking lot." However, in response to Brisbon's Crim.R. 29 motion during trial, the prosecutor asked the trial court to amend the indictment to "reflect that the kidnapping [was] a continuing course of conduct from the very first incident where he forced her to perform oral sex to the very last incident in the warehouse and thereafter when he was — still had her under his control until he released her and told her not to look back." (Tr. 988.) The trial court amended Count 12 as requested over objection.

{¶38} In finding that Counts 1 and 12 were not allied offenses and did not merge for sentencing, the trial court stated that the victim was forcefully removed from various locations and restrained of her liberty on multiple occasions. The court noted that there was not just one

act of rape and one act of kidnapping, but repeated acts involving prolonged restraint of the victim. (Tr. 1322-1323.) We agree.

{¶39} The Ohio Supreme Court has recognized that "implicit within every forcible rape * * * is a kidnapping" because the victim's liberty is restrained during the act of forcible rape. *State v. Logan*, 60 Ohio St.2d 126, 130, 397 N.E.2d 1345 (1979). The *Logan* court provided the following guidelines for determining whether rape and kidnapping are allied offenses that should merge for sentencing:

> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Id. at the syllabus.

{¶40} Applying these guidelines, we find that the rape conviction in Count 1 and the kidnapping conviction in Count 12 are not allied offenses that should merge for sentencing. In this case, the initial kidnapping for the purpose of engaging in sexual activity occurred when Brisbon reapproached the victim and forced her at gunpoint to go with him. Brisbon took her a nearby parking lot where, under some bushes, he raped her by forcing her to perform fellatio. This was the first act of rape as charged in Count 1. However, Brisbon repeatedly and forcefully removed the victim to different places in abandoned warehouses where he engaged in multiple and different acts of rape. Even after he committed the last act of rape, he continued to restrain

the victim's liberty by forcing her to walk outside with him and eat berries from a tree in an attempt to conceal any DNA.

{¶41} These multiple acts of kidnapping resulted in an increased risk of harm to the victim; the restraint was prolonged, the confinement was secretive, and the movement was substantial, demonstrating a significance independent from the other offenses, including the rape. Furthermore, the asportation and restraint of the victim subjected her to a substantial increase in the risk of harm separate and apart from the rape; thus, a separate animus existed as to each offense sufficient to support separate convictions in both Counts 1 and 12.

{¶42} Accordingly, the kidnapping charged in Count 12 was not incidental to the rape offense charged in Count 1, and the trial court did not err in failing to merge these counts as allied offenses at sentencing. The assignment of error is overruled.

{¶43} 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 convictions 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.

KATHLEEN ANN KEOUGH, JUDGE

ANITA LASTER MAYS, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR