[Cite as *State v. Pryor*, 2018-Ohio-2712.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
NORMAN L. PRYOR	:	Case No. 2017CA00122
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2016CR1548
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 9, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, Earle, J.

{¶ 1} Defendant-Appellant Norman Pryor appeals the June 27, 2017 judgment of conviction and sentence of the Court of Common Pleas of Stark County, Ohio. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEEDURAL HISTORY

{¶ 2} On August 1, 2016 at approximately 5:30 a.m., nurse anesthetist student B.A arrived at Aultman Hospital for her clinicals. As she walked toward the employee entrance, she glanced over her shoulder and saw a man behind her wearing a dark hoodie, a ski mask, and glasses. B.A screamed and began running toward the hospital, but the man caught her, tackled her to the ground, and held her there, strangling her while telling her to be quiet. B.A felt blood pooling in her ear, and later realized the man had cut through her ear with the lime-green box cutter he was wielding. The man pushed aside B.A's shorts and digitally penetrated her. He then told her "you're coming with me," and demanded her car keys.

{¶ 3} B.A handed the man her keys. He ran the box cutter across her cheek in a threatening manner and told her to get up. He then walked her to her vehicle and made her get in the driver's seat. He got into the passenger seat, started the car and reclined the seat all the way back so as not to be seen. He directed B.A to leave the lot without alerting the security guard.

{¶ 4} B.A left the hospital lot and drove until the man told her to pull over to the side of the road in a residential Canton neighborhood. He then ordered B.A into the back seat. As she climbed over the center console, the man digitally penetrated her again. Once they were both in the back seat, the man made B.A remove her clothing. He then

raped her both vaginally and anally, all the while threatening her with the box cutter. During the course of the rape the man talked constantly, demanding that B.A discuss her sexual fantasies, and to talk about herself and her family. Whenever B.A failed to answer his questions, the man would punch B.A in the face and head. After continuing this assault for approximately half an hour, the man ejaculated on B.A's stomach. He used a cloth grocery bag he found in the car to wipe off B.A and himself, and then threw the bag outside the car.

{¶ 5} The man then ordered B.A to drive to Waterworks Park. There he first covered B.A's eyes with her bra, then marched her down an embankment and shoved her into the water, telling her to wash off. As B.A complied with the man's order, she noticed he stopped talking. She ventured a peek under the edge of the bra and saw the man approximately 50 yards away, leaving the park.

{¶ 6} B.A ran to her car and drove to the Aultman Hospital emergency room. She advised ER staff she had been kidnapped and raped. She was subsequently examined by a Sexual Assault Nurse Examiner (SANE), and also spoke with police.

{¶ 7} The SANE nurse preformed a rape kit examination of B.A following the appropriate steps and procedures. She collected B.A's clothing, and swabs from several areas of B.A's body and took photographs of B.A's injuries. The nurse then sealed and labeled the kit. B.A's injuries included a slice through her left ear which required stitches, a cut lip, loose teeth, a bruised cervix, and a number of other bruises and scrapes.

{¶ 8} Several officers from the Canton Police Department participated in the investigation of this matter. Officer McIntosh interviewed B.A at the hospital and contacted the department's ID Bureau to photograph B.A's property which was scattered in the

parking lot where she was first attacked. McIntosh additionally had B.A's car towed for processing. Detective Monter took over the investigation and retraced the route B.A stated the man had made her drive. He recovered the cloth shopping bag the attacker had thrown out the window in the area B.A stated it would be found.

{¶ 9} Because her attacker was wearing a ski mask, B.A was unable to give a complete description. She was, however, able to describe his height, weight, skin color, clothing, and identify his voice.

{¶ 10} At the hospital, Detective Monter spoke with ER nurse Rebecca Diamond. Diamond stated she met a man who met the description given by B.A in August of 2015. She stated Norman "N.C" Pryor had been treated in the ER that month and she had befriended him on social media shortly thereafter. Once friends, Pryor would come to the hospital to visit her, usually after 3:00 a.m., but before sunrise. Diamond indicated that Pryor lived close by and parked in the employee parking lot when he visited. Monter thus began searching for Pryor.

