

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00223
DAVON ANTHONY OWENS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2009-CR-0729

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 7, 2010

APPEARANCES:

For Plaintiff-Appellee  
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*Gwin, P.J.*

{¶1} Defendant-appellant, Devon Anthony Owens, appeals from his conviction and sentence in the Stark County Court of Common Pleas on one count of rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(c). The plaintiff appellee is the State of Ohio.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On May 8, 2009, at approximately 1:00 a.m., Jamie Sanders was sleeping at her apartment in Windsor Place, an apartment complex in Canton, Ohio. Her children were home; her daughter was sleeping on the couch and her son was sleeping upstairs. She heard a knock on the door and opened it to find her neighbor and friend, appellant at the door. Appellant lived with his girlfriend at the apartment complex and Sanders knew him. She even stayed with him and his girlfriend for a few days when the electricity had been shut off in her apartment.

{¶3} Appellant asked her if she wanted to smoke a cigarette and Sanders replied that she did and let him in to her home. Sanders testified that appellant was “drunk.” Appellant started feeling on her legs and Sanders asked him to stop, pushing his hand away. Appellant inquired of Sanders - “why are you being so funny acting, you owe me anyways.” Sanders walked into the kitchen to get a drink of water and appellant followed.

{¶4} Appellant took his penis out of his pants and was rubbing up against Sanders’ back. She asked him to stop, but he did not, replying that she needed to “get on my team” and he could help her financially. Sanders tried to unlock the back door to get away, but appellant pushed it closed and locked it. Appellant then threw Sanders

down on a pile of dirty laundry, pulled Sander's shorts over to the side and inserted his penis into her vagina. When he was finished, he grabbed something on the floor and wiped himself off. Then, his cell phone rang and he answered it, walking outside and talking on the phone.

{15} Sanders ran to the neighbor's house and called her mother. Then, she called the police.

{16} Canton City Police Officers Richard Hart and Michael Rastetter testified that they responded to Sanders' residence on May 8, 2009, to investigate a sexual assault allegation. Officer Hart testified that he was present while Officer Rastetter conducted the initial interview with Sanders.

{17} When he arrived, Officer Rastetter testified that Sanders was visibly upset and crying. Patrolmen Hart made the same observation. Sanders told Officer Rastetter that she had been raped and described the details. Upon the advice of the officers, Sanders went to Aultman Hospital's Emergency Room where a Sexual Assault Nurse Examiner ("SANE") examined her for two to three hours.

{18} The vaginal swabs which were collected confirmed that appellant and Sanders engaged in vaginal intercourse. However, according to the testimony of the SANE nurse Christine Barcus there were no signs of force i.e. no signs of physical injury to Sanders body or vaginal cavity and no tears on her clothing. Sanders told Barcus about the rape, again describing the attack consistent with her statements to the responding law enforcement officers. Sanders was crying when she recounted the attack and appeared "upset" to Nurse Barcus.

{¶9} Sanders told Officer Rastetter that appellant had assaulted her. Patrolmen Hart and Rastetter went to the apartment where appellant was staying and arrested him on suspicion of rape. Appellant was given his *Miranda* warnings.

{¶10} Appellant told the officers that he was home all night, which his girlfriend confirmed (1T. at 175). Later he admitted that he had left the home to go to his cousin's house to play cards. (Id. at 175-176). During his conversation with the officers, appellant stated that he did not rape the girl, but that he and Sanders had engaged in consensual sexual intercourse. (Id. at 176-177).

{¶11} Ronnie Owens, appellant's cousin, described an incident on or about May 6, 2009, which he claimed to have personally observed where Sanders spread her legs apart while appellant walked into the kitchen to get a purple power drink. Appellant and Sanders then had sexual intercourse on the loveseat. Specifically, Ronnie testified that he observed Sanders stop at the bottom of the stairs, spread her legs, pulled her shorts to the side and engage in consensual vaginal intercourse with appellant.

{¶12} Appellant claimed the incident occurred the Wednesday before May 8 while the Cleveland Cavaliers were engaged in playoffs and the electricity had been turned off to Sanders' apartment. His account, however, could not be verified, as the Cavalier's playoffs were not scheduled on that date nor was the power off at Sanders' apartment.

{¶13} After hearing the evidence and receiving instructions from the trial court, the jury returned with a verdict of guilty of rape as charged in the indictment.

{¶14} The trial court held a sentencing hearing later that day. Appellant was sentenced to ten years in prison and five years of post release control. He was found to be a Tier III sexually oriented offender. (2T. at 305).

{¶15} Appellant timely appeals, setting forth the following two assignments of error:

{¶16} “I. THE COURT’S ADMISSION OF HEARSAY DENIED APPELLANT A FAIR TRIAL.

{¶17} “II. APPELLANT’S CONVICTION FOR ONE COUNT OF RAPE IN VIOLATION OF R.C. 2907 IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

I & II.

{¶18} Because we find the issues raised in appellant’s first and second assignments of error are closely related for ease of discussion we shall address the assignments of error together.

{¶19} The state, over the objection of counsel, called the two investigating officers to testify in detail about the out-of-court statements given by Sanders to the officers during the course of their investigation. In response to the defense’s objection, the state successfully argued that Sanders’ statements were admissible as excited utterances pursuant to Evid.R. 803(2). No other evidentiary reason was argued or considered for the admissibility of the statements. The trial court permitted the out-of-court statements to be considered by the jury as excited utterances.

{¶20} In his first assignment of error appellant argues that (1) Sanders’ out-of-court statements did not fall within any exception to the hearsay rule, particularly the

statements did not fall within the excited utterance exception; (2) that the trial court's decision to permit the jury to consider the otherwise inadmissible out-of-court statements was unreasonable and an abuse of discretion and/or an erroneous interpretation of Evid.R.803(2); and (3) that the prejudicial effect of the introduction of the inadmissible hearsay statements was to improperly bolster and corroborate the testimony of Jamie Sanders and her version of the events thereby denying the appellant a fair trial.

{¶21} In his second assignment of error appellant contends that his conviction is against the manifest weight and sufficiency of the evidence because the jury was misled in their judgment of Sanders' credibility by the introduction of the hearsay via the two investigating officers.

{¶22} The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. *Id.*; *State v. Feliciano* (1996), 115 Ohio App. 3d 646, 652, 685 N.E.2d 1307, 1310- 1311.

{¶23} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the

prosecution. Instead, we 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. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra. In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St. 3d 380 at paragraph three of the syllabus.

{¶24} There is no dispute that appellant engaged in vaginal intercourse with Sanders. Appellant's main argument is that the admission of Sanders' out-of-court statements to the investigating officers denied him a fair trial<sup>1</sup>.

{¶25} "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119, 509 N.E.2d 383.

{¶26} "The hearsay rule...is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have

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<sup>1</sup> Appellant does not argue that Sanders' statements to Christine Barcus the S.A.N.E. nurse-examiner describing the assault were inadmissible.

misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court.” *Williamson v. United States* (1994), 512 U.S. 594, 598, 114 S.Ct. 2431, 2434.

{¶27} Evid.R. 103(A) provides that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected and, if the ruling is one admitting evidence, a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent. In the case at bar, appellant objected during the testimony of Officer Hart; however, he did not object during the testimony of Officer Rastetter.

{¶28} The state argues that Sanders' statements to Officers Hart and Rastetter constitute excited utterances under Evid.R. 803(2). An “excited utterance” is defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Evid.R. 803(2).

{¶29} For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event. See *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234

{¶30} In *Duncan*, the Ohio Supreme Court emphasized, “ \* \* \* an appellate court should allow wide discretion in the trial court to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event.” *Id.* at 219. “[A]s the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance.” *Id.*, quoting McCormick on Evidence (2 Ed.972) 706, Section 297.

{¶31} “ [E]ach case must be decided on its own circumstances, since it is patently futile to attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be termed a spontaneous exclamation.’ “*State v. Taylor* (1993), 66 Ohio St.3d 295, 303, 612 N.E.2d 316, *supra*, quoting *Duncan*, 53 Ohio St.2d at 219-220, 373 N.E.2d 1234. Rather, we consider whether the declarant is still under the stress of the event or whether the statement was the result of reflective thought. *Id.*

{¶32} The out-of-court statements at issue here were made by Sander’s to the police upon their arrival at the residence in response to call reporting a “sexual assault.” Officer Rastetter arrived within five to ten minutes of the dispatch.

