[Cite as *State v. Cardona*, 2011-Ohio-4105.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1052
v.	:	(C.P.C. No. 09CR-12-7788)
Jordan Y. Cardona,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 18, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

R. William Meeks Co., *L.P.A.*, and *David H. Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Jordan Y. Cardona, appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of gross sexual imposition ("GSI") in violation of R.C. 2907.05. For the reasons that follow, we affirm.

{¶2} The following factual description of events surrounding the incident giving rise to appellant's conviction was adduced at trial as follows. During December 2009, R.H. was attending Otterbein University and lived in an apartment with two other girls. On December 19, R.H. decided to host a Christmas party at the apartment. The victim, B.H., a friend of R.H.'s, arrived at the apartment at approximately 7:00 p.m. that evening, and other guests began arriving at approximately 10:00 p.m. Appellant arrived at the party with three of his friends, Fernando, Rayshaun, and Louis.

{¶3} Appellant, Fernando, R.H., and B.H. began playing a drinking game called beer pong. At one point during the evening, B.H. and Fernando went into the bathroom, and the two began kissing. Afterwards, the two returned to the party, and B.H. began talking to appellant. After another game of beer pong, B.H. went to the bathroom and this time appellant followed her in and the two began kissing. Because R.H. began knocking on the bathroom door, B.H. and appellant left the bathroom and went to talk in R.H.'s bedroom. At approximately 2:00 a.m. the morning of December 20, R.H. and others decided to leave for another party being held near R.H.'s apartment. Everyone left R.H.'s apartment except for B.H. and appellant.

{¶4} According to B.H., she went into the bathroom, and appellant pushed the door open and came into the bathroom. The two began kissing again and B.H. was "okay with that." (Tr. 66.) B.H. testified that things started getting "a little more intense," and appellant began touching her body. (Tr. 66.) B.H. testified that she told appellant that she did not "want to go that far," but that she could not leave the bathroom because the way in which appellant was standing prevented her from opening the door. (Tr. 66.)

{¶5} Appellant kept attempting to put his hands down her pants, and eventually pulled B.H.'s pants and underwear down, turned B.H. around and penetrated her rectum with his penis despite her telling him to stop. Appellant did eventually stop and then asked B.H. to masturbate him, which B.H. refused. According to B.H., appellant did so himself and ejaculated into the sink. B.H. then sent a text message to R.H., and R.H. returned to the apartment. R.H. described B.H. as "very upset," and "just crying." (Tr. 168.) After discussing what happened, R.H. called the police. The police arrived, and at approximately 4:00 a.m., B.H. was taken to St. Ann's Hospital where she underwent a sexual assault examination.

{¶6} Caryn Nichol, the nurse that conducted the sexual assault examination of B.H. at the hospital, described the examination as "extremely intrusive." (Tr. 282.) Nichol described B.H.'s demeanor as "tearful, flushed face, crying at times," but, also that B.H. was calm and cooperative with the examination. (Tr. 297.) Nichol testified that while no vaginal injuries were observed, she did observe that B.H. had a "one-and-a-quarter centimeter long laceration" on her anus. (Tr. 298.)

{¶7} Raymond Peoples, a forensic scientist for Ohio's Bureau of Criminal Identification and Investigation, testified that he tested vaginal, oral, and anal samples, as well as B.H.'s underwear for the presence of semen and/or blood. While all of the samples tested negative for the presence of semen, the vaginal and anal samples and the underwear tested presumptive positive for the presence of blood. Additionally, it was stipulated that appellant's DNA matched the DNA obtained from amylase recovered from B.H.'s neck and breast.

{¶8} At trial, appellant presented the testimony of Rayshaun Jamison and private investigator Jen Ruffing. Jamison testified that he arrived at the party with appellant, and observed appellant and B.H. "flirting" as there was "a lot of touching, holding onto each other, hugging." (Tr. 374.) According to Jamison, after he returned to the apartment from the other party, he went to get appellant so that they could leave. Jamison testified that as they were leaving, appellant and B.H. "were still kind of being flirtatious still, hugging and trying to hold each other. [B.H.] kind of not wanting [appellant] to leave." (Tr. 380.) For purposes of impeachment, Ruffing testified regarding the interview she conducted with R.H.

{¶9} Based on the events of December 20, 2009, appellant was indicted by a Franklin County Grand Jury on December 30, 2009, for one count of rape, one count of kidnapping, and one count of GSI. A jury trial commenced on August 2, 2010. After deliberations, the jury returned verdicts of not guilty on the rape and kidnapping charges as contained in Counts 1 and 2 of the indictment, but guilty of GSI, a fourth-degree felony, in violation of R.C. 2907.05, as contained in Count 3 of the indictment. After a sentencing hearing held on October 1, 2010, appellant was sentenced to a three-year term of community control and notified of his classification as a Tier I sex offender.

{¶10} Appellant appealed the judgment of the trial court, and asserts the following two assignments of error:

> [1.] The trial court erred in denying Appellant's motion for judgment of acquittal, and by entering a verdict of Guilty against the manifest weight of the evidence, where the State failed to offer sufficient evidence as a matter of law that Appellant forced any sexual contact upon the prosecuting witness. This error by the trial court deprived Appellant of his right to due process of law as guaranteed by the Fourteenth

> Amendment to the United States Constitution and comparable provisions of the Ohio Constitution.
>
> [2.] The Trial Court violated Appellant's right to Due Process as Guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by entering verdicts of Guilty, as the Court's verdict was against the manifest weight of the evidence.

{¶11} In the first assignment of error, appellant contends the trial court erred in denying his motion for acquittal on the GSI conviction. When reviewing a trial court's decision to deny a motion for acquittal, an appellate court applies the same test as if reviewing the challenge based on the sufficiency of the evidence. *State v. George,* 10th Dist. No. 02AP-1412, 2003-Ohio-6658, citing *State v. Ali,* 154 Ohio App.3d 493, 2003-Ohio-5150. Sufficiency of the evidence inquires "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." *State v. Goodwin*, 84 Ohio St.3d 331, 343-44, 1999-Ohio-356, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The verdict will not be disturbed unless it is determined that reasonable minds could not have reached the conclusion the trier of fact reached. *Goodwin* at 344.

{¶12} R.C. 2907.05(A)(1) governs the offense of GSI and provides, in pertinent part, that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * the offender purposely compels the other person * * * to submit by force or threat of force." "Sexual contact" means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either

person." R.C. 2907.01(B). The jury may infer from the circumstances involved that the offender has the purpose to sexually arouse or gratify. *State v. Schmitz*, 10th Dist. No 05AP-200, 2005-Ohio-6617, ¶6.

{¶13} Under his first assignment of error, appellant contends the evidence is insufficient to support his GSI conviction because there is no evidence that appellant had any nonconsensual sexual contact with B.H. Appellant argues the jury's verdict of not guilty on the rape count demonstrates that he did not commit sexual contact by forced anal intercourse, and, therefore, because the state offered no other evidence of sexual contact, the evidence is insufficient to support the GSI conviction.

{¶14} A similar argument was presented to this court wherein the defendant was convicted of GSI but found not guilty of rape. *State v. Gale*, 10th Dist. No. 05AP-708, 2006-Ohio-1523, discretionary appeal not allowed, 110 Ohio St.3d 1443, 2006-Ohio-3862. In *Gale*, the defendant and the victim were engaged in an "on-again-off-again" relationship. The victim testified that on February 28, 2002, she and Gale argued about Gale's ex-girlfriend and that after the argument Gale vaginally raped her twice, once in the living room and once in the bedroom. In contrast, Gale testified that though the two argued about his ex-girlfriend, when the argument began to escalate, he left the victim's apartment and returned to his home. Out of the incident, Gale was charged with four counts of rape, two counts of GSI, kidnapping, attempted rape, and inducing panic. The jury found Gale guilty of two counts of GSI and inducing panic, and not guilty of two counts of rape and kidnapping. The remaining two counts of rape and attempted rape were dismissed.

{¶15} On appeal, Gale challenged both the sufficiency and the weight of the evidence supporting his GSI convictions. Like appellant, Gale argued that because he was found not guilty on both counts of rape, the state was unable to demonstrate that he committed sexual contact by forced vaginal intercourse, and, therefore, because there was no other evidence of sexual contact, the evidence was insufficient to support his convictions. In rejecting such argument, this court reiterated the well-established principle that "[c]onsistency between verdicts on several counts of an indictment is unnecessary where the defendant is convicted on one or some counts and acquitted on others; the conviction generally will be upheld irrespective of its rational incompatibility with the acquittal." *Gale* at ¶13, citing *State v. Adams* (1978), 53 Ohio St.2d 223, vacated in part on other grounds, 439 U.S. 811, 99 S.Ct. 69; *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15. Each count of a multi-count indictment is deemed distinct and independent of all other counts, and thus inconsistent verdicts on different counts do not justify overturning a guilty verdict. See *State v. Hicks* (1989), 43 Ohio St.3d 72, 78; *State v. Brown* (1984), 12 Ohio St.3d 147, paragraph one of the syllabus; *State v. Washington* (1998), 126 Ohio App.3d 264, 276. "The sanctity of the jury verdict should be preserved and could not be upset by speculation or inquiry into such matters to resolve the inconsistency." *Gale* at ¶13, quoting *State v. Lovejoy*, 79 Ohio St.3d 440, 444, 1997-Ohio-371.

{¶16} As in *Gale*, appellant was indicted of both rape and GSI, and, while the jury found appellant not guilty of rape under R.C. 2907.02(A)(2), it found appellant guilty of GSI under R.C. 2907.05(A)(1). GSI is a lesser-included offense of rape when based on the same conduct as its elements are identical to rape except that the type of sexual

activity involved in GSI is "sexual contact," while "sexual conduct" is necessary for a rape conviction. *Gale* at ¶14, citing *State v. Johnson* (1988), 36 Ohio St.3d 224.

{¶17} As stated in *Gale*, "[a]lthough the victim testified that defendant forced her to submit to vaginal intercourse, a term specifically described as 'sexual conduct,' the jury's determination that defendant did not commit rape does not affect his convictions for [GSI]. Because the state separately charged defendant with several counts of rape and [GSI], defendant's [GSI] convictions remain irrespective of their rational incompatibility with the jury's finding defendant not guilty of rape, provided the evidence is sufficient to sustain the convictions." Id. at ¶15. This court reasoned that because the victim testified that Gale forced vaginal intercourse in the living room and in the bedroom and because vaginal intercourse cannot occur without the defendant touching the victim's erogenous zone, there was sufficient evidence to prove Gale committed two counts of GSI.

{¶18} The scenario before us is markedly similar. As is relevant to this assignment of error, B.H. testified that she and appellant were alone in the apartment after the others left to attend another party. B.H. testified that she went into the bathroom, the door "was closed really tight, and [appellant] pushed open the door." (Tr. 63.) Once inside, they began kissing and B.H. was "okay with that." (Tr. 66.) According to B.H., appellant began touching her breasts and her body. B.H. testified, "[w]hen he started trying to get, unbuckling my pants and trying to put his hands down my pants, that is when I started telling him no, I don't want to go that far," and appellant was attempting to get B.H. to touch him. (Tr. 66.) When asked if any of his body parts touched hers when appellant put his hands in her pants, B.H. responded, "Just his hands." (Tr. 69) B.H. was also asked if his hands touched her "vaginal area," and B.H. replied, "No. He was

touching me, but I kept pushing him away." (Tr. 69.) Additionally, the following exchange occurred on B.H.'s direct examination:

> Q: After he tried to put your hands in his pants what was the next thing that happened?
>
> A: That's when he was just trying to get me to – he was trying to still kiss me and trying to unbuckle my pants and put his hands down my pants.
>
> Q: What were you doing?
>
> A: I was trying to tell him no, I don't want to do this, I don't want to go that far.
>
> Q: Why didn't you just leave the bathroom?
>
> A: How we were standing, since the door opened inward I couldn't really open the door, and it was closed all of the way.
>
> Q: Who closed the door?
>
> A: [Appellant].

(Tr. 68-69.)

{¶19} B.H. testified that appellant pulled her pants and underwear down, and that at this time she was facing appellant, but then appellant "pushed [her] around" by her shoulders so that she was facing the sink, and then appellant penetrated her rectum with his penis. (Tr. 70.) B.H. testified she was saying, "Please stop," but that appellant was still attempting to get her to kiss him. (Tr. 70.) B.H. testified that after awhile, appellant did stop and asked B.H. to masturbate him. When she refused, B.H. testified that he did so on his own and ejaculated into the sink. According to B.H., immediately after this incident, she had some blood coming from her rectum.

{¶20} Thus, despite appellant's contentions to the contrary, B.H.'s testimony provides evidence of the nonconsensual nature of appellant's actions. Further, because the action of anal intercourse alleged here cannot occur without appellant touching B.H.'s erogenous zone, the evidence sufficiently proves appellant had sexual contact with B.H. *Gale* at ¶16 (testimony that defendant forced victim to submit to vaginal intercourse constituted sufficient evidence to support GSI conviction even though the jury found the defendant not guilty of the rape charge); *State v. West*, 10th Dist. No. 06AP-111, 2006-Ohio-6259 (GSI conviction affirmed where the defendant was found guilty of GSI but not guilty of rape and both charges were based on allegation of vaginal digital penetration). *State v. Sallee* (July 19, 1991), 11th Dist. No. 90-A-1512 (jury could find that forceful sexual conduct did not occur but forceful sexual contact did if the jury concluded that penetration was not established beyond a reasonable doubt).

{¶21} Thus, construing the evidence most strongly in favor of the prosecution, as we are required to do, the state presented sufficient evidence to support appellant's GSI conviction. Accordingly, we overrule appellant's first assignment of error.

{¶22} In his second assignment of error, appellant contends his GSI conviction is against the manifest weight of the evidence. 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.' " Id., 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.

{¶23} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶24} Under this assigned error, appellant reiterates his contention that there was no evidence presented to support the GSI conviction because the only evidence of nonconsensual conduct comes from the act of anal penetration of which he was acquitted. As we have already determined, the evidence presented by way of B.H.'s testimony was sufficient to sustain appellant's GSI conviction, hence, we have already rejected appellant's position that *no* evidence was presented to support his conviction.

{¶25} Further, the jury heard B.H.'s testimony regarding the events that occurred that night, and as trier of fact, was free to believe or disbelieve all or any of the testimony presented. *Jackson*. Additionally, R.H.'s testimony corroborates B.H.'s testimony that she was upset and crying immediately following the alleged events. While it is conceivable that a different trier of fact may have accepted the defense's theory at trial and reached a different conclusion, we cannot say there is anything so inherently suspect about B.H.'s credibility that a reasonable juror could not find her testimony to be credible. *Brown* at ¶10. A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *State v. Anderson*, 10th Dist. No. 10AP-302, 2010-Ohio-5561, ¶19.

{¶26} Because the jury could properly believe the victim's testimony and because the jury is in the best position to determine the credibility of each witness by taking into account inconsistencies, as well as witnesses' manner and demeanor, we cannot conclude this record presents a scenario where the jury clearly lost its way. Accordingly, we overrule appellant's second assignment of error.

{¶27} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.

_____