[Cite as *State v. Williams*, 2019-Ohio-2335.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107748
v.	:	
MICHAEL SUELLS WILLIAMS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 13, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-614402-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha Forchione, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Michael Suells Williams ("Suells")[1] appeals from his convictions for rape, kidnapping, and other associated offenses and assigns the following errors for our review:

> I. Defendant-appellant's conviction[s] must be reversed because his waiver of counsel was not knowingly and voluntarily made, and therefore it was ineffective.
>
> II. Defendant-appellant's conviction[s] must be reversed due to prosecutorial misconduct.
>
> III. The trial court erred in granting a continuance during testimony from the alleged victim.
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> IV. The trial court erred in failing to allow defendant-appellant to properly cross-examine the alleged victim.
>
> V. Defendant-appellant's conviction must be reversed because the conviction for the firearm specification was not supported by sufficient evidence.
>
> VI. Defendant-appellant's conviction must be reversed because the conviction on the sexually violent predator specifications [was] not supported by sufficient evidence.
>
> VII. Defendant-appellant's conviction must be reversed because the trial court erred in failing to merge the kidnapping and rape charges.
>
> VIII. Defendant-appellant's conviction[s] must be reversed because all convictions were against the manifest weight of the evidence.

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

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[1] At a May 30, 2018 hearing in the case at hand, the court asked Suells the following: "Good morning, sir. It's a little unusual the way that we have your name listed in here, so what do you call yourself?" The defendant replied, "Suells." "Just Mr. Suells?" the court asked. "Yes," the defendant replied. Therefore, we refer to the defendant as "Suells."

{¶ 3} On October 21, 2016, Suells, who knew the victim C.H. "from the neighborhood," picked C.H. up from work, took her back to his house, and allegedly raped her multiple times. C.H. did not report the incident to the police. One week later, on October 28, 2016, as C.H. was walking to her apartment, Suells confronted her with a gun and forced her into her house. He forced his penis into her mouth multiple times, then received a phone call and left her house. On November 14, 2016, C.H. filed a police report because she believed Suells was going to continue to terrorize her.

{¶ 4} On April 3, 2018, Suells was charged with three counts of rape, three counts of kidnapping, two counts of having a weapon while under disability, and two counts of aggravated burglary. Suells's indictment included firearm, sexual motivation, and sexually violent predator specifications. Suells was declared indigent and assigned court-appointed counsel. On May 21, 2018, Suells filed a pro se motion of self-representation, requesting that defense counsel be terminated and that he represent himself "at all further proceedings henceforth."

{¶ 5} On May 30, 2018, the court granted defense counsel's oral motion to withdraw and appointed new counsel for Suells. On July 25, 2018, the court permitted the second defense attorney to withdraw as counsel and assigned a third attorney to represent Suells. On August 1, 2018, the court held a hearing on, and then granted, Suells's motion to waive counsel. Additionally, Suells signed a written waiver of counsel. The court ordered the third defense attorney to "remain as advisory counsel" for Suells.

{¶ 6} On August 13, 2018, Suells waived his right to jury trial, and this case proceeded to a bench trial. On August 30, 2018, the court found Suells guilty of the following offenses associated with the October 28, 2016 incident: rape in violation of R.C. 2907.02(A)(2), a first-degree felony; kidnapping in violation of R.C. 2905.01(A)(4), a first-degree felony; aggravated burglary in violation of R.C. 2911.11(A)(1), a first-degree felony; aggravated burglary in violation of R.C. 2911.11(A)(2), a first-degree felony; and having a weapon while under disability in violation of R.C. 2923.13(A)(3). The court also found Suells guilty of four one-year firearm specifications, four three-year firearm specifications, one sexual motivation specification, and two sexually violent predator specifications. The court acquitted Suells of all other charges, which were associated with the October 21, 2016 incident.

{¶ 7} On September 5, 2018, the court sentenced Suells to life in prison with parole eligibility after 32 years. It is from these convictions that Suells appeals.

Trial Testimony

{¶ 8} The following evidence was presented at Suells's bench trial:

{¶ 9} On August 15, 2018, C.H. testified that, in October 2016, she was living at 40th and Quincy in Cleveland. C.H. first met Suells when he got out of prison in 2016, although they knew of each other from the "28th projects" on the "West side" of Cleveland. Asked to explain how well she knew Suells, C.H. stated, "I don't know. It's like we somehow related some ways." They began talking and texting, and C.H. was interested in dating Suells.

