

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMIL A. WHITE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 2010CA00033

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2009CR1373

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JOHN D. FERRERO
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Hoffman, P.J.

{¶1} Defendant-appellant Jamil White appeals the Judgment Entry of the Stark County Court of Common Pleas overruling his Criminal Rule 29 motion for acquittal. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 9, 2009, Eunice Oliver visited the apartment of Debbie Fagley Webster, and asked Webster to help her buy \$50.00 worth of crack cocaine which she intended to then sell for \$100.00. Webster used Oliver's cell phone to call Appellant, a drug dealer.

{¶3} Shortly thereafter, Appellant came to Webster's apartment, and he and Oliver went to the kitchen to make a drug deal. Appellant placed a few pieces of crack on the microwave stand, and Oliver attempted to replace the crack with soap like material. An argument ensued, and Webster overheard Oliver say, "Please don't take my clothes off." Webster also observed Oliver waving her bra around while walking towards the bedroom.

{¶4} Appellant followed Oliver into the bedroom, and maintains Oliver agreed to engage in anal sex in exchange for the drugs.

{¶5} Oliver asserts she was of the understanding they were going into the bedroom in order for Appellant to add to the drug cache, as she had told him there was not enough for the purchase. Oliver testified Appellant then accused her of taking the drugs from the microwave stand, and became upset. Appellant cut the lights, slammed the bedroom door and threw her on the bed. Appellant pulled her pants and underwear down stating, "Since you took my drugs, I'm going to fuck you in your ass." Appellant

engaged in anal intercourse with Oliver. Afterwards, Appellant left, taking Oliver's cell phone and purse with him.

{¶6} Webster left the apartment, and later observed Appellant running out of the apartment with Oliver's purse in his hand.

{¶7} Appellant was arrested on unrelated charges on August 21, 2009. On October 6, 2009, the Stark County Grand Jury indicted Appellant on one count of rape, and one count of robbery. Following a jury trial, Appellant was found guilty of the rape charge, and not guilty of robbery. The trial court sentenced Appellant to seven years in prison and a term of post release control. The sentences were to run concurrently with Appellant's sentence on the unrelated charges.

{¶8} Appellant now appeals, assigning as error:

{¶9} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29 AND SUBMITTING THE CHARGES TO THE JURY, DESPITE INSUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENT OF 'FORCE' UNDER 2907.02."

{¶10} Appellant argues the trial court erred in denying his Criminal Rule 29 motion for acquittal, and his conviction is against the manifest weight and sufficiency of the evidence.

{¶11} In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, e.g., *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503.

{¶12} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, “sufficiency is the test of adequacy”); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *Jenks*, 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶13} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson*, 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26, 865 N.E.2d 1264, 1269-1270. An appellate court may not merely substitute its view for that of the jury, but must find that “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*, supra, 78 Ohio St.3d at 387, 678 N.E.2d 541. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721).

{¶14} Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1; *State v. Hughes* 2009-Ohio-2238.

{¶15} Herein, Appellant was convicted of rape, in violation of R.C. 2901.01(A)(1):

{¶16} “(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶17} “(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

{¶18} “(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶19} “(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.”

{¶20} R.C. 2901.01(A)(1) defines “force” as:

{¶21} “(1) “Force” means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.”

{¶22} At trial, Eunice Oliver testified:

{¶23} “Q. Okay. And you asked Debbie if she knew someone that could get you what?

{¶24} “A. A dub.

{¶25} “Q. Okay. Could you tell the jury what a dub is?

{¶26} "A. You take \$50 and you - - they sell you a hundred dollars worth of drugs, and then you resell it and double your money.

{¶27} "Q. Okay. And was she able to call someone?

{¶28} "A. Yes.

{¶29} "Q. And how did she call someone?

{¶30} "A. On my cell phone.

{¶31} "Q. You gave her your cell phone at that point?

{¶32} "A. Yes.

{¶33} "Q. All right. And do you know who she called?

{¶34} "A. J.

{¶35} "Q. Okay. Did you know who J was when she indicated J?

{¶36} "A. No.

{¶37} "Q. Okay. How long went by before anyone came over then?

{¶38} "A. About five, ten minutes.

{¶39} "Q. Okay. So it didn't take long?

{¶40} "A. No.

{¶41} "Q. All right. At this point describe to the jury who's all in the apartment and what's going on?

{¶42} "A. It's me, Debbie, and J. And J calls me in the kitchen, you know, to show me the drugs that he brought, sits them on the microwave, and then I look at it and tell him, I don't want it.

{¶43} "Q. Why do you tell him you don't want it?

{¶44} "A. Because it wasn't enough.

{¶45} "Q. Okay. All right. What happened next?

{¶46} "A. I leave out the kitchen and go back in the living room. And then him and Debbie's in the kitchen together.

{¶47} "Q. Okay. Then what happened?

{¶48} "A. He comes into the living room and asked me can he holler at me for a minute, you know. So we step off - - there's a bedroom off the side, we step off into the bedroom. Thinking okay, he's going to, you know, add more to that so I would buy it.

{¶49} "Q. Okay.

{¶50} "A. And that's when he said there's drugs missing, that I took his drugs. And I was like, I didn't take anything from you. I said, you can check my pockets, my purse. I said, I didn't take anything. And he wants me to give him my money, and I tell him, no.

{¶51} "Q. How does he seem emotionally at that point?

{¶52} "A. He's upset. He was upset when I first told him I didn't want it because he said, well, you made me come out this late, and so he was upset from then.

{¶53} " * * *

{¶54} "A. ...Then when I tried to leave, he cut the light out and slammed the door.

{¶55} "Q. You tried to leave?

{¶56} "A. (Witness nodding head up and down.)

{¶57} "Q. He cut the light out?

{¶58} "A. (Witness nodding head up and down.)

{¶59} "Q. And slammed the door?

{¶60} "A. Yeah.

{¶61} "Q. What did you do at that point?

{¶62} "A. He threw me on the bed.

{¶63} "Q. How did he throw you on the bed?

{¶64} "A. Like slammed me on the bed, grabbed me on my stomach.

{¶65} "* * *

{¶66} "The Witness: I was fighting him. And he told me if I didn't stop, he was going to punch me in my face.

{¶67} "By Ms. Dave:

{¶68} "Q. Did he seem angry at that point?

{¶69} "A. Yes.

{¶70} "Q. And what did you do?

{¶71} "A. I just started begging him not to do it, not to.

{¶72} "* * *

{¶73} "Q. Describe to the jury specifically what he said.

{¶74} "A. Before he said anything, he took my shirt over my head and pulled my pants and my underwear down.

{¶75} "The Court: Okay, let's stop a minute because I don't think she can transcribe that.

{¶76} "By Ms. Dave:

{¶77} "Q. He pulled your pants down?

{¶78} "A. Yes.

{¶79} "Q. Pulled your underwear down?

{¶80} "A. Yes.

{¶81} "Q. Okay. And at that point, is that when he says something?

{¶82} "A. Yeah.

{¶83} "Q. What does he say to you?

{¶84} "A. He said, well, since you took my drugs, I'm going to fuck you in your ass. That's what he said.

{¶85} "Q. Okay. What did you say to him when he said that?

{¶86} "A. I said, could you please not do this? You know, don't do this. And he did it anyway.

{¶87} "Q. Did he put his penis in your rectum?

{¶88} "A. Yes."

{¶89} Tr. at 103-106; 107; 108-109

{¶90} Debbie Webster then testified at trial:

{¶91} "Q. Okay. Thank you. And you don't see - - or let me ask you, do you see what's going on in the kitchen?

{¶92} "A. No, you can't see my kitchen from the living room.

{¶93} "Q. Okay. But you hear then arguing?

{¶94} "A. Yeah.

{¶95} "Q. Do you hear specifically any words exchanged between the two of them at the time?

{¶96} "A. Yes, I heard her state please don't take my clothes off.

{¶97} "Q. Okay. Did they start getting loud at all?

{¶98} “A. Well, they was out for several minutes and then they got quiet for several minutes, real quiet.

{¶99} “Q. Okay. Do you end up going in there for any reason?

{¶100} “A. No.

{¶101} “Q. What happens next?

{¶102} “A. She - - they came- - she came from the living room - - from the kitchen end of the living room on into the bedroom, and he followed her.

{¶103} “Q. Did they seem to be arguing still about what was going on?

{¶104} “A. No, not really. They kind of got quiet. I thought maybe they came to some kind of agreement or something, I don’t know.

{¶105} “Q. Okay. Did you hear or try and hear what was going on in that bedroom?

{¶106} “A. No, I had left right away to call the police. My phone hadn’t been working, and as soon as they went in the bedroom, I even said out loud, I’m out of here. And I left, went downstairs, across the street to the pay phone and called the police.

{¶107} “Q. Why were you going to call the police.

{¶108} “A. To have them removed. I was afraid I going to get hurt or be set up - - being set up or something. Something bad was happening I felt.”

{¶109} Tr. at 174-176.

{¶110} On cross-examination, she testified:

{¶111} “Q. Well, didn’t you just - - didn’t you just testify that you heard her say, don’t take my clothes off?

{¶112} “A. Yes.

{¶1113} "Q. All right. And you told Officer Fuelling that; is that correct?

{¶1114} "A. Yes.

{¶1115} "Q. You also told Officer Fuelling that same time you saw Eunice waving her bra around; isn't that correct?

{¶1116} "A. Yeah, she - - when she was going to go in the bedroom, she had the bra in her hand.

{¶1117} "Q. Okay. And you said that you saw both, that's Eunice Oliver and this person that you know that's J - -

{¶1118} "A. Uh-huh.

{¶1119} "Q. - - go into the bedroom; is that correct?

{¶1120} "A. Uh-huh.

{¶1121} "Q. And you didn't hear any fighting or arguing going on in the bedroom; isn't that correct?

{¶1122} "A I had left to call the police.

{¶1123} "Q. Did you tell Officer Fuelling that you didn't hear any fighting or arguing in the bedroom?

{¶1124} "A. Yeah, I believe so.

{¶1125} "* * *

{¶1126} "Q. Okay. She walked into the bedroom with the bra in her hand, correct?

{¶1127} "A. Uh-huh.

{¶1128} "Q. And J followed her in there: is that correct?

{¶1129} "A. Uh-huh."

{¶1130} Tr. at 181-182; 184.

{¶131} Appellant testified at trial:

{¶132} “Q. Okay. Well, tell us about the conversation that you’re having with Oliver.

{¶133} “A. Well, Miss Oliver, she asks me about \$50 worth of crack cocaine. I tell her before I even pulled the crack out of my pocket that the only thing I have was just the \$50 worth of crack cocaine. Miss Olivier asks then - - states to me, she says, well, let me see the crack. So I pull the crack out of my pocket and I place it on the stand next to the microwave.

{¶134} “Q. All right. And what proceeds - - it’s your crack cocaine, correct?

{¶135} “A Yes.

{¶136} “Q. You haven’t seen any money?

{¶137} “A. No.

{¶138} “Q. But you have received a quote or a price?

{¶139} “A. Right.

{¶140} “Q. Okay. What does she do with the crack cocaine there?

{¶141} “A. Well, when she see the crack cocaine sitting on the stand, she asks me is it all right if she picked - - if she looked at it. So I told her, yeah, you can go ahead.

{¶142} “So then - - and at that point in time that’s when she grabbed the crack cocaine up off of the stand, then she just sitting there, she looking at it, you know.

{¶143} “And at that time I basically like - - when she puts the crack back on the stand, you now, she like - - well, before she put the crack back on the stand, she asks me, like, is that – is that the best I can do?

{¶144} “And I’m like, well, basically right now It’s like a hard time out here in these streets, and that’s the best I can do for the \$50.

{¶145} “So she like - -she looking at it some more and then she like, no, baby, I don’t want it. She put it back on the stand.

{¶146} “* * *

{¶147} “A. So when she set the crack - - when she set the crack back down on the stand, I’m just standing there and I’m just looking at it, and I just look up at her and I ask her to just please put my dope back on the stand.

{¶148} “Q. Well, she did set something back down; didn’t she?

{¶149} “A. Yeah, she put the - - the stuff that was - - the stuff that she switched my crack with, she put that back on the stand, along with two little pieces that equaled up to the dime that I had right there that go with it, two 20 pieces that equaled up to the \$50 worth of crack.

{¶150} “When she put it back on the stand, I’m sitting there and I’m looking at it and I’m just basically, like, um-m, could you please put my dope back on the stand?

{¶151} “* * *

{¶152} “Q. All right. So you’re convinced that she’s switched crack cocaine?

{¶153} “A. Yeah, when she put the dope back on the stand, I can look at the dope and tell the difference between what she put back on the stand and the two little pieces that was with it, two pieces that she switched the dope with.

{¶154} “* * *

{¶155} “Q. Okay. Do you then have a conversation alone with Debbie in the kitchen area?

{¶156} “A. No. Miss Oliver - -- when I asked Deborah to tell me what it was that Miss Oliver put - - placed back on the stand, Miss Oliver was standing right there in the kitchen also. So what I did was I had Miss Webster go and get her crack pipe and come back in the kitchen with it, I gave her the piece of stuff that Miss Oliver had placed - - replaced back on the stand. And when - - Miss Deborah is standing there in front of me, she took it, put it on her stand, turned the stove on, put the crack pipe in the flame on the stove as an attempt to try to melt it down, and she took a hit and she turned and she said - - she said, no, J, it’s gank. It ain’t no dope, it’s soap.

