[Cite as *State v. Taulbee*, 2015-Ohio-1004.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- RYAN TAULBEE Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 14-CA-5 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 2013CR00479
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 13, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH D. SAKS Special Prosecuting Attorney Knox County Assistant Prosecutor 117 East High Street, Suite 234 Mount Vernon, Ohio 43050	ANDREW T. SANDERSON Burkett & Sanderson, Inc. 118 West Chestnut Street Lancaster, Ohio 43130

Hoffman, P.J.

{¶1} Defendant-appellant Ryan Taulbee appeals his conviction entered by the Fairfield County Court of Common Pleas on one count of rape, in violation of R.C. 2907.02(A)(2). Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and K.S., the victim herein, began dating in February of 2013. On the evening of September 27, 2013, Appellant and K.S. went out with a friend and were drinking. They returned to K.S.'s apartment at 6:00 a.m. on September 28, 2013. K.S.'s apartment is on the second floor of a two-story building. K.S. admits to having consumed approximately seven or eight drinks over a twelve hour span on the evening in question.

{¶3} K.S. testified upon returning to the apartment, Appellant found messages on K.S.'s phone from another male whom she had been seeing. He became angry and poured a drink over her head. She stood up abruptly, accidentally hitting Appellant with her elbow. Appellant then punched K.S. in the cheek and slapped her twice. Appellant then took K.S.'s phone and went downstairs.

{¶4} After Appellant left the apartment, K.S. removed her wet shirt. Appellant then returned to the apartment with handcuffs. He grabbed K.S.'s wrists and put them into the handcuffs. He told K.S. to take off the rest of her clothes, and she complied. Appellant threw K.S. onto the bed, got on top of her and forced his penis into her mouth. Appellant then told K.S. to get on top, and he grabbed her hair and forced her head onto his penis.

{¶5} K.S. testified Appellant hit her on the head when she did not perform fellatio exactly how he expected. He called her names, and pushed her legs apart in order to penetrate her vaginally with his penis.

{¶6} Appellant then put his fingers into K.S.'s vagina several times, cutting her vagina with his fingernails causing her to bleed onto her bed sheets. At the same time, he put one finger into her anus in a harsh manner. Appellant begged Appellant not to put his fingers into her vagina and anus. Immediately thereafter, Appellant got on top of K.S. and penetrated her with his penis vaginally.

{¶7} Appellant then removed the handcuff from K.S.'s right wrist and secured the same to her left ankle. He told her to clean herself, and she told him she could not because she was handcuffed. He then threw a hand towel at her and ordered her to clean herself. She complied. Afterward, Appellant stuffed the washcloth down her throat, causing her to choke on the washcloth.

{¶8} Appellant took K.S. to the kitchen and got something to eat. He then returned to the bedroom, but unable to get an erection, forced his penis into her anus. K.S. attempted to move away from Appellant and to push him away.

{¶9} Appellant put a pillow over K.S.'s face and pushed down. He also choked her on two occasions. Appellant used a bungee cord to drag K.S. throughout the apartment. K.S. testified she felt she did not have any choice but to perform the sexual acts with Appellant. Appellant carried on the encounter for approximately nine hours.

{¶10} When Appellant grew tired, he removed the handcuffs, and lay down on the bed. He then fell asleep. K.S. then dressed, and escaped from the apartment, fleeing to a neighbor's residence, and calling emergency services.

{¶11} Appellant maintains he engaged in consensual sexual activity with K.S. on the evening in question.

{¶12} On October 4, 2013, Appellant was indicted on six felony counts: Count One, Rape, in violation of R.C. 2907.02(A)(2), by fellatio; Count Two, Rape, in violation of R.C. 2907.02(A)(2), by digital anal penetration; Count Three, Rape, in violation of R.C. 2907.02(A)(2), by digital vaginal penetration; Count 4, Attempted Rape, in violation of R.C. 2923.02(A) and R.C. 2907.02(A)(2), by attempted penile anal penetration; Count Five, Kidnapping, in violation of R.C. 2905.01 (A)(3); and Count Six, Disrupting Public Services, in violation of R.C. 2909.04(A)(3).

{¶13} The matter proceeded to a jury trial. Appellant was found not guilty of all but one count contained in the indictment. The jury found Appellant guilty of Count Three, Rape, in violation of R.C. 2907.02(A)(2), by digital penetration. Appellant moved the trial court to set aside the verdict as contrary to the balance of the jury's findings. The trial court denied the motion.

{¶14} The trial court imposed a sentence of nine years in prison.

{¶15} Appellant appeals, assigning as error:

{¶16} "I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AND CANNOT BE RECONCILED WITH THE OTHER VERDICTS IN THE CASE."

{¶17} Appellant asserts his conviction for rape, in violation of R.C. 2907.02(A)(2), is inconsistent with his acquittal on the charge of kidnapping, in violation of R.C. 2905.01(A)(3).

{¶18} Initially, we note, inconsistency between verdicts is not grounds for reversal. In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, the Supreme Court of Ohio held,

> To the contrary, the Supreme Court has made clear that a verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, may not be disturbed merely because the two findings are irreconcilable. "'Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.' " *United States v. Powell* (1984), 469 U.S. 57, 62, 105 S.Ct. 471, 83 L.Ed.2d 461, quoting *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356. Accord *Harris v. Rivera* (1981), 454 U.S. 339, 345, 102 S.Ct. 460, 70 L.Ed.2d 530. "[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall for the Government at the defendant's expense." *Powell,* 469 U.S. at 65, 105 S.Ct. 471, 83 L.Ed.2d 461. As *Powell* notes, "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." Id.

{¶19} Here, Appellant was acquitted of the charge of kidnapping.

{¶20} R.C. 2905.01(A)(3) defines kidnapping as,

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means,

shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

***

(3) To terrorize, or to inflict serious physical harm on the victim or another;

{¶21} Appellant was convicted on Count Three of rape.

{¶22} R.C. 2907.02(A)(2) defines rape as,

(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.

{¶23} We note a conviction for kidnapping as indicted required a finding of terrorizing or the infliction of serious physical harm, which were not required for the offense of rape under R.C. 2907.02(A)(2). Regardless of any theoretical inconsistencies; such do not merit reversal per *Gardner*.

{¶24} Upon our review of the testimony and evidence presented at trial as discussed supra, we find Appellant's conviction for rape, in violation of R.C. 2907.02(A)(2), is not against the manifest weight and sufficiency of the evidence.

{¶25} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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, 387, 1997–Ohio–52, 678 N.E.2d 541, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶26} {¶ 24} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶27} The credibility of the witnesses being best left to the judgment of the trial court. We find the testimony and evidence presented at trial sufficient for the trial of fact to find the essential elements of the crime of rape by digital penetration proven beyond a reasonable doubt, and the jury did not lose its way in convicting Appellant of the charge. The evidence and testimony presented at trial demonstrates Appellant penetrated K.S. with his fingers several times, cutting her vagina with his fingernails. Blood was found on the bed sheets. Appellant testified she begged Appellant not to put his fingers into her vagina and anus.

{¶28} Accordingly, we find Appellant's conviction for rape, by digital penetration, is not against the manifest weight and sufficiency of the evidence.

{¶29} The sole assignment of error is overruled.

{¶30} Appellant's conviction in the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur