

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107870
 v. :
 :
 JORDAN THOMAS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629909-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kevin R. Filiatraut, Assistant Prosecuting Attorney, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and Robert B. McCaleb, Assistant Public Defender, *for appellant.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendant-appellant, Jordan Thomas, appeals his conviction for rape. Because we find the state presented sufficient evidence of force, we affirm Thomas's conviction.

Procedural History

{¶ 2} On June 22, 2018, Thomas was charged with rape in violation of R.C. 2907.02(A)(2), with a notice of prior conviction and repeat violent offender specification; kidnapping in violation of R.C. 2905.01(A)(4), with a notice of prior conviction and a repeat violent offender specification and sexual motivation specification; felonious assault in violation of R.C. 2903.11(A)(1), with a notice of prior conviction and a repeat violent offender specification; and domestic violence in violation of R.C. 2919.25(A), with a furthermore clause noting that Thomas had previously pleaded guilty to, or been convicted of, three offenses of domestic violence. The indictment arises from incidents that occurred between June 8, 2018, and June 10, 2018, with Thomas's domestic partner, C.B.

{¶ 3} On September 17, 2018, the case proceeded to a bench trial. The state presented the following witnesses: Cleveland Police Officers David Meissner and Jennifer Bachman; University Hospitals' SANE Nurse Debbie Howard; C.B.'s mother, T.B.; and the victim, C.B.

{¶ 4} Following trial, the court found Thomas guilty of rape, felonious assault, and domestic violence, but not guilty of kidnapping. At the sentencing hearing, the state conceded that the felonious assault and domestic violence charges

merged, and it elected to have the court sentence on the felonious assault count. The court then imposed the following prison sentence: six years on the rape count and 14 years on the felonious assault count, which included eight years on the base charge and an additional six years for the repeat violent offender specification, to be served concurrently for a total of 14 years in prison.

{¶ 5} Thomas now appeals, raising one assignment of error: the state obtained a conviction upon Count 1 (rape) upon insufficient evidence.

Evidence at Trial

{¶ 6} On June 10, 2018, Officers Meissner and Bachman responded to a call from dispatch at approximately 10:00 a.m. regarding a female being held against her will on the sixth floor of a large apartment complex. Officer Meissner testified that when he knocked on the door of the rental unit, the victim, identified as C.B., answered the door and appeared “very scared” and she was reluctant to exit the residence. The officer stated that C.B. was speaking very rapidly and the officers had to coax her out of the apartment. Officer Bachman described C.B. as very upset, distraught, and fearful. She testified that when she asked C.B. if she was okay, C.B. began to cry.

{¶ 7} Both officers observed severe injuries to the victim’s face and neck. Officer Meissner testified that C.B.’s eyes were red and discolored, as well as being swollen and black and blue. He testified that her petechial injuries were indicative of possible strangulation. Officer Meissner also observed black and blue marks on C.B.’s neck. Officer Bachman, who had medical training as well as police academy

training, testified that C.B. had swollen, bloodshot eyes with petechial hemorrhages that were indicative of strangulation to the point of unconsciousness. Officer Bachman stated that she did not believe C.B.'s condition was naturally caused, and C.B. in fact told the officers that Thomas had strangled her and she believed Thomas was hiding in the fifth floor laundry room.

{¶ 8} The officers searched the apartment complex for Thomas to no avail. They called for an ambulance for C.B. After the officers completed the search of the building, they visited C.B. at the hospital and had photographs taken of her injuries.

{¶ 9} SANE Nurse Debbie Howard performed a sexual assault examination on C.B. Howard testified that upon her examination, she observed a lot of bruising and contusions on C.B.'s face, swelling around her eyes, completely red sclera of her eyes, bruising around her neck, and C.B. was "very tearful, emotional." Howard explained that her observations, particularly regarding the rupture of the capillaries and bleeding in C.B.'s eyes, caused her to believe C.B. had been strangled. When Howard obtained a history from C.B., C.B. told Howard that Thomas strangled her with his hands and a belt. Howard testified that C.B.'s injuries were consistent with C.B.'s explanation. Howard also testified that C.B. told her that Thomas, her boyfriend, had sexually assaulted her with his fingers and a beer bottle.

{¶ 10} C.B.'s mother, T.B., testified that she had attempted to reach C.B. on June 10 by phoning C.B. and Thomas, but neither person answered. T.B. testified that she became concerned when she could not reach her daughter and she waited in her apartment. Within a few minutes, T.B.'s phone rang and it was her daughter

calling on Thomas's phone. T.B. testified that C.B. was speaking in a whisper, asking T.B. to call the police because Thomas would not let her leave the residence. T.B. testified that the next time she spoke with her daughter was when C.B. called from the hospital. T.B. testified that her daughter sounded scared. When T.B. saw her daughter two days later, she noticed C.B.'s eyes "were full of blood [and] you couldn't see [any] white." T.B. stated that C.B.'s face was swollen and she had bruises on her neck.

