[Cite as *State v. Musser*, 2016-Ohio-3023.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL T. MUSSER Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 15 CA 85 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 15 CR 375
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 12, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, J.

{¶1} Defendant-Appellant Michael T. Musser appeals his conviction entered in the Licking County Court of Common Pleas on one count of Rape following a jury trial.

{¶2} Appellee is the State of Ohio

STATEMENT OF THE CASE AND FACTS

{¶3} On or about May 1, 2015, J.L. went to Rockabillies Saloon on Church Street in Newark, Ohio. (T. at 159, 160). While at Rockabillies, she drank a beer and shot pool with other bar patrons. (T. at 161). Appellant Michael Musser was also present at Rockabillies that night. (T. at 269). Musser and J.L. didn't know each other and didn't have any contact while at Rockabillies until near closing time. At approximately 1:30 or 2:00 a.m., J.L. heard the bartender make the last call and she got ready to leave. (T. at 163). She was approached by an unknown white male with tattoos and red mohawk hairstyle. (T. 164). He struck up some small talk with J.L. and began walking on Church Street with her. (T. at 166). J.L. and Musser walked together from Rockabillies Saloon on West Church Street on the west side of Newark to an overpass on the east side of Newark. The approximate distance for the walk was 2.1 miles. (T. at 352). Prior to getting to a Circle K store on the corner of 11th and Church Street, Musser showed J.L. a knife in his pocket, informed her that he knew martial arts, and explained that he could hurt people real fast. (T. at 171).

{¶4} By the time they reached Circle K, J.L. was concerned about Musser's intentions and did not want him knowing where she lived. (T. at 172-174). J.L. decided that she would instead walk in the opposite direction when they reached 11th Street in hopes that if she spent some time talking with Musser maybe he would lose interest in

her or she might be able to spot a police officer. (T. at 174). J.L. sat and talked to Musser on a bench at the corner of 11th and Main Street for about an hour, hoping a police cruiser might go by. (T. at 175). After not seeing anyone that could help, she decided she would walk with Musser to the east side of Newark, thinking she would see a sheriff's deputy. (T. at 176, 177). J.L. was concerned that if she tried to run she would trip because of the shoes she was wearing. (T. at 181). As they passed the courthouse square, she noticed his behavior became much more intense. (T. at 182). Musser expressed frustration about not having had sexual relations with a woman in recent months. (T. at 182). J.L. heard Musser say something about the Family Dollar and the bike path. (T. at 182). As they passed the Licking County Justice Center, she didn't see any officers or cruisers in the parking lot. (T. at 182).

{¶5} J.L. stated that she didn't try to run because she was afraid that Musser would kill her. (T. at 183). After the two passed the Justice Center, Musser demanded she walk up a bike path with him. (T. at 184). The two walked up the bike path until they arrived under an overpass of State Route 16. (T. at 185). Musser walked behind a pole briefly and J.L. looked for a way to escape the situation. (T. at 185). Musser came back out from behind the pole and said, "Are you going to suck my dick or am I going to have to knock you out and take it." (T. at 185). Musser had his right fist pulled back as he threatened her. (T. at 185). Musser put his hand on J.L.'s shoulder and pushed her down. (T. at 227). Musser again told J.L. to "suck his dick", and she complied by performing oral sex on him. (T. at 187). When Musser ejaculated in her mouth, J.L. intentionally held the semen in her left cheek so that she could retain evidence against him. (T. at 187). J.L. spit the

semen on her coat sleeve while Musser wasn't looking. (T. at. 188). Musser let her leave after promising she would not tell anyone. (T. at 188, 189).

{¶6} J.L. stated that she walked to the Licking County Sheriff's Office and knocked on a door, but no one answered. (T. at 189). She then walked to a Speedway gas station, where she used the store phone to call 911. (T. at 190).

{¶7} Officer Delancey of the Newark Police Department responded to the call and took the report from J.L. (T. at 132). Delancey photographed J.L., collected her coat and got a description of the suspect. (T. at 134-138). Delancey also contacted detectives and transported J.L. to the hospital. (T. at 141). Detective Vanoy of the Newark Police Department arrived at the hospital and met with J.L. in the early morning hours of May 2, 2015. (T. at 305-307). J.L. described for Vanoy that she was sexually assaulted by a white male with a red mohawk hairstyle. (T. at 313). She also recalled that he had the names of his children tattooed on his arms and neck. (T. at 313). While at the hospital, Vanoy collected a sexual assault kit. (T. at 314).

{¶8} On May 5, 2015, Vanoy interviewed Vele Lovanovski, the owner of Rockabillies saloon. (T. at 319). Lovanovski remembered Musser being in Rockabillies the night of May 1, 2015, and that he had a mohawk hairstyle. (T. at 269, 272). Musser's girlfriend, Lindsey Leindecker, had bartended for Lovanovski at Rockabillies. (T. at 267). Lovanovski was able to provide Vanoy with information about Leindecker and Musser. (T. at 320). Vanoy then used Facebook and Bureau of Motor Vehicle records to identify and locate a home address for Leindecker. (T. at 320, 321). Vanoy had also received an investigative lead from Ohio BCI & I that associated Musser to the seminal fluid on J.L.'s jacket. (T. at 322).

{¶9} On June 3, 2015, Vanoy went to Leindecker's address and spoke to her about locating Musser. (T. at 323, 324). Vanoy received a call from Musser shortly after his visit with Leindecker. (T. at 323, 324). Musser was at work on June 3, 2015, but agreed to speak with Vanoy in the parking lot of the business. (T. at 324). Vanoy showed Musser a photograph taken of J.L. the night of the sexual assault but folded the photograph so that Musser could not see the semen that was visible in the photograph. (T. at 325). Musser denied knowing J.L. (T. at 325). Musser acknowledged that he had been to Rockabillies Saloon but stated he had not been there for four to five months. (T. at 326). Vanoy suggested that possibly Musser had engaged in consensual sex with J.L. but was trying to hide the fact that he cheated on his girlfriend. (T. at 328). Musser denied having ever cheated on his girlfriend. (T. at 329). During his interview, Musser claimed a friend, Kevin Ferrell, drove him home from Rockabillies on May 2, 2015. (T. at 327). Musser later acknowledged that he may have seen J.L. at Rockabillies Saloon but denied ever having sex with her. (T. at 326).

{¶10} Ferrell confirmed that he met Musser at Rockabillies on May 1, 2015, but that he refused to give Musser a ride and left Rockabillies without Musser. (T. at 287).

{¶11} On June 18, 2015, Appellant Michael Musser was indicted on one count of Rape, in violation of R.C. §2907.02(A)(2) and one count of Kidnapping, in violation of R.C. §2905.01(A)(4).

{¶12} On September 30, 2015, the case proceeded to jury trial.

{¶13} At trial, the jury heard testimony from the victim J.L., Officer Delancey and Detective Vanoy, the bar owner Vele Lozanovski, and Appellant’s friend Kevin Ferrell, as

set forth above. The jury also heard testimony from forensic scientist Sarah Glass and Correction's Officer Jamie McKee.

{¶14} Sarah Glass testified that she is a forensic scientist with BCI & I working in the DNA and biology section. She testified that she tested a cutting taken from the coat worn by J.L. on the night of May 1, 2015. She testified that the coat sample contained semen with DNA consistent as being from Appellant. (T. at 251). She further testified that the expected frequency of occurrence of that particular DNA profile was one in 463 quintillion, 800 quadrillion. (T. at 252).

{¶15} Jamie McKee testified that she is a Correction's Officer with the Licking County Sheriff's Office. She detailed the booking process which takes place when someone is arrested and brought to the Sheriff's Department for processing. She explained that after being inventoried and patted down, an inmate is fingerprinted and photographed. Additionally, any identifiable characteristics such as scars or tattoos are also documented. These photos and documents are part of the inmate's record. Mr. McKee identified Appellant's inmate photograph and the tattoos on his neck and left forearm with the names Wesley and Alexis

{¶16} Further, additional DNA testing, jail records, and divorce Records all linked Appellant to J.L. on the date of May 2, 2015. (T. at 252, 294, 333-335).

{¶17} Appellant, through counsel, argued that the sexual encounter under the overpass had been consensual in nature, and this was a case of "buyer's remorse." (T. at 404). Appellant did not call any witnesses on his own behalf. (T. at 385).

{¶18} On October 1, 2015, the jury found Appellant guilty of Rape. The jury was unable to reach a verdict as to the Kidnapping count.

{¶19} On October 30, 2015, the trial court sentenced Appellant to a six-year mandatory prison term on the Rape count.

