[Cite as *State v. Rivera*, 2012-Ohio-1915.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ [Cross-Appellant],	:	
v.	:	No. 10AP-945
	:	(C.P.C. No. 10CR-02-652)
Jeffrey Rivera,	:	(REGULAR CALENDAR)
Defendant-Appellant/ [Cross-Appellee].	:	

D E C I S I O N

Rendered on May 1, 2012

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor* and *Catherine M. Russo*, for appellee.

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

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Jeffrey Rivera ("appellant"), appeals from a judgment entry of conviction entered following a jury trial in the Franklin County Court of Common Pleas in which he was convicted of two counts of rape and one count of kidnapping. The State of Ohio ("the State") has also filed a cross-appeal challenging the trial court's purported "merger" of the rape and kidnapping counts through the imposition of concurrent sentences. For the reasons that follow, we affirm the findings of guilt, but we remand this matter for resentencing.

I. Facts and Procedural History

{¶ 2} On February 2, 2010, appellant and a co-defendant, Luis M. Vargas ("Vargas" or "co-defendant"), were indicted for raping and kidnapping S.K. at knifepoint on October 3, 2009. Appellant was charged with one count of kidnapping and two counts of rape. The co-defendant was charged with one count of kidnapping and three counts of rape.

{¶ 3} Appellant and his co-defendant were tried jointly in a jury trial which commenced on or about August 17, 2010. At trial, the State presented the testimony of several witnesses, including that of the victim, a sexual assault nurse examiner, and three Columbus police officers.

{¶ 4} S.K. testified that on October 2, 2009, she was visiting her cousin Annice, who lived in an apartment on Brookway Road. Also present at Annice's apartment were S.K.'s two minor children, Annice's boyfriend Shaway and his brother Deshawn, as well as Annice's female friends, Tanitia ("Nee Nee"), and Marva Johnson. The group watched movies, ate dinner and played with the kids. Later that night, as it approached the early morning hours of October 3, 2009, S.K. and the other women decided to leave the apartment to get a drink. The four women walked to a nearby Marathon gas station and purchased alcohol and cigarettes. Annice, Nee Nee, and Marva wanted to go to a bar near the gas station, but S.K. decided to go back to the apartment to be with her children. The three other women stood outside the bar and watched S.K. as she crossed the street to return to Annice's apartment.

{¶ 5} S.K. testified she was scared about walking back alone, so she called and sent a text message to Deshawn to ask him to meet her halfway, but he did not respond. S.K. then called her friend Chantler Tennant and spoke with him until he ended the call, stating he would call her back. At about the time that call ended, S.K. noticed a black vehicle coming toward her. It drove past her and turned around in a parking lot. She began to walk faster. The car slowed down and someone yelled out the window, asking to talk to her. She responded that she could not talk because she needed to get home. The passenger in the vehicle, who was later identified as appellant, asked S.K. if she needed a ride home, but she declined his offer. Appellant informed S.K. his name was "Young" and

showed her a tattoo on his right arm that said "Young." S.K. provided her first name and kept walking. The passenger asked again if S.K. wanted a ride and when she said no, the vehicle pulled away.

{¶ 6} As S.K. was beginning to walk across a field near Annice's apartment, she noticed the black vehicle again. The passenger (appellant) asked to talk to her. S.K. said no, but he gestured to her to approach. S.K. testified she stopped walking and spoke to appellant while maintaining a distance. Appellant then suddenly pulled out his penis and said "Don't you want this[?]" (Tr. 127.) S.K. said no, but appellant grabbed her arm and started trying to rub against her. S.K. testified she tried to pull away. Appellant repeatedly told S.K., "You know you want it." (Tr. 128.) S.K. told appellant she had to go. The driver of the vehicle, later identified as co-defendant Vargas, exited the vehicle and retrieved a knife from the trunk.

{¶ 7} S.K. testified appellant and Vargas began speaking to each other in Spanish. Vargas gave the knife to appellant, who ordered S.K. to get into the vehicle. S.K. got into the rear of the vehicle and sat in the middle. Vargas returned to the driver's seat and appellant got into the rear passenger's seat. Appellant still had his penis exposed. He instructed S.K. to "suck it." (Tr. 136.) S.K. told appellant she wanted to go home to her children, but he repeatedly insisted she was a "streetwalker" and said "You know you want it." (Tr. 137.) Appellant advised S.K. to "suck my penis." (Tr. 137.) Fearing for her life, S.K. did what she was told to do and performed fellatio on appellant at knifepoint for approximately five to ten minutes as Vargas drove the vehicle.

{¶ 8} S.K. testified she noticed the car had stopped near an abandoned building. Appellant and Vargas spoke to one another in Spanish. She recognized the word "policia" and noticed a police car driving away. Vargas then exited the vehicle and got into the rear of the car on the driver's side. Appellant asked Vargas if he "want[ed] to get some of this, too?" (Tr. 140.) Vargas responded affirmatively. Vargas pulled down S.K.'s pants and forced vaginal intercourse with her while she continued to give appellant oral sex. S.K. described the intercourse as "really, really rough," particularly due to the fact she had recently given birth and her body had not completely healed. (Tr. 274.)

{¶ 9} S.K. testified she stopped performing oral sex on appellant when Vargas was about to ejaculate because Vargas wanted S.K. to "suck [him] off." (Tr. 141.) Appellant advised Vargas not to ejaculate in S.K because they did not want to leave behind any evidence. S.K. "sucked off" Vargas while giving appellant a "hand job" at the same time. (Tr. 142-43.) Vargas ejaculated on S.K.'s back but then wiped it off with a cloth he picked up from the floor of the car. After that, Vargas exited the back seat and returned to the driver's seat and began driving again. As Vargas drove, S.K. testified she continued to give appellant oral sex for approximately five or ten minutes until he was about to ejaculate, at which point he ordered her to give him a "hand job" until he ejaculated into a piece of clothing.

{¶ 10} At one point during the course of the kidnapping and rape while S.K. was giving appellant oral sex, appellant located S.K.'s cell phone and began scrolling through and reading S.K.'s text messages. Appellant read one particular sexting message sent by S.K. to Deshawn out loud to Vargas. Appellant then commented to S.K., "If you didn't want none, why are you talking nasty? You probably had some earlier that day." (Tr. 219.)

{¶ 11} Vargas drove the vehicle to another apartment complex in a wooded area. The men ordered S.K. to wash out her mouth with alcohol by swishing the alcohol around in her mouth and spitting it out in a jug. They also ordered her to spit some alcohol into her hand and rub it onto her face.

{¶ 12} Eventually, the men drove S.K. to the general area of the location where she had originally been kidnapped. She was pushed out of the vehicle. S.K. testified the entire event lasted approximately 30 to 40 minutes. Afterwards, she called Nee Nee's cell phone to get a message to her Annice to ask Annice to return to the apartment. When Annice returned home, S.K. informed Annice she had been raped. Annice called 911 and an officer came to Annice's apartment to take a statement from S.K.

{¶ 13} Officer Mario Penny testified he was dispatched to 1280 Brookway Road on October 3, 2009 at 1:33 a.m. to meet with S.K. He described her demeanor as "shell-shocked," "wide-eyed," and "disconnected." (Tr. 505.) Officer Penny obtained basic information from S.K. about the incident, as well as a description of the suspects. Officer

Penny called a medic for S.K. and also contacted Detective Jennifer Watson of the sexual assault squad. In addition, because appellant had touched S.K.'s cell phone, Officer Penny collected the cell phone as evidence. On cross-examination, Officer Penny testified S.K. informed him the two suspects had switched places behind the wheel. He also testified one of the men had ejaculated on her face and then wiped it off her face. On re-direct, Officer Penny testified S.K. also reported the man who forced vaginal intercourse ejaculated on her back and used a t-shirt to wipe it off her back.

{¶ 14} Sarah Koenig, a sexual assault nurse examiner ("SANE") and a labor and delivery nurse, testified she examined S.K. and completed a sexual assault evidence collection kit. This included collecting a blood sample as well as cheek swabs for DNA, along with her clothing. Based upon the history provided by S.K., Nurse Koenig also swabbed S.K.'s right hip area to attempt to recover any semen which may have been present. In addition, Nurse Koenig visually inspected S.K. for bruises, abrasions, redness, tears, or swelling. A speculum exam and a toluidine blue dye exam were also conducted. No evidence of trauma was detected, which Nurse Koenig testified was not uncommon in a rape case.

