

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-38
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-743
v.	:	
	:	
JEROME W. JOHNSON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 25th day of June, 2010.

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STEPHEN K. HALLER, Atty. Reg. #0009172, by STEPHANIE R. HAYDEN, Atty. Reg. #0082881, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

DAVID SAMS, Atty. Reg. #0055235, Post Office Box 40, West Jefferson, Ohio 43162
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} This case is before on us on the direct appeal of Defendant-appellant Jerome Johnson from his conviction and sentence for Rape. Johnson argues that his conviction is based on insufficient evidence and that it is against the manifest weight of the evidence. He also claims that he was denied the effective assistance

of trial counsel and that the trial court erred in imposing a maximum sentence. We conclude that Johnson's conviction is supported by sufficient evidence, and it is not against the manifest weight of the evidence. We also conclude that Johnson was not denied the effective assistance of trial counsel and that the trial court did not err in imposing a maximum sentence.

I

{¶ 2} In October 2008, sixteen-year-old T.W. and her seventeen-year-old sister, C.W., went to visit their cousin, Marquita, and Marquita's boyfriend, Maurice. There, T.W. met Maurice's 41-year-old cousin, Jerome Johnson, for the first time. T.W., her sister, Maurice, and Johnson left to attend an event in which Marquita and some of her sorority sisters were competing. After the event, the five got something to eat before returning to the apartment. Marquita left to take T.W.'s sister home. When Marquita returned, she, T.W., Maurice, and Johnson had an alcoholic drink and talked for a while before the men left for a party. Marquita went to bed, and T.W. laid down on the couch and fell asleep.

{¶ 3} The next morning, Maurice and Johnson returned to the apartment with Maurice and Marquita's infant son, whom they had picked up from a friend's house. Johnson laid on the love seat, and Maurice went into the bedroom where he and Marquita played with their son and watched television. Three times Maurice went into the living room and kitchen and saw Johnson and T.W. asleep on the couches.

{¶ 4} A short time later, T.W. woke from a deep sleep and found Johnson on top of her. He had pushed aside her shorts and underwear, and his penis was

inside her vagina. T.W. told Johnson to stop, but he did not. She could not get up because he was holding her down with his hand on her back. After a brief struggle, T.W. was able to elbow Johnson off of her, and they both fell to the floor. Johnson got up and sat on the couch. When T.W. asked him why he would do something like that to her, he just laughed. T.W. went down the hall to the bathroom, but the door was stuck.

{¶ 5} Maurice heard noise in the hall. He found T.W. at the door, and he invited her into the bedroom to play with the baby. Seeing that T.W. looked scared and upset, Marquita and Maurice asked her what happened. At first T.W. just said that she wanted to go home, but eventually, after Maurice went out to the living room to talk to Johnson, T.W. told Marquita that Johnson had raped her. They called Marquita's mom, T.W.'s dad, and the police.

{¶ 6} At first, Johnson told Maurice that nothing had happened with T.W. Johnson then told Maurice that he had "just felt on" T.W. Maurice returned to the bedroom and listened to T.W.'s explanation. Johnson came into the room; he reached out toward T.W. and told her that he was sorry. T.W. flinched away from him and told him to stay away from her. Maurice told Johnson that they needed to leave the apartment until the police arrived, in order to avoid any potential conflict between Johnson and T.W.'s father. Although Maurice tried to convince Johnson to talk to the police, he refused to return to the apartment.

{¶ 7} When the police arrived, they found T.W. visibly upset. After T.W. told the officers what had happened, she was taken to the hospital where a rape kit was collected. The nurse observed that T.W. was very sad. The nurse observed dried

semen stains on each of T.W.'s buttocks, and both she and the doctor saw redness and swelling toward the back of T.W.'s vaginal area. The nurse also recovered sperm samples belonging to Johnson from T.W.'s vagina.

{¶ 8} In the meantime, an officer saw a man fitting the suspect's description. The officer pulled over and asked Johnson if his name was Jerome. Johnson acknowledged who he was, and without prompting, turned around, placing his hands behind his back to be handcuffed. Johnson was indicted on one count each of Rape and Gross Sexual Imposition.

{¶ 9} Johnson testified that he and T.W. had been flirting all evening, yet he could not remember anything that she said or did to give him that impression. Their conversation was general, such as where she lived and her college plans. He denied knowing T.W.'s age. He admitted that T.W. never said anything that led him to believe that she wanted to have sex with him, nor did she ever hug or kiss him.

{¶ 10} When Johnson and Maurice returned to the apartment with Maurice and Marquita's son, Johnson first laid down to sleep on the love seat. Deciding it was too short, he told T.W. to scoot over, and he laid down on the couch with her. Although T.W.'s eyes were closed, Johnson assumed that she was awake. He began caressing her legs and vaginal area. He testified that when T.W. moaned and pushed back against him, he moved aside her shorts and underwear and inserted his penis into her vagina from behind. He claimed that the sexual intercourse was consensual and that when she told him to stop, he did. Johnson insisted that he told Maurice that he had sex with T.W.

{¶ 11} When T.W. testified, she denied any physical contact with Johnson

prior to the rape. She explained that she did not flirt with Johnson, nor was there any conversation that even hinted at a sexual interest, by either party. Neither Marquita nor Maurice observed any physical contact or flirting between the two, nor did they hear any conversation indicating any sexual interest by T.W. in Johnson.