{¶ 11} Monter's investigation led him to the home of Summerly Rowlands. Rowlands and Pryor have a child in common, and he was living with her at the time. Rowlands told Monter that Pryor had come home early that morning wearing wet clothing. He had changed clothes and then left for Columbus saying he had a job offer through the iron workers union. Monter checked with the union and discovered Pryor was indeed an apprentice, but that there was no such job offer. Rowlands gave officers consent to search the home, and showed them where Pryor's belongings were. Pryor's belongings included a collection of five box cutters, one of which was light or lime green. Monter collected the

cutters. He then notified U.S. Marshalls to locate Pryor. Two days later, Pryor was apprehended in Atlanta, Georgia.

{¶ 12} B.A's rape kit was collected by the Canton Police Department and then turned over to the Bureau of Criminal Investigation (BCI) along with the cloth grocery bag for testing and analysis. Criminalist Lindsey Pruneski found evidence of semen on the cloth grocery bag and worked up a DNA profile for the semen. Criminalist Samuel Troyer then compared that profile to other DNA profiles in the BCI database. The database returned a hit to Norman Pryor. The frequency of that particular profile occurring in the random population is 1 in 1 trillion.

{¶ 13} The swabs from B.A's rape kit were also examined by Pruneski and Troyer. A DNA standard from Pryor was also obtained and submitted to the BCI for comparison. Semen was isolated on the vaginal swab, again revealing a DNA profile consistent with Pryor, and again a profile occurring in just 1 in 1 trillion individuals. On the anal/perianal swab from the rape kit, seminal fluid was detected and also determined to be consistent with Pryor with a statistic of 1 in 100,000 individuals. A swab taken from the outside door handle of B.A's car also yielded a DNA profile consistent with Pryor and with a statistic of 1 in 10 million. A swab from the back seat of the vehicle also yielded a DNA profile consistent with Pryor and with a statistic of 1 in 3 million.

{¶ 14} As a result of these events and investigation, the Stark County Grand Jury returned an indictment charging Pryor with one count of kidnapping, three counts of rape, one count of felonious assault, and one count of notice of change of address; registration of new address.

{¶ 15} Counsel was appointed to represent Pryor, however Pryor decided he would prefer to represent himself. The trial court thus granted Pryor's motion to dismiss his counsel and to proceed pro se. The trial court did, however, appoint stand-by counsel. The trial court further granted Pryor's motion to sever the registration charge from the other charges.

{¶ 16} The matter proceeded to trial on the most serious charges first. During Pryor's cross-examination of B.A, B.A indicated she recognized Pryor's voice and that he was the assailant. Shortly thereafter, Pryor requested that stand-by counsel to take over his representation for the remainder of the trial. Pryor was ultimately found guilty as charged, sentenced to an aggregate total of 52 years incarceration and classified as a Tier III offender. At a later trial on the registration offense, Pryor was also found guilty, and the trial court imposed an additional 2 year sentence to be served consecutive to the 52-year sentence.[1]

{¶ 17} Pryor now appeals his convictions and sentence. He raises four assignments of error:

I

{¶ 18} “APPELLANT’S CONVICTION WAS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.”

II

{¶ 19} “THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT TESTIMONY AND PHYSICAL EVIDENCE CONCERNING BOX CUTTERS.”

[1] See *State v. Pryor*, 5th Dist. Stark No. 17CA121.

III

{¶ 20} “THE STATE FAILED TO ESTABLISH VENUE.”

IV

{¶ 21} “THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT COULD CONSIDER FLIGHT IN DETERMINING APPELLANT’S GUILT.”

I

{¶ 22} In his first assignment of error, Pryor argues his convictions are against the manifest weight and sufficiency of the evidence. Specifically, Pryor argues the DNA evidence did not conclusively identify him as the perpetrator for one of the three counts of rape, that the rape kit was mishandled and the SANE nurse was not credible, that B.A was not credible, and that appellee failed to prove felonious assault. We find Pryor's arguments unavailing.