{¶ 10} From here, C.H.'s testimony became dubious. For example, the prosecutor asked C.H. about a time when Suells picked her up as she was walking to the bus stop after work. She testified, "That's the thing. I don't remember the month, the dates, and times." Additionally, C.H. could not recall where Suells took her after picking her up. "It's so long. So much stuff happened. I don't remember." Asked why she was testifying in court that day, C.H. replied, "I don't remember, dude. * * * There's a lot going on right now." The court took a recess, and when it went back on the record, C.H. refused to reenter the courtroom.

{¶ 11} The bench trial proceeded, and the state called Cleveland Police Detective Richard Durst ("Det. Durst") to testify. Det. Durst testified that he has been a police officer for almost 20 years, and he has been with the sex crimes unit for almost ten years. In October 2016, Det. Durst was assigned to follow up on a report C.H. made alleging that Suells raped her. When Det. Durst interviewed C.H. at the police station, C.H. was "nervous. Upset." Det. Durst testified that the alleged rape occurred at the house Suells was staying in on Drake. Det. Durst tried to track Suells down, but during the course of his investigation, Suells was taken into custody "by the feds. * * * He was considered an escapee from his halfway house."

{¶ 12} Det. Durst interviewed Suells in February 2017, at the federal prison in Youngstown. Suells was aware of C.H.'s allegations because C.H.'s police report was introduced into evidence at his federal court hearing for the escape charge. During the interview with Det. Durst, Suells answered questions by reading directly from his copy of C.H.'s statement to the police, changing only the issue of consent.

"Where [C.H.] had stated it was rape, you stated it was consensual. Everything else was consistent." Det. Durst testified that Suells "was making his statement as he was looking at the police report." According to Det. Durst, it was "not normal" that a suspect had the police reports at his or her disposal during an interview. "It was — it was like he had studied. Like he had a cheat sheet for a test. It was too perfect. Two people's recollection of one event normally touches on the same major components. But his was almost verbatim except for the fact of consent."

{¶ 13} Det. Durst testified that C.H. waited 17 days after the incident to report it to the police. In the detective's experience, victims may delay reporting "[b]ecause they're scared. They're afraid. They're afraid of retribution or not being believed."

{¶ 14} Cleveland Police Officer Jeffrey Frinzl ("Officer Frinzl") testified that on November 14, 2016, he received a dispatch call for a sexual assault at C.H.'s house on Quincy Avenue. When Officer Frinzl arrived at the house, C.H. told him that Suells raped her. Officer Frinzl testified that C.H. was "[v]ery scared. * * * You could tell she was nervous about talking to me to begin with. She seemed paranoid, afraid for her safety and for herself and her kids. She explained in detail some of the history that he has that she knew about and some of his prior jail time, stuff like that." Officer Frinzl further testified as follows: "She expressed a great fear. We felt the need to do as much as we could for her. We tried finding alternative housing. We made as many connections with resources as we could because we felt we had a real victim. * * * We tried to get her placed into a shelter for women because she was fearful to stay where she was."

{¶ 15} C.H. continued her testimony on August 21, 2018. This time, she recollected two incidents with Suells in detail. C.H. testified that in August 2016, she "was becoming friends" with Suells with the intention of possibly dating, but "things started going down like after a few months." One day in September or October, Suells picked her up on the east side of Cleveland after she finished working as a home health aide. According to C.H., Suells took her to his house.

> He was drinking, very aggressive, but I started getting used to it because that's how he was. * * * Like when I started getting to know him, he was like — he was cool at first, and then he started being very controlling, started scaring me, talking about my dead sister, do I know why she was dead. * * * Nobody gives a fuck about me. Nobody will never believe nothing that I say because he is him and I am me.
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> He was talking about * * * my sister that is deceased, and it got me emotional. And he made me bend over, and I told him no, I didn't want to do it. He did it anyway and he got disgusted because I was bleeding. * * * He pulled my pants down and that was the only thing that got off was my pants. * * * He did what he wanted to do. * * * Put his penis inside of me. * * * Just * * * kept telling me no matter what I say, nobody will believe me, and I believed him.

{¶ 16} Asked if Suells put his penis in her vagina or anus, C.H. replied, "My butt." C.H. testified that "you can't tell him no. * * * Because he was in control." According to C.H., the rape lasted until she began bleeding. "It seemed like he was disgusted, so he made me get in the tub with bleach. I had to sit in the tub with him with bleach. * * * He scrubbed my body." C.H. further testified about other details she remembered from that day, including how, after the rape, Suells called his caseworker about his "food stamps." C.H. recalled that Suells got angry with the caseworker, and he made her sit between his legs and turn her phone off while he

was on the call. C.H. testified that she was at Suells's house for "like six hours" before he drove her home. Furthermore, while they were in the car, Suells punched C.H. in the mouth, causing the wire bracket to fall off of her braces.

{¶ 17} Asked if she called the police after Suells took her home, C.H. testified, "No. * * * Because I was scared that nobody will believe me. * * * That if I did say something, the reputation that [Suells] had, I could have got killed."

{¶ 18} C.H. next testified about a second time Suells raped her. Although she could not recall the exact date, she testified that Suells "caught" her as she was getting out of a friend's car outside of her house. This time, Suells had a gun in one hand and a beer in the other hand, and said, "I want my dick sucked." C.H. told Suells no, but "he put the gun up to my head, and I said, You going to have to make me give you head. He made me. * * * With the gun up to my head, walked me, told me don't say nothing. Go in the house. Shut the fuck up, bitch."

{¶ 19} Suells forced C.H. into her house at gun point, and while they were in the kitchen, "[h]e kept forcing [his penis] in my mouth. * * * By that time, the gun was on my head. I just kept trying to keep my mouth shut tight as long as I can. He didn't even care that my braces was scratching him."

{¶ 20} Asked how Suells was acting, C.H. testified, "To him, it was turning him on. To me, it was torture." According to C.H., Suells put his penis inside her mouth "[t]wice that night." Eventually, Suells received a phone call and "left with his gun and the rest of his beer * * *. That's what saved me that night."

{¶ 21} C.H. further testified that she did not call the police when Suells left her house. "He had it in my head that nobody will believe me. He had more power in the streets, like now." C.H. further testified as follows:

> What caused me to call the police is because he just kept threatening me. And he had this girl and he kept trying to make my friend fight me. He had people thinking that I — that I was — had her thinking I was playing on their phone and stuff. And then when he knew that that didn't work, him and another girl, Tini, when he knew that it didn't work, they tried to pay her to fight me. * * * I had flagged some officers down when I got off work. I was getting scared because he be riding past the house, asking me why this person over here.

{¶ 22} C.H. asked the officers what she could do if she had been raped but did not go to the hospital. The officers told her to call 911. C.H. made this call on November 14, 2016. A recording of this 911 call was played for the court.

{¶ 23} Suells called the following witnesses to testify: Breana McQueen, Kenya Meyers, Aaron Harmon, Sasha Reed, Brittany Nettles, and Grayland Hargett. These witnesses all testified that they knew Suells and C.H. "from the neighborhood." Some of these witnesses testified that C.H. claimed to be pregnant with Suells's child. However, none of these witnesses were present when either alleged rape occurred, and none of these witnesses testified about the events that occurred on the two dates in question. Rather, the testimony Suells elicited from these witnesses was mostly inadmissible, because it was hearsay or not based on firsthand knowledge. The testimony that was properly admitted mostly concerned how many cell phones Suells had and whether or not C.H. had called these phones. The credibility of these

witnesses was called into question by the state. Almost all of them had prior felony convictions, and one of them was arrested on an active warrant after his testimony.

{¶ 24} Suells testified that he and C.H. had consensual sex on October 21, 2016, at his house, and on October 28, 2016, at her house. Suells testified that they had had sex prior to this, and "before [October] 21st, [C.H.] started saying she pregnant, she said it like once or twice * * *."

{¶ 25} According to Suells, on October 21, 2016, he picked her up after work at 93rd Street and Hough and they went back to his house. "Everything was cool. No arguments, no fights, no nothing." Suells testified that he "made something to eat" and had C.H. fold his clothes. Suells then testified that he "went and got something to eat — I don't know how to cook * * *." Suells further testified that C.H. performed oral sex on him and then they "laid in the bed and had sex for awhile." According to Suells, he noticed "a little smear of blood" on his boxer shorts, and he asked C.H. why there was blood if she was pregnant. Suells testified that C.H. told him that she was not pregnant.

{¶ 26} Sometime between October 21, 2016, and October 28, 2016, C.H. again told Suells that she was pregnant. C.H. scheduled an appointment for an abortion for a Saturday. Suells went out that Friday night and went to C.H.'s house at 4:00 a.m. on Saturday to get some sleep and take C.H. to her appointment at 9:00 a.m. C.H. was at home when Suells arrived. Suells testified that C.H. performed oral sex on him, but he did not have a gun or other weapon. C.H. asked Suells to have intercourse, and Suells told her, "No, I'm not fucking you, * * * because you do too

much stupid shit. You don't deserve for me to be fucking you." According to Suells, he left C.H.'s house at 5:00 a.m.

{¶ 27} Suells testified that C.H. continued to call him for the next week or so, "still blowing the phone up, texting me." According to Suells, C.H. "got a[n] app on my phone where she see the people who text me and call me * * *." Suells further testified that between October 28, 2016, and November 14, 2016 — which was when C.H. filed the police report — C.H. was still calling him. "If I raped somebody, they wouldn't be calling me after I raped them numerous times, plenty of times."

