

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	Case No. 09CA3112
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
SCOTTIE A. BUSH,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	Released 12/17/09

APPEARANCES:

Pamela C. Childers, Chillicothe, Ohio, for appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} Scottie Bush appeals his conviction for rape, which the victim alleged occurred in her room early one morning. The police corroborated the victim’s testimony with a towel from the victim’s room that contained spermatozoa and Bush’s D.N.A. Bush denied raping the victim and explained the evidence by contending he masturbated in her room when she was not present. A jury convicted Bush and the court sentenced him accordingly.

{¶2} First, Bush argues that the State produced insufficient evidence to prove that he used force to compel the victim to submit to sexual conduct. However, the victim testified that Bush violently flipped her on to her back, used his arms to hold her legs apart, laid on top of her, and applied his weight before engaging in sexual intercourse in spite of her request to stop. This testimony, if believed, clearly satisfied the “force” element of rape.

{¶3} Second, Bush contends that his conviction is against the manifest weight of the evidence. Essentially, he argues that his version of events was more believable than the victim's. However, credibility determinations are best left to the fact finder, in this case, the jury. And because the State produced substantial credible evidence going to every element of the offense, we see no manifest miscarriage of justice in the jury's verdict.

I. Statement of Facts

{¶4} Because Bush was having problems with his girlfriend, he began staying as a guest at the home of his half-sister, brother-in-law, and his three minor nieces. The victim was one of these nieces.

{¶5} Bush arrived at his half-sister's house sometime in the late night hours between Tuesday, May 6 and Wednesday, May 7. The victim testified that she was cleaning up her room, doing laundry, and preparing for a minor surgery the next day. Bush and the victim's father stayed up watching television. Her father went to bed at around 1:30 to 1:45 AM.

{¶6} At around 2:00 AM, the victim came out and asked Bush for help moving a large ferret cage that was blocking her closet door. After he helped her move the cage, he continued to stand at her door as she was putting clothes into the closet. Eventually he asked her if she wanted him to turn out her lights. She said yes. The lights went out, she got into her bed, said goodnight, and the door closed. She believed he had left the room.

{¶7} Moments later she felt something rub up against her leg. The victim was laying stomach-down, and she attempted to look around to see who it was. Bush

immediately lifted up her shirt and began to massage her back, stating that “he knew her back was hurting.” She told him her back was okay and that she did not want him to rub it. Bush continued, stopping momentarily to get some lotion, and then began to apply the lotion while he continued massaging. She asked him to stop.

{¶8} He began rubbing her more forcefully. He was massaging the side of her body and making contact with part of her breasts. He then made several attempts to flip her over onto her back. She resisted and attempted to stay on her stomach. On his third or fourth attempt he used enough force that she flipped over, her bed sheet went off the bed, and she nearly fell off the bed. He then began to massage her stomach and breasts. She began to cry and asked him to stop.

{¶9} Bush began to rub her vaginal area through her clothing. He then put his hand down her pants and attempted to digitally penetrate her vagina. She indicated that she was menstruating, had a tampon in, and that he was hurting her. He then got on top of the victim. He used his arms to hold her legs open. He then moved her shorts and underwear to the side, and tried to insert his penis in her vagina. She again indicated she had a tampon in and that he was hurting her. He ripped out the tampon. He then engaged in vaginal intercourse for approximately two or three minutes. The victim was uncertain whether he ejaculated inside of her, or at all.

{¶10} After he was done, he asked the victim if she had a towel. She reached over to a chair that had folded towels on it and handed him one. He wiped the victim’s vagina and legs and then wiped himself. He threw the towel at the victim and told her to put it in the dirty laundry. She threw it underneath the head of her bed. He then told the

victim if anything was ever said about what happened that night, he would do the same to her sisters.

{¶11} The victim stated that she cried for awhile, and then eventually fell asleep. Her mother woke her up later that morning. She got ready for her surgery and showered. She stated that she used a wash cloth and “scrubbed everywhere off that he touched.” At the doctor’s office, the victim told her grandmother what had occurred. She explained that she waited until she was at the doctor’s office because she was concerned that her father would kill Bush. She had her minor surgery and then went to the Adena Regional Medical Center to see a sexual assault nurse examiner and have a rape kit processed.

