[Cite as *State v. Muzic*, 2015-Ohio-1521.]

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

STATE OF OHIO	C.A. No. 27117
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN MUZIC	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 13 02 0360

DECISION AND JOURNAL ENTRY

Dated: April 22, 2015

HENSAL, Presiding Judge.

{¶1} John Muzic appeals his conviction and sentence for rape, kidnapping, and gross sexual imposition. For the following reasons, this Court affirms.

I.

{¶2} C.V. testified that, around 8:30 p.m. on January 24, 2013, she was babysitting for her aunt when Mr. Muzic knocked on the door of the house and asked if her aunt was home. Because one of the children recognized Mr. Muzic, C.V. let him inside the house. After C.V. explained that she did not expect her aunt back for a couple of hours, Mr. Muzic left.

{¶3} Two hours later, Mr. Muzic returned to the house with a box of alcoholic beverages. C.V. let him into the house and called her aunt to tell her he was there. As C.V. was making the call, however, C.V.'s aunt and her husband returned home. After they made some jokes about the fact that C.V. let someone she did not know into the house, they went outside to smoke a cigarette with Mr. Muzic. They also began drinking the alcoholic beverages.

According to C.V., although she was only 16, she was allowed to partake in the drinking. While they were socializing, C.V.'s cousin also arrived home.

{¶4} C.V.'s aunt and her husband eventually went to bed, leaving C.V., her cousin, and Mr. Muzic awake. When the cousin asked Mr. Muzic about his dogs, C.V. indicated that she loved dogs and, learning that Mr. Muzic lived down the street, asked to see them. Mr. Muzic agreed, and the two of them set off for his house. C.V.'s cousin stayed behind because she wanted to use C.V.'s cell phone to call her boyfriend.

{¶5} C.V. testified that, when they got to Mr. Muzic's house, Mr. Muzic got them each a beer and told her that no one leaves his house without finishing their alcohol. According to C.V., as she played with the dogs, Mr. Muzic began asking her questions about her sexual experiences. The questions made C.V. feel awkward, so she asked to leave, explaining that she did not feel well. Mr. Muzic reminded her, however, that she had to finish her beer first.

{¶6} C.V. testified that she continued playing with the dogs and got down on the floor with them. Mr. Muzic got down next to her and slid a couple of his fingers down the inside of her pants and underwear. C.V. wanted to leave, so she got off the floor, sat down on the couch, and finished her beer. When she was done, she walked to the front door and opened it. Before she could leave, however, Mr. Muzic shut the door and tried to kiss her. C.V. testified that she pushed him away, but he continued trying to kiss her. After she pushed him away again, Mr. Muzic put one of his arms around her neck and another around her waist and dragged her to a back bedroom. The force around her neck was significant enough that C.V. was unable to breathe at times.

{¶7} According to C.V., after getting to the bedroom, Mr. Muzic told her to take off her shirt while he removed her pants. He made her perform oral sex on him while he put his

fingers in her vagina. When she tried to talk, he pressed on her throat or covered her mouth to prevent her from speaking. After a little while, however, C.V. told him that, if he intended to have sex with her, he may as well do it already.

{¶8} C.V. testified that, after she made her suggestion, Mr. Muzic stopped what he was doing and began having vaginal intercourse with her, biting her neck, lip, ear, and breasts throughout the encounter. He stopped before ejaculating, however, and suddenly became very remorseful, realizing that he had just raped her. C.V. testified that, although Mr. Muzic was crying, she convinced him that they should get dressed and go out to the living room, where she remained with him for a little while. As they sat together, Mr. Muzic explained to her that he had been drinking and fighting with his wife a lot and told her that he would drive her to the police station if she wanted to make a report. C.V. did not know whether she could trust Mr. Muzic or if he was just testing her, so she declined his offer and suggested that they return to her aunt's house instead. After Mr. Muzic dropped her off, C.V. called her brother to take her home and, after waking her father, went to the police station to report what had happened. An ambulance later took her to a hospital for a medical examination.

{¶9} The Grand Jury indicted Mr. Muzic for one count of rape, one count of kidnapping, and one count of gross sexual imposition. At trial, Mr. Muzic testified that C.V. was mistaken about what happened at his house. According to him, after they arrived at his house, he showed her around and they started playing with his dogs. As they were lying near each other on the floor, they began playfully kicking and wrestling with each other. When their actions got the dogs too riled up, they decided to get up and each of them used a bathroom. When they met back up in the hallway, Mr. Muzic put his arm around C.V. and they started kissing. They eventually moved to his bedroom and began undressing. They continued kissing and touching

each other until it occurred to Mr. Muzic that he was cheating on his wife, and he stopped the encounter. He testified that, after they got dressed, he drove C.V. back to her aunt's house. Although Mr. Muzic admitted that he touched C.V.'s vagina while they were in the bedroom, he denied that they had intercourse, that he said C.V. could not leave his house until she finished her beer, or that he choked her. A jury, nevertheless, found him guilty of the offenses, and the trial court sentenced him to 15 years imprisonment. Mr. Muzic has appealed, assigning two errors.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT-APPELLANT HUMBERT'S (SIC) MOTION FIR (SIC) JUDGMENT OF ACQUITTAL UNDER CRIMINAL RULE 29.

{¶10} Although Mr. Music's first assignment of error refers only to Criminal Rule 29, his argument is that his rape and kidnapping convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Under Criminal Rule 29(A), a defendant is entitled to a judgment of acquittal on a charge against him "if the evidence is insufficient to sustain a conviction * * *." Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> 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. 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. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. If, on the other hand, a defendant asserts that his conviction is against the manifest weight of the evidence:

> [A]n 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. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins* at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶11} Regarding whether there was sufficient evidence to convict Mr. Muzic of rape, Ohio Revised Code Section 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." According to Mr. Muzic, the State failed to prove that he engaged in sexual conduct with C.V. Sexual conduct means "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(A).

{¶12} C.V. testified that, after Mr. Muzic dragged her to his bedroom with his arm pressed around her neck, he forced her to perform fellatio on him while he put his fingers in her vagina. She testified that he also had non-consensual vaginal intercourse with her. Viewing her testimony in a light most favorable to the State, it was sufficient to establish sexual conduct and, thus, to support Mr. Muzic's conviction under Section 2907.02(A)(2).

{¶13} The jury also found Mr. Muzic guilty of kidnapping under Section 2905.01(A)(4). That section provides 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[.]" Mr. Muzic argues that the State failed to prove that he restrained C.V.'s liberty. At trial, however, C.V. testified that Mr. Muzic grabbed her around the waist and neck and dragged her down the hall to his bedroom for sexual activity. Her testimony was sufficient to support Mr. Muzic's kidnapping conviction.

{¶14} Mr. Muzic next argues that his kidnapping conviction should only be a felony of the second degree because he released C.V. "in a safe place unharmed." R.C. 2905.01(C)(1). As this Court explained in *State v. Hardy*, 9th Dist. Summit No. 24480, 2009-Ohio-2677, "[a]part from the fact that safe, unharmed release is a statutory defense that [Mr. Muzic], not the trial court, was obligated to raise, * * * '[t]he fact that a rape occurred is ample evidence of the harm contemplated by R.C. 2905.01(C).'" (Citations omitted) *Id.* at ¶ 22, quoting *State v. Royston*, 9th Dist. Summit No. 19182, 1999 WL 1215297, *6 (Dec. 15, 1999). We, therefore, conclude that Mr. Muzic's rape and kidnapping convictions are supported by sufficient evidence.

{¶15} Regarding whether Mr. Muzic's convictions are against the manifest weight of the evidence, he contends that the only evidence that supports C.V.'s version of the facts is her own testimony. He argues that, even though investigators recovered his DNA from C.V.'s neck, right breast, and underwear, that evidence is consistent with his version of the facts. He also notes that, despite C.V.'s claim that he applied so much force on her neck that she could not breathe, the nurse who examined her a few hours after the alleged incident did not find any evidence of bruising on her neck.