{¶ 28} Suells testified that he spent more time with C.H. than what C.H. testified to, including picking her up from and dropping her off to work several times. According to Suells, he was sexually active with three women during October 2016, and all three women knew each other, at least marginally. Much of his testimony concerned who called whom on various cell phones during the time frame in question. According to Suells, his testimony can be corroborated by his cell phone records, although it is unclear how.

{¶ 29} Suells also pointed to inconsistencies between C.H.'s testimony and the November 2016 police report regarding the incident. For example, C.H. testified that Suells raped her anally; however, the police report states that he raped her vaginally. Another example is that the police report states that C.H.'s children were upstairs when the second rape occurred at her house. However, when she testified, the state did not ask, and C.H. did not mention, whether her kids were home at the time.

{¶ 30} Other than his testimony that the sexual activity between him and C.H. on October 21, 2016, and October 28, 2016, was consensual, Suells offered no evidence to contradict or call into question C.H.'s testimony that Suells raped her.

Waiver of Counsel

{¶ 31} In his first assigned error, Suells argues that his waiver of counsel was "ineffective," because the court did not adequately "discuss the charges against him."

{¶ 32} Pursuant to Crim.R. 44(A) and (C), a defendant, "after being fully advised of his right to assigned counsel, [may] knowingly, intelligently, and voluntarily waive * * * his right to counsel. * * * Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶ 33} However, "courts are to indulge in every reasonable presumption against the waiver of * * * the right to be represented by counsel." *State v. Dyer*, 117 Ohio App.3d 92, 95, 689 N.E.2d 1034 (2d Dist.1996). For a waiver of counsel to be knowing, intelligent, and voluntary, it "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

{¶ 34} In the case at hand, Suells made it clear to the court throughout these proceedings that, although he knew he was not a lawyer, he wanted to represent

himself and he wanted a trial. The court — in painstaking detail at times — made it clear to Suells that, although defending himself was his right, "I can only give you my most strongest [sic] opinion on how foolish that would be."

{¶ 35} At his court proceeding on June 21, 2018, Suells reiterated that he wanted to represent himself. At that time, he was being represented by his second court-appointed attorney, and the court asked him, "Are you still on board with Mr. Schlachet representing you?" Suells replied, "No, I want to be my own lawyer." The court reviewed the written waiver of counsel with Suells at this proceeding. The court and defense counsel also discussed the sexually violent predator specifications that Suells was charged with and how convictions of these specifications result in life imprisonment. Suells's attorney at the time gave him a copy of the Ohio Revised Code, the Ohio Jury instruction, and case annotations on sexually violent predator specifications.

{¶ 36} The court also reviewed the alternative of a plea bargain with Suells, although Suells told the court that a "plea bargain is out of the question * * *." The court nonetheless informed Suells of this option, stating that he was facing "a very lengthy prison sentence," and a plea bargain would likely result in "lesser prison time."

{¶ 37} The court held another hearing on the record on July 26, 2018, at which Suells was represented by his third attorney. Suells continued to maintain that he wanted to represent himself, although he had not yet sign the written waiver of counsel. Another hearing was held on August 2, 2018, to "formalize for the record"

Suells's intent to waive his right to counsel and proceed pro se. The court reviewed the written waiver with Suells again. The court asked Suells if he had any questions about what constitutional rights he was giving up. Suells replied, "No, I do not." The court reviewed Suells's indictment, including each charge, the degree of each felony, and each specification. The court particularly focused on the sexually violent predator specifications, each of which included a "life tail" of imprisonment with the court making "a determination as to the eligibility of parole. It could be ten, 20, 30, 40 years to life at this point in time."

{¶ 38} The court, the prosecutor, and the defense attorney explained to Suells that the sexually violent predator specifications would have to run consecutively, but the prison sentences for convictions of other offenses could be run consecutively or concurrently, at the court's discretion. The court explained that some of the counts, particularly kidnapping, could merge for sentencing, but that other counts, particularly having a weapon while under disability, would not merge for sentencing. The court also talked about the three-year sentence for the firearm specifications running consecutive and prior to the underlying sentences, using the following example: "[L]et's just assume for the sake of argument that he's found guilty on Count 1 alone as it was indicted. So am I to understand that it would be a — the sentence would be 13 to life?" The state and defense attorney agreed that this was correct.