{¶33} The admission of a declaration as an excited utterance is not precluded by questioning which is neither coercive nor leading, which facilitates the declarant’s expression of what is already the natural focus of the declarant’s thoughts, and does not destroy the domination of the nervous excitement over the declarant’s reflective faculties. *State v. Wallace* (1988), 37 Ohio St.3d 87, 524 N.E.2d 466, paragraph 2 of the syllabus; *State v. Green*, Delaware App. No. 01CA-A-12-067, 2002-Ohio-3949 at ¶ 37.

{¶34} We agree with appellee, the fact Officer Rastetter told Sanders to “calm down” before she related the events did not affect the admissibility of Sanders’ statement as an excited utterance. In *State v. Smith* (1986), 34 Ohio App. 3d 180, 517 N.E.2d 933, this court held that a statement given to a police officer by a rape victim was admissible as an excited utterance, even though it was given to the officer thirty to forty-five minutes after the event, and she had previously spoken to neighbors. See also, *State v. Daugherty* (March 16, 1998), Licking App. No. 97-CA-99.

{¶35} We note each of the individuals to whom Sanders related her story, including both police officers, found Sanders to be visibly shaken and upset. This state of emotional excitement, according to the testimony of Christine Barcus the S.A.N.E. nurse-examiner, did not cease, even upon questioning of her in the hospital. In light of these facts, we find the trial court did not abuse its discretion in admitting Sanders’ statements to Officer Rastetter and Officer Hart. Neither officer gave an opinion concerning the credibility or believability of Sanders’ statements. Each officer simply related the information he acquired and the circumstances surrounding the giving of that information. Further, Sanders did testify and was cross-examined concerning her statements.

{¶36} In addition, even if error occurred in the admission of the statements, it was harmless. We note that any error will be deemed harmless if it did not affect the accused's “substantial rights.” Before constitutional error can be considered harmless, we must be able to “declare a belief that it was harmless beyond a reasonable doubt.” *United States v. Chapman*, (1967), 386 U.S.18, 24, 87 S.Ct. 824, 828. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error

is harmless and therefore will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶37} Christine Barcus the S.A.N.E. nurse-examiner related the same information to the jury concerning Sanders description of the sexual assault. Therefore, the testimony of the two investigating officers was cumulative.

{¶38} Because we find there is no reasonable possibility that testimony cited as error by appellant contributed to a conviction, any error is harmless. *State v. Kovac*, 150 Ohio App.3d 676, 782 N.E.2d 1185, 2002-Ohio-6784 at ¶ 42; *State v. Morrison*, Summit App. No. 21687, 2004-Ohio-2669 at ¶66.

{¶39} Corroboration of victim testimony in rape cases is not required. See *State v. Sklenar* (1991), 71 Ohio App.3d 444, 447, 594 N.E.2d 88; *State v. Banks* (1991), 71 Ohio App.3d 214, 220, 593 N.E.2d 346; *State v. Lewis* (1990), 70 Ohio App.3d 624, 638, 591 N.E.2d 854; *State v. Gingell* (1982), 7 Ohio App.3d 364, 365, 7 OBR 464, 455 N.E.2d 1066.” *State v. Johnson*, 112 Ohio St.3d 210, 217, 2006-Ohio-6404 at ¶53, 858 N.E.2d 1144, 1158. See also, *State v. Basham*, Muskingum App. No. CT2007-0010, 2007-Ohio-6995. Accordingly, the testimony of Ms. Sanders, if believed, is sufficient for the jury to find appellant guilty as charged in the indictment.

{¶40} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of rape. We hold, therefore, that the State met its burden of production regarding each element of the crime of rape and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶41} Although appellant cross-examined Sanders and presented the testimony of his cousin in an attempt to argue that the sexual encounter was consensual, and further argued that no forensic evidence supported the allegations of rape, the jury was free to accept or reject any and all of the evidence offered by the appellant and assess the witness' credibility. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E. 2d 492.

{¶42} We conclude the jury, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the crime of rape.

{¶43} The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶44} Appellant's first and second assignments of error are overruled.

{¶45} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J.,

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

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