[Cite as *State v. Colvin*, 2010-Ohio-6244.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. ARION RAMON COLVIN Appellant	C.A. No. 09CA009728 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CR076688

DECISION AND JOURNAL ENTRY

Dated: December 20, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Arion Colvin appeals from his convictions in the Lorain County Court of Common Pleas. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} On the evening of May 31, 2008, K.B. went over to a neighbor's house to party. When she arrived, the neighbor, a man named Steven and a couple other people were already there. Later, Mr. Colvin arrived and K.B.'s cousin arrived as well. K.B. drank heavily, consuming nearly a whole bottle of Long Island Iced Tea. After getting into an argument with Steven, K.B. was encouraged to have a few shots to calm down, which she did. However, at that point K.B. became ill and ran out of the house and vomited on the neighbor's lawn. She then told her cousin that she wanted to go home.

{¶3} K.B.'s cousin got their belongings and began to walk K.B. home. While they were walking, Mr. Colvin came up to K.B.'s cousin and told her he needed to speak to K.B.

K.B.'s cousin told Mr. Colvin that K.B. could not talk to him in her condition and told him to talk to K.B. the next day. Mr. Colvin persisted, but K.B.'s cousin did convince Mr. Colvin to leave. K.B.'s cousin helped K.B. to the couch, took off her shoes, and put a blanket over her. K.B.'s cousin then stayed with K.B. for about a half an hour until K.B. was sound asleep. K.B.'s cousin closed the door when she left, but did not lock it at K.B.'s request in case she was sick again and needed to go outside to vomit.

{¶4} K.B. awoke to find Mr. Colvin on top of her having vaginal intercourse with her. K.B. told him to stop but Mr. Colvin told her to "[j]ust give [him] a few more minutes." K.B. was unable to stop Mr. Colvin as he was stronger than she was and held his hands over her arms. When Mr. Colvin finished, he got up and left.

{¶5} Based upon this incident, Mr. Colvin was indicted on one count of rape, in violation of R.C. 2907.02(A)(2), and two counts of sexual battery, in violation of R.C. 2907.03(A)(2),(3). The matter proceeded to a bench trial and the judge found Mr. Colvin guilty of all charges. Mr. Colvin was sentenced to a total of six years in prison. Mr. Colvin has appealed, raising two assignments of error for our review.

MANIFEST WEIGHT OF THE EVIDENCE

{¶6} In Mr. Colvin's first assignment of error, he asserts that his convictions are against the manifest weight of the evidence. Mr. Colvin's main contention appears to be that there was conflicting evidence presented and that K.B.'s testimony was not believable, and thus, the convictions are against the manifest weight of the evidence. We disagree.

{¶7} In reviewing a challenge to the weight of the evidence, the appellate court

> "'must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Thomas*, 9th Dist. Nos. 22990, 22991, 2006-Ohio-4241, at ¶7, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶8} In reversing a conviction as being against the manifest weight of the evidence, "the appellate court sits as the 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thomas* at ¶8, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Accordingly, "this Court's 'discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thomas* at ¶8, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶9} Mr. Colvin was convicted of one count of rape, in violation of R.C. 2907.02(A)(2) and two counts of sexual battery, in violation of R.C. 2907.03(A)(2) and (A)(3). R.C. 2907.02(A)(2) provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "'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).

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

Sexual conduct includes "vaginal intercourse between a male and female[.]" R.C. 2907.01(A).

{¶10} R.C. 2907.03(A)(2) provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired." R.C. 2907.03(A)(3) provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." "A person acts

knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶11} Mr. Colvin has not pointed with particularity to any conviction that he believes is against the manifest weight of the evidence; instead, he broadly asserts that his convictions are against the manifest weight of the evidence due to inconsistencies in the evidence and his assertion that K.B.'s testimony was not credible or reliable.

{¶12} K.B. testified that on the evening in question she went over to her neighbor's house to party. K.B.'s cousin testified that K.B. wanted to attend the party because she wanted to drink because she was depressed that her then current boyfriend was in jail. The testimony revealed that K.B. drank heavily. It is estimated that she drank nearly a bottle of Long Island Iced Tea and a few shots. At some point in the evening, according to both K.B. and K.B.'s cousin, K.B. began to argue with a man named Steven, and so her neighbor suggested she have a shot to calm down. K.B. drank a few shots in a row and then quickly became sick and vomited outside on the neighbor's front yard. K.B. testified that she told her cousin that she needed to go home. K.B.'s cousin gathered their belongings and proceeded to walk K.B. home. According to both K.B. and her cousin, K.B. said only a few words to Mr. Colvin and did not flirt with him.

{¶13} K.B.'s cousin testified that as she was walking K.B. home, Mr. Colvin was walking with them and asked to speak with K.B. K.B.'s cousin stated that she told Mr. Colvin that K.B. was not in a condition to talk to him and that he should talk to her later. According to K.B.'s cousin, Mr. Colvin persisted and followed the two to K.B.'s front door, but K.B.'s cousin convinced Mr. Colvin to leave. K.B.'s cousin helped K.B. to the couch, took off her shoes, and put a blanket around her. K.B.'s cousin put a garbage can near the couch in case K.B. needed to

vomit again. K.B.'s cousin stayed with K.B. for about one half hour, until K.B. was snoring. When K.B.'s cousin left, she closed the door, but left it unlocked, as both K.B. and K.B.'s cousin testified K.B. had asked K.B.'s cousin to do. Both also testified that K.B. wanted the door left open in case K.B. became sick, as it was her habit to vomit outside.

{¶14} K.B. testified that she had fallen asleep with her clothes on but when she woke up her pants and underwear were not on her. She stated that she awoke to find Mr. Colvin on top of her having vaginal intercourse with her. She told him to stop, but he continued, stating "[j]ust give me a few more minutes." K.B. testified that Mr. Colvin was stronger than she was and she could not fight him off. Mr. Colvin held his hands over her arms. When Mr. Colvin finished, he left. K.B. testified that later that day, Mr. Colvin came over and told her not to say anything.

{¶15} K.B. testified that she was very upset and she called her cousin to ask about what had happened that night. K.B. also spoke with her mom and her sister, and the three came over to K.B.'s house. They encouraged K.B. to go to the hospital, and K.B. agreed to be examined. K.B. also called her neighbor about the incident, and her neighbor told K.B. not to pursue any charges against Mr. Colvin.

{¶16} Elizabeth Greenawalt, a nurse with the Sexual Assault Care Unit, testified that K.B. was her patient on June 1, 2008. She testified that K.B. was quiet and apprehensive. Ms. Greenawalt stated that K.B. said she feared for the safety of her children if she were to report the crime. Ms. Greenawalt discussed the questionnaire that was completed. As she was interviewing K.B., Ms. Greenawalt completed the questionnaire and checked off the boxes indicating that oral sexual contact had taken place. However, Ms. Greenawalt also noted that the narrative that K.B. told to her did not contain any references to oral sexual contact. Ms. Greenawalt explained that she took down the narrative portion of the report as K.B. told her what

had happened. Ms. Greenawalt then testified that her examination revealed a bruise on K.B.'s arm, "tenderness and redness in the posterior area, in the vaginal opening," and what she describes in her report as "a scant amount" of blood in the vaginal canal. Ms. Greenawalt testified that K.B.'s injuries were consistent with the use of force and were not, in her experience, consistent with "vigorous consensual sex[.]" As K.B. did not want to report the assault to the police, Ms. Greenawalt instead, as required by law, reported it anonymously to the authorities. Ms. Greenawalt testified that K.B. told her that she would report it to the police later as she was afraid for her safety and her children's safety. After the assault, K.B. testified that she did not go back to live at her home because she was afraid. K.B. testified that she did not tell Ms. Greenawalt that there had been oral sexual contact and thus the questionnaire was inaccurate. K.B. averred that the narrative, however, did accurately reflect what happened.