{¶ 39} The court explained the sexual motivation specification and how, if Suells was found guilty of this, it would require sexual offender "reporting" upon his

potential release from prison. The court continued to explain the charges and sentencing to Suells: "Counts 1, 3, and 6 are all counts of rape and they are all punishable by a potential term of incarceration of ten to life, but with the three-year firearm specification, you have to serve three years prior to and consecutive to the imposition of that ten to life sentence which would effectively be 13 to life." The court then explained the details about the kidnapping charges in Counts 2, 4, and 7; the weapons charges in Counts 5 and 10; and the aggravated burglary charges in Counts 8 and 9. The court concluded that Suells was facing a maximum stated sentence of life in prison with parole eligibility after 92 years.

{¶ 40} The court explained that, if Suells represented himself at trial, he was entitled to have "standby" or advisory counsel, but that Ohio law prohibited hybrid representation. The court inquired into whether Suells was aware of the "facts and evidence that the State intends to introduce at trial" and made sure that Suells had received the state's discovery materials. The court also reviewed with Suells the "beyond a reasonable doubt" burden of proof under which the state must present its case against him.

{¶ 41} The court next reviewed with Suells the "potential legal defenses" that he may raise on his behalf, and the court instructed Suells that it was his burden to raise these defenses should they apply. The court detailed the following: failure to produce evidence; impeachment testimony; motions to suppress (both evidence and statements); state and federal constitutional violations; motions in limine; affirmative defenses, including self-defense, alibi, and speedy trial; motions to

dismiss; and suppression of evidence. The court also reviewed with Suells that he would be responsible, just as an attorney would be, for complying with the rules of evidence and criminal procedure.

{¶ 42} The court accepted the written waiver of counsel that Suells signed and reminded him that his trial was set for August 13, 2018. At Suells's request, the court authorized funds for a defense investigator and, to the extent of its authority, made "the appropriate advisement" that Suells could use the jail's law library to prepare for his case.

{¶ 43} In reviewing waivers of counsel at the trial-court level, this court has held the following:

> Although there is no prescribed colloquy in which the trial court and a pro se defendant must engage before a defendant may waive his right to counsel, the court must ensure that the defendant is voluntarily electing to proceed pro se and that the defendant is knowingly, intelligently, and voluntarily waiving the right to counsel. Given the presumption against waiving a constitutional right, the trial court must ensure the defendant is aware of "the dangers and disadvantages of self-representation" and that he is making the decision with his "eyes open."

(Citation omitted.) *State v. Buchanon*, 8th Dist. Cuyahoga No. 80098, 2003-Ohio-6851, ¶ 16. *See also State v. Gibson*, 45 Ohio St.2d 366, 378, 345 N.E.2d 399 (1976) (holding the following regarding waiver of counsel: "And while, in retrospection we may question the wisdom of such a decision, as indeed the defendant has, we are satisfied that it was validly made. The trial court conducted a complete inquiry which did comport with the accepted standards of laying a foundation to accept a waiver of counsel and the defendant knowingly and intelligently exercised his rights").

{¶ 44} In the instant case, the court held multiple hearings regarding Suells's request to represent himself at trial. The court appointed a series of three defense attorneys and urged Suells, repeatedly, to allow one of these attorneys to represent him, cautioning Suells of the dangers and disadvantages of self-representation. For example, the court stated the following to Suells:

> I know I shared this with you last time, you wouldn't be your own dentist, pull your own tooth. You wouldn't be your own surgeon to take care of a health issue. You go to the expert to do that for you.
>
> So while you may think that you and only you would be in the best position to represent yourself, again, all I can do — and I think I have the obligation to suggest to you in the strongest way possible that that's a terrible idea; but if that's what you choose to do, I can't stop you from doing it.

{¶ 45} Upon review, we find that Suells unambiguously asserted his right to self-representation. The record shows that Suells was literate, competent, and acting under his own free will. The court complied with its duty to inform Suells about, and inquire into Suells's understanding of, the nature of the charges, the statutory offenses, the potential penalties, and the possible defenses. Suells has failed to show that his waiver of counsel was not knowingly, voluntarily, and intelligently made. Accordingly, the court did not err in granting Suells's request to represent himself at trial, and his first assigned error is overruled.

Prosecutorial Misconduct

{¶ 46} In his second assigned error, Suells argues that various incidents of inadmissible testimony were elicited from the prosecutor "which rose to the level of depriving [Suells] of his right to a fair trial." Specifically, Suells points to the

prosecutor asking a detective about the word "murder" tattooed on Suells's chest. Suells further argues that this same detective improperly testified as to his opinion that "Suells's rendition of events was so close to that of the victim, with the exception of the issue of consent, it was almost as if he had used a cheat sheet, and that it was not credible for that reason." Finally, Suells argues it was improper for the prosecutor to ask a witness "whether the witness wanted to come to court." Suells concedes that, at trial, he did not object to the testimony which he is now challenging on appeal.