{¶12} Nurse Brenda Skaggs administered the rape kit. She also testified at trial. Using a colposcope, Skaggs took magnified photographs of the interior of the victim’s vagina, which showed a laceration or abrasion on the victim’s hymen. Skaggs testified that this laceration was consistent with “blunt force trauma” and could only have been caused by some object having been inserted into the victim’s vagina.

{¶13} On June 4, the victim visited the Child Protection Center and was examined by Doctor Scott McCallum. McCallum performed a physical examination on the victim and also took photographs of the interior of her vagina with a colposcope. He compared the photographs taken by him with those taken a month earlier by Skaggs. He testified that the earlier photographs showed a laceration to the hymen. The more recent photographs showed that the laceration was healing. McCallum opined that the healing observed through these photographs demonstrated that the laceration was the result of acute blunt traumatic injury to the hymen, and not some pre-existing condition.

{¶14} Ross County Detective Keith VanHoose also testified on the State's behalf. On May 7, he met up with the victim's family at the hospital. He spoke with the victim's mother and then went out to the house. VanHoose found Bush there and asked if he would speak with him. After Bush agreed, VanHoose conducted a recorded interview in his police cruiser.

{¶15} During the interview, Bush at first seemed confused – he told the detective that he first got to the house over the weekend, sometime between Saturday, May 3, and Sunday, May 4. When VanHoose informed him that there was a complaint that he had done something wrong to one of his nieces, he was emphatic that nothing had happened. VanHoose then asked whether he had had any interactions with any of his nieces. He admitted to having an argument with the victim. VanHoose asked him whether he may have masturbated in the victim's room. He admitted that he had. He claimed to have masturbated in her room when she was not there on Saturday. Bush said he ejaculated into his hand. He then went to the bathroom, used toilet paper to wipe his hand, and then flushed the toilet paper. VanHoose terminated the interview and went to collect evidence from the victim's room.

{¶16} VanHoose collected two towels from the room, one at the foot and one underneath the head of the bed. He located a used tampon on the floor. He also collected bottles of lotion, the sheets and pillowcases from the victim's bed, and the clothes she was wearing during the alleged assault.

{¶17} VanHoose then conducted a second interview with Bush. He told Bush that his story did not match the evidence inside the victim's room. Bush then admitted he had made an error about the date he masturbated in the victim's room. He stated

that he had masturbated in the room on Monday because he did not arrive over the weekend. VanHoose then told him he found a tampon on the floor, and that the victim was menstruating. He asked Bush if it was unusual that a woman would just throw her used tampon on the floor. Bush implied that the house was a mess and that this would not be out of the ordinary. VanHoose replied that he had found other used tampons in the garbage. Bush still denied having any improper contact with the victim.

{¶18} The State called two forensic scientists from Ohio B.C.I. (Bureau of Criminal Identification) who tested the evidence seized from the victim's room, the biological matter contained in the rape kit, and oral swabs from Bush. The substance of their testimony was that no semen was found on swabs obtained during the victim's rape kit examination, the victim's clothing, the sheets on her bed, or the towel located at the foot of the bed. Spermatozoa were identified on a portion of the towel found underneath the head of the bed. This portion of the towel tested positive for both the victim's and Bush's D.N.A.

{¶19} Bush testified on his own behalf at trial and denied having any sexual relations with the victim. He stated that when he got home from work on Tuesday evening, everyone was in the living room watching television. He wanted to call his girlfriend "in private," so he went into the victim's room. While on the phone, he masturbated and ejaculated onto his hand. He saw a towel on the floor and used the towel to clean the semen from his hand. He put the towel back on the floor.

{¶20} After coming out of the room, he got into an argument with the victim. The substance of this argument was that the victim disapproved of his girlfriend. He also said that she confronted him about some money he allegedly owed her father. On

cross-examination, he stated that she threatened him in some respect, although it is not clear what the threat was concerning, perhaps the debt owed to her father.

