[Cite as *State v. Miller*, 2017-Ohio-7986.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-16-037

Appellee — Trial Court No. 2014-CR-309

v.

Asa Miller — **DECISION AND JUDGMENT**

Appellant — Decided: September 29, 2017

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Jonathan M. McGookey, Assistant Prosecuting Attorney, for appellee.

Brian J. Darling, for appellant.

* * * * *

MAYLE, J.

{¶ 1} Defendant-appellant, Asa Miller, appeals the May 13, 2016 judgment of the Erie County Court of Common Pleas, convicting him of two counts of rape, one count of aggravated burglary, and one count of felonious assault, and sentencing him to an

aggregate prison term of 33 years. For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶ 2} Asa Miller was charged with aggravated burglary, felonious assault, and two counts of rape in connection with the July 2, 2014 attack of his neighbor, G.B. The case was tried to a jury beginning April 5, 2016.

{¶ 3} According to the evidence presented by the state, Miller lived in the apartment above G.B. Sometime in the very early morning hours of July 2, 2014, Miller knocked on G.B.'s door. G.B. answered the door wrapped in a bedsheet, and told Miller that she was not in the mood for company. Miller pushed his way into the apartment anyway. He threw her to the floor, punched her repeatedly, pulled down his pants, and penetrated her vaginally. He then flipped her over and penetrated her anally. After the attack, while Miller was still in her apartment, G.B. went to her bedroom and dressed. Miller asked her where she was going and she responded "nowhere." He threatened to kill her if she told anyone what had happened. G.B. quietly slipped out of the apartment and went to a neighbor's home where she called 9-1-1. She identified Miller as her attacker.

{¶ 4} Officers went to Miller's apartment where they found him cooking breakfast. They told him that they were investigating the assault of his neighbor and that he had been identified as her assailant. Miller claimed that he had been nowhere near the victim and that the assault was perpetrated by a man known as "Mississippi." Miller appeared to be intoxicated and he became increasingly agitated and uncooperative.

Officers arrested him on charges related to his intoxication and transported him to the county jail. Once at the jail, one of the officers collected Miller's clothes, at which point Miller asked, "man what do you need my drawers for? Yeah, I fucked her and that other girl. You all are on some bullshit."

{¶ 5} G.B. was taken to the emergency room of Firelands Regional Medical Center where she underwent a sexual assault nurse examination ("SANE"). The examination revealed a tear at the six o'clock portion of her vagina, vaginal bruising, and bruising and tears of the anal wall. A colposcope showed further damage inside her vagina and anus. G.B. also suffered bruising to her face, neck, chin, eyes, arms, back, and "throughout everywhere on her body," and a fracture to her superior orbital wall. The nurse examiner collected G.B.'s T-shirt, shorts, and underwear, took vaginal, oral, anal, and perianal swabs, and obtained hair samples, pubic hair combings, and a sample from a dried stain on her left arm.

{¶ 6} These items and a number of other items were submitted for analysis by the Bureau of Criminal Investigations ("BCI"), along with known DNA samples collected from Miller, G.B., and G.B.'s boyfriend, with whom G.B. had had consensual sex five days earlier. BCI scientists testified as to the results of that analysis.

{¶ 7} Vaginal swabs and a sample from the crotch of G.B.'s underwear contained a mixture of DNA consistent with that of G.B. and her boyfriend; Miller was excluded as a contributor. Anal swabs contained DNA consistent only with that of G.B. Fingernail scrapings included a mixture of DNA consistent with that of G.B. and Miller; G.B.'s boyfriend was excluded as a contributor. A sample from the front of G.B.'s underwear

contained a mixture of DNA consistent with that of G.B. and Miller; G.B.'s boyfriend was excluded as a contributor. A sample taken from the crotch of Miller's underwear contained a mixture of DNA consistent with that of G.B. and Miller. And a sample from the front of Miller's underwear contained a mixture of DNA consistent with that of Miller and G.B.; G.B.'s boyfriend was excluded as a contributor.

{¶ 8} The jury convicted Miller of all counts. On May 9, 2016, the trial court sentenced Miller to a prison term of 11 years on the aggravated burglary charge and on each count of rape, to be served consecutively. The court merged the felonious assault and aggravated burglary convictions.