{¶ 23} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin,* 20 Ohio

App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 24} First, Pryor raises several credibility arguments. He first argues that because B.A failed to immediately disclose the incidents of digital penetration to the SANE nurse and to law enforcement, appellee failed to prove count two of the indictment which alleged rape by vaginal digital penetration. He then also argues the SANE nurse was not credible because she had to refer to her notes during her testimony and because she mislabeled a key piece of evidence.

{¶ 25} It is well settled, however, that the credibility of trial witnesses is a matter for the jury to determine. *State v. Yarbrough,* 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216.

{¶ 26} B.A explained that following the most traumatic event of her life, it was difficult to recall every detail immediately. T. 406. As for the alleged mislabeling, the SANE nurse explained that she wrote the time instead of the date on the envelope containing B.A's oral swab before placing it into the rape kit and sealing the same, but had followed the prescribed protocol in completing the kit. Additionally, it had been a year since the SANE nurse examined B.A. T. 498-499, 513, 521. It was the jury's duty to evaluate the credibility of these statements, and assign the appropriate weight.

{¶ 27} Next, Pryor contends appellee failed to prove the charge of felonious assault because appellee failed to prove that a box cutter is capable of inflicting or causing death, failed to prove that Pryor possessed, carried or used a box cutter as a weapon,

and failed to produce the box cutter used in the attack. However, appellee presented the testimony of B.A who stated Pryor was wielding a lime green box cutter and used it to slice through her ear. She additionally testified that Pryor held the box cutter on her throughout the rape and threatened to slit her throat with it. T. 345-357. Upon locating Pryor's residence, Detective Monter seized a collection of box cutters belonging to Pryor. T. 655-656. Appellee further presented testimony from Jamie Bates who testified that shortly before the attack on B.A, Pryor showed her a light green box cutter that he kept in his car. Pryor told Bates he kept the box cutter in the car for protection. It was not required that for appellee produce the box cutter used in the attack. We find appellee produced sufficient evidence to support Pryor's conviction for felonious assault.

{¶ 28} Finally, Pryor argues the state failed to prove each element of count four of the indictment, rape by anal intercourse. Pryor argues appellee failed to prove this count by pointing to the forensic evidence. He argues that the 1 in 100,000 statistic derived from B.A's anal/perianal swab, is not strong enough to support a conviction for this count of the indictment. However, it is not necessary for the state to produce forensic evidence at all. The testimony of one witness, believed by the trier of fact, is sufficient to establish a fact in question. *State v. Adams,* 5th Dist. Licking No. 14-CA-25, 2014-Ohio-4233, ¶ 14. B.A testified she was anally raped. T 353. The forensic evidence merely corroborated her testimony.

{¶ 29} Upon review of the entire record, we find Pryor's complaints without merit. We find the jury could reasonably have found all of the elements of each charged offense established beyond a reasonable doubt, and did not lose its way in so doing.

{¶ 30} The first assignment of error is overruled.

II

{¶ 31} Pryor next argues the trial court erred in admitting physical and testimonial evidence regarding the box cutter used to threaten and injure B.A. Specifically Pryor challenges as irrelevant the testimony of Jamie Bates who testified that Pryor — 5 days before B.A's kidnapping, assault and rape — showed her a box cutter with a light green handle that he kept in his car for protection. He also challenges as irrelevant, the admission of the box cutters recovered from his residence, one of which had a light green handle. Pryor's complaints are without merit.

{¶ 32} Evid. R. 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Even if relevant, evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evid. R. 403(A).

{¶ 33} The admission or exclusion of relevant evidence rests within the trial court's sound discretion. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 34} First, as noted by the appellee, Pryor admitted the relevance of the box cutters in his first assignment of error by arguing the state failed to prove he caused or attempted to cause serious physical harm to B.A by means of a deadly weapon because it failed to produce the box cutter used to threaten and injure B.A, and failed to prove

Pryor possessed, carried, or used a box cutter as a weapon. Pryor cannot have it both ways.

{¶ 35} Next, even if that were not true, the perpetrator used a box cutter with a light green or lime-colored handle to carry out his attack on B.A. The state was required to prove Pryor possessed, carried or used a box cutter as a weapon. The box cutters recovered from Pryor's residence and Bates' testimony were relevant to show Pryor had a preference for using a box cutter as a weapon, and kept one accessible, allegedly for protection, when he left the house.

{¶ 36} We find no error in the admission of the box cutters or Bates' testimony. The second assignment of error is overruled.

III

{¶ 37} In his third assignment of error, Pryor argues the state failed to prove venue. Although Pryor concedes B.A testified she worked at Aultman Hospital, located in Stark County, Ohio, Pryor argues this testimony was elicited via a leading question, and thus presumably was insufficient to establish venue. We disagree.

{¶ 38} While venue is not an essential element of a charged offense, courts have required that venue be proved by the state beyond a reasonable doubt unless it is waived by the defendant. *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). Venue need not be proven in express terms as long as it is established by all the facts and circumstances in the case. *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969, paragraph one of syllabus (1907).

{¶ 39} Pryor did not object to the leading nature of the question. We therefore review his complaint under a plain error standard of review. In order to prevail under a

plain error analysis, Pryor bears the burden of demonstrating the outcome clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶ 40} Here, venue was proven in express terms. On direct examination, the state asked B.A "[n]ow back in August of 2016 were you working at an area hospital here in Stark County?" B.A responded, "[y]es, at Aultman Hospital." T. 337.

{¶ 41} Pryor has failed to either argue or establish plain error. The above stated standard does not preclude establishing venue via leading question, and moreover, the record reveals Pryor's defense was the identity of the perpetrator, not the location of the crimes.

{¶ 42} The third assignment of error is overruled.

IV

{¶ 43} In his final assignment of error, Pryor challenges the flight instruction provided to the jury. Specifically, Pryor argues there was no evidence presented that he fled the jurisdiction following the attack on B.A, nor that any trip he took to Georgia constituted flight, and that therefore a flight instruction was not warranted. We disagree.

{¶ 44} It is well established that evidence of flight is admissible, as it tends to show consciousness of guilt. *Sibron v. New York,* 392 U.S. 40, 66, 88 S.Ct. 1889, 20 L.Ed.2d 917(1967). Further, a jury instruction on flight is appropriate if there is sufficient evidence in the record to support the charge. *See United States v. Dillon,* 870 F.2d 1125 (6th Cir.1989). The decision whether to issue a flight instruction rests within the sound

discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Sims,* 13 Ohio App.3d 287, 289, 469 N.E.2d 554(1st Dist.1984). Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140(1983).

{¶ 45} The trial court instructed the jury as follows (T. 819-820):

> Testimony has been admitted indicating that the Defendant fled the jurisdiction. You are instructed that the Defendant's conduct alone does not raise a presumption of guilt, but it may tend to indicate the Defendant's consciousness of guilt. If you find that the facts do not support that the Defendant fled the jurisdiction or if you find that some other motive prompted the Defendant's conduct, or if you are unable to decide what the Defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the Defendant engaged in such conduct and if you decide that the Defendant was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the Defendant is guilty of the crimes charged. You alone will determine what weight, if any, to give this evidence.

{¶ 46} Contrary to Pryor's argument, evidence was presented at trial indicating that Pryor fled the jurisdiction immediately after assaulting B.A. Pryor went home immediately following the attack on B.A, changed out of his wet clothes, and then lied to his girlfriend, telling her he had to go to Columbus, Ohio for a job offer through the iron workers union. Pryor was found by U.S. Marshals two days later in Atlanta, Georgia. Pryor's claim of a job offer was investigated and proved false. T. 626-628, 650-662.

{¶ 47} Adequate evidence was presented to indicate Pryor fled Stark County. The trial court did not, therefore, abuse its discretion in providing the jury with a flight instruction.

{¶ 48} The final assignment of error is overruled.

{¶ 49} The judgement of conviction and sentence of the Court of Common Pleas, Stark County Ohio is affirmed.

By Wise, Earle, J.

Wise, John, P.J. and

Gwin, J. concur.