{¶16} Although the DNA evidence may be consistent with both C.V.'s and Mr. Muzic's version of the facts, Mr. Muzic's version has gone through several iterations. Detective Edward Carlile testified that, when he interviewed Mr. Muzic following the incident, Mr. Muzic initially told him that he and C.V. wrestled a little, but they never kissed and that the farthest she went into his house was to use the bathroom. When informed that C.V. could accurately describe his bedroom, Mr. Muzic suddenly remembered that he had given her a tour of the house when they arrived. Mr. Muzic later admitted during the interview that he had not been honest with the detective and confessed that he and C.V. had kissed. He denied, however, that he had touched her intimate areas or that they had been in his bedroom. As the interview continued, Mr. Muzic again told the detective that he had not been honest and admitted that they had, in fact, been in the bedroom and that he had touched C.V.'s vagina.

{¶17} Mr. Muzic testified that the reason he lied to Detective Carlile at first was because he did not want his wife to find out that he had cheated on her. Unlike his version of the facts, however, which evolved over time, C.V. was consistent in what she told her brother, law enforcement, a nurse practitioner, and the jury about what happened at Mr. Muzic's house. It is the jury's province to take note of inconsistencies in the testimony of the witnesses and resolve or discount them accordingly. *State v. Sykes*, 9th Dist. Summit No. 25263, 2011-Ohio-293, ¶ 21. "Likewise, it is the jury's role to evaluate the credibility of the witnesses and to determine what weight to give any inconsistencies in the[ir] testimony." *Id.*, quoting *State v. Gooden*, 9th Dist. Summit No. 24896, 2010-Ohio-1961, ¶ 30. "[A] jury is free to believe or reject the testimony of each witness * * *." *State v. Miles*, 9th Dist. Summit No. 26187, 2012-Ohio-2607, ¶ 24, quoting *State v. Rice*, 9th Dist. Summit No. 26116, 2012-Ohio-2174, ¶ 35.

{¶18} In this case, the jury observed each of the witnesses and determined that C.V.'s account of the incident was credible. "[A] verdict is not against the manifest weight of the evidence where the jury's resolution of credibility is reasonable and where the jury ultimately chose to believe the State's witnesses as opposed to defense witnesses." *State v. Brown*, 9th Dist. Summit No. 26490, 2013-Ohio-5112, ¶ 20. "This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others." *State v. Hill*, 9th Dist. Summit No. 26519, 2013-Ohio-4022, ¶ 15. Upon review of the record, we conclude that this is not the extraordinary case in which the jury clearly lost its way resulting a manifest miscarriage of justice. *Otten*, 33 Ohio App.3d at 340. Mr. Muzic's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANT'S CONVICTIONS WERE NOT ALLIED OFFENSES OF SIMILAR IMPORT, AND FAILED TO MERGE APPELLANT'S CONVICTIONS FOR SENTENCING.

{¶19} In his second assignment of error, Mr. Muzic argues that the trial court erred when it did not merge his rape and kidnapping convictions for sentencing purposes. Ohio Revised Code Section 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, which prohibits multiple punishments for the same offense. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 23. It provides:

> (A) [If] the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) [If] the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the

> indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

{¶20} The Ohio Supreme Court has recently clarified the test courts must apply when determining whether offenses are allied offenses of similar import. In *State v. Ruff*, __ Ohio St.3d __, 2015-Ohio-995, it held that "courts must evaluate three separate factors—the conduct, the animus, and the import." *Id*. at paragraph one of the syllabus. "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) * * * if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus. "[A] defendant whose conduct supports multiple offenses may be convicted of all the offenses if * * * the conduct constitutes offenses of dissimilar import[.]" *Id*. at paragraph three of the syllabus. In summary, it held:

> If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Id. at ¶ 25.

{¶21} C.V. testified that, when Mr. Muzic carried her to the bedroom, he put so much pressure on her neck that she could not breathe at times. This constituted a separate, identifiable harm from the rape, which, under *Ruff*, means that the kidnapping and rape offenses were of dissimilar import. *See* R.C. 2901.01(A)(3) (defining physical harm as any injury, illness, or other physiological impairment, regardless of its gravity or duration); *State v. Pruitt*, 11th Dist. Trumbull No. 2011-T-0047, 2012-Ohio-1134, ¶ 32 (explaining that choking constitutes physical harm). The trial court, therefore, did not err when it failed to merge the offenses at sentencing. Mr. Muzic's second assignment of error is overruled.

III.

{¶22} Mr. Muzic's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

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 Summit, 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

JACOB T. WILL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.