{¶ 47} Part of Suells's argument under this assigned error is that he was representing himself at trial, and he was "apparently unaware of the extent of prejudicial and inadmissible evidence that was elicited against him." However, a pro se defendant is "held to the same standard of conforming to legal procedure as attorneys. * * * A pro se defendant will be expected to abide by the rules of evidence and procedure, regardless of his familiarity with them." *Cleveland v. Lane*, 8th Dist. Cuyahoga No. 75151, 1999 Ohio App. LEXIS 5893 (Dec. 9, 1999).

{¶ 48} Additionally, this case was tried to the bench rather than a jury. "The Ohio Supreme Court has repeatedly recognized that when a judge hears evidence in a bench trial, the court must be presumed to have 'considered only the relevant, material, and competent evidence arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Thomas*, 8th Dist. Cuyahoga No. 90623, 2008-Ohio-6148, ¶ 34, quoting *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987); *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968).

{¶ 49} As Suells is raising this argument for the first time on appeal, we review it under a plain error standard. Crim.R. 52(B). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland*, 50 Ohio St.3d 58, 62, 553 N.E.2d 894 (1990). Given the presumption that the court did not consider the allegedly improper evidence and the fact that the court acquitted Suells of some of the charges against him, we cannot say that the outcome of the trial would have been different had the questionable testimony been kept out.

{¶ 50} Accordingly, Suells's second assigned error is overruled.

Continuance During Trial

{¶ 51} In his third assigned error, Suells argues that it was error for the court to grant a "recess" to the state during the victim's testimony and that this "recess" effectively turned into a continuance. According to Suells, the victim's testimony initially "decimated the State's case," because the victim claimed that she did not remember anything. However, after the "recess," the victim's "testimony was suddenly markedly different than it was before."

{¶ 52} Suells's trial was set to start on August 13, 2018. However, Suells waived his right to a jury trial that morning, and the state asked for a one-day continuance because it did not have its witnesses scheduled until the next morning in anticipation of jury selection. The court granted this one-day continuance. The next morning, the state informed the court that the victim and her brother received threats for her safety and his life if the victim testified in the case at hand. Over

Suells's objection, the court granted another one-day continuance so the state could investigate these alleged threats.

{¶ 53} The court reconvened on August 15, 2018, and trial commenced. The first witness to testify for the state was C.H. It is apparent from the record that C.H. was uncomfortable during her testimony. The state asked for a five-minute recess, and when the prosecutor came back into the courtroom, she notified the court that the witness refused to continue testifying. According to the state, "the witness's * * * child was the victim of a very violent offense. That sentencing was today. At about 11:30 today. So she's in a very heightened emotional state today already in light of that."

{¶ 54} Suells objected to this, arguing that his speedy trial rights were being violated. The court offered Suells the opportunity to call his witnesses to the stand that day to testify. Suells refused, stating, "I would like the State to finish putting on their witnesses, your Honor." The court then instructed the state to put on its next witness, which it did. Subsequently, the state had no additional witnesses available that day, and Suells agreed to have one of his witnesses testify. After this, neither the state nor Suells had any witnesses remaining to testify that day.

{¶ 55} The court issued a journal entry on August 15, 2018, which states in part as follows: "State asked for a brief conti[n]uance to investigate discovery. Case stayed. Court finds justice would be served by allowing a brief conti[n]uance at state[']s request."

{¶ 56} Suells's trial continued one week later on August 21, 2018. After brief testimony, Suells requested a continuance to obtain additional phone records. The court granted the continuance over the state's objection, and the trial resumed on August 29, 2018. The trial was completed the same day, and the court rendered its verdict the next day.

{¶ 57} Whether to grant a continuance of trial is within the broad discretion of the court. "In evaluating a motion for a continuance, a trial court should consider the length of the delay requested; the inconvenience to the litigants, witnesses, opposing counsel, and the court; and whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived." *State v. Chandler*, 8th Dist. Cuyahoga No. 81817, 2003-Ohio-6037, ¶ 20. The circumstances in *Chandler* are somewhat similar to the facts of the case at hand. In *Chandler*, the state requested a continuance "because the victim * * * was unavailable to testify because his wife was undergoing surgery." The court granted a one-week continuance over the defendant's objection. On appeal, this court found no abuse of discretion "[b]ecause the trial was only continued for a week, the court gave consideration to the inconvenience and hardship to the defense, and the reason for the request for the continuance was legitimate and not for a dilatory purpose * * *." *Id*. at ¶ 22.

