

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-03-054
- vs -	:	<u>OPINION</u>
	:	10/29/2012
CHRISTOPHER MARCUM,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-03-0469

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Jeffrey W. Bowling, 315 South Monument Avenue, Hamilton, Ohio 45011, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Christopher Marcum, appeals his convictions and sentence in the Butler County Court of Common Pleas for abduction and violation of a civil protection order.

{¶ 2} On March 21, 2011, the Butler County Court of Common Pleas issued a civil stalking protection order (CPO) requiring that Marcum refrain from coming within 500 feet of

Eva Clendenin or her parents, Dwight and Karen Clendenin. Marcum and his parents attended the hearing, at which the protection order was issued. At the time of the hearing, Eva was 17 years old and Marcum was 18.

{¶ 3} The following day, March 22, 2011, Dwight Clendenin asked his son and Eva's brother, Adam, to meet Eva after school at her bus stop because he and Karen were afraid that something would happen to her. Adam agreed to meet his sister, and met the bus with several of his friends, Stephanie Howden, Cody Conley, and Sean Reynolds. The group went to the Clendenin residence, but then decided to go for a walk. The group walked through a cemetery, and then sat down behind a store to smoke Black and Mild cigars. Once there, the group heard tires squealing, and then saw Marcum exit a pickup truck and come toward them. Once Marcum reached the group, he implored Eva to talk and forgive him for past actions.

{¶ 4} According to Adam's testimony, when Eva refused to speak with Marcum or go with him, Adam and Sean Reynolds got up and asked "what the hell is going on?" At that point, Marcum called to his friend, Zack, who was a passenger in the pickup truck. Zack exited the truck, pulled out a knife, and told Adam, Reynolds, and Howdan to "get back." Adam then told Reynolds to call the police, and Reynolds called 911 to report the incident. Marcum then dragged Eva to his pickup truck, put her inside, and drove away.

{¶ 5} The police responded and began looking for Marcum's pickup truck. Within a short amount of time, Detective James Cifuentes of the Hamilton Police Department located the truck, and upon his approach, saw Eva jump out of Marcum's truck, and observed that she was limping. Detective Cifuentes testified that when he approached Eva, she was upset, had been crying, and that her lip was quivering. Detective Cifuentes also testified that Eva was out of breath and seemed distraught.

{¶ 6} Marcum was arrested, and claimed to police that Eva had not been with him.

When police searched Marcum's pickup truck, they located a knife. Eva accompanied Detective Cifuentes to the police station and gave a statement, in which she indicated that Marcum had forced her into his pickup truck and was begging her to forgive him and talk to him. Eva also indicated that Marcum held her in the truck for approximately 20 minutes before she was able to get out of the truck, and that Marcum had threatened her in the past.

{¶ 7} Marcum was indicted on single counts of abduction and violating a CPO. Marcum pled not guilty, and the matter proceeded to a jury trial. During the trial, Eva testified on behalf of the defense and stated that Marcum had not abducted her, but rather, the two had concocted a ruse to make it look like a kidnapping because her parents did not want her spending time with Marcum. The state presented testimony from Dwight, Adam, Stephanie Howden, Sean Reynolds, Chris Gibson, as well as Detectives Mark Henson and Cifuentes.

{¶ 8} A jury found Marcum guilty on both counts, and the trial court sentenced him to five years of community control. Marcum now appeals his convictions and sentence, raising the following assignments of error:

{¶ 9} THE GUILTY VERDICTS TO THE CHARGES OF ABDUCTION AND FELONY VIOLATING A PROTECTION ORDER WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 10} Marcum argues in his first assignment of error that his convictions are against the manifest weight of the evidence.

{¶ 11} A manifest weight challenge examines the inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other.

State v. Wilson, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298.

In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing 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 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. Cummings, 12th Dist. No. 2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 12} 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 since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶ 13} Marcum was charged with abduction in violation of R.C. 2905.02(A)(1), which states, "no person, without privilege to do so, shall knowingly do any of the following: by force or threat, remove another from the place where the other person is found." Marcum was also charged with violating a protection order, which was a felony because Marcum violated the protection order while committing the felony of abduction. According to R.C. 2919.27(A)(1), "no person shall recklessly violate the terms of any of the following: a protection order * * *."

{¶ 14} After reviewing the record, Marcum's convictions for violating a CPO and abduction are supported by the manifest weight of the evidence. The jury considered the following evidence in reaching its verdicts and did not clearly lose its way or create a manifest miscarriage of justice by virtue of its guilty verdicts.

{¶ 15} Dwight Clendenin testified that he, his wife, and both children attended the hearing during which the court issued a CPO. Marcum also attended the hearing, and was

therefore aware that by the terms of the CPO he was not permitted to be within 500 feet of Eva. The state offered, and the court admitted, the CPO as an exhibit.

{¶ 16} Adam testified that when Marcum approached the group as they were smoking their Black and Milds, Eva became "distressed" and "hysterical a bit" as Marcum continued to try to talk to her. Adam then testified that Eva "got kind of bad while [Marcum] was talking to her. It didn't really get too bad until he was actually dragging her into the truck." Adam also testified that Zack pulled the knife on him and his friends so that they would stay back from Marcum. However, once Marcum placed Eva in the truck and instructed Zack to get in the truck so they could leave, Zack became hesitant, and only jumped into the bed of the truck when Marcum prodded him once more. Adam ended his testimony by stating that based on his knowledge and familiarity with Eva in conjunction with her actions and demeanor on the day of the incident, she did not voluntarily get into the truck with Marcum.

{¶ 17} Stephanie Howden testified that as the group was smoking the Black and Milds, she saw Marcum approach, and that he was trying to talk to Eva. Howden testified that Eva refused to talk to Marcum despite his pleas. Howden also testified that Marcum tried to grab Eva's arm and that Eva pulled away "and she continued to say no, she didn't want to talk to him." When asked to describe how Marcum took Eva to the truck, Howden testified that Marcum "grabbed [Eva] from the torso and was moving backwards and getting to the car, him first and then her on his lap." When asked what Eva was doing during this time, Howden responded, "she was struggling and screaming."

{¶ 18} Sean Reynolds testified that Eva "started to scream no" when Marcum asked if he could talk to Eva. Reynolds also testified that Marcum "scooped" Eva up and put her in the truck, and that Eva was "screaming" during the incident. Reynolds also testified to calling 911 and reporting the incident. The state then played the 911 tape, during which, Eva is heard screaming in the background.

{¶ 19} Officer Brian Gleason of the Hamilton Police Department testified that he responded to a dispatch regarding the incident, and that he took Marcum into custody when police located him. Officer Gleason testified that once Marcum was in custody and informed of the charges, Marcum stated that he was never with Eva.

{¶ 20} Detective Cifuentes testified that he began looking for Marcum's pickup truck after hearing the dispatch regarding the abduction, and that he eventually drove up to the location where Marcum's truck was stopped. Detective Cifuentes testified that he saw Eva "get out and run" from Marcum's truck, and that he followed her to offer assistance. When he came upon her, she was limping and "upset." Detective Cifuentes stated that Eva had been crying, and that her lip was quivering. He also stated that "she was out of breath, and she just seemed distraught."

{¶ 21} Detective Cifuentes recalled taking Eva to the police station and that she gave a statement in which she relayed that Marcum had forced her into his truck and drove away with her. Detective Cifuentes recounted that while Eva gave her statement, and even after, she was "rattled" and "upset."