{¶ 15} Detective Watson testified she is assigned to the sexual assault unit of the Columbus Division of Police and she investigates rapes and kidnappings within the city. Detective Watson was notified by Officer Penny of the incident involving S.K. Detective Watson made several attempts to contact S.K. and exchanged messages with her before finally interviewing S.K. on either October 22 or 23, 2009. Prior to the interview with S.K., Detective Watson submitted items from the rape kit for testing. No spermatozoa were found on the submitted slides, but the swab obtained from S.K.'s right hip indicated the presence of semen.

{¶ 16} Detective Watson developed a potential suspect prior to meeting with S.K. on October 22 or 23, 2009. At the interview, she showed S.K. a photo array containing six photographs. S.K. immediately identified appellant, located in position No. 3 of the photo array, as the passenger in the vehicle and reiterated that he had a tattoo on his arm with the word "Young." Detective Watson confirmed appellant indeed had such a tattoo on his

arm. Based upon that information, Detective Watson eventually obtained a search warrant to collect a DNA swab from appellant for comparison purposes.

{¶ 17} Detective Watson also testified a second potential suspect was developed. That suspect was Vargas. Detective Watson eventually obtained an oral swab from Vargas as well. The oral swabs of appellant and Vargas were submitted to the crime lab for comparison to the DNA obtained from the swab collected from S.K.'s right hip area.

{¶ 18} Sergeant John Stadley, a third shift officer with the Columbus Division of Police, testified that on January 23, 2010, he came into contact with appellant and Vargas at approximately 4:00 a.m. in the area of East Long Street and Taylor Avenue. The two men were in a four-door, dark-colored Chevrolet Cavalier. Vargas was driving and appellant was the front-seat passenger. Sergeant Stadley described the vehicle as messy with lots of trash and miscellaneous items on the floor. Sergeant Stadley also made an in-court identification of the two men.

{¶ 19} Prior to the close of the State's case, the parties entered into a stipulation, which was read to the jury, regarding the DNA obtained from the male fraction of the dried stain swab collected from S.K.'s right hip. Appellant was excluded as a contributor, but it was stipulated that the dried stain swab from S.K.'s right hip matched the DNA swab standard obtained from Vargas.

{¶ 20} At the conclusion of the State's case, the trial court granted Vargas' Crim.R. 29 motion with respect to one of the two rape counts alleging Vargas had engaged in vaginal intercourse with S.K. The trial proceeded on all other counts.

{¶ 21} Appellant introduced the testimony of three witnesses on his behalf: Marva Johnson, Chantler Tennant, and defense investigator Scott Hall.

{¶ 22} Marva testified she was at Annice's apartment on October 2, 2009. Later that night, Marva, Nee Nee, Annice, and S.K. left the apartment to go to a bar on Livingston Avenue called Misty's. Before reaching the bar, they stopped at a Marathon gas station where S.K. purchased alcohol and everyone drank from the bottle. All four women then went to the bar. S.K. only stayed for 20 or 30 minutes before leaving to go back to Annice's apartment. Later, S.K. called to say she had been raped. As a result of

the phone call, Annice left the bar, but Marva and Nee Nee stayed for a while because they did not believe S.K. had been raped.

{¶ 23} Chantler testified he was talking to S.K. on the phone during the early morning hours of October 3, 2009. He testified he believed S.K. had initiated the call. They were discussing an upcoming hair appointment. S.K. advised she was walking down Livingston Avenue. Chantler testified he heard a car approach and a guy yelled something. S.K. told Chantler she would have to call him back later. Chantler denied that the reason for the termination of the call was because he had another call he had to take. At that time, he was not under the impression that S.K. was in trouble. He did not hear from her again that night and, in fact, he did not hear from her for approximately three weeks.

{¶ 24} Investigator Hall testified he participated in interviewing S.K. During the course of the interview, S.K. described appellant as five feet four inches tall, denied drinking on the night of the incident, and stated she wore her glasses throughout the entire incident.