{¶17} K.B. testified that a few days after the assault she went to the police station to report the incident, however, because she was kept waiting for a long time, and she was upset, she left the station without filing a complaint. A few days after that, K.B. did return to the police station and did file a complaint. Officer Hargreaves, a police officer with the City of Lorain, took K.B.'s complaint. Officer Hargreaves testified that he observed K.B. to "be visibly shaken, having various bouts of crying. She was red in the face. It appeared that she was very upset." Officer Hargreaves spoke with the hospital regarding K.B.'s assault examination and filed his initial report. The investigation was then turned over to Detective Bermudez. K.B. testified that Detective Bermudez contacted her. K.B. testified she was questioned about the boxes on the sexual assault questionnaire concerning the oral sexual contact and she explained that the responses were not accurate.

{¶18} Detective Curry testified concerning Detective Bermudez's actions, as Detective Bermudez had taken a position out-of-state at the time of the trial. He stated that Detective Bermudez was assigned to the case and that he interviewed Mr. Colvin about the incident on June 10, 2008. That interview was played for the trier of fact. In that interview, Mr. Colvin acknowledged that he had sex with K.B. on the evening in question, but asserted that the sex was consensual. Mr. Colvin also maintains in the interview that K.B. was flirting with him at the party.

{¶19} K.B.'s neighbor testified on Mr. Colvin's behalf. The neighbor testified that K.B. called him the evening of May 31, 2008 to see if he would have a party. K.B.'s neighbor agreed and he and K.B. went to the liquor store to buy alcohol for the party. The neighbor confirmed that K.B. drank a lot, but claimed that she was not so intoxicated as to be incoherent. According to K.B.'s neighbor, during the course of the evening, K.B. became belligerent. In addition, she began hitting on a woman at the party as well as the man named Steven. Steven and K.B. got into an argument. The neighbor testified that K.B. then drank a few shots and immediately got sick. She ran outside and vomited on the lawn. K.B.'s neighbor testified that K.B. then stated she wanted to go home and that she wanted Mr. Colvin to walk her home. According to the neighbor, Mr. Colvin and K.B. left together. The neighbor noted that K.B.'s cousin went with them.

{¶20} Essentially, Mr. Colvin asserts that K.B.'s account of the assault to Ms. Greenawalt is inconsistent with her trial testimony. It is true that the questionnaire completed at the hospital has boxes checked indicating that there was oral sexual conduct between Mr. Colvin and K.B. However, K.B. did not fill out the form, rather Ms. Greenawalt completed the form as she interviewed K.B. Ms. Greenawalt recorded K.B.'s narrative report which did not indicate

that any oral sexual contact took place. When questioned about the checked boxes by the police, K.B. stated that the boxes should not have been checked. It would not be unreasonable for the trier of fact to believe that the questionnaire was incorrectly completed due to human error and that K.B.'s narrative and trial testimony represented what had occurred. K.B.'s testimony was supported by Ms. Greenawalt's testimony concerning the physical examination she performed on K.B. Ms. Greenawalt concluded that K.B.'s injuries were consistent with the use of force and were inconsistent with consensual sex.

{¶21} Mr. Colvin also maintains that K.B.'s version of events is not credible as "[i]t is more plausible to believe that [K.B.] went to the hospital out of concern that she had contracted a venereal disease, and fabricated the contention that she had been raped out of concern that her boyfriend would find out she had been with another man while he was in jail." The trier of fact had the opportunity to assess the credibility of K.B.'s testimony, the State's other witnesses as well as the recording of Mr. Colvin's interview with police in which Mr. Colvin described his version of what occurred. Notably, Mr. Colvin's version directly conflicted with K.B.'s version. Thus, it was necessary for the trier of fact to resolve any conflicts in the evidence. In so doing, the trier of fact was able to observe the witnesses' demeanor during testimony and use these observations to weigh the credibility and resolve the conflicts in the testimony. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. While it is true that K.B. did receive treatment for sexually transmitted diseases while at the hospital and is true that K.B.'s boyfriend was in jail at the time of the assault, that does not mean that the only reasonable conclusion to be drawn from the evidence is that K.B. fabricated the assault. K.B.'s testimony is corroborated in part by the conclusions Ms. Greenawalt was able to draw from her examination of K.B.

{¶22} After a thorough review of all the evidence, we cannot say that the trier of fact lost its way in convicting Mr. Colvin of rape and two counts of sexual battery. Mr. Colvin's first assignment of error is overruled.

ALLIED OFFENSES

{¶23} In Mr. Colvin's second assignment of error he contends that the trial court committed plain error in sentencing him for both rape and sexual battery as the two offenses are allied offenses of similar import. Despite the State's contention to the contrary, Mr. Colvin has not argued that his two convictions for sexual battery are allied with each other.

{¶24} Mr. Colvin acknowledges that he did not raise the issue of allied offenses in the trial court and thus asks this Court to consider his argument for plain error. See Crim.R. 52(B). "The [Supreme Court of Ohio] has held that it is plain error to impose individual sentences for multiple counts that constitute allied offenses of similar import * * * ." *State v. Sands*, 9th Dist. No. 25051, 2010-Ohio-5461, at ¶2, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶31.

{¶25} The Supreme Court has provided courts with a procedure for determining whether offenses are allied offenses of similar import:

> "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, * * * we stated: In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus." (Internal citations and quotations omitted.) *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶16.

Despite the fact that Mr. Colvin has quoted to similar language in his brief, which clearly requires that courts first compare *the elements* of the offenses in the abstract, Mr. Colvin has not listed the elements of the offenses nor even indicated which portions of the rape and sexual battery statutes are at issue. In fact, Mr. Colvin does not present this Court with argument or analysis, but instead states in a conclusory manner only that "the offenses are so similar that the commission of Rape will necessarily result in the commission of Sexual Battery. They arose out of the same single act, and therefore were not committed separately or with a separate animus." See App.R. 16(A)(7).

{¶26} Even a cursory examination of the elements of the statutes at issue, which were previously detailed above, reveals that rape, as defined in R.C. 2907.02(A)(2) is not an allied offense of similar import with sexual battery, as defined by either R.C. 2907.03(A)(2) or R.C. 2907.03(A)(3). A rape committed in violation of R.C. 2907.02(A)(2) requires proof of the element of force, whereas sexual battery in violation of R.C. 2907.03(A)(2) or R.C. 2907.03(A)(3) contains no such requirement. Mr. Colvin's second assignment of error is overruled.

CONCLUSION

{¶27} In light of the foregoing, we overrule Mr. Colvin's assignments of error and affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶28} I agree with the majority's judgment and reasoning in regard to the first assignment of error. I agree that Mr. Colvin's second assignment of error should be overruled because forcible rape, under Section 2907.02(A)(2) of the Ohio Revised Code, and sexual battery under either Section 2907.03(A)(2) or (A)(3) are not allied offenses of similar import. As the majority has pointed out, Section 2941.25(A) of the Ohio Revised Code requires a two-step analysis. *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, at ¶14. In the first step, the court must compare the elements of the two crimes in the abstract, without reference to the evidence in the particular case. *Id.* at ¶27. "If the elements of the offenses correspond to such a

degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step." *Id.* at ¶14 (quoting *State v. Blankenship*, 38 Ohio St. 3d 116, 117 (1988)).

{¶29} Under the forcible rape statute, "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). The sexual battery provisions under which Mr. Colvin was charged provide that "[n]o person shall engage in sexual conduct with another . . . when . . . [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired [or] . . . [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." R.C. 2907.03(A)(2), (3). The elements of forcible rape are not sufficiently similar to those of either Section 2907.02(A)(2) or (A)(3) that the commission of forcible rape will result in the commission of either of the sexual battery offenses. One could purposely compel another to engage in sexual conduct through the use of force when the other person is aware that the act is being committed and is perfectly able to appraise the nature of and control her own conduct. Similarly, without using force, one could engage in sexual conduct with another whose ability to appraise the nature of or control her own conduct is substantially impaired or who is unaware that the act is being committed. As the elements of the offenses, compared in the abstract, fail to sufficiently correspond to one another, they are not allied offenses of similar import.

APPEARANCES:

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DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.