{¶ 9} Miller appealed and assigns the following errors for our review:

> I. MR. MILLER'S CONVICTION FOR TWO COUNTS OF RAPE, FELONIOUS ASSAULT, AND AGGRAVATED BURGLARY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE EVIDENCE SUPPORTS MR. MILLER'S VERSION OF CONSENSUAL SEXUAL CONTACT AND [G.B.'S] VERSION OF EVENTS IS NOT CREDIBLE DUE TO HER MIXTURE OF ALCOHOL AND PRESCRIPTION DRUGS.
>
> II. MR. MILLER'S CONVICTIONS FOR TWO COUNTS OF RAPE, FELONIOUS ASSAULT, AND AGGRAVATED BURGLARY ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE PROSECUTION.

III. THE TRIAL COURT ERRED WHEN IT DENIED MR. MILLER'S REQUEST TO PLAY THE PRIOR TESTIMONY OF ARZELLE ROBINSON AS IT WAS RELEVANT TO THE CASE BECAUSE IT WAS RELEVANT TO ILLUSTRATE MR. MILLER TRANSFERRED HIS DNA TO [G.B.] THROUGH CONSENSUAL SEXUAL CONTACT.

IV. THE TRIAL COURT ERRED WHEN IT DENIED MR. MILLER'S SECOND RULE 29 MOTION BECAUSE THE TRIAL COURT CONCLUDED NO PENETRATION OCCURRED WHEN DENYING THE REQUEST TO PLAY MR. ROBINSON'S TESTIMONY, AND AS SUCH THE TRIAL COURT WAS BOUND TO CONCLUDE NO VAGINAL OR ANAL RAPE OCCURRED FOR PURPOSES OF ACQUITTAL.

V. THE TRIAL COURT ERRED WHEN IT REFUSED TO MERGE MR. MILLER'S TWO COUNTS OF RAPE, FELONIOUS ASSAULT, AND AGGRAVATED BURGLARY AS, BASED ON [G.B.'S] VERSION OF EVENTS, THEY ARE CRIMES OF SIMILAR IMPORT COMMITTED WITH THE SAME ANIMUS.

II. Law and Analysis

A. Manifest Weight

{¶ 10} In his first assignment of error, Miller argues that his convictions were against the manifest weight of the evidence because (1) the evidence supports his claim

that he and the victim engaged in consensual sexual contact, and (2) the victim's testimony was not credible because she was under the influence of alcohol and prescription medication.

{¶ 11} When reviewing a claim that a verdict is against the manifest weight of the evidence, the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We do not view the evidence in a light most favorable to the state. "Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson*, 6th Dist. Lucas No. L–10–1369, 2012–Ohio–6068, ¶ 15, citing *Thompkins* at 388. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 12} Although under a manifest-weight standard we consider the credibility of witnesses, we must nonetheless extend special deference to the jury's credibility determinations given that it is the jury who has the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14.

{¶ 13} Miller testified at trial. He said that on the evening of July 1, 2014, he heard a thud outside his door and found G.B. face-down on the ground. He helped her up and asked if she was alright. G.B. asked him if he had any pain pills or anything to drink, and they went into his apartment. He went to get her some Advil or Tylenol, and she opened a bottle of wine and started drinking it from the bottle. Miller claimed that at some point, G.B. initiated fellatio, but stopped because she said her jaw hurt. They stayed in his apartment until around 11:50 p.m.

{¶ 14} Miller testified that he wanted to go to sleep, but G.B. said she was bored. She invited him to her apartment to watch a movie with her. As they walked to her apartment, G.B. stumbled on the stairs, but Miller caught her. When they went inside, G.B. started a movie and Miller left to buy cigarettes. He said that he returned around 12:15 a.m. He knocked, and she opened the door to let him in.

{¶ 15} G.B. started the movie back up, and they talked, drank beer, and watched the movie. Miller testified that G.B. began talking about sex, but he was concerned that her daughter, who lived with her, might come home. He also said that he was not interested in G.B. in that way and did not like the smell of the alcohol she was drinking. Miller told G.B. that he did not want to have sex, but offered to go to the store to buy her another beer. He left for the store around 1:00 a.m.

{¶ 16} Miller testified that as he returned to the apartment building, he saw a blue car drive away. He knocked on G.B.'s door and it took a while for her to answer. Miller gave her the beer, and G.B. again started talking about having sex. Miller told her that she would have to wash up first, and G.B. went to the restroom to do so. She then invited

him into her bedroom and he kneeled on the bed. G.B. "fished" Miller's penis out of his pants and began fondling him, but he could not become aroused. He suggested that they just watch the movie. He left around 1:35 a.m. He made something to eat then fell asleep on the couch. He said he was awoken by the sun at 7:00 a.m.