{¶21} On cross-examination the State inquired about the inconsistencies in his interview with VanHoose and his trial testimony. He claimed they were the result of nerves and confusion.

{¶22} After the jury found the defendant guilty, the trial judge sentenced him to nine years incarceration. This appeal followed.

II. Assignments of Error

{¶23} Bush raises the following assignments of error:

I. THE TRIAL COURT'S VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF EACH ELEMENT OF THE OFFENSE TO SUSTAIN A CONVICTION BEYOND A REASONABLE DOUBT.

II. THE TRIAL COURT'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE AND THEREFORE VIOLATES APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND [THE] FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

III. Sufficiency of the Evidence

{¶24} In his first assignment of error, Bush asserts that his conviction is not supported by sufficient evidence because the State failed to produce sufficient evidence of "force." He claims that no "violence, compulsion, or constraint" was exerted against the victim, she merely said "don't hurt me, please stop." Bush also argues that the only evidence of "force" was the testimony of a nurse and doctor who stated that the victim's hymen suffered "blunt force trauma" and that this does not necessarily show that penetration occurred.

{¶25} 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. See, e.g., *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. 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. *Id.*, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. Reviewing courts will not overturn convictions on sufficiency of evidence claims unless reasonable minds could not reach the conclusion reached by the trier of fact. See *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 162, 749 N.E.2d 226; *State v. Treesh* (2001), 90 Ohio St.3d 460, 484, 739 N.E.2d 749.

{¶26} Furthermore, a reviewing court is not to assess “whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (Cook, J., concurring); see, also, *State v. Noling* (2002), 98 Ohio St.3d 44, 49-50, 781 N.E.2d 88, quoting *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (stating that “the trier of fact *** is burdened with assessing the credibility and veracity of witnesses”). The trier of fact may believe all, part or none of the testimony of each witness who appeared before it. See, e.g., *State v. Long* (1998), 127 Ohio App.3d 328, 335, 713 N.E.2d 1.

{¶27} The jury convicted Bush of rape, in violation of R.C. 2907.02(A)(2), which provides “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” The Revised Code defines sexual conduct as “vaginal intercourse between a male and female ***

[p]enetration, however slight, is sufficient to complete vaginal or anal intercourse.” R.C. 2907.01(A). “Force” means “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1).

{¶28} The record here contains sufficient evidence to support Bush’s conviction. The victim testified that she was laying stomach-down on the bed when the attack began. Bush lifted up her shirt as far as it would go and began to massage her back. She testified that “he started massaging my back a little bit more rougher. I just had a feeling he was going to do something to me.” Next, she stated that he began to massage her sides, so that he was touching part of her breast. The victim stated that throughout this massage she repeatedly asked him to stop, and he responded that she was “okay.”

{¶29} Next, the victim testified that Bush grabbed her right side and tried to flip her over repeatedly. She attempted to stay stomach-down. On the third or fourth try, “he used enough force it just rolled me over to where I almost fell off the bed.” He then lifted up her shirt and began to massage her stomach and breasts for two to three minutes. Bush then got up, stood beside the bed, and began to touch her through her clothes in her vaginal area. He moved his hand underneath her shorts and underwear and tried to insert his fingers into her vagina. She told him “to stop because I had a tampon in and it was hurting.”

{¶30} Next, she stated he “got on top of me and was laying down on me and used his arms to hold my legs open and he moved my shorts and underwear, pulled them over to the side, and tried to stick his penis in my vagina.” She stated that his chest was on top of her and that she could feel his weight. She again indicated to Bush

that she had a tampon in and it was hurting. He “ripped it out” with his fingers, threw it, and then inserted his penis in her vagina. He engaged in vaginal intercourse with the victim for two or three minutes.

{¶31} This testimony is legally sufficient to support the rape charge. Force was established when the victim stated that Bush laid on top of her, applied his weight, and engaged in intercourse in spite of her request to stop. This clearly demonstrates “physical constraint” in accordance with the Revised Code definition of force. Physical constraint was also shown through the victim’s testimony that he used his arms to hold her legs apart. And force could be substantiated by the violent manner in which Bush flipped the victim onto her back.

{¶32} Bush seems to confuse the issues of “force” and “sexual conduct.” He claims that the only evidence of “force” was the photographic evidence and supporting testimony indicating blunt force trauma to the victim’s hymen. He asserts that this evidence does not prove penetration occurred. But penetration is relevant to the “sexual conduct” element of rape. The State must prove the separate and distinct concept of “force” to show a person was compelled to submit to sexual conduct. Accordingly, the evidence of “blunt force trauma” here tends to show that the victim was penetrated. Skaggs testified that this type of injury can only occur when some object enters the vagina. McCallum testified that something had to be “banging” against the victim’s hymen. This evidence is less probative to show that force was used to compel the victim to have intercourse. Certainly, an injury to the hymen could indicate violent sex and lead a jury to believe force was used to compel the victim. But here it was used by the State to corroborate the victim’s statement that penetration occurred.

{¶33} Bush's argument that there was no evidence of "violence, compulsion, or physical constraint" is meritless. We are firmly convinced that any rational trier of fact could have found the essential elements of rape proven beyond a reasonable doubt. Accordingly, we overrule this assignment of error.

IV. Manifest Weight of the Evidence

{¶34} In his second assignment of error, Bush asserts that his conviction was against the manifest weight of the evidence. In essence, he contends that his version of events was more believable than the victim's. He states that the D.N.A. evidence found on the towel, which revealed both his and the victim's D.N.A., is consistent with his testimony that he masturbated into his hand and used the victim's towel to clean up. He further contends that, had he raped the victim, his D.N.A. evidence would have been located on the victim's clothing or the fitted sheet on her bed. And he argues that the victim's testimony is unbelievable because during the several minutes when he was massaging her, she did not cry out, even though she allegedly testified that "making a sound would have stopped the act."

{¶35} In deciding whether a criminal conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences there from, consider the credibility of the 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 granted. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶36} While an assignment of error based on the manifest weight of the evidence permits the appellate court to consider the credibility of witnesses, that power

is not absolute. The weight to be given to evidence and decision regarding the credibility of witnesses are still issues primarily placed on the trier of fact. *State v. Murphy*, Washington App. No. 03CA12, 2003-Ohio-4939, at ¶15, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact is still in the best position to gauge the credibility of witnesses and the weight of evidence as it is presented at trial. *Id.* Appellate courts are cautioned to overrule criminal convictions on the basis of the manifest weight of the evidence in only exceptional cases in which the evidence weighs so heavily against the conviction that the jury clearly lost its way. *State v. Brown*, Athens App. No. 09CA3, 2009-Ohio-5390, at ¶24. In general “[a] reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *Id.*, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus.

{¶37} As we explained in the preceding section, R.C. 2907.02(A)(2) provides that “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” The Revised Code defines sexual conduct as “vaginal intercourse between a male and female *** [p]enetration, however slight, is sufficient to complete vaginal or anal intercourse.” R.C. 2907.01(A). “Force” means “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1).

{¶38} Upon reviewing the entire record, we cannot say the jury lost its way and created a manifest miscarriage of justice. Bush’s argument is that his story was more credible than the victim’s account, and the jury lost its way in believing her. We do not

agree. There is no evidence in the record that the victim ever waived in her account of the rape. Her testimony was consistent on both direct and cross-examination.

Bush's version of events was inconsistent from the start.

{¶39} Bush told VanHoose during the first interview that he arrived at the victim's residence over the weekend, and he swore to having masturbated in the victim's room on Saturday. He later said that he masturbated in the room on Monday because he did not arrive over the weekend. At trial, he claimed the masturbation occurred on Tuesday evening.

{¶40} In describing the act of masturbation, Bush initially explained that he ejaculated on to his hand. When VanHoose asked what he did with the semen he quickly responded that he walked to the bathroom, got some toilet paper, wiped off his hand, and then flushed it down the toilet. At trial Bush told a different and more detailed story regarding the manner in which he masturbated in the victim's room. He now claimed he was alone in the victim's room, talking to his girlfriend on the phone, and decided to masturbate. After ejaculating, he found a towel on the floor and wiped himself off with it. He placed the sullied towel back on the floor.

{¶41} Bush admitted that he had been in an argument with the victim. He claimed that the victim disapproved of the girlfriend. This was consistent with his trial testimony. But during the interview he said the argument got "kind of heated." At trial he alleged that the victim threatened him. He was unable to explain why he had not mentioned this to the police detective.

{¶42} When VanHoose asked Bush where he slept during his stay, he initially stated that he slept on the couch. Soon thereafter, he admitted sleeping in the victim's room. He then claimed he had not slept in her room but only laid on her bed.

{¶43} It seems apparent that the jury had a valid reason to doubt Bush's testimony. The jurors may well have recognized that his story about the date of the masturbation changed three times. They could also have interpreted the change in his story about the manner in which he disposed of the ejaculate as an attempt to conform his version of events to the State's evidence. The jurors were free to reject his claim that these and other inconsistencies were the result of nervousness or loss of memory.

{¶44} On the other hand, the victim's trial testimony was consistent and conformed to the physical evidence. She testified that Bush forcibly penetrated her vagina with his penis. She indicated that after the sex act Bush used a towel to wipe her vagina and legs and then used the towel to clean himself. She claimed to have thrown this towel underneath the head of her bed. Bush's spermatozoa and D.N.A. were located on the towel found underneath the head of the bed. Bush testified that the towel he used was located on the floor. On cross-examination, he could not recall exactly where it was when he picked it up, other than it was on the floor. He also could not specify exactly where he placed the towel after using it. No semen was found on the towel located at the foot of the bed.

{¶45} The absence of spermatozoa on the victim's clothing, or on her sheets does not convince us otherwise. She was unsure whether he ejaculated inside of her, or at all. It is conceivable that he did not ejaculate into the victim, but ejaculated onto the towel after wiping her. Regardless, the crime of rape does not require the State to

prove that the defendant achieved a sexual climax. The presence of spermatozoa on the towel located at the head of the bed is consistent with the victim's account concerning the sexual assault.

{¶46} Bush's claim that the victim's story was unbelievable because she could have stopped the act if she had cried out is similarly unavailing. Her testimony in this regard is somewhat ambiguous:

MR. MARKS: When he was on top of you, he was laying on top of you, correct?

VICTIM: Yes.

MR. MARKS: Were you able to get out from underneath him?

VICTIM: If I would have made noise, then there's a chance I could have.

MR. MARKS: But you didn't feel as though you could up at that time?

VICTIM: No.

{¶47} Thus, the victim apparently thought there was a "chance" that she could have encouraged Bush to get off of her if she had started making noise. Certainly, a rape victim is not required to loudly resist her assailant. The jury could believe that she did not want to make a loud noise for any number of reasons. Perhaps she was in shock. Maybe she was embarrassed. At trial she claimed that she waited to tell her family about the rape because she was concerned that her father would kill Bush. Regardless, her testimony clearly indicated that she wanted Bush to stop, and asked him repeatedly to do so.

{¶48} In conclusion, we do not believe that the "jury clearly lost its way" in believing the victim, rather than Bush. Her testimony was consistent. Bush's was not.

And the physical evidence was consistent with her version of events. Accordingly, this assignment of error is meritless.

V. Conclusion

{¶49} Consequently, we conclude that the record contains sufficient evidence to support Bush's conviction for rape. The victim's testimony at trial, viewed in a light most favorable to the prosecution, comprised more than sufficient evidence of "force" to allow the jury to determine that a rape occurred. And Bush's conviction for rape was not against the manifest weight of the evidence. Bush's statement to the police and his trial testimony was inconsistent. The victim did not waiver in her version of events and her account was consistent with the physical evidence. We cannot say that the jury clearly lost its way in believing the victim. Therefore, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.