[Cite as *State v. Cherif*, 2010-Ohio-5325.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1176
v.	:	(C.P.C. No. 09CR-03-1351)
Ousmane A. Cherif,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 2, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Ousmane A. Cherif ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas convicting him of rape and kidnapping. For the following reasons, we affirm.

{¶2} Appellant was indicted for raping and kidnapping L.S. on February 22, 2009. He pleaded not guilty and waived his right to a jury. At the bench trial, L.S.

testified as follows. Appellant was introduced to L.S. as "Brandon." (Vol. I Tr. 20.) She met appellant the first week of February 2009 while visiting her friend Abraham Camara. Appellant was staying with Camara while visiting from New York.

{¶3} Camara and appellant picked L.S. up and took her to Camara's apartment on the evening of February 16, 2009. Camara's friend, Keri Greer, was also visiting, and later that night, Camara and Greer went into a bedroom. Greer called for L.S., and L.S. went in the bedroom, followed by appellant. While the four were in bed together, appellant was on top of L.S. Appellant kissed L.S. for a few minutes, however, L.S. did not kiss him back and told him to stop. Greer encouraged L.S. to have sex with appellant, but L.S. told her she did not want to have sex because she was almost eight months pregnant. Appellant stopped kissing L.S., and they left the room. Later, Camara drove L.S. home, and appellant and Greer joined them.

{¶4} On February 22, 2009, Camara brought L.S. to his apartment for her to see a laptop computer he was selling. Appellant was in the living room drinking alcohol and watching television. L.S. went to Camara's bedroom to see the laptop, and Lacy Small, another friend of Camara, was also in that room. L.S. went to the living room after she was finished looking at the laptop, and Camara and Small stayed in the bedroom and closed the door. While L.S. was in the living room, appellant sat next to her and started rubbing her leg. L.S. did not feel like having sex, however, because she was uncomfortable from her pregnancy. L.S. repeatedly told appellant to leave her alone, but he refused and held her down by putting his weight on her stomach and pushing down on her legs. It hurt where he used force against her body, and she told

him that he was making her sick. She was concerned for herself and her baby, and she tried to push him away, but she was not strong enough. She screamed and banged on the wall behind her, however this wall was not adjacent to the bedroom where Camara and Small were. Finally, after appellant removed L.S.'s pants and underwear, he took off his pants and forced her to have vaginal sex.

{¶5} When appellant stopped, L.S. tried to get her clothes, but appellant grabbed them and would not let her have them until after L.S. threatened to get Camara while she was half-undressed. After L.S. got dressed, she went to Camara's bedroom to ask him for a ride home. L.S. did not tell Camara about appellant raping her because she was afraid Camara would side with appellant and leave her stranded. Camara drove L.S. home, and appellant and Small joined them. Appellant and L.S. were sitting in the backseat, and L.S. was sending text messages to her sister to tell her about the rape. She went to the hospital after she got home and was discharged the next morning. She went back to the hospital that same day she was discharged because her vagina was bleeding, and she was placed on "modified" bed rest for the remainder of her pregnancy. (Vol. I Tr. 66.)

{¶6} On cross-examination, L.S. testified as follows. Although she was yelling when she told appellant to leave her alone, she does not know why Camara and Small did not come out of the bedroom to help. She acknowledged learning that Greer and appellant had sex, but she denied being upset about it. She also denied sending a suggestive photograph of herself to appellant's cell phone.

{¶7} Nurse Terri Lehman examined L.S. at the hospital and testified as follows. L.S. reported that appellant held her down and forced her to have vaginal sex. She said that her legs and vaginal area hurt, and she generally described her pain as "7 out of 10." (Vol. I Tr. 188.) Although Lehman found no signs of trauma to L.S.'s vaginal area, the nurse explained that this was not unusual for women L.S.'s age.

{¶8} Next, the parties stipulated that appellant's DNA was on vaginal swab samples taken from L.S. The court also admitted into evidence appellant's interview with Detectives Welsh and Lawson, where he stated the following after waiving his *Miranda* rights. He came to Ohio from New York to look for employment. He denied meeting Small or L.S., and he said he did not have sex with anyone while staying at Camara's apartment. He said the last time he had sex was on Valentine's Day when he was with his girlfriend in New York.

{¶9} Welsh testified that, when she first contacted appellant at Camara's apartment, he denied that he was "Brandon." (Vol. I Tr. 200.) Welsh also identified an exhibit documenting activity on appellant's cell phone. The exhibit established that L.S. sent appellant text messages. In some of the messages, L.S. mentions a photograph she was sending to appellant's phone.

{¶10} The prosecution rested its case, and Greer testified as follows for the defense. Greer confirmed that appellant is known as "Brandon." On February 16, 2009, Greer was visiting Camara at his apartment, and L.S. and appellant were also there. L.S. told Greer that she liked appellant, and L.S. flirted with him that night. Eventually, everyone went in the bedroom; appellant and L.S. had sex, and Greer and

Camara had sex. Although Greer initially testified that the last time she was at Camara's apartment was on February 16, 2009, with L.S., she subsequently testified that she had sex with appellant at the apartment probably a few days later. L.S. became angry with Greer and appellant when she found out that they had sex. Lastly, Greer said that she cared more about appellant than L.S. did, and she became visibly upset upon seeing appellant in the courtroom.

{¶11} Next, Small testified as follows. Small previously dated Camara and was staying at his apartment on February 22, 2009. On that date, Camara brought L.S. to the apartment for her to visit appellant. Small and Camara watched television in the bedroom, with the door closed, while L.S. and appellant were in the living room. Small did not hear L.S. yell " 'stop' " that evening, but claimed she would have if L.S. was actually yelling. (Vol. II Tr. 33.) Additionally, L.S. appeared normal that night and did not say that she was raped. In any event, Small did not know what appellant and L.S. were doing in the living room. Lastly, she said that she did not like L.S. and found her to be annoying.

{¶12} Appellant testified as follows. He met L.S. after he came to Ohio from New York at the end of January 2009. Afterward, L.S. sent him text messages and a suggestive photograph of herself to his cell phone. He saw L.S. on February 16, 2009, at Camara's apartment, and they had sex that evening in the bedroom while Greer and Camara were also having sex there. Appellant had sex with Greer the next day, and L.S. confronted him when she learned about it.

{¶13} On February 22, 2009, Camara picked L.S. up, at her request, so that she could visit appellant. While they were alone in the living room, appellant and L.S. started kissing and eventually had consensual sex. Later, Camara drove L.S. home, and appellant and L.S. were kissing and talking in the backseat until Greer called him on his cell phone. L.S. was upset with appellant for talking to Greer.

{¶14} During cross-examination, appellant said that, during his interview with the detectives, he did not mention having consensual sex with L.S., and that he even denied knowing her or Small, because he did not want to discuss his personal life. He conceded that, when physical evidence confirmed that he had sex with L.S., he stopped claiming that he did not know her.

{¶15} The trial court found appellant guilty of rape and kidnapping. It did not merge the offenses and imposed concurrent sentences of four years imprisonment on each count.

{¶16} Appellant appeals, raising the following assignments of error:

> **First Assignment of Error**
>
> Appellant's convictions are against the manifest weight of the evidence.
>
> **Second Assignment of Error**
>
> The trial court erred by entering separate judgments of conviction for allied offenses of similar import in violation of R.C. 2941.25(A).

{¶17} In his first assignment of error, appellant contends that his convictions for rape and kidnapping are against the manifest weight of the evidence. We disagree.

{¶18} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we 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 ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶19} Appellant contends that his testimony established that he and L.S. had consensual sex on February 22, 2009. Appellant contradicted himself, however, when defending against the accusations, initially claiming to detectives that he did not know or have sex with L.S. and subsequently testifying that he had consensual sex with L.S. He lied when he told the detectives that he did not have sex with anyone while staying at Camara's apartment and when he told Welsh that he was not "Brandon," even though that was his nickname. The record indicates, as appellant ultimately conceded, that he initially denied knowing L.S. because it was not yet revealed that physical evidence

proved that he had sex with her. Because appellant could no longer deny knowing L.S., he testified that he had consensual sex with her, but the trial court reasonably rejected that testimony, given appellant's contradictions and lies about himself and the incident.

{¶20} Appellant also argues that his claim that he had consensual sex with L.S. on February 22, 2009, is supported by Small's testimony that she did not hear L.S. yelling for appellant to leave her alone and that L.S. appeared normal that night and did not say she had been raped. The trial court may have properly concluded from the evidence, however, that the reason Small did not hear L.S. yell was not because it did not happen, but was due to Small watching television in another room with the door closed. It was also reasonable for the court to conclude that L.S. did not mention the rape to Camara or his friend Small because, as L.S. indicated, she relied on Camara to give her a ride home, and she did not want to risk Camara taking appellant's side and leaving her stranded upon finding out about the accusation. Furthermore, it was within the province of the trial court to disregard Small's testimony because she demonstrated hostility and bias against L.S. through her admission that she did not like L.S. See *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶70. See also *Davis v. Alaska* (1974), 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (holding that bias is " 'relevant as discrediting the witness and affecting the weight' " of the person's testimony).

{¶21} Next, appellant claims his consensual sex defense is supported by Greer's testimony that L.S. flirted and had sex with him a week before the February 22, 2009 incident. L.S. denied this, and it was reasonable for the trial court to reject Greer's testimony because she showed her bias in favor of appellant, and against L.S., when

she became emotional upon seeing him in the courtroom and testified that she cared about him more than L.S. did. See *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110. Also undermining Greer's testimony is that it contained inconsistencies.

{¶22} Appellant also asserts that L.S. had a motive to falsely accuse him of rape and kidnapping because, according to his witnesses, she was upset that he had sex with Greer. L.S. denied being upset about appellant having sex with Greer, and it was within the province of the trial court to reject testimony from appellant's witnesses suggesting otherwise.

{¶23} Lastly, appellant argues that L.S. is not credible because records of his cell phone activity refute her testimony that she did not send him a suggestive photograph of herself. But, despite any inconsistency on that matter, we conclude that, considering the record in its entirety, the trial court did not lose its way in believing L.S.'s testimony that appellant raped and kidnapped her. L.S. was unequivocal in her testimony about appellant raping and kidnapping her, and, soon after the sexual assault, she went to a hospital, where she also discussed the rape and kidnapping. To be sure, Lehman found no signs of trauma to L.S.'s vaginal area, but this did not negate L.S.'s claim of forcible rape because, according to Lehman, a lack of trauma to that area is not unusual for women L.S.'s age. In any event, Lehman confirmed that L.S. complained of pain to her legs and vaginal area, and these symptoms correspond with L.S.'s testimony about how the sexual assault occurred.

{¶24} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. The

trial court accepted L.S.'s claim that appellant raped and kidnapped her, and appellant has not demonstrated a basis for disturbing the court's conclusion. Accordingly, we hold that appellant's convictions for rape and kidnapping are not against the manifest weight of the evidence, and we overrule his first assignment of error.

{¶25} In his second assignment of error, appellant argues that the trial court erred by not merging his rape and kidnapping offenses. We disagree.

{¶26} Because appellant did not raise the merger issue at trial, he forfeited all but plain error. See *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶127; Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶27} We now address whether the trial court committed plain error by not merging appellant's rape and kidnapping offenses. R.C. 2941.25, Ohio's multiple count statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶28} For purposes of R.C. 2941.25, a conviction consists of a guilty verdict and sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶12. Under the statute, punishment is permitted for multiple offenses if they are not allied offenses of similar import, i.e., offenses whose elements, compared in the abstract, do not correspond in a manner where the commission of one will result in the commission of the other. See *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14, 26. Likewise, punishment is permitted for multiple offenses of similar import committed separately or with a separate animus. *Rance* at 636; *Cabrales* at ¶14. When multiple offenses of similar import happen from a single act and animus, however, the court must merge the crimes into one conviction for sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶41-42. It is plain error to impose multiple sentences, even if concurrent, for offenses that merge under R.C. 2941.25. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶29} Rape and kidnapping are allied offenses of similar import. *Cabrales* at ¶25, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶94. Plaintiff-appellee, the state of Ohio, contends that the offenses do not merge, however, because appellant committed them with a separate animus. When a kidnapping—the movement or restraint of a victim—"is merely incidental" to a rape, there exists no separate animus sufficient to sustain separate convictions. *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus. But when the kidnapping "subjects the victim to a substantial increase in risk of harm separate and apart from" the rape, a separate animus exists for each offense sufficient to support separate convictions. Id.

{¶30} In *State v. Oldham* (May 13, 1999), 8th Dist. No. 73644, the court concluded that a defendant committed rape and kidnapping with a separate animus, and that the offenses did not merge, because when he restrained a pregnant victim during the sexual assault by placing his weight on her stomach and forcing her into positions where her stomach was compressed, he subjected her to a substantially increased risk of harm to her pregnancy, i.e., a harm separate and apart from the rape. We agree with the rationale in *Oldham*, and apply it to our analysis, because that case is in accord with *Logan* and this court's precedent. See *State v. Haynes*, 10th Dist. No. 01AP-430, 2002-Ohio-4389, ¶114 (concluding that a separate animus to commit rape and kidnapping existed where a defendant's restraint on a victim not only facilitated the rape, but also substantially increased the risk that the victim would suffer another harm separate and apart from the rape), and *Saleh* at ¶130 (same).

{¶31} Here, applying plain error, we conclude that there was evidence of harm to L.S. separate from the rape. Appellant applied his weight on the pregnant L.S.'s stomach to hold her down and rape her. The restraint was severe enough that it hurt her and made her feel sick, and she was concerned for her baby. She experienced vaginal bleeding and was placed on modified bed rest for the remainder of her pregnancy. Thus, like *Oldham*, appellant committed rape and kidnapping with a separate animus because the restraint he used on L.S. not only facilitated the rape, but also jeopardized her pregnancy and, therefore, subjected her to a harm separate and apart from the underlying rape. Accordingly, R.C. 2941.25 did not require the trial court to merge appellant's rape and kidnapping offenses. Because the trial court did not

commit plain error by not merging the offenses, we overrule appellant's second assignment of error.

{¶32} To conclude, we overrule appellant's first and second assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.