{¶ 17} Miller claimed that he and G.B. had had sex on a few occasions beginning in January of 2014; the last time they had sex was in April of 2014. He denied that he had vaginal or anal sex with G.B. on the morning in question, however. On appeal, Miller insists that the vaginal and anal tears observed during G.B.'s SANE evaluation were consistent with consensual sexual contact, and he points out that G.B.'s boyfriend's DNA—not his DNA—was found in G.B.'s vagina and on the crotch of her underwear. He claims, therefore, that the evidence does not support a finding that he purposefully compelled G.B. to have sex with him, and the jury's verdict was against the manifest weight of the evidence.

{¶ 18} The state responds that a victim's testimony that she was raped need not be supported by physical evidence or other corroborating testimony. Rather, it argues, "the testimony of a rape victim, if believed, is sufficient to support each element of rape." *State v. Robinson*, 6th Dist. Lucas No. L-09-1001, 2010-Ohio-4713, ¶ 100. We agree. Indeed, this principal is well-established. *See, e.g.*, *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 53; *State v. Wampler*, 6th Dist. Lucas No. L-15-1025, 2016-Ohio-4756, ¶ 58.

{¶ 19} Miller also argues that even if a rape victim's testimony is *generally* sufficient to support a rape conviction, G.B.'s testimony could not be believed because she was intoxicated and on prescription medication during the morning in question.

{¶ 20} According to bloodwork drawn at 9:15 a.m., G.B. had a blood-alcohol content ("BAC") of .22. She had also been prescribed a number of medications including Celexa, Hydroxyzine, Prilosec, and Seroquel. Miller contends that these medications can cause confusion, impaired judgment, impaired motor coordination, and dizziness, all of which may be exacerbated when taken with alcohol. He argues that this rendered G.B.'s testimony incredible.

{¶ 21} A witness' intoxication is one of many factors that may be weighed by the jury in assessing credibility. *State v. Bailey*, 8th Dist. Cuyahoga No. 97754, 2012-Ohio-3955, ¶ 11, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). It may provide appropriate fodder for cross-examination. It does not, however, render the witness' testimony per se incredible. *State v. Melton*, 8th Dist. Cuyahoga No. 103341, 2016-Ohio-1227, ¶ 7. *See, e.g., Bailey* at ¶ 10-12 (rejecting appellant's argument that his conviction was against the manifest weight of the evidence due to the eyewitnesses' intoxication).

{¶ 22} Here, defense counsel questioned G.B., responding officers, and medical providers about G.B.'s level of intoxication. The ER physician estimated that the hour before coming to the hospital, G.B.'s BAC would have been approximately .24. Nevertheless, the officers, the ER physician, and the SANE nurse all testified that G.B. did not appear to be impaired. They described her as "awake," "alert," "oriented," and

"coherent." While it was certainly appropriate for the defense to explore the topic during cross-examination, the jury ultimately found G.B.'s testimony credible. Its decision that G.B.'s testimony was credible despite her level of intoxication did not render Miller's conviction against the manifest weight of the evidence.

{¶ 23} Miller also contends that his aggravated burglary conviction was against the manifest weight of the evidence because G.B.'s testimony at trial was at odds with what she told first responders and ER personnel. Specifically, Miller argues that G.B. told responding officers and the SANE nurse that she opened the door to her apartment, Miller walked in, and he sat on the couch talking to her before he attacked her. At trial, however, she testified that Miller pushed her aside, forcing his way in, and shoved her up against the stove. Again, G.B. was cross-examined about this alleged discrepancy, as were a number of other witnesses. The jury made a credibility determination and we will not disturb that determination on appeal.

{¶ 24} We find Miller's first assignment of error not well-taken.

B. Sufficiency of the Evidence

{¶ 25} In his second assignment of error, Miller argues that his convictions were not supported by sufficient evidence. He claims (1) that rape was not proven because the state did not establish that he penetrated the victim by force or threat of force; (2) felonious assault was not proven because the element of "serious physical harm" was not established; and (3) aggravated burglary was not proven because the element of "force, stealth, or deception" was not established.

{¶ 26} Whether there is sufficient evidence to support a conviction is a question of law. *Thompkins*, 78 Ohio St.3d 380 at 386, 678 N.E.2d 541 (1997). In reviewing a challenge to the sufficiency of evidence, "[t]he 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." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

1. Rape

{¶ 27} 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." "Sexual conduct," as related to the allegations at issue in this case, means "vaginal intercourse between a male and female; anal intercourse * * * between persons regardless of sex * * *." R.C. 2907.01(A). With respect to the rape convictions here, Miller argues that the state failed to establish that he penetrated the victim by force or threat of force given the evidence that his DNA was found only on G.B.'s waistband and under her fingernails—not in her vagina. G.B. testified, however, that Miller forced her to the floor and penetrated her both vaginally and anally. The state, therefore, presented evidence that Miller penetrated G.B. by force or threat of force.

