[Cite as *State v. Waugaman*, 2019-Ohio-1102.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 18CA18
	:	
ROBERT WAYNE WAUGAMAN III	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2017 CR 0111 R
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 25, 2019

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GARY D. BISHOP RICHLAND CO. PROSECUTOR JOSEPH C. SNYDER 38 South Park Street Mansfield, OH 44902	WILLIAM T. CRAMER 470 Olde Worthington Road, Suite 200 Westerville, OH 43082

Delaney, J.

{¶1} Appellant Robert Wayne Waugaman III appeals from the February 9, 2018 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This incident arose on December 18, 2016. Appellant and Jane Doe had been dating for several months and appellant moved into Doe's house a week before, although he still had his own residence. On the evening of December 17, appellant and Doe drank several bottles of wine and watched Netflix. As the night progressed, appellant demanded oral sex from Doe and she refused.

{¶3} According to Doe's testimony, after this refusal, appellant had an "attitude" and she got up to use the bathroom. When she came out, appellant was in the hallway and she tried to walk past him. He "chest-bumped" her and told her not to put her hands on him. Doe said appellant then pushed her into the bedroom and onto the bed. She was wearing a long shirt-style dress over leggings, and appellant ripped the dress off, causing the buttons to fall to the floor. Appellant was angry; Doe struggled against him and was scared. She told him to stop and to get off of her. Doe said appellant struck her, pulled the rest of her clothes off, and sexually assaulted her on the bed.

{¶4} Appellant stopped the sexual assault without ejaculating when he became "bored" and told Doe to get up if she was "such a badass," threatening that if she did so he would knock her teeth out. The two stared at each other for a moment and then appellant left the room. Doe got up from the bed and put on different clothes.

{¶5} Doe left the bedroom and appellant was in the hallway. He grabbed her by the neck and choked her to unconsciousness. He also struck her several times.

{¶6} At one point, Doe ran back into her bedroom and grabbed a loaded firearm from her dresser; appellant asked if she was going to shoot him and took the firearm from her. Appellant took the clip out of the firearm and left the room with it. Police later found the firearm on a counter.

{¶7} In another "break" from the assault, Doe ran to the bathroom, locked herself in, and curled up in the bathtub. Appellant broke the door down, crying, and asked her "why [she] made [him] do this to [her]." Appellant asked Doe if she wanted him to leave, she said yes, and he punched her again. Doe's dog tried to bite appellant during the assault; appellant punched the dog and put it in the basement.

{¶8} Eventually appellant said it was time to go to sleep and laid down on the bed. Doe laid down beside him and waited for him to fall asleep. Once he was asleep, she put her cat and dog in her car and drove a short distance down the street to her parents' house.

{¶9} Doe's father testified he was awakened by Doe banging on his door in the early morning hours of December 18, 2016. Doe, visibly upset, said appellant had beaten her and she wanted him out of the house. The father called 911 and police arrived at the parents' house to speak to Doe. The father did not hear Doe's entire conversation with police but accompanied Doe and police back to Doe's house to remove appellant.

{¶10} Officers who made contact with Doe at her parents' house observed visible injury to her face and she told then about the prolonged assault, but not the alleged rape.

Doe repeatedly told officers she did not want appellant arrested and only wanted him out of her house.

{¶11} Doe, her father, and police returned to Doe's house and found appellant asleep in the bedroom. Police made contact and observed no visible injury to appellant. He was "in a very deep sleep" and "difficult to wake up." He was described as slightly incoherent but calm. Lt. Thomas asked appellant to leave the residence and officers stood by while he gathered his belongings. At one point appellant picked up a bottle of wine and drank from it, then added it to his belongings. On his way out of the house, he purportedly told Doe, "Well played, [Doe]" and told her she should be tested for sexually-transmitted diseases because he was sleeping with other women throughout his relationship with her.

{¶12} Police observed the broken bathroom door and injuries to Doe. Appellant did not make any inculpatory statements at the scene and did not appear to be injured. Officers investigated whether the potential criminal charge was domestic violence, which would require an immediate arrest, or assault, which could be further investigated and pursued later by Doe. Because the pair had lived together very briefly and appellant still had his own residence, police determined the two were not "family or household members," therefore no domestic-violence arrest was made. Doe also had not told police appellant sexually assaulted her. At trial, she acknowledged she only wanted him removed from the residence and did not want him to be arrested. She knew he had a criminal record and did not want him to get in trouble again because of his children.

{¶13} Doe came to the police department the next day and was given a statement form to fill out. She took the form home, completed it, and returned her written statement

later. The written statement included the sexual assault. Based upon the further allegations, upon her return to the police department, Doe was interviewed, photographed, and taken to a hospital for a SANE exam. Officers also collected evidence from her home including her clothing and the buttons ripped from the dress.

{¶14} The SANE nurse testified at trial that she observed visible injuries to Doe's head consistent with blunt force trauma. Doe reported the entire history of the incident to the nurse, including the sexual assault. In addition to tenderness and bruising on Doe's head and body, the nurse found evidence of trauma to Doe's cervix. A rape kit was collected and submitted to B.C.I. An evidence technician found D.N.A. consistent with appellant's profile on Doe's underwear. Doe was photographed by police and the SANE nurse. The photos demonstrate bruising to her head, hand, inner thigh, and arms.

{¶15} Appellant was charged by indictment as follows: Count I, rape pursuant to R.C. 2907.02(A)(1), a felony of the first degree; Count II, kidnapping pursuant to R.C. 2905.01(A)(4), a felony of the first degree; Count III, kidnapping pursuant to R.C. 2905.01(B)(2), a felony of the first degree; Count IV, having weapons while under disability pursuant to R.C. 2923.13(A)(2), a felony of the third degree; and Count V, assault pursuant to R.C. 2903.13(A), a misdemeanor of the first degree.

{¶16} Appellant entered pleas of not guilty and filed a motion to suppress statements from his interview with law enforcement. Following an evidentiary hearing on the motion to suppress, the trial court granted the motion and suppressed his statements. The matter proceeded to trial by jury and appellant was found guilty as charged upon Counts III (kidnapping) and V (assault) and not guilty of the remaining counts.

{¶17} The trial court sentenced appellant to a prison term of 11 years upon Count III to be served concurrently with six months upon Count V. The trial court further noted, "Plus an additional prison sentence of 673 days for committing this felony offense while on PRC pursuant to O.R.C. 2929.141 which must be served consecutively to the Defendant's sentence in Count III above" (emphasis in original).[1]

{¶18} Appellant now appeals from the trial court's sentencing entry of February 9, 2018.

{¶19} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶20} "I. APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE VIOLATED BY A KIDNAPPING CONVICTION THAT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶21} "II. THE KIDNAPPING CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE."

ANALYSIS

I., II.

{¶22} Appellant argues his conviction upon one count of kidnapping [Count III] is against the manifest weight and sufficiency of the evidence.[2] We disagree.

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[1] Appellant was also sentenced upon a separate criminal case at the same time, Richland County Court of Common Pleas case number 2017 CR 634. In that case, appellant was sentenced to a prison term of 12 months concurrent with the prison term imposed in the instant case. Appellant's contemporaneous appeal of 2017 CR 634 is before us, separately, as *State v. Waugaman*, 5th Dist. Richland No. 18CA19.

[2] Appellant does not challenge his conviction upon one count of misdemeanor assault [Count V].

{¶23} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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."

{¶24} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶25} Appellant challenges his conviction upon one count of kidnapping pursuant to R.C. 2905.01(B)(2), which states in pertinent part: "No person, by force, threat, or deception, * * * shall knowingly * * * under circumstances that create a substantial risk of

serious physical harm to the victim * * * : [r]estrain another of the other person's liberty[.]" Appellant argues the evidence did not establish a substantial risk of serious physical harm because Doe's injuries "merely consisted of light bruising." (Brief, 12).

{¶26} "Serious physical harm" is defined by R.C. 2901.01(A)(5) as any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶27} We note appellee was not required to prove that appellant caused serious physical harm, but that he created a substantial risk of it by means of restraining Doe. R.C. 2901.01(A)(8) defines a "substantial risk" as a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist. We find the evidence established appellant choked and physically restrained Doe during a sustained physical assault.

{¶28} At trial appellant freely acknowledged hurting Doe. Defense trial counsel began opening statement with the admission that "I'm going to tell you right now Bobby is guilty of assault. He put his hands on [Jane Doe] that night." (T. II, 185). Appellant asserts on appeal, however, that he did not choke Doe, and that his claim is supported by the absence of marks upon her neck. As appellee responds, however, the SANE nurse testified the absence of marks after choking is not unusual.

{¶29} Appellee presented evidence in the form of Doe's testimony that appellant choked her to unconsciousness, a fact which she also related to the SANE nurse. A loss of consciousness due to choking would support a finding of serious physical harm. A loss of consciousness, irrespective of its duration, satisfies the definition of "temporary, substantial incapacity." *State v. Sales*, 9th Dist. Summit No. 25036, 2011-Ohio-2505, ¶ 19, citing *State v. Redwine,* 12th Dist. Brown No. CA2006–08–011, 2007–Ohio–6413, ¶ 32; *State v. Bradford,* 9th Dist. Summit No. 22441, 2005–Ohio–5804, ¶ 19; *State v. Jones*, 12th Dist. Butler No. CA98–10–222, at *9 (Sept. 7, 1999).

{¶30} Our review of the record includes, e.g., the photos of Jane Doe, and we find sufficient evidence was adduced at trial to convict appellant of one count of kidnapping in violation of R.C. 2905.01(B)(2). Appellee was required to prove that appellant acted with purpose to restrain the victim of her liberty. *State v. Lenard*, 8th Dist. Cuyahoga No. 105342, 2018-Ohio-4847, ¶ 23. Appellee's evidence, including the testimony of Jane Doe, the SANE nurse, and police, along with photos of Doe's injuries, demonstrated that appellant's sustained assault of Doe included repeatedly punching her and choking her into unconsciousness; restraint of Doe in the bedroom, bathroom, and throughout the house; injuries to Doe including bruising, abrasions, and tenderness of the cervix; and

visible bruising on Doe's face, arms, and legs. We find the record demonstrates appellant purposely terrorized and assaulted Doe, and restrained her of her liberty.

{¶31} The statute requires that the circumstances under which the offender restrained the victim's liberty created a substantial risk of serious physical harm to her. *State v. Garner*, 9th Dist. Summit No. 25771, 2012-Ohio-1439, ¶ 13. *See also*, *State v. Patterson*, 5th Dist. Stark No. 2017CA00022, 2017-Ohio-8970, appeal not allowed, 152 Ohio St.3d 1491, 2018-Ohio-2155, 99 N.E.3d 427; *State v. Ranes*, 3rd Dist. Hancock No. 5-91-7, 1992 WL 29263, appeal not allowed, 64 Ohio St.3d 1428, 594 N.E.2d 970; *State v. Cruz*, 9th Dist. Medina No. 03CA0031-M, 2003-Ohio-4782; *State v. Cisternino*, 11th Dist. Lake No. 99-L-137, 2001 WL 314798, appeal not allowed, 92 Ohio St.3d 1444, 751 N.E.2d 483. The circumstances of the instant case, when viewed in a light most favorable to appellee, reveal an ongoing physical assault to which appellant freely admitted. Doe sought refuge from the assault in the bathroom and he broke the door down, to which he also admitted. We conclude the evidence creates an inference that Doe was restrained under circumstances that created a substantial risk of serious physical harm.

{¶32} Furthermore, upon our review of the entire record, we cannot say the jury was unreasonable in finding that the circumstances under which appellant restrained Doe subjected her to a substantial risk of serious physical harm. Appellant's manifest-weight argument is premised upon a challenge of Doe's credibility because the jury did not convict appellant of the offenses related to the sexual assault. The weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Rayner*, 5th Dist. No. 2015CA00105, 2016-Ohio-3161, 65 N.E.3d 84, ¶ 25. We find the split verdict in the instant case supports the conclusion that the jury critically weighed the testimony

and evidence, accepting some and rejecting others. Thus, after a thorough review of the record, we cannot say the jury lost its way in finding appellant guilty of kidnapping.

{¶33} We conclude appellant's kidnapping conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

CONCLUSION

{¶34} Appellant's two assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.