[Cite as *State v. Hogan*, 2010-Ohio-3385.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1182 (C.P.C. No. 08CR-12-8615)
Tremain Hogan,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 20, 2010

Scott & Nemann Co., L.P.A., and *Adam Lee Nemann*, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Barbara Farnbacher*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Tremain Hogan ("appellant"), is appealing from his convictions on charges of rape, attempted rape and kidnapping. He also is appealing from the sentences of incarceration totaling 19 years which were imposed upon him. He assigns five errors for our consideration:

> [I.] The trial court erred by failing to suppress the victim's pretrial identification of the Appellant.
>
> [II.] The trial court erred by admitting testimony that referenced prior bad acts by the Appellant.
>
> [III.] The verdict was against the manifest weight of the evidence.
>
> [IV.] The evidence against Mr. Hogan was insufficient to sustain a jury verdict of guilty.
>
> [V.] The trial court erred by failing to merge the Kidnapping charge with the charges for Rape and Attempted Rape.

{¶2} By way of brief factual background, on the evening of November 24, 2008, J.B. was grabbed from behind by a man previously unknown to her. She was forced into a wooded area and sexually assaulted. She eventually identified appellant as her assailant. At issue in the first assignment of error, is the admissibility of this identification.

{¶3} Trial counsel for appellant filed a timely motion to suppress the identification, alleging that members of the Reynoldsburg Police Department had used suggestive procedures in obtaining the identification of appellant by J.B. A hearing was held on the motion at which the only witness was Kevin McDonnell, a detective with the Reynoldsburg Police Department. J.B. was not called as a witness in the suppression hearing. The hearing was conducted after a jury had been impaneled, but before opening statements.

{¶4} At the hearing, Detective McDonnell testified that J.B. described her attacker as "black male, 5'10", 6' tall, skinny build." (Tr. 25.) Detective McDonnell testified that J.B. claimed her attacker was wearing a black skullcap, a black coat, black shirt and dark-colored jeans. She described her attacker as having a big flat nose, per

Detective McDonnell, and having his hair in braids or corn rows. J.B's initial description to police included a claim her attacker had a thin, light beard. Later descriptions of the attacker differed, especially as to height and build, as noted below.

{¶5} Reynoldsburg police concluded that there was a connection between the attack on J.B. and an event approximately three weeks earlier in which a male had exposed himself. As a result, they received a surveillance video from the Reynoldsburg Walmart store and still photographs from the location where the exposing allegedly occurred. Eventually, appellant was identified as being similar to the person in the surveillance tape.

{¶6} The surveillance video and the photographs were shown to J.B. J.B. claimed that the person in the video was blurry. Per Detective McDonnell's recollection, J.B. claimed the person in the video had the same kind of build as her attacker. (Tr. 13.) J.B. was shown the video on more than one occasion, but "probably less than five."

{¶7} Appellant worked at the Walmart store at the time.

{¶8} Based upon the police's belief that appellant was the person who exposed himself approximately three weeks before the attack on J.B., appellant was arrested. Later, the police put a photograph of appellant into a photo array which was shown to J.B. The photo array is in the appellate record.

{¶9} J.B. picked out the photo of appellant as being a photograph of her attacker.

{¶10} On cross-examination, at the hearing on the motion to suppress, Detective McDonnell acknowledged that the description of her attacker given by J.B. to police

originally was a male, 5'8", with a dark complexion, wearing a heavy hooded coat, black shirt, dark pants, black wave cap, and having corn rows.

{¶11} A separate description generated by Reynoldsburg police on the night of the assault, indicated the assailant was 6' 2" or 6' 3" with dreadlocks and with an average build.

{¶12} A third description generated, apparently based upon an interview with J.B., indicates that the attacker was 5' 10" to 6' with a dark complexion, skinny build, braids in hair, large flat nose and a thin, light beard.

{¶13} On cross-examination, Detective McDonnell testified again that he showed the surveillance video to J.B. before she was shown the photo array. At that time, J.B. indicated her attacker had called himself "L" or "Latrell." J.B. also added that she thought her attacker was in his early 20's.

{¶14} Detective McDonnell did not show surveillance video or single photographs of any other suspects, including potential suspects named "Latrell," prior to providing J.B. the photograph array including appellant.

{¶15} The testimony of Detective McDonnell at the end of the hearing indicated that J.B. was grabbed from behind, after dark and taken to an area of pine trees. J.B. was scared, frightened and traumatized.

{¶16} The trial court judge overruled the motion to suppress at the close of the hearing and stated afterwards "let's get our jury in here and get back on track." (Suppression Hearing, at 38.) The comment is a concern, because it could imply that addressing a motion to determine if the victim was being led toward making a potentially

inaccurate identification of her attacker was a diversion from the trial in progress and not a critical, or even decisive step in the proceedings.

{¶17} J.B. testified at trial about the attack, but her testimony was not before the trial judge when he ruled on the motion to suppress identification. J.B. testified that she worked at Sam's Club until 10:00 p.m. and then stopped by Walmart to get some snacks before walking home. While walking home, she heard footsteps behind her. The man approaching her from behind threatened her with a weapon and told her "don't look at my face or I [will] kill you." (Tr. 73.)

{¶18} Later the man told her to perform oral sex on him, which she refused to do. However, at that time, she was able to see his face briefly.

{¶19} The man told her he had been watching her, but J.B. did not know how or when.

{¶20} J.B. testified that the day after the assault, a detective showed her a surveillance tape showing appellant standing at Walmart and "telling me is that similar?" J.B. said it could be similar, with similar build and facial features. She recalled herself being shown the tape two-to-three times.

{¶21} J.B. claimed to have also seen her assailant's facial features briefly when headlights from a passing car shone on it.

{¶22} J.B. said that the detective, in asking her to look at the photo array said "we have somebody" and "he showed me the photos and to pick out anyone that -- that attacked [me]." (Tr. 109.)

{¶23} J.B. also testified the detective asked her to "look at the photos and see if you recognize – if I recognize the person who did it." (Tr. 111.) J.B. then "looked over and I went on number five."

{¶24} Clearly, the Reynoldsburg detective conveyed the message that the police had caught the man who had attacked J.B. and she merely had to pick his photo out of the six photos shown to her. She then picked out the photograph which looked most like the man police had shown to her on a surveillance tape from approximately three weeks before the attack.

{¶25} The procedure utilized by the Reynoldsburg Police Department was impermissively suggestive. The procedure involves the suggestive problems which the Supreme Court of the United States has addressed in cases such as *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, and *Simmons v. United States* (1968), 390 U.S. 377, 88 S.Ct. 967. Mistaken eyewitness identification seems to be the single greatest cause of wrongful convictions. The eyewitness is not lying. The eyewitness has simply made an honest mistake.

{¶26} The chances for such a mistake are dramatically increased when police send a message to a lay witness that "we have your man." The witness wants to help prosecute the person who attacked her or him. The witness also tends to hold the police in high regard as a matter of cultural attitudes and because the police are helping the crime victim. As a result of these considerations, police training now routinely includes tips on ways to minimize conscious or subliminal messages steering a crime victim toward identifying a particular person as a suspect.

{¶27} The record in this appeal does not indicate why Reynoldsburg police thought that a male who exposed himself was more likely to be sexually assaultive then another male. Why Reynoldsburg police, having reached that conclusion, kept showing the same man to J.B. repeatedly before showing her a photo array which included his picture is not clear. The desire to "solve" the crime is understandable, but not at the cost of potentially pursuing charges against the wrong man.

{¶28} Because a suggestive police procedure on occasion steers a witness or crime victim toward a person who actually is guilty, case law from the United States Supreme Court allows eyewitness identification from a person who has been subjected to suggestive police conduct if the witness can demonstrate an independently reliable basis for the identification. See *Biggers* at 198-99.

{¶29} Because of the trial court's initial ruling on the motion to suppress, the trial court never addressed the question of whether or not J.B. had a reliable, independent recollection of her attacker and that appellant was her attacker. This issue remains to be resolved if J.B.'s identification testimony is to be used in subsequent proceedings. The trial court can determine whether an additional hearing is necessary at which the issue of J.B. having an independently reliable basis for her identification can be fully explored. If such an independently reliable basis is proven, then the initial jury verdicts and judgment of guilt can be reinstated.

{¶30} The first assignment of error is sustained.

{¶31} Based upon our ruling on the first assignment of error, one possibility is that the trial court will order the verdicts of guilty to be reinstated. Therefore, none of the other assignments of error before us are rendered moot.

{¶32} The third and fourth assignments of error address the weight and sufficiency of the evidence in appellant's trial.

{¶33} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. Id. "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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶34} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins*, at 387. In so doing, the court of appeals, sits as a " 'thirteenth juror' " and, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of

witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " Id. (quoting *State v. Martin* [1983], 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶35} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967), 10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶36} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶37} The testimony of J.B. was sufficient to establish that she had been kidnapped and raped. Her testimony also showed that a second form of rape was attempted. Thus, the evidence was more than sufficient to establish that the crimes alleged in the indictment had been committed.

{¶38} J.B. also identified appellant as being her attacker. Thus, the evidence was sufficient to support the verdicts of the jury, assuming the admissibility of J.B.'s identification.

{¶39} The fourth assignment of error is overruled.

{¶40} We are not in a position to find that the jury's verdict was against the manifest weight of the evidence. Despite the problems with the police conduct which led J.B. to identify appellant as her attacker, we cannot determine that the identification was in fact incorrect. We, therefore, cannot find that the jury verdicts were against the manifest weight of the evidence.

{¶41} The third assignment of error is therefore overruled.

{¶42} The second assignment of error questions the trial court's admission of testimony and statements which told the jury that appellant was suspected by Reynoldsburg police of being involved in another crime. In opening statement, the assistant prosecuting attorney told the jury that Detective McDonnell "has in the back of his mind something else that happened at Walmart 20 days earlier * * *. He had that in his mind, and he thought they might be connected."

{¶43} When Detective McDonnell testified at trial he stated that he showed J.B. "some video of a previous incident that happened at Walmart in November of 2008." The detective was then allowed, over defense objections, to state that he believed that the incident on November 4 was related to what occurred involving J.B. The detective then described the event of November 4 as an "offense."

{¶44} The trial judge sustained a defense objection to the detective's description of the event as an offense, but overruled a defense motion for a mistrial. Instead, the judge gave the jury an instruction to disregard both the question and the answer.

{¶45} We cannot say the trial court abused its discretion in its handling of the issue. The simple reference to the November 4 incident, described in the motion to suppress hearing as someone exposing themselves, did not necessitate starting the trial over. The jury was never informed of the exact nature of the police allegation involving the November 4 incident. The trial judge told the jury to disregard the reference to the incident as an offense. Unless we, as an appellate court, are to find that the juries cannot abide by limiting instruction given by a judge, we must find that the trial here had the discretion to refuse to grant a new trial and chose to give a limiting instruction instead.

{¶46} The second assignment of error is overruled.

{¶47} The final assignment of error argues that appellant could not be sentenced for all the offenses separately and consecutively. This assignment of error involves the application of R.C. 2941.25, which reads:

> (A) Where the same conduct the 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.

{¶48} The Supreme Court of Ohio's recent interpretation of R.C. 2941.25 supports the position of counsel for appellant. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the Supreme Court found rape and kidnapping to be allied offenses of similar import. the *Cabrales* decision followed *State v. Logan* (1979), 60 Ohio St.2d 126.

{¶49} The incident involving J.B. was not of long duration. All of the restraint and removal of J.B. was done to expedite the sexual assault. The testimony at trial indicate no other animus. Under the circumstances, the prosecution needed to be provided the choice of having appellant convicted on the sexual assaults or convicted of kidnapping, but R.C. 2941.25 barred his being convicted of both the sexual assaults and the kidnapping.

{¶50} The fifth assignment of error is sustained.

{¶51} In summary, the first and fifth assignments of error are sustained. The second, third and fourth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is vacated and the case is remanded for further proceedings consistent with this decision.

Judgment vacated and remanded
for further proceedings.

CONNOR, J., concurs.
BROWN, J., concurs in judgment only.

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