[Cite as *State v. Davis*, 2011-Ohio-2207.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-143
	:	O P I N I O N
- vs -		5/9/2011
	:	
ANTONIO MICHAEL DAVIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-06-1126

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HUTZEL, J.

{¶1} Defendant-appellant, Antonio Michael Davis, appeals his rape conviction following a jury trial in the Butler County Court of Common Pleas.

{¶2} Appellant was indicted in July 2009 on two counts of rape in violation of R.C. 2907.02 (felonies of the first degree). The charges stemmed from allegations that on two separate occasions on May 8, 2009, appellant, age 20, engaged in

forcible sex with A.N., age 19. A jury trial held in April 2010 revealed the following facts.

{¶3} In the spring of 2009, appellant and the victim began communicating through the social networking website MySpace after the victim received a MySpace friend request from appellant, even though they did not know one another. The victim lived in a house with her grandparents; appellant lived with his mother and stepfather. Appellant and the victim met face-to-face for the first time on May 6, 2009. That day, they spent a few hours together at the victim's house. According to the victim, they watched television with her grandfather for a few hours before her grandmother drove appellant home. According to appellant, he and the victim engaged in consensual sex twice that day.

{¶4} They met again two days later, on May 8. Once again, they spent a few hours together at the victim's house. Appellant, the victim, and her younger brother first spent time together in the victim's bedroom watching television and listening to music. The bedroom is located on the second floor of the house and does not have a door. The brother eventually left the bedroom and went downstairs. Soon after, appellant got closer to the victim and they began kissing. As they were kissing, appellant became very aggressive and angry. According to the victim, appellant then (1) started humping her and biting her breasts, (2) pulled the victim's shorts to the side, even though she told him "no [ ] 15 or 20 times," (3) penetrated the victim's vagina with his penis, and (4) "came or ejaculated," moved off, and sat on a couch nearby as if "nothing ever happened." During the incident, the victim tried to get appellant off of her, repeatedly told him "no" and/or to stop, and screamed for help.

{¶5} Following the incident, the victim left the room to change into a pair of

pants. Upon returning to her bedroom, she sent a text message to her brother telling him she had been raped "but not to make a big deal of it because [she didn't] want nobody to fight." Her brother came to her room and confronted appellant who replied he had not done anything. After a brief time, they all went downstairs to eat.[1] The victim did not tell her grandparents about the rape. After the meal, the three went back to the victim's bedroom and watched television and listened to music. Approximately 30 minutes later, the brother left the room.

{¶6} Once again, appellant got closer to the victim, started biting her breasts, and tried to rip her pants. The victim tried to kick him off, kept screaming to get off of her, and repeatedly told him "no" and/or to stop. But appellant restrained the victim, continued to bite her breasts, and raped her again, ejaculating into her vagina. The victim testified the whole incident was physically very painful. During both incidents, appellant told her "it will only take a few minutes, just let me f*** you."

{¶7} Unbeknownst to appellant and the victim, her brother hid behind a stairwell after he left her bedroom the second time. As he was hiding, he observed appellant come out of the bedroom to make sure the brother had gone downstairs. Appellant went back into the room. A few minutes later, the brother heard the victim "saying no, no, get off of me stop and just kept repeating that," before becoming quiet. At that point, the brother walked into the room. Appellant was lying on top of the victim; appellant had his pants on but his zipper was completely unzipped. The victim's pants were pulled down to her knees. The police were called; the victim was taken to the hospital.

1. The victim testified that the three of them went downstairs to eat. By contrast, appellant testified he stayed in the victim's bedroom while the victim and her brother ate downstairs.

{¶8} Butler County Sheriff's Deputy Thomas Back was dispatched to the victim's house. The victim, who was very upset and crying, told him she had been raped. Deputy Back then talked to appellant who was very calm. After being asked what was going on, appellant told the deputy that "he wanted to have sex with [the victim] and she didn't want to, and he did it anyways." Appellant then wrote a statement in which he admitted having sex with the victim even though she did not want to and told him no.

{¶9} Appellant was then transported to the sheriff's department where he was interviewed by Detective Steve Sprague. During the interview, appellant was alert but somewhat nervous and fidgety. He told the detective he had Attention Deficit Hyperactivity Disorder (ADHD). The detective admitted that after speaking with appellant, he could tell he had some mental issues; however, appellant was able to communicate very well. During the interview, appellant initially told the detective that the first time he and the victim engaged in sex, he stopped after the victim told him to stop. Appellant admitted, however, that the second time they engaged in sex, he did not stop until after the victim told him to stop eight or nine times. As the detective was preparing paperwork, appellant admitted, out of the blue, that he had in fact forced himself on the victim both times.

{¶10} At the hospital, the victim was examined by Sexual Assault Nurse Examiner (SANE) Kimberly Runnels. While telling Runnels what had happened, the victim became so upset she vomited twice and had to be given anti-nausea medication. Runnels observed several injuries on the victim, including bruises and a bite mark on her breasts, significant redness and swelling and a tear in the vaginal area, and bruising to her cervix. The victim's injuries indicated "forcible penetrating

trauma to the external genitalia [and] blunt force trauma to the cervical area." Runnels testified the injuries could have been caused by someone "engaged in very rough sex or very clumsy." She further testified she was not trained to determine whether injuries were the result of consensual or nonconsensual sex.

{¶11} Appellant testified on his own behalf. On direct examination, appellant denied forcing himself on the victim either time; rather, they had consensual sex both times and the victim never protested or told him to get off. Appellant stated that the second time, the victim's brother walked in the room and caught appellant laying on top of the victim with his zipper unzipped. Appellant admitted telling the police at the scene and in his written statement that he had raped the victim but claimed that was not the truth. With regard to his statements to Detective Sprague, appellant testified he told the detective he had forced himself on the victim both times because he believed such admissions would prevent him from going to jail. Appellant further stated he was afraid of the detective. Appellant reiterated he had consensual sex both times on May 8.

{¶12} On cross-examination, appellant was questioned about the discrepancies between his statements to the police and his testimony at trial. With regard to the first incident, appellant testified that what he initially told the detective (he stopped after the victim told him to) was not the truth. Rather, he and the victim had consensual sex. With regard to the second incident, appellant testified the truth was that the victim told him eight or nine times to stop. Appellant also testified he was telling the truth when he admitted to the detective he had forced himself on the victim both times. Yet, appellant next testified he and the victim had consensual sex.

{¶13} Appellant's testimony on redirect examination continued to be

confusing. He testified that he had nonconsensual sex with the victim on May 8; his admission to the detective he forced himself on the victim both times was the truth; and he told the truth on direct examination: he did not rape the victim.

{¶14} Defense witnesses testified appellant was diagnosed with ADHD and psychosis; has inappropriate social behaviors for which he receives counseling; and suffers from anger and impulse control problems. His therapist testified that when confronted about his inconsistencies, appellant does not always recognize he has been inconsistent. Further, he does not always acknowledge he is not telling the truth.

{¶15} On April 8, 2010, the jury found appellant not guilty of the first rape (Count One) but guilty of the second rape (Count Two). Appellant moved for an acquittal or a new trial on the ground the jury's verdicts were inconsistent. The trial court denied the motion. Appellant was sentenced to three years in prison and classified as a Tier III sex offender.

{¶16} Appellant appeals, raising two assignments of error.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING THE TELEPHONE RECORDS OF [THE VICTIM'S] CALLS TO CZARNECKI [APPELLANT'S MOTHER] AND D'ALESSANDRI [APPELLANT'S COUSIN], RATHER THEN ALLOWING A SHORT RECESS FOR THE STATE TO REVIEW THOSE RECORDS." [SIC]

{¶19} Appellant argues the trial court abused its discretion and denied his right to present a defense when it prohibited him from introducing into evidence cellular phone records of the phone calls the victim made to appellant's mother

between May 6 and May 8, 2009.[2] The trial court excluded the records as a sanction for appellant's Crim.R. 16 discovery violation.

{¶20} If a party fails to comply with Crim.R. 16's discovery requirements, a trial court "may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(L) (formerly Crim.R. 16[E][3]). It is within the trial court's sound discretion to decide what sanction to impose for a discovery violation. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3. When deciding on a sanction, a trial court must impose the least severe sanction that is consistent with the purpose of the rules of discovery. Id. at 5.

{¶21} The sanction of excluding testimony or evidence may infringe on a criminal defendant's Sixth Amendment right to present a defense. Id. Consequently, a trial court must inquire into the circumstances surrounding the violation before imposing a sanction. Id. "Factors to be considered by the trial court include the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions." Id. The exclusion of evidence is a permissible sanction for a criminal defendant's discovery violation as long as the exclusion does not completely deny the defendant his constitutional right to present a

2. On appeal, appellant argues the trial court erred in prohibiting him from introducing into evidence cellular phone records of the phone calls the victim made to appellant's mother and his cousin between May 6 and May 8, 2009. However, at trial, defense counsel only referred to appellant's mother's cellular phone records when he sought to introduce them into evidence. We will therefore only address the exclusion of appellant's mother's cellular phone records.

defense. Id.

{¶22} As stated earlier, appellant and the victim first met face-to-face on May 6, and then again on May 8. The victim denied she had sex with appellant on May 6, whereas appellant testified they had consensual sex twice that day. On the first day of trial, the victim testified on direct examination about sending text messages to Donna Czarnecki (appellant's mother) between May 6 and May 8 but could not recall the contents of the text messages. By contrast, on cross-examination, the victim testified that she (1) never sent text messages to Czarnecki, (2) only talked to Czarnecki on Czarnecki's home phone and never on her cellular phone, and (3) did not know who Joseph D'Alessandri (appellant's cousin) was. The first day of trial concluded with the testimony of the victim's brother and Deputy Back.

{¶23} As the second day of trial began, defense counsel disclosed to the trial court and to the state for the first time his intention to introduce cellular phone records of Czarnecki which showed numerous text messages between Czarnecki and the victim on May 6 and May 8. Defense counsel explained he knew about the text messages but did not have physical evidence until that morning. The record shows that in August and September 2009, defense counsel sent subpoenas to the telephone service providers of Czarnecki and D'Alessandri to obtain records of phone calls and text messages received by Czarnecki and D'Alessandri. The companies did not comply with the subpoenas.[3] Subsequently, defense counsel did not request enforcement of the subpoenas he issued or file a motion to compel the production of the records.

3. On appeal, defense counsel asserts that "the two entities refused to comply with the subpoenas, claiming that the records no longer existed." There is nothing in the record in support of the assertion.

{¶24} The cellular phone records sought to be introduced were printed out the night before by appellant's stepfather. Apparently, appellant's stepfather, who sat through the first day of trial, was angered when the victim denied sending text messages to either Czarnecki or D'Alessandri. At home, the stepfather took it upon himself to find the cellular phone records on the Internet. Defense counsel admitted to the trial court he was not aware cellular phone records "were so easily accessible."

{¶25} The state objected to the introduction of the records on the ground it violated Crim.R. 16. Further, the state argued it was prejudiced as it did not have the opportunity to prepare the victim regarding these records prior to her taking the stand in the state's case-in-chief. While debating what sanction to impose for the discovery violation, the trial court considered granting a continuance but concluded it was not feasible because of scheduled trials on the court's calendar. The trial court ultimately prohibited defense counsel from introducing the records, but allowed the state to look at the records over the lunch hour. The trial court also made it clear it would re-examine its ruling in the event the state opened the door to the records through its cross-examination of appellant's witnesses.

{¶26} Subsequently, after the state rested its case, Czarnecki and D'Alessandri testified at length about receiving several text messages from the victim on May 6. Czarnecki testified that on the evening of May 6, the victim sent her a text message telling her appellant was "a player [who] got booty off of [her]." Subsequently, during an exchange of text messages, the victim told Czarnecki appellant "kind of forced" her to have sex with him and wondered if appellant had a girlfriend. Czarnecki testified the victim also sent text messages to D'Alessandri that evening. On May 8, Czarnecki received several text messages from the victim,

including one after the first rape in which the victim told her appellant forced her to have sex. Czarnecki received a text message from the victim's brother after the second rape. Czarnecki testified she tried to save the victim's text messages on her cellular phone but was unsuccessful due to a defect with her phone.

{¶27} D'Alessandri testified he received a text message from the victim on the evening of May 6 asking him if appellant was a player. Subsequently, during an exchange of text messages, the victim told D'Alessandri that appellant had "kind of forced himself" on her but denied he raped her. Later that evening, the victim called D'Alessandri and admitted appellant did not force himself on her. Although he knew about the rape allegations against appellant, D'Alessandri did not think about saving the victim's text messages.

{¶28} On rebuttal, the state called the victim back on the stand. The victim denied knowing who D'Alessandri was, denied sending him text messages, and did not recall whether she had a telephone conversation with him. The victim denied having sex with appellant on May 6; admitted sending text messages to Czarnecki after May 6 but did not recall sending her text messages on May 6; and did not recall telling Czarnecki appellant was a player who "got booty off" of her. When questioned by defense counsel with regard to May 6, the victim testified that she and appellant sent several text messages to Czarnecki that day; she did not recall talking to Czarnecki on May 6; and she believed the text messages she received that evening from Czarnecki's cellular phone were from appellant. The victim admitted sending several text messages to Czarnecki's cellular phone on May 8.

{¶29} Upon thoroughly reviewing the record, we find the trial court did not abuse its discretion in prohibiting appellant from introducing the cellular phone

records of Czarnecki regarding the text messages she received from the victim on May 6 and May 8. The trial court considered granting a continuance to address the fact the state was unaware of these text messages until defense counsel's opening statement at trial and thus was denied the opportunity to prepare the victim before she took the stand. The trial court, however, ultimately concluded it could not grant a continuance because of scheduled trials on the court's calendar.

{¶30} The exclusion of these records did not act to *completely* deny appellant his right to present a defense. See *Papadelis*, 32 Ohio St.3d at 5. Following the exclusion of the records, Czarnecki and D'Alessandri both testified at length about the text messages (and their contents) they both received from the victim on May 6. Czarnecki also testified about the text messages she received from the victim on May 8. While the victim adamantly denied sending text messages to Czarnecki during the state's case-in-chief, her testimony on rebuttal was more nuanced with regard to her communications with Czarnecki and D'Alessandri.

{¶31} Defense counsel told the trial court that the cellular phone records were crucial to appellant's defense and faulted the state for not interviewing Czarnecki and D'Alessandri before trial. However, defense counsel offered no explanation as to why, after subpoenas were sent to the service providers and not complied with, he did not contact the providers or move to compel them to produce the records. According to defense counsel, appellant's stepfather, a lay witness, was able to find the records on the Internet in a short amount of time. Defense counsel admitted he was not aware cellular phone records were "so easily accessible."

{¶32} Finally, even if Czarnecki's cellular phone records could have been brought in, whether appellant and the victim had consensual sex or no sex at all on

May 6 would not be dispositive as to whether rape occurred on May 8. The trial court, therefore, did not err in excluding the records.

{¶33} Appellant's first assignment of error is overruled.

{¶34} Assignment of Error No. 2:

{¶35} "THE CONVICTION OF DAVIS OF RAPE UNDER COUNT TWO OF THE INDICTMENT STANDS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶36} Appellant argues that since the state presented the same evidence at trial in support of both rape charges, and since appellant presented the same evidence in support of his defense under both rape charges, the jury's verdicts are "logically impossible." That is, the jury's verdict acquitting him on one count of rape is inconsistent with the guilty verdict on the second count of rape.

{¶37} The fact the jury returned inconsistent verdicts does not mandate a reversal of appellant's rape conviction. It is well-established that "inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Brown* (1984), 12 Ohio St.3d 147, 149. "Each count in an indictment charges a distinct offense and is independent of all other counts; a jury's decision as to one count is independent of and unaffected by the jury's finding on another count." *State v. Cope*, Butler App. No. CA2009-11-285, 2010-Ohio-6430, ¶69. Thus, a conviction will generally be upheld irrespective of its rational incompatibility with an acquittal. *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15.

{¶38} Appellant also argues that his rape conviction is against the manifest weight of the evidence.

{¶39} "In determining whether a conviction is against the manifest weight of the evidence, the court, 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 reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 389, 1997-Ohio-52. An appellate court will not reverse a judgment against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony. Id; *State v. Bailey*, Butler App. No. CA2002-03-057, 2003-Ohio-5280, ¶22.

{¶40} At this juncture, we note that while the caption of appellant's second assignment of error challenges his rape conviction as being against the manifest weight of the evidence, the analysis under the assignment of error refers to the sufficiency of evidence standard. However, it is well-established that "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. As a result, "a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency." Id.

{¶41} In the case at bar, the victim testified appellant raped her in her bedroom on two different occasions on May 8, 2009. Both times, she tried to get appellant off of her and repeatedly told him "no" and/or to stop. Unbeknownst to the victim and appellant, the victim's brother was hiding outside of the victim's bedroom during the second rape. While hiding, he heard the victim "saying no, no, get off of

me stop and just kept repeating that," before becoming quiet. The brother then walked into the room. Appellant was lying on top of the victim; appellant had his pants on but his zipper was completely unzipped. The victim's pants were pulled down to her knees. Runnels examined the victim at the hospital and testified that the victim's injuries indicated "forcible penetrating trauma to the external genitalia [and] blunt force trauma to the cervical area."

{¶42} At the scene, appellant told a deputy that "he wanted to have sex with [the victim] and she didn't want to, and he did it anyways." Appellant then wrote a statement in which he admitted having sex with the victim even though she did not want to and told him no. At the sheriff's department, after being interviewed by Detective Sprague, appellant eventually admitted he had in fact forced himself on the victim both times. At trial, appellant's testimony was confusing and at times contradictory: while he testified on direct examination that he and the victim had consensual sex both times, and explained the reasons behind his written statement and his admission to the detective, he also testified on cross and redirect examination that he had nonconsensual sex and forced himself on the victim both times.

{¶43} After a careful review of the record, we cannot conclude the jury lost its way and committed a manifest miscarriage of justice in convicting appellant of rape under Count Two. We refuse to overturn the verdict because the jury did not believe testimony presented on appellant's behalf. "When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. White*, Butler App. No. CA2003-09-240, 2004-Ohio-3914, ¶28. As the trier of fact in this case, the jury was

in the best position to judge the credibility of witnesses and the weight to be given the evidence. See *State v. DeHass* (1967), 10 Ohio St.2d 230. The jury was thus free to accept or reject any or all of appellant's evidence.

{¶44} We therefore find that appellant's rape conviction under Count Two is not against the manifest weight of the evidence. We also necessarily find that the conviction is supported by sufficient evidence. *Wilson*, 2007-Ohio-2298 at ¶35.

{¶45} Appellant's second assignment of error is accordingly overruled.

{¶46} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.