{¶ 22} During the defense's case, Eva testified. She stated that she had a friend text Marcum and ask him to meet Eva after school behind the store. Eva testified that she and Marcum concocted a plan so that they could see each other, without her getting into trouble with her parents, who had refused to let her see Marcum. Eva stated that she acted afraid, and pretended to be abducted, but that she went voluntarily with Marcum. Eva stated that she became afraid when she and Marcum saw police cars, and that she did not want to get in trouble so she got out of the truck and began walking away from it. Eva explained her distressed appearance when Detective Cifuentes found her as being attributed to being afraid she or Marcum would get into trouble.

{¶ 23} On cross-examination, Eva gave contradicting answers to the state's questions

regarding concocting the plan through the text message. Eva also testified that the friend who sent the text no longer attended school, and that she was unable to prove that the text actually occurred. Eva also claimed not to remember having made several of the declarations she included in her statement to police.

{¶ 24} Marcum essentially argues that his convictions are against the manifest weight of the evidence because of Eva's testimony regarding concocting the rouse and her assertion at trial that she went with Marcum voluntarily. However, and "upon acknowledging that such extensive testimony will inevitably produce some inconsistent or conflicting assertions, we recognize the sound principal [sic] that the trier of fact is best positioned to weigh the credibility of the individual witnesses and reach a conclusion based on the totality of the evidence." *State v. Hernandez*, 12th Dist. No. CA2010-10-098, 2011-Ohio-3765, ¶ 41, quoting *State v. Dunn*, 9th Dist. No. 04CA008549, 2005-Ohio-1270, ¶ 10.

{¶ 25} The jury was in the best position to determine the credibility of the witnesses, and to determine whether Marcum abducted Eva or if it was part of a concocted rouse to see each other. The fact that the jury chose to believe the state's witnesses, however, does not render its decision as being against the manifest weight of the evidence. As such, Marcum's first assignment of error is overruled.

{¶ 26} Assignment of Error No. 2:

{¶ 27} THE CHARGE OF ABDUCTION AND VIOLATING A PROTECTION ORDER ARE CRIMES OF SIMILAR IMPORT AND A CONVICTION OF BOTH REQUIRES THE STATE TO ELECT THE CONVICTION UPON WHICH THE COURT SHALL SENTENCE THE OFFENDER.

{¶ 28} Marcum argues in his second assignment of error that the trial court erred by not merging the abduction and violation of a protection order convictions for sentencing purposes.

{¶ 29} The Ohio Supreme Court has set forth a two-part test to determine if offenses are allied offenses of similar import pursuant to R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48.

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

(Emphasis in original.) The court went on to state,

if the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Id. at ¶ 49-51. (Emphasis in original.)

{¶ 30} Applying the *Johnson* analysis to the case at bar, we must first determine if it is possible for abduction and violating a CPO to be committed with the same act. The answer is yes, it is possible. If one were intending to abduct a person he is forbidden to be in contact with because of a CPO, that offender must necessarily violate the CPO in order to move the protected person from where she was located. In that hypothetical, the offender has a single animus, mainly the abduction, and the violation of the CPO would merely be part of the single act committed with a single state of mind. However, that does not end our analysis because we must next determine whether Marcum's offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." The answer to that question is no.

{¶ 31} The record indicates that Marcum violated the terms of the CPO the moment he

came within 500 feet of Eva as he pulled his pickup truck near her location behind the store. At that moment, Marcum had violated the terms of the CPO but had not abducted Eva because the record indicates that he first tried several times to simply talk to her, rather than abduct her. The record does not indicate that Marcum approached the group with the animus to immediately abduct Eva. Instead, Marcum implored Eva to talk, and only after his attempts were unsuccessful, did Marcum escalate the situation by physically picking up Eva and putting her in his pickup truck. Marcum's act of removing Eva by force from the place where she was found was therefore committed with a separate state of mind, and with a separate animus than Marcum had for violating the CPO by merely coming within 500 feet of Eva to talk.

{¶ 32} Having found that the convictions were not allied offenses, the trial court properly sentenced Marcum on both counts. As such, Marcum's second assignment of error is overruled.

{¶ 33} Judgment affirmed.

RINGLAND, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.