{¶ 25} The jury found appellant guilty of two counts of rape (fellatio) and one count of kidnapping. Vargas was found guilty of one count of kidnapping, one count of rape alleging vaginal intercourse, and one count of rape alleging fellatio. A sentencing hearing was held on September 3, 2010. The State argued against merger of the rape and kidnapping offenses and requested consecutive sentences. Appellant's trial counsel argued the offenses should be merged. Trial counsel for the co-defendant also argued for merger and referenced a recent Tenth District case, *State v. Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, in which we determined the kidnapping and rape offenses in that case should be merged. The trial court stated it believed the kidnapping count had to be merged with the rape counts because it was directly related to the rape offenses. The trial court sentenced appellant to eight years of incarceration on each of the rape counts, which was ordered to be served consecutively to one another. However, the trial court also imposed eight years for the kidnapping count, but ordered that count to be served concurrently. This timely appeal now follows.

II. Assignment of Error and Cross—Assignment of Error

{¶ 26} Appellant has raised a single assignment of error for our review:

> Appellant's convictions are against the manifest weight of the evidence.

{¶ 27} In addition, the State has filed a cross-appeal in which it also asserts a single assignment of error for our review:

> THE TRIAL COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S RAPE AND KIDNAPPING COUNTS THROUGH THE IMPOSITION OF CONCURRENT SENTENCES.

III. Analysis

A. Manifest Weight of the Evidence

{¶ 28} We shall begin by addressing appellant's assignment of error before addressing the cross-assignment of error raised by the State. In arguing his assignment of error, appellant asserts his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶ 29} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 30} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *See Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90

Ohio St.3d 460, 484 (2001); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 31} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶ 25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *see also State v. Robinson*, 162 Ohio St. 486 (1955) (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95 (2000).

{¶ 32} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact finder's resolution of the conflicting testimony." *Wilson* at ¶ 25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 33} A conviction should be reversed on manifest weight grounds only in 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*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 34} In the instant case, appellant challenges his convictions, claiming the State failed to present physical or forensic evidence probative of his guilt. Appellant attacks the investigation conducted by the police, noting the knife used to commit these crimes was never recovered, there was no fingerprint or DNA evidence linking him to the crime, and the investigating detective did not interview S.K. until nearly three weeks after the incident. Appellant also points to the lack of a confession or other incriminating statement tying him to the crime.

{¶ 35} Additionally, appellant attacks the testimony of S.K., the State's key witness, arguing her testimony was filled with inconsistencies and implausibilities and, therefore, it is not believable. For example, appellant takes issue with the following, claiming it raises questions as to S.K.'s credibility: (1) S.K.'s testimony that she left her two young children with two men whose last names she did not know; (2) the conflict between S.K.'s testimony that she was not drinking that night and she did not go to the bar next to the gas station, and the contradictory testimony from Marva; (3) S.K.'s claim she was not seeking sex, despite the "sext" message she sent to Deshawn earlier in the day; (4) the discrepancy between who ended the phone call with Chantler just before S.K. was kidnapped and raped—S.K. or Chantler; (5) discrepancies in S.K.'s testimony as to whether the two offenders switched places behind the wheel at any point; (6) S.K's testimony that the vaginal intercourse with Vargas was "really, really rough," despite the fact that it was not described in that fashion to the SANE nurse; and (7) the discrepancy as to where the liquor bottle she purchased from the gas station was located in the vehicle during the sexual assault.

{¶ 36} We believe the evidence here is more than sufficient to support appellant's convictions and that the verdicts are not against the manifest weight of the evidence.

{¶ 37} Appellant was found guilty of kidnapping, pursuant to R.C. 2905.01(A)(4), for removing S.K. from the place where she was found and/or by restraining her for the purpose of engaging in sexual activity with her against her will, using force, threat or deception. Appellant was also found guilty of two counts of rape, pursuant to R.C. 2907.02(A)(2), for engaging in sexual conduct, to wit: fellatio, with S.K. by purposely compelling her to submit by force or threat of force.

{¶ 38} A reasonable juror could have found appellant guilty of all three crimes. S.K.'s testimony itself establishes that she was kidnapped. She testified the two men forced her into their car at knifepoint and held her against her will using force and/or threats for the purpose of engaging in sexual activity with her. Appellant forced S.K. to perform two separate acts of oral sex on him, each lasting five to ten minutes.

{¶ 39} S.K.'s testimony also establishes that she was raped by appellant on two occasions. The first act occurred after S.K. was forced into the vehicle when appellant, who had his penis exposed, told her to "suck it" as Vargas drove them around in the vehicle. The second act occurred after Vargas forced vaginal intercourse with S.K. and ordered her to "suck off" his penis, when S.K. was forced to give appellant oral sex again for five to ten minutes until he was about to ejaculate. The two men attempted to limit evidence of the rapes by ejaculating into pieces of clothing. They also forced S.K. to rinse out her mouth with alcohol and to rub alcohol onto her face in furtherance of concealing their crimes.

{¶ 40} S.K.'s testimony was strengthened by her description of appellant, which included a description of a distinctive tattoo located on appellant's right arm, which bore the word "Young." S.K. also immediately identified appellant from a photo array shown to her by Detective Watson and made an in-court identification of appellant.

{¶ 41} As noted above, appellant cites to several portions of S.K.'s testimony which he contends are inconsistent and implausible, which in turn causes her testimony to be unbelievable. However, in analyzing whether a conviction is based upon sufficient evidence, we do not assess whether the evidence is to be believed, but instead, whether the evidence, if believed, would support a conviction. Here, the testimony of S.K., if believed, is sufficient to find appellant guilty of the kidnapping and two rape counts.

{¶ 42} Even in analyzing these convictions under a manifest weight review, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice warranting reversal, as a reasonable juror could find the testimony of S.K. to be credible. Many of appellant's challenges to S.K.'s credibility involved details which were in no way significant to the account of the actual crimes at issue (e.g., who ended the phone call just

before she encountered the two offenders, where the liquor bottle was located in the vehicle, whether or not her cell phone vibrated during the incident).

{¶ 43} Furthermore, we note that a decision on the credibility of the witnesses made by a fact finder, such as a jury, is given great deference by a reviewing court. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 28. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 16, citing *State v. Gray*, 10th Dist. No. 99AP-666 (Mar. 28, 2000); *see also State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶ 8. The weight to be given to the evidence, as well as the credibility of the witnesses, are issues which are primarily to be determined by the trier of fact. *State v. Hairston*, 10th Dist. No. 05AP-366, 2006-Ohio-1644, ¶ 20, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967). The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the witnesses' testimony is credible. *Chandler* at ¶ 9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58. A jury, as the finder of fact and the sole judge of the weight of the evidence and the credibility of the witnesses, may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67 (1964); *State v. Jackson*, 10th Dist. No. 01AP-973 (Mar. 19, 2002); and *Chandler* at ¶ 13. "While the jury may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render [a] defendant's conviction against the manifest weight of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236, 1996 Ohio App. LEXIS 2245, *7, 1996 WL 284714, *3 (May 28, 1996). A conviction is not against the manifest weight of the evidence merely because the jury believed the prosecution testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶ 38 (reversed and remanded in part on other grounds); *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶ 22.

{¶ 44} Here, the jury was well aware of the fact that the defense had introduced testimony to contradict the testimony of S.K. It was within the province of the jury to take this into consideration when weighing the evidence in order to determine whether or not it found S.K.'s testimony credible. Furthermore, the testimony of S.K. was subject to cross-

examination, at which point appellant's counsel had the opportunity to attempt to undermine her credibility. Based upon the evidence presented, the jury was free to determine that it believed the events relayed by S.K. and the other State witnesses. It was also within the province of the jury to determine that S.K.'s testimony, in whole or in part, was believable.

{¶ 45} Furthermore, the lack of physical evidence such as DNA and/or fingerprint evidence linking this particular offender to the crime is not fatal to a conviction, given the circumstances at issue here. Appellant did not engage in vaginal intercourse with S.K.; rather, he forced S.K. to perform oral sex and a hand job and then ejaculated into a piece of clothing. The two men also forced S.K. to wash away the remains of any semen by ordering her to swish alcohol in her mouth and rub it on her face. The lack of physical evidence against appellant is not unbelievable, given the circumstances and the efforts of the two men to limit any evidence which could possibly be left behind.

{¶ 46} Additionally, " 'there is no requirement, statutory or otherwise, that a rape victim's testimony be corroborated as a condition precedent to conviction.' " *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 61, quoting *State v. Flowers*, 10th Dist. No. 99AP-530 (May 4, 2000). " '[T]he testimony of a rape victim, if believed, is sufficient to support each element of rape.' " *Id.*, quoting *State v. Kring*, 10th Dist. No. 07AP-610, 2008-Ohio-3290, ¶ 42. Moreover, there is DNA evidence linking appellant's co-defendant to the crime, and appellant was present in the vehicle with Vargas at the time the two of them were arrested, which lends support to S.K.'s testimony about the two men committing the crimes together. It is apparent the jury believed S.K.'s testimony regarding the rapes committed by appellant, despite a lack of corroborating physical evidence against him.

{¶ 47} As to appellant's criticism regarding the delay in the investigation and the fact that the knife used in this case was never recovered, we find these arguments to be without merit. Detective Watson explained that as long as the victim of a sexual assault went to the hospital for treatment as soon as possible after the event (which occurred here), it was not critical to conduct the police interview immediately. Detective Watson further indicated she and S.K. had played "phone tag" for a while and had difficulty

scheduling a time to meet due to other intervening events, but she began investigating the matter prior to meeting with S.K. She also stated that because appellant and Vargas were not located and arrested until January 23, 2010, more than three months after the offense (when they were stopped in Vargas' vehicle), she would not expect to locate the knife or other evidence from the night of the crime in the vehicle.

{¶ 48} In conclusion, based upon all of the above, we believe a reasonable jury could find appellant guilty of kidnapping and rape. Accordingly, we overrule appellant's single assignment of error.

B. Use of Concurrent Sentences and Merger of Kidnapping and Rape Offenses

{¶ 49} We shall now address the State's cross-assignment of error, in which it asserts the trial court erred by purportedly merging the kidnapping count with the two rape counts through the use of concurrent sentences.

{¶ 50} The State argues a trial court cannot "merge" two counts through the imposition of concurrent sentences. The State argues the trial court's improper merger belief caused the trial court to renounce its sentencing discretion as established under R.C. 2929.11 and 2929.12 and, therefore, the imposition of a concurrent sentence on the kidnapping count was contrary to law. In addition, the State argues the counts were not subject to merger because they did not constitute "allied offenses of similar import" subject to merger pursuant to R.C. 2941.25.

{¶ 51} In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶ 19-21, we recently discussed the standard of review applicable to felony sentencing issues as follows:

> In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19, this court held that, pursuant to R.C. 2953.08(G), we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶ 19.
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> After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing

> the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
>
> As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶ 8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100.

Id. *See also State v. Pankey*, 10th Dist. No. 11AP-378, 2011-Ohio-6461, ¶ 18; and *Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, at ¶ 83.

{¶ 52} The State argues that where a trial court erroneously believes that concurrent sentences are required by law, a reviewable sentencing error occurs. The State further argues that because such sentences are the result of a mistake, rather than discretion, the sentences violate R.C. 2929.11 and 2929.12 in that the trial court fails to consider relevant factors, such as whether consecutive prison terms advance the purposes and principles of felony sentencing. Here, the State contends the record demonstrates the trial court declined to consider consecutive sentences based on an erroneous belief that: (1) the kidnapping count was required to be merged with the rape counts; and (2) the counts merged as a result of the imposition of concurrent sentences.

{¶ 53} Ohio's multiple counts statute, R.C. 2941.25 reads as follows:

> (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.

{¶ 54} Thus, R.C. 2941.25 prohibits merger and allows cumulative punishment if the offenses: (1) lack a similar import/are of dissimilar import; (2) were committed separately; or (3) were committed with a separate animus as to each. These three bars to merger are disjunctive. *State v. Bickerstaff*, 10 Ohio St.3d 62 (1984).

{¶ 55} During the sentencing proceedings, the trial court referred to defense counsel's citation to *Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, in which we determined the kidnapping and rape counts in that particular case must be merged. Specifically, the trial judge noted: "Now, I cannot in good consc[ience] not merge the kidnapping count. I feel like it was related directly to the offense. That was the whole basis of the [Judge] Schneider decision that you discussed earlier, okay?" (Tr. 890.) Thus, the trial court in the instant case presumed this matter necessarily required merger of the kidnapping and rape counts based upon our decision in *Hogan*. However, this presumption is incorrect. Although kidnapping and rape are offenses of similar import (*see State v. Donald*, 57 Ohio St.2d 73 (1979)), *Hogan* does not stand for the proposition that all kidnapping and rape offenses must be merged under all circumstances, since merger is not required where the offenses were committed separately or where there is a separate animus, as noted above.

{¶ 56} In *Hogan*, the defendant was convicted of kidnapping, rape, and attempted rape and was sentenced by the trial court to an aggregate prison term of 19 years, which involved consecutive sentences on the three counts. On appeal, we vacated the sentences and remanded for further proceedings, which included allowing the prosecution to elect whether it wished to proceed on the kidnapping count or the rape and attempted rape counts. Relying upon the premise set forth in *State v. Logan*, 60 Ohio St.2d 126 (1979), we found that because kidnapping and rape were offenses of similar import, *and* because the restraint was not prolonged, the confinement was not secretive, and the movement was not substantial, *a separate animus did not exist for the offenses* and, therefore, merger was required. Stated differently, because the restraint or movement was merely incidental to the rape, rather than having its own significance independent of the rape, we

determined a separate animus did not exist and, therefore, the offenses in *Hogan* were required to be merged. This determination was based upon the particular facts of that case, which demonstrated that the victim was grabbed from behind by a stranger after dark, forced into a wooded area, and sexually assaulted.

{¶ 57} In the instant case, however, the facts and circumstances are quite different from those found in *Hogan*. Here, S.K. was kidnapped at knifepoint in a parking lot and forced to get into a vehicle. S.K. testified she was driven around the city for approximately 30 to 40 minutes to various locations, including an abandoned building and a second apartment complex in a wooded area. S.K. was raped four times during the course of the ride around the city. S.K. was ordered to keep her head down so that she could not look around in an attempt to familiarize herself with her surroundings. During the time when S.K. was in the vehicle with the two men while it was parked near an abandoned building, a police car was also in the vicinity. Vargas waited for the police car to leave before he entered the backseat and forced S.K. to submit to intercourse. Later, while they were at the apartment complex in a wooded area, the men ordered her to destroy evidence of the rapes by swishing alcohol around in her mouth and spitting it into a jug and by washing her face with alcohol. After she was ordered to use the alcohol to destroy any evidence of the rapes, S.K. was forced back into the vehicle and eventually driven to the general location of the area from which she had been kidnapped.

{¶ 58} These facts arguably demonstrate a confinement that was prolonged and secretive, and arguably support a kidnapping that was not merely incidental to the rapes. *See State v. Smith*, 10th Dist. No. 94APA-09-1300 (Apr. 6, 1995) (restraint of the victim was not incidental to the rapes where the restraint was prolonged and the movement was substantial: victim was driven around before, during, and after the assaults; victim was not released immediately after the rapes; victim was confined in secret as she was driven to a dark alley/street so that the defendant could have intercourse with her and she was instructed to keep her head down so that she could not see where she was); *State v. Wade*, 10th Dist. No. 10AP-159, 2010-Ohio-6395, ¶ 74 ("the kidnapping was not merely incidental to the rape, which lasted five or ten minutes, but also involved prolonged restraint of 20 to 30 minutes") (reversed on other grounds as to sexual offender

classification); and *State v. Greathouse*, 2d Dist. No. 21536, 2007-Ohio-2136, ¶ 46 (crimes were committed with a separate animus where detention was prolonged due to defendant driving victim around "for quite some time" before driving to the location where the rape occurred; detention posed a substantial increase in risk of harm separate from the rape because the hazard of traveling in a vehicle for a prolonged period of time increased the potential harm).

{¶ 59} When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44. The *Johnson* plurality opinion set forth a two-part test for determining whether or not offenses are allied and therefore required to be merged. The first question is whether it is possible to commit one offense and commit the other offense with the same conduct. *Id.* at ¶ 48. If so, then the offenses are of similar import. If the offenses can be committed by the same conduct, the test requires the court to "determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50.

{¶ 60} It is possible to commit the offenses of rape and kidnapping with the same conduct. *Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, at ¶ 78. Therefore, the two offenses are of similar import, which results in an analysis under the second step in *Johnson*. A trial judge, in its analysis of the second step in *Johnson*, could determine a separate animus existed for the kidnapping count under the facts and circumstances in this case, based upon appellant's conduct and the guidelines set forth in *Logan*, 60 Ohio St.2d at 126, for determining whether a separate animus exists in the context of a kidnapping. *See Logan* (where the restraint or movement is merely incidental, there is no separate animus, but where the restraint is prolonged, the confinement secretive or the movement substantial so as to demonstrate a significance independent of the other offense, or where the asportation or restraint subjects the victim to a substantial increase in risk of harm separate from that of the underlying crime, a separate animus exists).

{¶ 61} Here, however, the trial judge did not consider or analyze this issue pursuant to *Johnson* and/or *Logan*. Instead, the trial court relied upon *Hogan*, 10th Dist.

No. 09AP-1182, 2010-Ohio-3385, to support its (erroneous) belief that merger was required as a matter of law and, therefore, the trial court applied erroneous legal reasoning in concluding it could not consider the possibility of consecutive sentences as a sentencing option. In *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, the Supreme Court of Ohio addressed an issue very similar to this. The court ultimately vacated the sentence and remanded the matter for proper sentencing.

{¶ 62} In *Damron*, the court accepted the appeal to address two specific issues: (1) whether a sentence is contrary to law, even if it falls within the permitted statutory range, if the court failed to consider the mandatory provisions in R.C. Chapter 2929, or if the court relied upon an erroneous legal determination that removed a sentencing option from its consideration, and (2) whether a sentencing error occurs when a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import and whether such an error can be corrected on appeal.

{¶ 63} Similar to the trial court in the instant case, the trial court in *Damron* relied upon a previously decided case involving similar offenses, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, to presume merger of the felonious assault and domestic violence counts was required as a matter of law in the *Damron* case. Pointing out that *Harris* has never stood for the proposition that offenses of domestic violence and felonious assault are required to merge as a matter of law, the Supreme Court held that because the trial court applied erroneous legal reasoning, the case had to be remanded for resentencing. *Damron* at ¶ 1, 17. The same rationale applies to *Hogan*, as it relates to the offenses of kidnapping and rape and as it applies to the trial court's erroneous reasoning in the instant case.

{¶ 64} In *Damron*, the Supreme Court further found that the trial court had failed to properly merge the convictions it was purporting to merge. When an offender has been found guilty of offenses which are allied offenses, the multiple counts statute prohibits the imposition of multiple sentences. *Id.* at ¶ 17, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12. Thus, a trial court must merge the offenses into a single conviction and then impose an appropriate sentence for the offense chosen for sentencing. *Id.*, citing *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶ 41-43. Where a trial court instead finds

the offender guilty of both offenses and sentences him on both offenses, error occurs. "The imposition of concurrent sentences is not the equivalent of merging allied offenses." *Id*. For purposes of R.C. 2941.24, the multiple counts statute, a "conviction" consists of the combination of both a determination of guilt and a sentence/penalty. *Id.*, citing *Whitfield* at ¶ 12.

{¶ 65} Here, like in *Damron*, appellant has been convicted of both offenses which were purportedly merged based upon an erroneous belief that such merger was required. Such error must be corrected.

{¶ 66} Based upon the authority cited above, we sustain the State's sole assignment of error. The sentence is vacated and we remand this matter for proper sentencing for the trial court to apply *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, to consider appellant's conduct and determine whether a separate animus exists for the two offenses, and to consider all relevant sentencing provisions in R.C. 2929.11 and 2929.12, including consecutive sentences if the court determines the offenses do not merge.

IV. Conclusion

{¶ 67} In conclusion, appellant's single assignment of error challenging the manifest weight of the evidence is overruled. The State's cross-assignment of error challenging the sentence in this matter is sustained. The judgment of the Franklin County Court of Common Pleas is affirmed in part as to the findings of guilt. However, we vacate the sentence and remand this matter for proper resentencing.

Judgment affirmed in part
and reversed in part;
cause remanded with instructions.

KLATT and SADLER, JJ., concur.

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