{¶ 58} Upon review of the case at hand, we find that the continuances at issue were reasonable in length; outside of wanting his trial to go forward, Suells failed to set forth how the continuances may have inconvenienced him; and the purpose of the continuances was legitimate — one day to allow C.H. time to compose herself

prior to continuing her testimony; one day to investigate alleged threats made to C.H. and her family; and one week for the state to complete discovery. Furthermore, Suells asked for and received a one-week continuance shortly after the state's continuances at issue. We cannot say that the court abused its discretion in granting the state's continuances, and Suells's third assigned error is overruled.

Cross-examination of Victim

{¶ 59} In his fourth assigned error, Suells argues that the trial court erred by sustaining an objection during his cross-examination of the victim after he "asked her if she had told any other individuals that he did not commit the crime." According to Suells, he "should have been permitted to inquire as to this; what could be more relevant than if the alleged victim had admitted that she fabricated the allegations?" The specific testimony under scrutiny follows:

> THE DEFENDANT: And have you ever had a conversation with certain people and you tell them that I didn't commit this crime?
>
> THE STATE: Objection.
>
> THE COURT: Sustained.

{¶ 60} Suells argues that sustaining this objection violated Evid.R. 608(B), which states that, generally, "[s]pecific instances of conduct of a witness" are inadmissible "for the purpose of attacking or supporting the witness's character for truthfulness * * *." However, there is an exception to this rule, in that specific instances of conduct "may, * * * in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness * * *."

{¶ 61} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Pursuant to Evid.R. 401, relevant evidence is "evidence having 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." Relevant evidence is not admissible, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

> The scope of cross-examination and the admissibility of evidence curing cross-examination are matters which rest in the sound discretion of the trial judge. Thus, when the trial court determines that certain evidence will be admitted or excluded from trial, it is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse of discretion.

O'Brien v. Angley, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980).

{¶ 62} Although not fully explained in Suells's brief, it appears that his argument on appeal is that he should have been allowed to impeach C.H. Furthermore, it was not entirely clear during trial what Suells was attempting to establish with this line of questioning. He failed to lay a foundation of why he asked C.H. this question, he failed to identify a specific "instance of conduct" regarding C.H.'s truthfulness, and he failed to identify to whom or when she allegedly made this statement. The court inquired of Suells, "Where are you going with this, Mr. Suells? * * * What evidence do you have of that?" Suells consulted with his advisory counsel and resumed his cross-examination of C.H. with questions about a different topic.

{¶ 63} Upon review, we find that Suells has failed to show a clear and prejudicial abuse of discretion regarding the court's decision to sustain the state's objection. Accordingly, Suells's fourth assigned error is overruled.

Sufficiency of the Evidence — Firearm and Sexually Violent Predator Specifications

{¶ 64} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution=s evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of the evidence require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, & 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 65} 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. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶ 66} The state must prove the following for a defendant to be convicted of a three-year firearm specification: "that the offender had a firearm on or about the

offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145(A). Pursuant to R.C. 2923.11(B)(2), to determine whether a firearm is operable, or "capable of expelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶ 67} The state must prove the following for a defendant to be convicted of a sexually violent predator specification: that the defendant committed "a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1). *See also* R.C. 2941.148(A). Courts may consider the following factors in determining whether a defendant is likely to engage in further sexually violent offenses:

> (a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.
>
> (b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.
>
> (c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.
>
> (d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

> (e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.
>
> (f) Any other relevant evidence.

R.C. 2971.01(H)(2).

{¶ 68} In his fifth and sixth assigned errors, Suells argues that that because the victim "did not describe the gun in any detail whatsoever," the state presented insufficient evidence that the firearm was operable. Suells further argues that "[t]he trial court, in rendering its verdict, engaged in no analysis whatsoever as to why the [sexually violent predator] specification applied."

{¶ 69} Concerning the firearm specification, we find no authority for Suells's argument that, because C.H. "did not describe the gun in any detail whatsoever — not shape, size, color, or any other respect," there was insufficient evidence to sustain Suells's firearm specification conviction. C.H. testified that Suells "had a gun" when he raped her the second time. Suells "put the gun up to [C.H.'s] head," forced her into her own home, and forced her to perform oral sex on him. This court has held that "a victim's belief that the weapon is a gun, together with the defendant's intent to create and use the victim's belief for the defendant's own criminal purposes, is sufficient to prove a firearm specification." *State v. Johnson*, 8th Dist. Cuyahoga No. 90449, 2008-Ohio-4451, ¶ 23.

{¶ 70} Upon review, we find that the state presented sufficient evidence to support Suells's firearm specification conviction.

