

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-07-005
- vs -	:	<u>OPINION</u>
	:	5/4/2015
GARY L. STEELE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 14-CR-11442

Martin P. Votel, Preble County Prosecuting Attorney, Gractia S. Manning, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

William O. Cass, Jr., 135 West Dorothy Lane, Suite 209, Kettering, Ohio 45429, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, Gary Steele, appeals his convictions in the Preble County Court of Common Pleas for aggravated burglary and attempted rape, as well as his designation as a sexually violent predator.

{¶ 2} Preble County Sheriff's Deputies Paul Plaughner and Shane Hatfield were patrolling together on New Year's Eve when they received notification that a male driving a

purple Dodge Neon had committed theft at a local Walmart. A description indicated that the offender was wearing blue jeans and a camouflage coat and hat. Soon after receiving information regarding the Walmart theft, the deputies were dispatched to a burglary that was occurring at the home of James Hale.

{¶ 3} Hale told Deputy Plaughter that he knew Steele, and that Steele had forced his way into his home and later drove away in a small car with several bicycles in the trunk. Deputy Plaughter then received another dispatch that a motorcycle accident had occurred. However, when Deputy Plaughter arrived on the scene, he actually found a stack of bicycles next to the guardrail, as well as a child's bicycle in the middle of the road. Deputy Plaughter also found broken automobile glass on the side of the road and tire tracks in the dirt, indicating that a car's window had been broken when the car went off the roadway and struck the guardrail.

{¶ 4} Based on his discussions with Hale, as well as finding the discarded bicycles and broken glass, Deputy Plaughter believed that the crimes were related. Deputy Plaughter also began to suspect that Steele, with whom he was familiar, was the offender who committed the crimes at Walmart. Deputy Plaughter began to investigate the matter, and he and Deputy Hatfield went to the Northedge Apartments where Steele was known to visit. Upon their arrival, the deputies observed a purple Dodge Neon in the parking lot of the apartment complex that had its back windshield broken out. The deputies noticed that the car did not have frost on the windows and hood as did the other cars in the parking lot, and also observed a camouflage coat inside the car. The deputies also saw alcohol, women's bras and panties, and other items in the car similar to what had been stolen from Walmart earlier that night. As the deputies were making their observations, they heard a "shrill" scream followed by screams of "No" and "Help" coming from an apartment in the complex.

{¶ 5} The deputies entered an apartment building, and were directed by a resident,

who had also heard the screams, to a specific apartment. Deputies Plaughter and Hatfield opened the door of the designated apartment and shined their flashlights inside. There, they found Steele on top of a woman with his body between her legs and his pants pulled halfway down. Steele had his hands in the area of the victim's waist and was trying to pull her pants off. Deputy Plaughter ordered Steele off the victim, and arrested him.

{¶ 6} The victim, a 67-year-old woman, told the deputies that Steele had knocked on her door and told her when she opened the door that he was going to rape her. The victim told deputies that Steele was wearing a hooded sweatshirt, and had the hood over his head and tied tightly so that only his eyes were visible. Steele threatened to kill the victim if she resisted, and forced his way into her apartment. The victim told deputies that Steele had forced her to the ground, and that she fought him the entire time resulting in multiple bruises on her arms, wrist, knees, and elbow. Deputies also found in the victim's apartment pairs of women's panties with the tags on them, which had been stolen from Walmart earlier that night.

{¶ 7} The day after the attempted rape, a neighbor showed the victim a photograph of Steele, and informed her that Steele was her assailant. The victim was familiar with Steele from his visiting the apartment complex. The victim later explained to deputies that Steele had been in her apartment at one time when a group of people came to visit her. The victim also told deputies that Steele had come to her apartment on one other occasion, but she told him at that time to leave and not come back.

{¶ 8} Steele was indicted for aggravated burglary, attempted rape, assault, trespass in a habitation, two counts of theft, and possession of marijuana. The attempted rape charge also carried a specification that Steele was a sexually violent predator. Steele pled no contest to all of the charges except for aggravated burglary, attempted rape, and the sexually violent predator specification, and the matter proceeded to trial. A jury trial was held, and the

jury found Steele guilty of aggravated burglary and attempted rape. The jury also found that Steele was a sexually violent predator after a hearing on that matter.