2. Felonious Assault

{¶ 28} R.C. 2903.11(A)(1) provides that "no person shall knowingly * * * cause serious physical harm to another * * *." With respect to the felonious assault conviction, Miller argues that "serious physical harm" was not established because Miller testified that he heard a thud and found G.B. lying face-first on the stairwell, which indicates that G.B.'s orbital fracture preceded his interaction with her that night. G.B., however, testified that Miller inflicted that injury upon her by striking her in the face. The jury found G.B.'s testimony to be credible, and we do not consider witness credibility in a sufficiency analysis. The state, therefore, presented evidence of the "serious physical harm" element of the offense.

3. Aggravated Burglary

{¶ 29} Under R.C. 2911.11(A)(1), "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * with purpose to commit in the structure * * * any criminal offense, if * * * the offender inflicts, or attempts or threatens to inflict physical harm on another." With respect to the aggravated burglary conviction, Miller argues that "force, stealth, or deception" was not established because G.B. initially told officers and health care providers that Miller knocked on the door, she opened it, and he walked in, sat down, and began talking to her. He contends that her trial testimony differed from her initial account in that she testified that Miller forced his way in and pushed her against the stove. Again, where sufficiency of the evidence is raised as error, we make no credibility determinations; we look only to whether the state presented evidence of each essential element of the crime. Here, regardless of what G.B. may have

told responding officers and ER personnel, she testified at trial that Miller forcibly entered her apartment. The state, therefore, presented evidence of the "force, stealth, or deception" element of the offense.

{¶ 30} We find Miller's second assignment of error not well-taken.

C. The Exclusion of Robinson's Testimony

{¶ 31} In his third assignment of error, Miller argues that the trial court abused its discretion when it prohibited Miller from presenting the testimony of Arzelle Robinson. He argues that Robinson's testimony would have supported his claim that he and the victim engaged in consensual sexual contact on July 2, 2014.

{¶ 32} Robinson was an acquaintance of Miller. He testified at an October 2, 2015 hearing on the state's motion in limine to exclude evidence of prior specific instances of the victim's sexual activity. Robinson said that he had heard G.B. call Miller "baby," had seen them cuddle, and had seen them go into Miller's bedroom together. Miller intended to present this testimony at trial to show that despite G.B.'s testimony to the contrary, he and G.B. had a prior sexual relationship and engaged in consensual sexual activity on the morning in question. He subpoenaed Robinson to appear at trial, but Robinson failed to appear. After the court unsuccessfully attempted to compel his appearance by sending officers to Robinson's home, Miller requested that he be permitted to present Robinson's hearing testimony.

{¶ 33} The court denied Miller's request. It reasoned that even assuming that it was true that Miller and G.B. had a prior sexual relationship, Miller's position at trial was

that he did not engage in sexual intercourse with G.B. on July 2, 2014. Accordingly, it held, Robinson's testimony was not relevant.

{¶ 34} An appellate court reviews a trial court's rulings on evidentiary matters under an abuse of discretion standard. *State v. Long*, 53 Ohio St.2d 91, 98, 372 N.E.2d 804 (1978). "'Abuse of discretion' suggests unreasonableness, arbitrariness, or unconscionability. Without those elements, it is not the role of [the] court to substitute its judgment for that of the trial court." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9.

{¶ 35} Under Evid.R. 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio * * *." "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 36} Moreover, under R.C. 2907.02(D), "[e]vidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity" may be admissible to the extent it involves "the victim's past sexual activity with the offender," but "only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

{¶ 37} Here, Miller insisted that G.B. attempted to initiate sexual activity with him on the morning in question. He maintained, however, that he did not have sexual intercourse with her because he was unable to become aroused. G.B., on the other hand, claimed that Miller brutally raped her on July 2, 2014, and she denied that she and Miller had ever engaged in any kind of sexual activity in the past. While Robinson's testimony would have contradicted G.B.'s testimony, Miller unequivocally denied penetrating G.B., punching her, and causing both the internal and external vaginal and anal injuries. We cannot say that the trial court abused its discretion in refusing to allow Miller to present Robinson's hearing testimony given Miller's insistence that he did not have intercourse with G.B. on July 2, 2014.

{¶ 38} We find Miller's third assignment of error not well-taken.

D. Crim.R. 29

{¶ 39} In his fourth assignment of error, Miller argues that the trial court erred in denying his second Crim.R. 29 motion for acquittal because in denying the request to play Robinson's testimony, it concluded that no penetration occurred. He contends that the court was bound, therefore, to conclude that no rape occurred for purposes of his motion for acquittal.

{¶ 40} A motion for acquittal under Crim.R. 29(A) challenges the sufficiency of the evidence. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39. The denial of a motion for acquittal under Crim.R. 29(A) "is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 41} The state presented testimony from G.B. that Miller penetrated her both vaginally and anally without her consent. The ultimate issue of whether to believe G.B. was for the jury. As for the reason for denying Miller's request to present Robinson's hearing testimony, the trial court did not "find" or "conclude" that no penetration occurred—it found that Robinson's testimony that Miller and G.B. had a past romantic relationship was not relevant in light of Miller's insistence at trial that no penetration occurred on the morning in question. The trial court properly denied Miller's Crim.R. 29 motion.

{¶ 42} We find Miller's fourth assignment of error not well-taken.

E. Merger of Allied Offenses

{¶ 43} In his fifth assignment of error, Miller argues that the trial court erred in failing to merge Miller's convictions as allied offenses of similar import. While the trial court, in fact, merged Miller's felonious assault and aggravated burglary convictions, Miller argues that the conviction arising out of G.B.'s vaginal rape should have merged with the conviction arising out of her anal rape because they were not separate crimes—it was a single act with a single motive. He also contends that the felonious assault and rape convictions should have merged because the two offenses resulted in the same harm, and the act of punching G.B. was committed to force her to succumb to his sexual advances. He also maintains that hitting G.B. served as both the force element of the rape and the aggravating element of the burglary, therefore, it could not serve as the conduct supporting a separate felonious assault charge.

{¶ 44} The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, applicable to the state through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. The Double Jeopardy Clause protects against a number of abuses. *Id.* Pertinent to this case is the protection against multiple punishments for the same offense. *Id.* To that end, the General Assembly enacted R.C. 2941.25, which directs when multiple punishments may be imposed. *Id.* It prohibits multiple convictions for allied offenses of similar import arising out of the same conduct:

> (A) Where 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) Where 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.

{¶ 45} In *Ruff*, the Ohio Supreme Court examined in detail the analysis that must be performed in determining whether offenses are allied offenses of similar import under R.C. 2941.25. It identified three questions that must be asked: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were

they committed with separate animus or motivation?" *Id.* at ¶ 31. If the answer to any of these questions is "yes," the defendant may be convicted and sentenced for multiple offenses. *Id.* at ¶ 25, 30. The court explained that offenses are of *dissimilar* import "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at ¶ 23. And it emphasized that the analysis must focus on the defendant's conduct, rather than simply compare the elements of two offenses. *Id.* at ¶ 30.

{¶ 46} While he recognizes that courts have found that vaginal rape and anal rape produce separate harm, Miller characterizes vaginal and anal penetration as "arbitrary distinctions," or a mere "change of positions." A protracted discussion of this polemical assertion is unnecessary. Suffice it to say that the argument lacks merit and that it is well-established that instances of vaginal rape and anal rape may form the basis for two separate rape convictions. *State v. Hernandez*, 12th Dist. Warren No. CA2010-10-098, 2011-Ohio-3765, ¶ 48 (recognizing that "the law in Ohio is clear that oral, anal, and vaginal rapes are distinct acts that constitute separate acts"). Miller's arguments to the contrary are unavailing.

{¶ 47} As to the felonious assault forming the basis for the force element of rape, we find that the harm inflicted by the repeated punching of G.B. was different than the harm resulting from the rapes. Moreover, G.B. testified that Miller was "very" strong, he grabbed her by the hair, arms, and legs, and she was unable to fight back. Thus, there was separate conduct constituting the "force" element of the offense.

{¶ 48} We find Miller's fifth assignment of error not well-taken.

F. Conclusion

{¶ 49} We find that (1) Miller's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence; (2) the trial court did not err in denying Miller's motion for acquittal; (3) the court did not err in denying Miller's request to present Robinson's hearing testimony; and (4) the court did not err in merging only his felonious assault and aggravated burglary convictions. We, therefore, find Miller's five assignments of error not well-taken and affirm the May 13, 2016 judgment of the Erie County Court of Common Pleas. Miller is ordered to pay the costs of this appeal under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
CONCUR.
JUDGE