{¶ 11} C.B. testified that she met Thomas in September 2017 and they began a "fairy tale" relationship. She moved in with Thomas in October 2017. After moving in, however, Thomas became violent and controlling. She stated that she could not visit her uncle or other family members "without it being an issue" with Thomas. Consequently, she cut off ties with her friends. Toward the end of October, there was an "altercation" between C.B. and Thomas. C.B. stated that she no longer desired to live with Thomas, but some of her belongings remained at Thomas's residence.

{¶ 12} On June 8, 2018, C.B. spent the day with her aunt and uncle while Thomas worked. C.B. testified that Thomas called her and asked where she was and she told him she was at the grocery store with her family. Thomas told C.B. that he was also at the grocery store but did not see C.B. Thereafter, Thomas began sending C.B. numerous text messages, asking "where you at" and "what the f*** are you doing." In one text message, Thomas instructed C.B. to "answer the damn phone." At one point, C.B. stopped answering his text messages, and C.B. testified that she

“had a bad feeling,” because when she does not respond to Thomas or answer her phone, “it is not a good thing.” After C.B. returned to her aunt and uncle’s house, Thomas told C.B. that he would pick her up there. C.B. stated that although she was hesitant, she went with Thomas back to his place to get her remaining belongings in his apartment.

{¶ 13} C.B. testified that when they arrived at Thomas’s apartment, Thomas immediately attacked her from behind. He accused her of lying regarding her whereabouts and, before she could respond, he strangled her with a belt to the point of unconsciousness. When she awoke, he began kicking her and beating her with a shoe rack. C.B. testified that there was nothing she could do to stop him while he was “in that rage.” She stated that her head was “pounding” and she felt as if her “eyes just bulged out of my face” and she was in severe pain. Thomas, however, made C.B. go with him to pick up his paycheck. C.B. testified that she could not leave; she was “scared to run.” Thomas dumped out the contents of her purse and disassembled her phone. She could not call anyone, and she had no way of getting a bus. She could not see because her eyes were so bloodshot and blurry, and the bright lights caused her head to hurt. She stated that she felt helpless. Upon returning to the apartment, C.B. was still in pain and believed she needed medical attention. But because she knew she could not go to the hospital, she went to sleep.

{¶ 14} C.B. testified that when she awoke the next morning, she tried to behave normally because she did not want to fight with Thomas, and she was hoping Thomas “would be in a better mood.” Although her vision was slightly better, she

felt bad and she said she looked like a monster, “like something that done came back from the dead.” Every time she passed a mirror, she cried.

{¶ 15} C.B. stated that, for Thomas, it was a typical Saturday of watching sports, drinking beer. And although she did not want to be there, Thomas “had me come in the living room” and sit with him. She did not want to say or do anything “to make him go off.” On cross-examination, C.B. explained that she could not leave, because when she previously attempted to leave, Thomas “grabbed me, snatched me back, or did something to knock me down, to keep me from that door.” The more noise she made, the longer Thomas beat her.

{¶ 16} On that morning, C.B. was wearing only Thomas’s shirt. She explained that she could not walk around Thomas’s house with clothes on because “clothes [were] forbidden.” She testified that while sitting across from Thomas in the living room, Thomas said to C.B., “since [you] want to be out f***ing, then [you’re] going to get f***d,” and Thomas took his beer bottle, which contained beer, and pushed it into her vagina so far that the entire neck of the bottle was inside her vagina. C.B. stated that it “burn[ed].” She cried, told Thomas it hurt, and asked him to stop. She testified that Thomas used force to push the bottle into her vagina and she did not consent to Thomas’s actions. C.B. testified that when Thomas stopped, he “went back to drinking his beer like * * * nothing happened.” She stated that for the remainder of the day, her head and eyes continued to hurt, and her eyes remained swollen and began “sticking shut” with puss. She did not try to leave the apartment because she was scared.

{¶ 17} The next morning, C.B.'s phone was still inoperable. When Thomas left the apartment to do laundry, C.B. retrieved Thomas's cell phone to call her mother. She asked her mother to phone the police because Thomas was "not about to let me leave." The police arrived rather quickly, and C.B. went by ambulance to the hospital for medical treatment.

Sufficiency of the Evidence

{¶ 18} In his sole assignment of error, Thomas contends that the state presented insufficient evidence to support his conviction for rape in violation of R.C. 2907.02(A)(2). In support, Thomas argues that the state failed to present sufficient evidence of force.

{¶ 19} When assessing a challenge to the sufficiency of the evidence, a reviewing 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 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, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 20} Thomas was convicted of rape under R.C. 2907.02(A)(2), which prohibits an individual from engaging in sexual conduct with another by purposely compelling the other person to submit by force or threat of force. “Force” is “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1).

{¶ 21} Ohio case law dictates that the type and amount of force necessary to compel a victim to submit “by force or threat of force” depends upon the relationship between the victim and the offender. *State v. Labus*, 102 Ohio St. 26, 38-39, 130 N.E. 161 (1921) (finding the term “force” is a relative term that depends upon the “age, size, and strength of the parties and their relation to each other” and “[w]ith the filial obligation of obedience to the parent, the same degree of force and violence would not be required upon a person of such tender years as would be required were the parties more nearly equal in age, size, and strength”); *State v. Eskridge*, 38 Ohio St.3d 56, 58, 526 N.E.2d 304 (1988) (finding that “[f]orce need not be overt and physically brutal, but can be subtle and psychological” where “coercion [is] inherent in parental authority when a father sexually abuses his child”); *State v. Dye*, 82 Ohio St.3d 323, 328, 1998-Ohio-234, 695 N.E.2d 763 (applying *Eskridge* to a case involving a victim who was the nine-year-old son of the adult offender’s female friend and finding sufficient evidence of force given the age and size disparity between the victim and the offender, the psychological force, and the offender’s position of authority over the young victim).

{¶ 22} In other cases, where there is no “filial obligation” or the victim is an adult, the Ohio Supreme Court has determined that “[a] defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit.” *State v. Schaim*, 65 Ohio St.3d 51, 55, 600 N.E.2d 661 (1992), paragraph one of the syllabus; *State v. Jackson*, 8th Dist. Cuyahoga No. 92531, 2010-Ohio-3080, ¶ 45; *In re L.R.F.*, 2012-Ohio-4284, 977 N.E.2d 138, ¶ 24 (8th Dist.). A threat of force can be inferred from the circumstances surrounding the sexual conduct. *Schaim; Jackson*. Where the conduct concerns an adult victim, “the state must prove force or threat of force either through direct evidence of such or by inference where the defendant overcame the victim’s will by fear and duress.” *State v. Rupp*, 7th Dist. Mahoning No. 05 MA 166, 2007-Ohio-1561, ¶ 33. Because the rape statute does not require the threat of force to be direct or express, “the threat of force includes both explicit and implicit threats.” *Id.*

{¶ 23} In this case, Thomas contends that the state failed to present sufficient evidence of the use of force or the threat of force, and because the alleged conduct occurred between two adults, the element of force cannot be inferred. In support, Thomas relies on this court’s opinion in *State v. Rodriguez*, 8th Dist. Cuyahoga No. 82265, 2003-Ohio-7056. *Rodriguez*, however, does not stand for the proposition that duress could never be inferred.

{¶ 24} Noting that “the alleged conduct was between two adults,” this court in *Rodriguez* stated that “the element of force cannot be inferred,” and it found that

the state failed to present sufficient evidence that the defendant purposely forced the victim to submit to sexual conduct. *Id.* at ¶ 26. The court in *Rodriguez*, however, cited *Schaim, supra*, for the proposition that force or threat of force can be established when the defendant “creates the belief” that physical force will be used if the victim does not submit and that “the element of force can be inferred from the circumstances surrounding the sexual conduct * * *.” *Id.* at ¶ 18, citing *Schaim* at 55. And in reversing the defendant’s conviction, the *Rodriguez* court stated that “[i]n the absence of proof, *either direct or by inference*, * * * we must conclude the state failed to prove an essential element of its case.” (Emphasis added.) *Id.* at ¶ 26. *Rodriguez*, therefore, essentially determined that proof of force by inference would have sufficed.

{¶ 25} Here, we find the state presented sufficient evidence of force or the threat of force required under R.C. 2907.02(A)(2). First, we find that the evidence demonstrates Thomas used physical force in penetrating C.B.’s vagina with his beer bottle. C.B. testified that Thomas used force to push the beer bottle into her vagina, so much so that the entire neck of the bottle was inside of her, causing pain and burning, which caused her to cry. Further, Thomas’s act was accompanied by the hostile comment to C.B. that “since [you] want to be out f***ing, then [you’re] going to get f***d.” These words connote compulsion.

{¶ 26} Furthermore, the record is replete with evidence that C.B.’s will had been overcome by fear or duress. C.B. testified as to Thomas’s controlling and angry behavior and her reluctance to act against his wishes. She stated that she could not

visit family members because Thomas had “an issue with it.” Thomas’s “issue” also caused her to cut off ties with her friends. She stated that when she did not answer her phone while out shopping with her aunt and uncle, she knew “it [was] not a good thing.” And after Thomas picked her up that day, he attacked her, strangling her to the point of unconsciousness. He then kicked her and beat her with a shoe rack when she awoke. C.B. testified that there was nothing she could do to stop him when he was “in that rage.” She further testified that after the strangulation, she was in severe pain, she had difficulty seeing, and she was “scared to run.” She stated that she felt helpless. C.B. testified that when Thomas had instructed C.B. to sit with him in the living room the day after he strangled her, she did not want to say or do anything to anger him any further or “make him go off.” She explained that when she previously attempted to leave, Thomas grabbed her or knocked her down to keep her away from the door. She further stated that the more noise she made, the longer Thomas beat her.

{¶ 27} The foregoing evidence is sufficient to show that Thomas had used physical force or threatened C.B. with physical force in the past, specifically the attack on C.B. the previous night, such that C.B. was instilled with such fear that she could not exercise her will. Thus, the state has proven force or threat of force sufficient to support a conviction of rape under R.C. 2907.02(A)(2).

{¶ 28} Thomas’s sole assignment of error is overruled.

{¶ 29} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending 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.

MICHELLE J. SHEEHAN, JUDGE

**LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR**