

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-10-079
 :
 - vs - : OPINION
 : 7/18/2011
 :
 ROBERT C. WILLIS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2010 CR 000294

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Robert Willis, appeals his conviction in the Clermont County Court of Common Pleas for sexual battery.

{¶2} Appellant was indicted in March 2010 on one count each of rape and sexual battery. The charges stemmed from an allegation that on January 1, 2010, appellant engaged in sexual conduct with A.G. (the victim) while the victim was asleep. A jury trial held in August 2010 revealed the following facts.

{¶3} On December 31, 2009, the victim, her friend Jessica Gragg, Edwin Ross (Eddie), his brother Steven Ross, and appellant celebrated New Year's Eve together by drinking at a party and later at a bar. When the bar closed around 2 a.m. on January 1, the group went to Steven's apartment where they continued to drink. Throughout the evening, the victim drank beer, "lemon drop" shots, and shots of "Jagermeister." She testified she does not drink that much normally, and that during her pregnancy (her child was born in November 2009), she did not drink at all.

{¶4} At Steven's apartment, the victim drank beer while standing around a kitchen table and talking to others. Feeling intoxicated and nauseous, the victim left the group and went to lay down on a sectional couch in the living room. She fell asleep fully clothed. When she woke up later that day, she was only wearing her shirt. Her pants were on a table, folded, and her underwear was on the floor. Appellant was laying on the other side of the couch.

{¶5} When asked by the victim, appellant told her they had sex and that she was the one who initiated it. The victim had no memory of the event. Nor did she remember taking her pants or underwear off or folding her pants. She also did not remember going from the bar to Steven's apartment, or going to the apartment with two men she had met at the bar. In fact, the only moments she could remember after leaving the bar were talking around the kitchen table, laying down on the couch, and waking up a few hours later.

{¶6} Jessica testified that the victim went to sleep on the couch around 3:30 a.m. At the time, Jessica, Steven, and appellant were talking in the bedroom. Around 4 a.m., before she went to bed with Steven, Jessica covered up the victim with a blanket. The victim did not wake up. The victim was fully clothed. Eddie was asleep elsewhere on the couch.

{¶7} Eddie testified he went to sleep on the couch. At the time, appellant, Jessica, and Steven were in a backroom. When Eddie woke up sometime later, appellant was on the couch under the covers with the victim. Appellant's pelvis was positioned close to the victim's pelvis. Appellant was shirtless; the victim's pants were on the floor.

{¶8} Eddie testified that when he woke up, he "felt like something was going on" with appellant and the victim. According to Eddie, appellant acted like he and the victim were just "setting there in a stationary position." Appellant told him, "give me five minutes." Based on appellant's pointing to the victim and his statement, Eddie believed appellant was implicitly telling him he could have his turn once appellant was done.

{¶9} Eddie testified that unlike appellant, the victim did not talk to him and did not move when Eddie woke up. Eddie testified the victim was asleep and clearly out. Feeling ill at ease, Eddie decided to go home. But before he did, he tried to get the victim up by tapping on her arm three times and by saying her name. The victim did not respond at all. Eddie left.

{¶10} When Jessica woke up later that morning, the victim had already left the apartment. Appellant, however, was still there. When asked by Jessica, appellant told her that he and the victim had sex. Likewise, later that day, appellant told Eddie the victim had woken up and started "participating in whatever was going on."

{¶11} A month later, Jessica, Steven, and Eddie were at a party. Neither the victim nor appellant were at the party. While discussing whether appellant had sex with the victim at the New Year's Eve party, someone gave appellant the nickname of "Fun Sneak-a-Dick" (appellant's regular nickname is "Fun"). Jessica then asked Eddie whether the victim was asleep that day. Eddie replied, "Yes, she was." Jessica contacted the victim and the two later went to the police station.

{¶12} Appellant testified on his behalf. Appellant admitted he had sex with the victim during the New Year's Eve party but claimed it was consensual. According to appellant, after he smoked with Jessica and Steven, appellant used the restroom to remove his pants (as he was going to sleep) and went to the living room. Eddie and the victim were in the room watching TV. Eddie left after appellant declined his offer to take him home. The victim was on the couch under a blanket wearing only a shirt and her underwear. Soon after, appellant and the victim started kissing on the couch and rubbing one another's genitals. The victim took her underwear off, got on top of appellant, and the two had sex (appellant testified his penis went inside the victim's vagina). They then went to sleep on the couch.

{¶13} Appellant testified that the victim was awake and responsive while they were having sex. He denied she was asleep or unconscious before the act and denied having sex with her while she was unconscious. He further testified the victim never gave him any indication she wanted him to stop or did not know what was going on.

{¶14} The victim testified she never consented to have sex with appellant and did not take off her clothes and get on top of appellant. She further testified that while appellant tried to kiss her and touch her while they were out celebrating New Year's Eve, she was not attracted to him at all.

{¶15} On August 12, 2010, the jury acquitted appellant of rape but found him guilty of sexual battery. He was subsequently sentenced to five years of community control.

{¶16} Appellant appeals, raising two assignments of error.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY FAILING TO GRANT DEFENDANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO ESTABLISH EACH MATERIAL

ELEMENT OF THE OFFENSE BEYOND REASONABLE DOUBT."

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED IN ENTERING A FINDING OF GUILTY ON THE JURY'S VERDICT BECAUSE SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶21} At the heart of both assignments of error is appellant's claim that the state failed to prove that at the time he engaged in sexual conduct with the victim, the victim's ability to appraise the nature of, or control, her own conduct was substantially impaired. In other words, appellant asserts the state failed to prove that the sexual conduct and the victim's impairment occurred at the same time.

{¶22} Initially, we note that although appellant moved for a Crim.R. 29(A) acquittal at the close of the state's case, he failed to renew his motion at the close of all the evidence following his testimony. It is well-established that a defendant who moves for a Crim.R. 29(A) acquittal at the close of the state's case during a jury trial waives any error in the denial of the motion if he puts on a defense and fails to renew his motion at the close of all the evidence. *State v. Calloway*, Ross App. No. 10CA3147, 2011-Ohio-173, ¶7; *State v. Stout*, Warren App. No. CA2010-04-039, 2010-Ohio-4799. In failing to renew his motion, appellant waived any sufficiency claim he may have had on appeal.

{¶23} However, even if appellant had preserved this issue for appeal, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶7.

{¶24} A manifest weight challenge 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. *Id.* at ¶8. When considering whether a conviction is against the manifest weight of

the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25. While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶25} Appellant was convicted of sexual battery, in violation of R.C. 2907.03(A)(2), which states: "No person shall engage in sexual conduct with another, not the spouse of the offender, when the offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."

{¶26} "Sexual conduct" is defined as "vaginal intercourse between a male and female; *** and, without privilege to do so, the insertion, however slight, of any part of the body *** into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A); *State v. Craven*, Butler App. No. CA2005-11-476, ¶31 (testimony that defendant put his penis into the victim's vagina sufficient to prove he engaged in sexual conduct with the victim). "A jury can reasonably conclude the defendant knew the victim was substantially impaired and unable to object to the defendant's conduct if there was evidence that the victim was in a state of deep sleep or drunkenness." *State v. Anderson*, Wood App. No. WD-04-035, 2005-Ohio-534, ¶41.

{¶27} Upon reviewing the record, we find that appellant's conviction for sexual

battery is not against the manifest weight of the evidence. The state presented evidence that appellant and the victim, who are not husband and wife, engaged in sexual intercourse, that at the time of the sexual conduct, the victim was in a state of deep sleep and/or drunkenness, and that she never consented to having intercourse with appellant. See *State v. Tollivar* (July 31, 1997), Cuyahoga App. No. 71349 (upholding defendant's sexual battery conviction for engaging in sexual conduct with the victim where the victim was in a state of deep sleep or drunkenness at the time of the intercourse, where the victim never consented to the intercourse, and where the victim had no memory of the event).

{¶28} Although there was contradictory evidence presented to the jury with regard to whether the victim was unconscious or alert during the sexual conduct, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *Stout*, 2010-Ohio-4799 at ¶18. This case, as with most sexual act cases, turned on witness credibility. The jury "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony." *Id.* The jury was within its province to credit the testimony of the state's witnesses and discredit appellant's testimony. *Id.*

{¶29} In the case at bar, the jury chose to believe the testimony of the victim and the state's witnesses. We cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's sexual battery conviction must be reversed. Appellant's assignments of error are overruled.

{¶30} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.