{¶20} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶21} "I. APPELLANT'S RIGHTS TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED BECAUSE HIS CONVICTION FOR RAPE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶22} "II. APPELLANT'S CONVICTION FOR RAPE WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE."

I., II.

{¶23} Appellant's Two Assignments of Error raise common and interrelated issues; therefore, we will address the arguments together.

{¶24} In his First Assignment of Error, Appellant argues that his conviction was not supported by sufficient evidence. In his Second Assignment of Error, Appellant contends his conviction is against the manifest weight of the evidence produced by the state at trial.

{¶25} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.; see also McDaniel v. Brown,* 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming

this standard); *State v. Fry,* 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶ 146; *State v. Clay,* 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶ 68.

{¶26} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins,* 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) *Id.* at 387, 684 N.E.2d 668, 78 Ohio St.3d 380, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed.1990) at 1594.

{¶27} 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 fact finder's resolution of the conflicting testimony. *Id.* at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida,* 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that " '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.' " *State v. Thompkins, supra,* 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983).

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

{¶28} "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.

{¶29} "* * *

{¶30} "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶31} Appellant herein was found guilty of Rape, in violation of R.C. 2907.02(A)(2), which provides:

{¶32} "(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶33} To find Appellant guilty of rape, the trier of fact would have to find beyond a reasonable doubt that Appellant engaged in sexual conduct with J.L. when Appellant purposely compelled J.L. to submit by force or threat of force. R.C. §2907.02(A)(2).

{¶34} Sexual conduct includes, "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. §2907.01.

{¶35} "Force" means 'any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.' R.C. §2901.01(A)(1). Further, the Ohio Supreme Court has held that " '[f]orce need not be overt and physically brutal, but can be subtle and psychological. *As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.*' " (Emphasis added.) *State v. Daniel,* 9th Dist. Summit No. 19809, 2000 Ohio App. LEXIS 4133, *13 quoting *State v. Eskridge,* 38 Ohio St.3d 56, 58–59, 526 N.E.2d 304 (1988); *State v. Stump,* 4th Dist. Scioto No. 1817, 1990 Ohio App. LEXIS 5942, *7; *State v. Kauffman,* 187 Ohio App.3d 50, 72, 2010–Ohio–1536, 931 N.E.2d 143.

{¶36} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Appellant committed the crime of rape. As set forth above, J.L. testified that Appellant had a knife, that he threatened to "knock her out", and that she was afraid he would hurt her or kill her if she tried to escape. She further testified that she was forced to perform fellatio on him based on such fear. Further evidence connected the sperm from J.L.'s jacket to Appellant. Additional evidence placed Appellant at the bar on the night in question.

{¶37} We hold, therefore, that the state met its burden of production regarding each element of the crime of rape and, accordingly, there was sufficient evidence to support Appellant's conviction.

{¶38} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her

judgment. *Cross Truck v. Jeffries,* 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). The Ohio Supreme Court has emphasized: " '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.' " *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E.2d 517, 2012–Ohio–2179, *quoting Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown,* 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212(1967).

{¶39} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.' " *State v. Pallai,* 7th Dist. Mahoning No. 07 MA 198, 2008–Ohio–6635, ¶ 31, *quoting State v. Woullard,* 158 Ohio App.3d 31, 2004–Ohio–3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke,* 7th Dist. Mahoning No.

99 CA 149, 2002–Ohio–1152, at ¶ 13, *citing State v. Gore,* 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶40} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Hunter,* 131 Ohio St.3d 67, 2011–Ohio–6524, 960 N.E.2d 955, ¶ 118. *Accord, Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶41} In the case *sub judice*, the jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens,* 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness's testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill,* 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell,* 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist.1992).

{¶42} Upon review, we find that this is not an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins,* 78 Ohio St.3d at 387, 678

N.E.2d 541, *quoting Martin,* 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost its way nor created a miscarriage of justice in convicting Appellant of the charge of rape.

{¶43} Based upon the foregoing and the entire record in this matter, we find Appellant's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and the defense presented by Appellant. This Court will not disturb the trier of facts finding so long as competent evidence was present to support it. *State v. Walker,* 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Appellant's guilt.

{¶44} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime of rape beyond a reasonable doubt.

{¶45} Appellant's Two Assignments of Error are overruled.

{¶46} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By: Wise, J.
Farmer, P. J., and
Gwin, J., concur.

JWW/d 0503