{¶157} “Q. You said she used the word yank?

{¶158} “A. Gank.

{¶159} “Q. What do you do then?

{¶160} “A. Then I just asked Miss Oliver, again, to please give me my dope back.

{¶161} “* * *

{¶162} “A. And when me and Miss Deborah, we reenter back in to the apart - - her apartment, Miss Oliver was in the bedroom. And so when I go in there –

{¶163} “Q. How do you know she’s in there?

{¶164} “A. Because Deborah - - Debbie told me that Miss Oliver was in the bedroom.

{¶165} “Q. Where did - -

{¶166} “A. So - -

{¶167} “Q. Where were you physically located when Debbie told you that Oliver was in the bedroom?

{¶168} “A. I was in the living room.

{¶169} "Q. All right. Please continue.

{¶170} "A. But as I'm in the living room and I'm looking for Miss Oliver, Miss Deborah told me that Miss Oliver was in the bedroom.

{¶171} "Q. Do you ever see Miss Oliver waving her brassiere?

{¶172} "A. Yes.

{¶173} "Q. Where are you when you see her doing that?

{¶174} "A. We in the bedroom.

{¶175} "Q. Please continue.

{¶176} "A. So now we in this bedroom and she like - - she ask me what do she have to do to be able to get her purse and her phone back.

{¶177} "And I was like, well, you know, just give me some head, you know. So at this time, you know, she agreed to us doing this. So I pulls my pants down, I sits on the bed, and she sit next to me and she started giving me some head.

{¶178} " * * *

{¶179} "Q. So, now, the door to the bedroom is open or closed?

{¶180} "A. The door to the bedroom was opened. The door - -

{¶181} "Q. The light on or off?

{¶182} "A. The light was on because - - well, when I first walked into the bedroom, Miss Oliver was - - well, not when I first walked into the bedroom. When I tried to gain entrance into the bedroom I noticed that Miss Oliver was hiding behind the door. So I asked Miss Oliver why was she hiding behind the door. And before I entered into the bedroom, I asked her to move to away from behind the door to the other side of the room.

{¶183} “So when I go inside the bedroom, I asked Miss Deborah where was the light switch located at so I can turn the light on. So Miss Oliver told me where the light switch was at, which was on the wall behind the door, and I turned the light switch on. And so to see who was – to turn the lights on. So when I turned the light on I’m just standing there and Miss Oliver is just standing there and that’s when I seen her with the bra in her hand, she was waving the bra around.

{¶184} “Q. Okay. So the light is on, the door is open or closed?

{¶185} “A. The door is open. The door was never closed.

{¶186} “Q. All right. The entire time you were in there?

{¶187} “A. The whole time we was in the bedroom, we never closed the door, turned the light off or nothing.

{¶188} “Q. Was Debbie in the living room?

{¶189} “A. Yes, she was in the living room.

{¶190} “Q. All right. Please continue.

{¶191} “A. So as we in the bedroom, that’s when it got to the point to where me and Miss Oliver we get to talking about if - - what does she have to do to be able to get her purse or her phone back.

{¶192} “At first I asked her - - well, okay, before I had got to the point about her giving me some head, I just told her well, okay, you can get your purse and your phone back, just give me my money. I told her, since you took my dope from me and I got your purse and your phone, if you give me some - - give me the money, I will take the money before anything.

{¶193} “So Miss Oliver states to me that she doesn’t have no money and that it’s – any other - - any other thing that she could do to be able to pay me. And the only thing I could think of was if she didn’t have any money was for us to have sex.

{¶194} “Q. All right. And did you have sex?

{¶195} “A. Yes, we had sex.

{¶196} “Q. In that bedroom?

{¶197} “A. Yes.

{¶198} “Q. All right. This was not vaginal sex; is that correct?

{¶199} “A. No, it was anal.”

{¶200} Tr. at 295-299; 301; 302-303; 309-314.

{¶201} As set forth above, the trier of fact is in the best position to view the demeanor of the witnesses and to judge their credibility. Upon review of the testimony at trial, we find the evidence, if believed by the jury, could reasonably support a finding of guilt beyond a reasonable doubt when viewed in a light most favorable to the prosecution. We cannot say the jury clearly lost its way or created a manifest miscarriage of justice warranting a reversal of the conviction.

{¶202} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMIL A. WHITE

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 2010CA00033

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY