

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1029 (C.P.C. No. 10CR-04-2482)
Roosevelt J. Henderson, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Law Office of Thomas F. Hayes, LLC, and *Thomas F. Hayes*,
for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Roosevelt J. Henderson, Jr., appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of felonious assault in violation of R.C. 2903.11, a felony of the second degree, as well as two counts of rape in violation of R.C. 2907.02 and one count of kidnapping in violation of R.C. 2905.01, all felonies of the first degree. Because sufficient

evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed on April 21, 2010, defendant was charged with two counts of felonious assault, two counts of rape, and one count of kidnapping arising out of defendant's interaction with the victim on the evening of June 5, 2009 and continuing into the early morning hours of the next day. Following the prosecution's request that the trial court dismiss one count of felonious assault, a jury trial began and ultimately resulted in the jury's finding defendant guilty on all four remaining counts. The trial court sentenced defendant to a total of 18 years of imprisonment and journalized its decision in an entry filed October 5, 2010. Defendant timely appeals.

II. Assignments of Error

{¶3} Defendant assigns two errors on appeal:

- I. The Evidence was Insufficient to Support a Finding of Guilt.
- II. The Verdict was Against the Manifest Weight of the Evidence.

III. First Assignment of Error - Sufficiency of Evidence

{¶4} Defendant's first assignment of error asserts the evidence is insufficient to support a finding of guilty on the charges of felonious assault, rape, and kidnapping. Defendant specifically asserts the state failed to present sufficient evidence that defendant: (1) knowingly caused or attempted to cause physical harm to the victim by means of a knife; (2) compelled the victim, by force or threat of force, to engage in vaginal intercourse or cunnilingus, and (3) restrained the victim for the purpose of facilitating the

commission of any felony. As a result, defendant contends, the trial court erred in not granting his Crim.R. 29 motion for acquittal.

{¶5} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶6} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. The court does not weigh the credibility of the witnesses in reviewing the sufficiency of the evidence. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

A. The Evidence

{¶7} According to the state's evidence, the victim was living in June 2009 at 1736 East Long Street, Apartment M, having lived there for approximately five years. She first met defendant in the early 1980s when she was working as a nurse's assistant. No relationship developed between them then, and she did not see him again until "the end of 2008, 2009." (Tr. 43.) At that time, she saw defendant standing outside a store she was

entering. In early May 2009, he came to stay at her apartment, and a sexual relationship with him began. After about two weeks, she realized defendant was stealing from her, and she informed him he could not be at her apartment when she was absent. Toward the end of May, she asked him to leave because he had not found a job and did not choose to go to church with her; he left when she asked.

{¶8} She next saw defendant on the evening of Friday, June 5, 2009. She was washing clothes and cleaning her apartment when defendant came to the apartment at about 10:00 p.m. or 10:30 p.m. They talked about almost nothing until a neighbor, Sam Richards, knocked on the door. Richards periodically visited with her, but they were just neighbors. When Richards knocked on the door, defendant opened the door, rudely informed him the victim was busy and told him not to come back. Defendant slammed the door.

{¶9} At that point, defendant accused the victim of having a sexual relationship with Richards, pushed her against a wall and hit her with both his fists and his open hand. Knowing the victim had fibromyalgia, he stomped on her left hip where she would most feel the impact. He then retrieved a knife from the kitchen drawer, pointed it at her, and said he would hurt her. Although defendant wanted money from the victim, he also demanded to examine her sheets to see if any semen stains were on them.

{¶10} Defendant then made the victim take off her clothes, stating he wanted to smell her to see if she had been having sex. She complied because she did not want to be hurt anymore, was tired of his hitting her, and did not know what he would do with the knife. Once the victim's clothes were off, he put his mouth to her vagina, stuck out his tongue, and touched her vagina. He let his pants drop and inserted his penis inside the

victim's vagina. She did not resist, as not only did her eyes and head hurt from his hitting her, but he had a knife. When he stopped, he went into the bathroom, retrieved one of the rags the victim used to clean the bathroom, and wiped her with it. He said he "wanted to do it again." (Tr. 60.) The victim, however, told him she had money but needed to go to an automated teller machine to retrieve it. With that, he told her to get dressed, go into the bathroom and clean herself.

{¶11} As the victim did so, she dialed 911 on the phone near the bathroom. Defendant walked past her, and because the victim believed he saw her with the phone, she put it down. When it began to beep, she picked it up and again dialed 911. She hung up, and a 911 operator called back, asking the victim a series of questions to determine her circumstances. Defendant asked who it was, but the victim told him a neighbor was concerned about whether she was okay.

{¶12} The victim stalled to give police time to arrive, but defendant finally said they had to leave to get the money. Defendant and the victim walked out of her apartment and started up a hill, but the victim, knowing police would come on Long Street, suggested they instead proceed that way. When the police cruiser pulled up, the victim ran over to it and told the officer she had been physically and sexually assaulted. The police called medics who took her to Ohio State University Hospital East Emergency Room.

B. The Charges

{¶13} The first count for the jury's consideration was felonious assault. Defendant was charged with knowingly causing or attempting to cause physical harm to the victim by means of a deadly weapon or dangerous ordnance, a knife. See R.C. 2903.11(A)(2). "A

person acts knowingly regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). The evidence is sufficient to support all of the elements of felonious assault.

{¶14} Under Ohio law, " '[e]vidence that a defendant pointed a deadly weapon at another, without further evidence regarding the defendant's intention, is insufficient to sustain a conviction for felonious assault under R.C. 2903.11(A)(2).' " *State v. Mincy*, 1st Dist. No. C-060041, 2007-Ohio-1316, ¶66, citing *State v. Brooks* (1989), 44 Ohio St.3d 185, syllabus. *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶33. By contrast, " 'the act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use the weapon to cause harm, is sufficient evidence' to sustain a conviction for felonious assault under R.C. 2903.11(A)(2)." *Id.*, quoting *Mincy* at ¶67, quoting *State v. Green* (1991), 58 Ohio St.3d 239, syllabus. See also cases cited in *Ryan*: *State v. Smith*, 4th Dist. No. 06CA7, 2007-Ohio-502, ¶39 (concluding defendant's holding victim at knifepoint, "coupled with his repeated threats to cause bodily harm constitute sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that Smith committed felonious assault"); *State v. Wertz* (Oct. 30, 1998), 5th Dist. No. 98 CA 09 (determining evidence of the defendant's putting knife to victim's throat and threatening to cut victim's throat or kill victim was sufficient to support conviction for felonious assault with a deadly weapon).

{¶15} Here, defendant not only struck the victim numerous times with either his fists or an open hand and stomped on her left hip, but he also retrieved a knife from the

kitchen drawer and used it throughout the remainder of the ordeal in the victim's apartment. He pointed the knife at the victim and threatened to hurt her with it, stating "I will kill you" or "I could hurt you right now." (Tr. 57.) Holding the knife and moving it around, defendant continued to hit her. As a result of defendant's actions, the victim sustained injuries to her face and eye; she also had a small laceration on her index finger. On such evidence, a reasonable juror could conclude that defendant, by knowingly wielding the knife and threatening the victim, caused or attempted to cause physical harm to the victim.

{¶16} To convict defendant of rape, the state was required to prove defendant engaged in sexual conduct with the victim, purposely compelling her to submit by force or threat of force. See R.C. 2907.02(A)(2). R.C. 2907.01 defines sexual conduct to mean "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." According to the definition, "[p]enetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2901.01(A)(1) defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶17} Here, the victim testified defendant ordered her to take off her clothes, he put his mouth on her vagina, and he touched her vagina with his tongue. With that testimony, the state presented sufficient evidence to prove defendant engaged in cunnilingus with the victim. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶86, cert. denied, 540 U.S. 955, 124 S.Ct. 405 (finding that penetration is not required to commit

cunnilingus; "[r]ather, the act of cunnilingus is completed by the placing of one's mouth on the female genitals"). In addition, the victim testified defendant inserted his penis in her vagina and engaged in sexual intercourse with her, evidence sufficient to support sexual conduct by vaginal intercourse. Although defendant suggests the evidence is insufficient because the state did not offer any forensic evidence to support the victim's testimony, such testimony is not required. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶53, cert. denied (2007), 552 U.S. 836, 128 S.Ct. 74.