{¶ 71} Concerning the sexually violent predator specification, we note that the trial court did not order a presentence investigation report prior to sentencing Suells. It is apparent from the record that he has a lengthy criminal history. In fact, he had just been released from federal prison and was living in a halfway house when he raped C.H., and he was charged with escape for leaving this halfway house prior to being arrested for the case at hand. There is no evidence in the record, however, of the details of Suells's criminal history, including whether any of his prior convictions were for sexually violent offenses.

{¶ 72} However, this court has held that R.C. 2971.01(H) "allows an offender to be classified and sentenced as a sexually violent predator based on the convictions of the underlying offense contained in the indictment." *State v. Boynton*, 8th Dist. Cuyahoga No. 93784, 2010-Ohio-4670, ¶ 5. In the instant case, Suells was convicted of kidnapping with a sexual motivation specification and rape, both of which are sexually violent offenses. He showed no remorse for his crimes and denied committing all of them. He testified that, during one incident, C.H. did not "deserve" sex, because she did "too much stupid shit." This deviant type of thinking exemplifies a sexually violent predator.

{¶ 73} Accordingly, we find sufficient evidence to support sexually violent predator specifications, and Suells's sixth assigned error is overruled.

Merger of Allied Offenses

{¶ 74} In his seventh assigned error, Suells argues that his rape and kidnapping convictions should have merged for sentencing because he "allegedly

accosted the victim near her home (therefore, slight movement), at a point just prior to the alleged rape, and the movement was done to facilitate the rape, with no other purpose."

{¶ 75} We review a trial court's R.C. 2941.25 allied offenses determination under a de novo standard. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, & 28. Pursuant to R.C. 2941.25(A), "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, * * * the defendant may be convicted of only one."

{¶ 76} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 896, & 30-31, the Ohio Supreme Court detailed the allied offenses analysis:

> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant=s conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
>
> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant=s conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? And (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶ 77} Suells was convicted of rape in violation of R.C. 2907.02(A)(2), which states that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other to submit by force or threat of force." Suells was also convicted of kidnapping in violation of R.C. 2905.01(A)(4), which states that

"[n]o person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity * * * with the victim against the victim's will * * *."

{¶ 78} Ohio courts still apply the test found in *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979), to determine whether rape and kidnapping convictions merge for sentencing, despite that this test predates *Ruff*. "The primary issue * * * is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." *Id*. Put another way, courts must ask "whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime." *Id*.

{¶ 79} C.H. testified that Suells held her at gun point outside of her home, forced her into her house, and raped her in the kitchen. Upon review, we find that moving C.H. from outside in public view to inside her home was more than incidental. Indeed, it substantially increased the risk of harm by taking C.H. from a public place, where exposure could limit the damage, to the confines of her home, where Suells could commit the offense unimpeded. The purpose of asportation was to avoid the possibility of detection. *See State v. Zanders*, 8th Dist. Cuyahoga No. 99146, 2013-Ohio-3619, ¶ 29 ("the restraint and force used to drag the victim to a secluded location was separate and distinct from the force exercised during the acts of rape").

{¶ 80} Accordingly, we find that the court did not err by failing to merge the rape and kidnapping convictions for sentencing. Suells's seventh assigned error is overruled.

Manifest Weight of the Evidence

{¶ 81} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, & 25, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive C the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 82} An appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on

manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶ 83} In his eighth and final assigned error, Suells argues that all of his convictions are against the manifest weight of the evidence. Specifically, Suells argues that there was no physical evidence presented in this case, there was no admission by him of any wrongdoing, and there were no witnesses to the events. The case, therefore, rests with the credibility of the victim, and "her testimony was questionable at best."

{¶ 84} This court has consistently held that "[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Blankenship*, 8th Dist. Cuyahoga No. 77900, 2001 Ohio App. LEXIS 5520 (Dec. 13, 2001). *See also State v. McSwain*, 8th Dist. Cuyahoga No. 105451, 2017-Ohio-8489, ¶ 34 (the victim's "testimony alone, if believed, is sufficient to sustain convictions for rape, GSI, and kidnapping"). In *McSwain*, the victim testified that the defendant forcibly raped her, and the defendant testified that he and the victim smoked crack cocaine and had consensual sex. *Id.* This court upheld McSwain's convictions as being supported by sufficient evidence and not against the manifest weight of the evidence. *Id.*

{¶ 85} In the case at hand, C.H. testified that Suells kidnapped her at gunpoint, threatened her, and raped her. Suells testified that the two had consensual sex. "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). The fact-finder "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.

{¶ 86} Upon review, we cannot say that the court lost its way and created a manifest miscarriage of justice by convicting Suells of rape, kidnapping, and other associated offenses related to the October 28, 2018 incident. Accordingly, his eighth and final assigned error is overruled.

{¶ 87} 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 of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending 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.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR