[Cite as *State v. Johns*, 2015-Ohio-2455.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2014-T-0036**
KEVIN TERRELL JOHNS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CR 00372.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Kevin Terrell Johns, appeals from the April 30, 2014 judgment of the Trumbull County Court of Common Pleas, sentencing him for kidnapping, rape, having weapons while under disability, and labeling him a Tier III sex offender.[1] On

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1. Appellant additionally appeals from the March 20, 2014 judgment on the verdict and the April 14, 2014 denial of his motion for a new trial. However, appellant does not raise any specific assignments of error on appeal from either of those judgments.

appeal, appellant challenges the sufficiency and manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} On June 28, 2013, appellant was indicted by the Trumbull County Grand Jury on six counts: counts one and three, aggravated robbery, felonies of the first degree, in violation of R.C. 2911.01(A)(1) and (2) and (C) with R.C. 2941.145 firearm specifications; count two, kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2) and (C) with an R.C. 2941.145 firearm specification; count four, kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(4) and (C) with an R.C. 2941.145 firearm specification and an R.C. 2941.147 sexual motivation specification; count five, rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(a) and (B) with an R.C. 2941.145 firearm specification and an R.C. 2941.148 sexually violent predator specification; and count six, having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2) and (B).[2] The following month, a superseding indictment was filed which included the foregoing six counts and added an R.C. 2941.148 sexually violent predator specification to count four. Appellant was appointed counsel, entered a not guilty plea at his arraignment, and waived his right to a speedy trial.

{¶3} The matter proceeded to a jury trial which commenced on March 10, 2014. The state presented ten witnesses, including the two victims, Warren City Police officers, and representatives from the Ohio Bureau of Criminal Identification and Investigation ("BCI"). They collectively established that appellant victimized two women, M.H. and S.B., on April 13, 2013.

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2. The charges stem from appellant's involvement with two victims: M.H. and S.B.

{¶4} M.H. and S.B. were roommates and best friends. M.H. drove S.B. and the two headed for the Eastwood Mall in Niles. En route, they spoke via cell phone with Taemarr Walker, a previous boyfriend of S.B.'s and a recent inmate at the Noble Correctional Institution, who invited himself along.

{¶5} M.H. pulled into the driveway of Mr. Walker's mother's home on Woodbine Avenue in Warren to pick him up. While on the phone, Mr. Walker told them to come to the back door, which they did. As they knocked on the door, and while S.B. was still on the phone with Mr. Walker, who was inside the residence, a man S.B. recognized from a prior occasion approached, (later identified as appellant), asking for Mr. Walker. S.B. knew this man to have a nickname. She thought his nickname was "Coyote."

{¶6} According to S.B., the man claimed Mr. Walker owed him money. S.B. relayed the information to Mr. Walker, who was annoyed that she was talking with this man. However, Mr. Walker did not come outside in a timely fashion. Rather, S.B. and M.H. testified the man took a gun out of his pocket and demanded money from them. M.H. never met the man before this encounter. The man ordered S.B. and M.H. at gunpoint into M.H.'s vehicle. The man, while brandishing the firearm, instructed M.H. to drive around town for a bit. She ended up driving into downtown Warren toward an ATM. During the ride, S.B. and Mr. Walker exchanged several phone calls. M.H. testified that during one of those calls, the gunman grabbed the phone from S.B. and demanded money from Mr. Walker.

{¶7} The gunman then directed M.H. to drive him to a property on Kenilworth Avenue in Warren. She complied with his demand. After they arrived, the gunman ordered M.H. out of her car. S.B. remained inside the vehicle. The gunman took M.H.'s

car keys and both women's cell phones. He told M.H. to go behind a fence and remain there or he would shoot both her and S.B. She complied. At that time, the gunman stuck his gun in S.B.'s face, ordered her to remove her pants, and engaged in vaginal intercourse with her in the backseat. After ejaculating, the gunman wiped himself off with a jacket M.H. left in her car. He then ordered M.H. back in the car at gunpoint.

{¶8} M.H. drove a few blocks toward Youngstown Road. The gunman fled the vehicle, kept the ladies' cell phones, and instructed them not to tell anyone. S.B. immediately told M.H. what had happened while she was waiting behind the fence. M.H. drove S.B. to Trumbull Memorial Hospital. A rape kit was administered, M.H. surrendered her jacket, and Warren City Police were notified. The rape kit and clothing items were later sent to BCI for testing.

{¶9} Patrolman John Wilson spoke to both M.H. and S.B. Both victims described the suspect as a light-skinned black male with short, kinky, curly hair, about five foot six inches in height, weighing around 130 pounds, with teardrop tattoos near both eyes, another tattoo between his eyes, and other tattoos on his face and hands.

{¶10} Detective Michael Currington interviewed both M.H. and S.B. Detective Currington showed them photo line-ups. However, appellant's photo was not included in the photo array. Neither victim recognized anyone.

{¶11} Two days after the incident, S.B. discovered the assailant's photograph on Facebook, who she believed was nicknamed, "Coyote." M.H. also saw the online posting. The two victims were in agreement that that man was the suspect. In fact, M.H. testified she was "positive" and "5,000 percent sure that was him." Through further

investigation, Detective Currington discovered that the man on the Facebook page was actually nicknamed “K-Bodie,” similar in sound to “Coyote.”

{¶12} The rape kit and clothing items were sent to BCI for testing. Diedre Hartz, a forensic biologist, discovered semen in S.B.’s vaginal sample, her underwear, and on M.H.’s jacket. Christopher Smith, a forensic scientist, testified that the semen found matched appellant’s DNA. Specifically, Smith found a single DNA profile for appellant on M.H.’s jacket, and a mixture of both appellant’s and S.B.’s DNA on her vaginal swabs and underwear. Smith testified that appellant “cannot be excluded as a source of the semen on the vaginal swabs, the underwear and the jacket,” as his DNA profile includes an expected frequency of occurrence of one in 989,100,000,000,000,000,000 unrelated individuals.

{¶13} Following the DNA analysis, Detective Currington ran a CODIS search.[3] The search revealed a hit for appellant and indicated he served time at the Noble Correctional Institution for robbery and assault on a police officer.

{¶14} At the close of the state’s case, appellant’s counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶15} Appellant presented one witness and took the stand in his own defense. Appellant’s girlfriend, Tamika Breckenridge, testified she had overheard a telephone conversation between S.B. and Mr. Walker. Ms. Breckenridge claimed S.B. told Mr. Walker, “‘I’m sorry for lying on Mr. Johns.’” Ms. Breckenridge stated she went to the station and reported to Lieutenant Jeffrey Cole that S.B. was lying about the rape. However, during his testimony for the state, Lieutenant Cole said Ms. Breckenridge never came to the station to discuss S.B., Mr. Walker, or appellant.

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3. CODIS, Combined DNA Index System, is a database that includes DNA records of convicted felons.

{¶16} Appellant testified he had consensual sex with S.B. at some motel near a strip joint or Taco Bell. Appellant said that he, Mr. Walker, S.B., and M.H. all got one room and shared liquor, marijuana, and pills. After having sex with S.B., appellant stated he wiped himself on M.H.'s jacket. Appellant stated S.B. accused him of rape because someone had stolen money from her and she thought he had something to do with it. Appellant said he is not a rapist and that he never raped anyone. On cross-examination, appellant admitted that two inmates accused him of sexual assault.

{¶17} Following trial, the jury found appellant guilty on counts two (kidnapping, involving M.H.); five (rape, involving S.B.); and six (having weapons while under disability), along with the attendant specifications. The jury found appellant not guilty on counts one (aggravated robbery, involving M.H.); three (aggravated robbery, involving S.B.); and four (kidnapping, involving S.B.). A judgment on the verdict was filed on March 20, 2014. Thereafter, appellant filed a Crim.R. 33 motion for a new trial. The trial court denied appellant's motion on April 14, 2014.

{¶18} The trial court ultimately sentenced appellant to serve a total of 28 years in prison and labeled him a Tier III sex offender on April 30, 2014. Appellant filed a timely appeal and asserts the following two assignments of error:

{¶19} "[1.] The appellant's convictions for having a weapon under disability and various firearms specifications are not supported by sufficient evidence.

{¶20} "[2.] The appellant's convictions are against the manifest weight of the evidence."

{¶21} Preliminarily, we note that appellant does not challenge his sentence. Rather, on appeal, appellant's assigned errors focus on sufficiency and manifest weight of the evidence concerning his trial.

{¶22} In his first assignment of error, appellant argues his convictions for having weapons while under disability and the various firearm specifications are not supported by sufficient evidence. Appellant contends the firearm he allegedly used was never located nor tested. As such, appellant maintains the state failed to prove the handgun was "operable."

{¶23} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id.* at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶24} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-14 (Dec. 23, 1994):

{¶25} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶26} """* * * The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*."'

{¶27} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.'" (Emphasis sic.) (Citations omitted.)

{¶28} "[A] reviewing court must look to the evidence presented * * * to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March*, 11th Dist. Lake No. 98-L-065, 1999 Ohio App. LEXIS 3333, *8 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus (1991). Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997).

{¶29} In this case, appellant was charged, inter alia, with having weapons while under disability in violation of R.C. 2923.13(A)(2), which states: "Unless relieved from

disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence * * *."

{¶30} R.C. 2923.11(B)(1) defines "firearm" as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant [and] includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable."

{¶31} Although appellant takes issue with the fact that the handgun was never located and tested for operability, we note that the recovery of a firearm used in a criminal offense is not required to prove that a particular firearm was operable at the time of the crime. Rather, the Supreme Court of Ohio has held that "it should be abundantly clear that where an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state's burden of proving that the firearm was operable or capable of being readily rendered operable." *State v. Thompkins,* 78 Ohio St.3d 380, 384 (1997).

{¶32} In this case, the record establishes that appellant, a convicted felon under a disability, threatened M.H. and S.B. with an operable firearm to facilitate the kidnapping and rape. Appellant's threats were explicit and were corroborated by both victims.

{¶33} During his initial encounter with M.H. and S.B. outside of Mr. Walker's mother's residence, appellant produced a firearm and pointed it at them. According to M.H. and S.B., appellant said "'Just do what I say'" and "'Get in the fucking car.'" While

inside the car, appellant continued to brandish the gun, pointed it at the women, and demanded money. After M.H. pulled into the Kenilworth driveway, appellant ordered her to stand behind a fence and told her that if she did not comply, he would shoot her and S.B. While alone with S.B. inside the vehicle, appellant told her that her affiliation with Mr. Walker would "get her hurt." S.B. testified appellant shoved the gun in her face, ordered her to take off her pants, and raped her.

{¶34} Viewed as a whole, the testimony of M.H. and S.B. constituted circumstantial evidence upon which a reasonable juror could find that unless they cooperated with appellant's demands, he intended to shoot one or both of them. Based on the foregoing, the jury could infer that appellant was in possession of an operable firearm at the time of the offenses, that is "a deadly weapon capable of expelling projectiles by an explosive or combustible propellant." *Thompkins, supra,* at 383; *see, also, State v. Jackson*, 11th Dist. Lake No. 2012-L-061, 2013-Ohio-4846, ¶47-48.

{¶35} Pursuant to *Schlee, supra*, the state presented sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements were proven. Thus, the trial court did not err in overruling appellant's Crim.R. 29 motion.

{¶36} Appellant's first assignment of error is without merit.

{¶37} In his second assignment of error, appellant contends his convictions for kidnapping, rape, and having weapons while under disability are against the manifest weight of the evidence.

{¶38} This court stated in *Schlee, supra*, at *14-15:

{¶39} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶40} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)"' (Citations omitted.) * * *" (Emphasis sic.)

{¶41} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, *supra* at 387.

{¶42} With respect to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967).

{¶43} As stated, the jury found appellant guilty on counts two (kidnapping, involving M.H.); five (rape, involving S.B.); and six (having weapons while under disability), along with the attendant specifications.

{¶44} R.C. 2905.01(A)(2), kidnapping, states in part: "No 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 facilitate the commission of any felony or flight thereafter[.]"

{¶45} R.C. 2907.02(A)(1)(a), rape, provides in part: "No person shall engage in sexual conduct with another * * * when * * * [f]or the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by * * * force, threat of force, or deception."

{¶46} R.C. 2923.13(A)(2), having weapons while under disability, states in part: "Unless relieved from disability as under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence * * *."

{¶47} Upon review, the state's witnesses established the following: appellant, by "force, threat of force, or deception" removed M.H. or restrained her liberty "[t]o facilitate the commission of any felony or flight thereafter"; "engage[d] in sexual conduct" with S.B. by "force, threat of force, or deception"; and "knowingly acquire[d], [had], carr[ied], or use[d] any firearm or dangerous ordnance" when he has been previously "convicted of any felony offense of violence," i.e, robbery. *See* R.C. 2905.01(A)(2); R.C. 2907.02(A)(1)(a); and R.C. 2923.13(A)(2).

{¶48} Again, the jurors heard testimony that appellant brandished a gun; forced M.H. and S.B. into the car; threatened the women with the gun while demanding money; ordered M.H. to drive to the Kenilworth Avenue property; ordered M.H. out of her car; threatened to shoot M.H. and S.B. if M.H. did not remain behind a fence; ordered S.B. at gunpoint to remove her pants; engaged in vaginal intercourse with S.B.; ordered M.H. back into her car; and ordered M.H. at gunpoint to drive him to a drop-off spot near Youngstown Road. S.B. told M.H. about the rape and she immediately took S.B. to the

hospital where a rape kit was administered. Police were contacted and spoke with both women. BCI representatives testified that the semen found in S.B.'s vaginal sample, her underwear, and on a jacket left in M.H.'s car matched appellant's DNA profile by one in 989,100,000,000,000,000,000 unrelated individuals.

{¶49} On appeal, appellant contends there were discrepancies presented by the state's witnesses, including: (1) the number of times S.B. and appellant had met before this incident; (2) the lack of physical injuries sustained by S.B.; (3) whether both S.B. and M.H. went to Mr. Walker's back door; (4) whether any false statements were given; and (5) whether there were any "breaks in the chain of custody."

{¶50} Upon review of the record, we fail to see any contradictions worthy of a reversal.

{¶51} First, although irrelevant to any of the charges, both S.B. and appellant's girlfriend, Ms. Breckenridge, testified that S.B. had met appellant on one prior occasion.

{¶52} Second, the lack of physical injuries following the rape is consistent with S.B.'s testimony, as she never asserted that appellant beat her up or physically injured her in order to facilitate the rape. Rather, S.B. testified appellant held a gun to her while ordering her to do as she was told.

{¶53} Third, both M.H. and S.B. testified they went to Mr. Walker's back door when appellant approached, brandished the gun, and ordered them in the car.

{¶54} Fourth, S.B. testified she had told Mr. Walker at one point that she was going to drop the rape charge so that she would be left alone even though that was not her intention. Also, Ms. Breckenridge testified she overheard a telephone conversation between S.B. and Mr. Walker. Ms. Breckenridge claimed S.B. told Mr. Walker, "'I'm

sorry for lying on Mr. Johns.'" Ms. Breckenridge stated that she went to the station and reported to Lieutenant Cole that S.B. was lying about the rape. However, during his testimony for the state, Lieutenant Cole said that Ms. Breckenridge never came to the station to discuss S.B., Mr. Walker, or appellant. Further, the jury heard testimony that M.H. and S.B., best friends and roommates at the time of the incident, later had a falling out over household expenses. M.H. admitted to posting lies online about S.B. because she was mad at her. Police officers testified and described M.H.'s and S.B.'s demeanors following this incident as "very shaken," "tears in their eyes," looked like they had gone through something "tragic," "very frightened," "upset," and "distraught."

{¶55} Fifth, any "breaks in the chain of custody" regarding the transportation of the rape kit and jacket to BCI for testing and logging it in by police is irrelevant, unwarranted, and moot due to appellant's own self-serving testimony. As stated, appellant testified that he engaged in sexual intercourse with S.B., thereby corroborating that the DNA found in S.B.'s vaginal sample, her underwear, and on the jacket left in M.H.'s car was in fact his own.

{¶56} Although appellant claims the state's witnesses were untrustworthy, there is no merit to appellant's assertions. The jury found all of the state's witnesses credible and chose to believe them. *DeHass, supra,* at paragraph one of the syllabus. Based on the evidence presented, as previously stated, we cannot say that the jury clearly lost its way in finding appellant guilty of kidnapping, rape, and having weapons while under disability. *Schlee, supra*, at *14-15; *Thompkins, supra*, at 387.

{¶57} Appellant's second assignment of error is without merit.

{¶58} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.