{¶ 9} The trial court merged the aggravated burglary and attempted rape charges, and sentenced Steele to an aggregate sentence of eight years to life. The trial court also classified Steele as a Tier III sexual predator. Steele now appeals his convictions and sexually violent predator designation, raising two assignments of error. For ease of discussion, we will address Steele's assignments of error out of order.

{¶ 10} Assignment of Error No. 2:

{¶ 11} THE APPELLANT'S CONVICTIONS WERE BASED ON INSUFFICIENT EVIDENCE AND WAS [sic] AGAINST THE WEIGHT OF THE EVIDENCE.

{¶ 12} Steele argues in his second assignment of error that his convictions were against the manifest weight of the evidence and not supported by sufficient evidence.

{¶ 13} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. Warren No. CA2006-01-007, 2007-Ohio-2298. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 14} A manifest weight challenge examines the inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other. *Wilson*, 2007-Ohio-2298.

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 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.

State v. Cummings, 12th Dist. Butler No. CA2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 15} While appellate review includes the responsibility to consider the credibility of witnesses and the weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, 12th Dist. Butler No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶ 16} Steele was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1), which provides that no person shall trespass by force, stealth, or deception into an occupied structure with the purpose to commit in that structure any criminal offense when the offender inflicts or attempts to inflict physical harm in the process.

{¶ 17} Steel was also convicted of attempted rape in violation of R.C. 2923.02(A), which provides, "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." According to R.C. 2907.02(A)(2), "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 18} After reviewing the record, we find that Steele's convictions were supported by sufficient evidence and were not rendered against the manifest weight of the evidence. The state presented evidence that Steele forced his way into the victim's apartment and attempted to rape her, thus constituting the offenses of aggravated burglary and attempted

rape.

{¶ 19} Deputy Plaughter testified that he began to investigate Steele upon learning that a man stole various items from Walmart, and that Steele had later forced his way into Hale's home. Deputy Plaughter testified that as part of his investigation, he went to the side of the road where a motorcycle accident had been reported, and found the bicycles that Hale reported were in the trunk of Steele's car. Deputy Plaughter also testified that he surmised that Steele's car had gone off of the road, hit the guardrail, and that the car's window shattered as a result. Deputy Plaughter then testified about arriving at the Northedge Apartments and finding Steele's car there, and that the back window was shattered and missing glass. Upon observing Steele's car, Deputy Plaughter noticed that the car lacked the frost present on other cars in the lot, indicating that it had recently arrived. During his observations of the car, including that there was a camouflage coat and stolen items from Walmart inside, Deputy Plaughter began hearing the victim's screams.

{¶ 20} Deputy Plaughter testified that he and his partner ran into the apartment complex upon hearing "shrill" screams of "No" and "Help," and that he was directed by a neighboring resident to the victim's apartment. Deputy Plaughter testified that upon opening the door to the apartment, he saw Steele on top of the victim "who was lying on the floor, on her back, her legs were spread. [Steele] was between her legs. His pants were unfastened and about halfway down." Deputy Plaughter testified that he could see part of Steele's buttocks because of Steele's pants being pulled down.

{¶ 21} Deputy Plaughter also testified that deputies took photographs of the victim's injuries, as well as the stolen items recovered from Steele's car, including women's panties similar to those found in the victim's apartment.

{¶ 22} The state next called the victim's neighbor who testified that he saw Steele enter the victim's apartment after pulling on the hood of his sweatshirt. The neighbor testified

that he was watching television when he heard a car door shut. He looked out the window and saw a man, later identified as Steele, exit the car and come into the apartment complex. The neighbor testified that when he heard Steele coming up the stairs, he looked through the peephole in his door to see Steele pull up his sweatshirt hood, and knock on the victim's door. When Steele entered the victim's door, the neighbor decided to call police and heard screams as he was dialing the phone. The neighbor reported the screaming to the 911 dispatcher, and then exited his apartment to waive Deputies Plaughter and Hatfield to the correct location of the screams. The neighbor testified that he recognized Steele after he had been arrested, as Steele had frequented the apartment complex and was known in the area.

{¶ 23} The victim also testified, and stated that at the time of the incident, she was 67 years old and living alone in her apartment. The victim testified that on the early morning of the incident, she heard a knock on the door and assumed it was her neighbor asking to borrow her newspaper as he frequently did. Instead, the victim was encountered by Steele, who had his hood pulled over his head and cinched so that only his eyes were visible.

{¶ 24} The victim testified that Steele told her that he was going to rape her and that if she didn't let him in the door, he would kill her. The victim also described the way in which Steele grabbed her as he came in the door, and that he began to force her to the ground once he was in her apartment. The victim then described the way in which she fought Steele, thus sustaining the injuries later photographed by deputies. The victim testified that she did not allow Steele into her home, and that she never consented to his conduct in any way.

{¶ 25} The victim also testified that she knew Steele from a previous encounter. The victim testified that the year before the incident occurred, Steele was in her apartment while a group of people were visiting her. She also recalled seeing Steele outside the apartment

complex on occasion, and that one time he came to her apartment and she told him to leave.

The victim testified that Steele had not been back in her apartment, and that the two did not have a relationship.

{¶ 26} To rebut the state's evidence, Steele called Rebecca Lowe to testify on his behalf. Lowe testified that she knew Steele and that she saw on multiple occasions Steele entering and exiting the victim's apartment. Lowe also testified that she saw Steele "hanging out" with the victim and that she believed that Steele and the victim "liked each other." Lowe also testified that in her personal experience with the victim, the victim's moods could change suddenly. On cross-examination, Lowe admitted to being a convicted felon, and that she was receiving treatment for a heroin addiction. Lowe also admitted to taking drugs during the time she alleged seeing Steele and the victim together.

{¶ 27} Steele argues that Lowe's testimony establishes that he and the victim had a consensual relationship and that the victim's testimony lacked credibility. However, issues of credibility are best determined by the jury, and we will not disturb the jury's inherent decision that Lowe's testimony lacked credibility or that the victim's testimony was credible. The evidence established that Steele used force to enter into the victim's apartment by pushing her into the apartment, or that he used stealth when he cinched his hood over his face to hide his identity. The evidence also shows that Steele fought with the victim, and that he caused her physical harm as evidenced by the bruises she suffered on different parts of her body.

{¶ 28} The evidence also established that Steele attempted to rape the victim, as he engaged in conduct that if successful would be rape. Steele pulled his pants down and forced his body between the victim's legs, holding her body down as she struggled against him and screamed for help. Steele told the victim that he was going to rape her, and later grabbed at the victim's waist in an attempt to remove her pants once his pants were pulled

down. Steele only stopped once the deputies arrived and forced him off the victim.

{¶ 29} After viewing this evidence in a light most favorable to the prosecution, the jury could have found the essential elements of attempted rape and aggravated burglary proven beyond a reasonable doubt. As such, Steele's convictions are supported by sufficient evidence. Additionally, the convictions were not against the manifest weight where the jury did not clearly lose its way or create such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. Having found that Steele's convictions are supported by sufficient evidence and were not rendered against the manifest weight of the evidence, Steele's second assignment of error is overruled.

{¶ 30} Assignment of Error No. 1:

{¶ 31} THE JURY'S FINDING THAT THE APPELLANT IS A SEXUALLY VIOLENT PREDATOR WAS BASED ON INSUFFICIENT EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE.

{¶ 32} Steele argues in his first assignment of error that his sexually violent predator designation was also against the manifest weight of the evidence and was not supported by sufficient evidence.

{¶ 33} Once Steele was found guilty of attempted rape, the jury was asked to determine whether Steele was a sexually violent predator pursuant to R.C. Chapter 2971.¹ The jury then heard evidence regarding the issue, and found that Steele was a sexually violent predator.

{¶ 34} According to R.C. 2971.01(H)(1), a sexually violent predator means, "a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage

1. R.C. 2941.148 requires the state to include a "sexually violent predator specification" in the instrument in which the defendant is charged with a violent sex offense. Steele's indictment includes the required specification.

in the future in one or more sexually violent offenses." The statute sets forth several factors that may be considered when determining the likelihood that the offender will engage in one or more sexually violent offenses in the future. As pertinent to this case, those factors include,

(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.

* * *

(c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.

* * *

(f) Any other relevant evidence.

A trier of fact may rely upon any one of the factors listed in R.C. 2971.01(H)(2)(a)-(f) when determining whether a defendant is a sexually violent predator. *State v. Cartwright*, 12th Dist. Preble No. CA2012-03-033, 2013-Ohio-2156, ¶ 27.

{¶ 35} Steele's violent sexual predator designation is supported by the evidence. Sergeant George Pettit of the Preble County Sheriff's Office testified that he is the sex offender notification officer for the sheriff's office, and that his duties include registering sexual offenders, verifying their addresses, and keeping track of sexual offenders living in the county. Sergeant Pettit testified that Steele was a registered sex offender at the time he attempted to rape the victim because he had been convicted in Florida for attempted molestation and lewd exhibition. Steele's convictions occurred in 2002 and he was imprisoned until 2005. Upon his release, Steele moved to Preble County, and registered as a sex offender with lifetime reporting requirements.

{¶ 36} The state also called Michael McNabb, who testified that Steele trespassed

onto the Preble County Fairgrounds in order to have sex with his horses. McNabb owns several horses, and keeps them in a barn at the fairgrounds. When McNabb noticed on several occasions that items had been moved around and his horses disturbed, he installed cameras in the barn. McNabb testified that the cameras are triggered by movement, and that the camera photographed Steele as he prepared to have sex with one of his horses. McNabb took the photographs to the sheriff's office, and Deputy Brad Moore began an investigation. McNabb also testified that he keeps a container of heel salve near his horses to rub on their heels to keep them soft. McNabb found the container of salve in the middle of the aisle way, and the salve had an indentation caused by male genitalia. McNabb gave the salve to Deputy Moore as well.

{¶ 37} Deputy Brad Moore testified that when he received the pictures and salve from McNabb, he recognized Steele as the individual photographed. Deputy Moore testified that the photographs depicted Steele as he readied himself, including stacking chairs near the horse's stall, and walking around with his pants pulled down to his ankles. One photograph depicted Steele holding the container of heel salve.

{¶ 38} The state also called a woman who testified that she knew Steele, and believed that he had unwanted sexual contact with her. The woman testified that she had been drinking at a bonfire and had fallen asleep near the fire. When she woke up, Steele was standing above her with his pants pulled down to his ankles.

{¶ 39} Steele countered the state's evidence with arguments that the photographs involving the horses were grainy and poor quality. However, the jury heard testimony from Deputy Moore that he clearly recognized Steele from the photographs, and that Steele admitted to him during the investigation that he had been in the barn. Moreover, the jury could view the photographs and determine whether Steele was the man depicted in the photographs.

{¶ 40} Steele also challenged the use of the jury's guilty verdict in the underlying case for attempted rape in determining the likelihood that he would commit sexually violent crimes in the future. Steele relies on *State v. Wooten*, 9th Dist. Lorain No. 13CA010510, 2014-Ohio-3980, for the proposition that a guilty verdict is not tantamount to a second conviction required before R.C. 2971.01(H)(2)(a) will apply. However, we need not determine whether or not Steele being found guilty of attempted rape satisfies R.C. 2971.01(H)(2)(a) where the jury heard evidence to fulfill other factors listed in the statute.

{¶ 41} Specifically, and even assuming arguendo that subsection (H)(2)(a) was inapplicable, the fact that Steele had been convicted of attempted molestation and lewdness would satisfy R.C. 2971.01(H)(2)(c), that available information or evidence suggests that Steele chronically commits offenses with a sexual motivation, as well as R.C. 2971.01(H)(2)(f), the catch all of any other relevant evidence.

{¶ 42} The jury heard evidence that Steele has committed offenses such as attempted molestation, lewdness, trespass in order to have sex with horses, as well as attempted rape. It does not matter under which factor the jury considered this evidence, as the record clearly established that Steele was likely to commit a sexually violent crime in the future pursuant to either R.C. 2971.01(H)(2)(c) or (f).

{¶ 43} When viewed in a light most favorable to the prosecution, this evidence supports the jury's finding that Steele had committed a sexually violent offense and is likely to commit sexually violent offenses in the future. As such, Steele's first assignment of error is overruled.

{¶ 44} Judgment affirmed.

HENDRICKSON and M. POWELL, JJ., concur.