{¶ 12} A jury found Johnson guilty of both charges. The trial court merged the Gross Sexual Imposition conviction into the Rape conviction and ordered a maximum, ten-year sentence. From his conviction and sentence, Johnson appeals.

II

{¶ 13} Johnson's First Assignment of Error is as follows:

{¶ 14} "THE DEFENDANT-APPELLANT'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE AND IS OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶ 15} In his First Assignment of Error, Johnson argues that his Rape conviction is not supported by sufficient evidence and that it is against the manifest weight of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "An appellate court's function when reviewing the

sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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."

{¶ 16} In contrast, when reviewing a judgment under a manifest weight standard of review "[t]he court 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 [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction." *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 17} Johnson was convicted of Rape, in violation of R.C. 2907.02(A)(2), which states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." He claims that the conviction should be vacated because the State failed to prove the element of force. He insists that the sexual activity was consensual, and he stresses that when the victim told him to stop, he did.

{¶ 18} Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A). "The

force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58, quoting *State v. Labus* (1921), 102 Ohio St. 26, 38-39. When a victim is asleep and not aware of the defendant’s acts, only minimal force is necessary to support a Rape conviction under R.C. 2907.01(A)(2). *State v. Clark*, Cuyahoga App. No. 90148, 2008-Ohio-3358, ¶17. More specifically, the *Clark* court held: “The manipulation of a sleeping victim’s clothing in order to facilitate sexual conduct constitutes force.” *Id.*, citations omitted. See, also, *State v. Burton*, Gallia App. No. 05CA3, 2007-Ohio-1660, ¶38, citations omitted.

{¶ 19} T.W. testified that she awoke to find Johnson raping her. Not only had he pushed her shorts and underwear to the side in order to gain access to her vagina, but he was holding her down with his hand on her back. Moreover, when T.W. told Johnson to stop, he did not, and the rape ended only after she was able to elbow him off of her and onto the floor. This evidence is sufficient to prove the element of force.

{¶ 20} Viewing the State’s evidence, as we must, in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of Rape to have been proven beyond a reasonable doubt. Therefore, Johnson’s conviction is supported by sufficient evidence. Nor do we believe that the jury clearly lost its way in convicting Johnson of Rape.

{¶ 21} Johnson’s First Assignment of Error is overruled.

{¶ 22} Johnson's Second Assignment of Error is as follows:

{¶ 23} "THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶ 24} Johnson next claims that he was denied his constitutional right to the effective assistance of trial counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.*

{¶ 25} Johnson contends that his trial counsel was ineffective because counsel "failed to move for a directed verdict or otherwise defend on the precise issue raised by appellant" in his First Assignment of Error. Trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶146, citations omitted. Although counsel did not move for a directed verdict, which is provided for in the Ohio Rules of Civil Procedure, but not in the Criminal Rules, he did make a Crim.R. 29 motion for acquittal, which is the appropriate vehicle in a criminal case for testing the sufficiency of the evidence. For the reasons set forth in Part II, above, we conclude that the trial court properly overruled the motion.

{¶ 26} Johnson's Second Assignment of Error is overruled.

IV

{¶ 27} Johnson's Third Assignment of Error is as follows:

{¶ 28} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE IMPOSITION OF A MAXIMUM PRISON TERM CONTRARY TO LAW."

{¶ 29} Finally, Johnson points out that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, is predicated upon *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and he claims that the United States Supreme Court overturned *Blakely* in *Oregon v. Ice* (2009), 555 U.S. ---, 129 S.Ct. 711, 172 L.Ed.2d 517. He therefore concludes that we are returned to the pre-*Foster* requirement of R.C. 2929.14(C), which stated that before the trial court could impose a maximum sentence, the court was required to either find that the defendant committed the worst form of the offense or that he is the worst form of offender. There are several flaws with Johnson's argument.

{¶ 30} Johnson failed to raise this issue in the trial court below and has waived the issue for appeal. *State v. Davis*, 116 Ohio St.3d 414, 2008-Ohio-2, ¶377, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Nevertheless, we will still consider a forfeited claim under a plain-error analysis. *Id.* at ¶378, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶24. The stringent test for plain error

requires the party claiming plain error to show that “(1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial.” *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68; Crim.R. 52(B). We find no plain error in this case.

{¶ 31} Johnson mistakenly believes that *Ice* overturned *Blakely*. To the contrary, in *Ice* the Supreme Court merely declined to extend *Blakely* to cases involving statutory schemes, like Oregon’s, regarding the imposition of *consecutive* sentences for multiple convictions. *Ice* neither involved, nor addressed, the imposition of a maximum sentence for a single crime, as in the case before us. In this case, the trial court merged Johnson’s Gross Sexual Imposition conviction into his Rape conviction and ordered only a single sentence. We find nothing in *Ice* that applies to the imposition of sentences not involving consecutive sentences.

{¶ 32} Johnson’s Third Assignment of Error is overruled.

V

{¶ 33} All of Johnson’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

Stephen K. Haller
Stephanie R. Hayden
David Sams
Hon. J. Timothy Campbell