{¶18} Finally, the state presented sufficient evidence that defendant used force to compel the victim to submit. Not only did defendant threaten the victim with the knife, but the victim testified she complied when defendant told her to take off her clothes, as she did not want to be hurt anymore, was tired of defendant's hitting her, and did not know what defendant would do with the knife.

{¶19} The final charge was kidnapping, requiring the state to prove defendant, by force, threat, or deception, restrained the victim's liberty for the purpose of facilitating the commission of a felony, to engage in sexual activity, or both. See R.C. 2905.01(A)(2) and (4). The victim testified defendant restrained her of her liberty in her own apartment by virtue of his beating her and threatening her with the knife. Only with the assistance of the 911 operator and police was she able to escape his restraint. During the course of the restraint, enforced with physical abuse and threats, he twice raped the victim. On those facts, a reasonable juror could conclude defendant used force or threat of force to restrain the victim for purposes of either committing felonious assault, rape, or both.

{¶20} Defendant's first assignment of error is overruled.

IV. Second Assignment of Error - Manifest Weight of the Evidence

{¶21} Defendant's second assignment of error contends that, even if the evidence is sufficient to support the charges, the convictions are against the manifest weight of the evidence.

{¶22} When presented with an argument concerning the manifest weight of the evidence, we weigh the evidence in a limited manner to determine whether sufficient competent, credible evidence supports the jury's verdict and permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶23} Defendant suggests the convictions are against the manifest weight of the evidence because (1) the testimony of Sam Richards conflicted with that of the victim, and (2) no forensic evidence corroborated the victim's testimony concerning the rape convictions.

{¶24} Defendant initially contends inconsistencies in the victim's testimony as compared with that of other witnesses render her testimony suspect. In particular, defendant notes the victim testified that Sam Richards knocked on her door shortly after

defendant arrived, but Richards stated he did not appear at her apartment until 1:00 or 1:30 in the morning, after he was done working for the day. A discrepancy in the testimony of the two witnesses concerning the time Richards arrived does not render the verdict against the manifest weight of the evidence. Rather, it raises a credibility issue the jury properly may resolve. Moreover, although Richards and the victim disagreed on the time of their encounter, Richards largely corroborated the victim's testimony in significant aspects: he testified he heard defendant and the victim arguing about money, and he described the same exchange with defendant that the victim related in her testimony.

{¶25} More significant to defendant's second assignment of error, defendant points to the lack of forensic evidence to corroborate the victim's claim that defendant raped her, as neither her clothes, nor the washcloth she stated defendant used to wipe her, bore DNA evidence. In the absence of forensic evidence corroborating the victim's testimony, defendant contends the verdict is against the manifest weight of the evidence.

{¶26} Although defendant accurately notes the absence of forensic evidence regarding the sexual assault, a point emphasized during the trial, the state's evidence explained the lack of forensic corroboration. Kimberly Ann Nye, an R.N. at OSU East Hospital's emergency room, testified that vaginal trauma is not always evident following forceful intercourse. The nurse's testimony, however, corroborated other aspects of the victim's testimony, noting the victim complained of head pain, had bruising and abrasions on her face and head, and was tearful and disheveled. Moreover, Jamie Armstrong, a forensic DNA analyst with the Columbus Police Crime Lab posited a number of reasons why DNA evidence may be lacking.

{¶27} In addition, underlying defendant's argument is the supposition that defendant ejaculated. The evidence, however, is less than clear on that issue and may explain the lack of DNA or semen for forensic analysis. Similarly, although the victim testified defendant licked her neck and forehead, absence of dried saliva stains may be explained in the evidence that defendant told the victim to go to the bathroom to clean herself before they went to the automated teller machine for money.

{¶28} Accordingly, the jury reasonably could have concluded, consistent with the testimony of the state's witnesses, that the lack of such forensic evidence was neither unusual nor inconsistent with the victim's testimony.

{¶29} Defendant's second assignment of error is overruled.

V. Disposition

{¶30} Having overruled defendant's two assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.
