

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

KIM BROWN

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.  
Hon. John W. Wise, J.  
Hon. Patricia A. Delaney, J.

: Case No. 2014CA00102

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Case No. 2013CR1718

**JUDGMENT:**

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 16, 2015

APPEARANCES:

For Plaintiff-Appellee:

For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant Kim Brown appeals his conviction and sentence on May 21, 2014 by the Stark County Court of Common Pleas.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} Defendant-Appellant Kim Brown was indicted by the Stark County Grand Jury on one count of attempt to commit an offense -- rape, a second-degree felony in violation of R.C. 2907.02(A)(2); one count of felonious assault, a second-degree felony in violation of 2903.11(A)(2); one count of kidnapping, a first-degree felony in violation of R.C. 2905.01(A)(4); one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1); and one count of possession of cocaine, a fifth-degree felony in violation of R.C. 2925.11(A)(C)(4)(a). Three counts contained a repeat violent offender specification.

{¶3} Brown entered a plea of not guilty to the charges. A jury trial was held on May 12, 2014. Prior to the voir dire of the jury, the State and Brown agreed the repeat violent offender specification was not a jury issue and was to be decided by the trial court only if the trial court considered the maximum sentence on the applicable offenses. (T. I, p. 7).

{¶4} The following evidence was adduced at the jury trial:

{¶5} During the late hours of November 1, 2013, Brown was at a home in Alliance, Ohio. T.L. arrived at the home and shortly thereafter, T.L. and Brown left in T.L.'s van. According to T.L.'s testimony, her friend asked her to drive Brown to his friend's house. T.L. agreed and she and Brown drove around Alliance looking for his

friend. They stopped at three locations. T.L. waited in the van while Brown looked for his friend.

{¶6} At the last location, Brown asked T.L. if she wanted to come into the house instead of waiting in the van. T.L. agreed and she followed Brown, entering the house by walking down outside steps that led to a basement. It was dark inside the house and T.L. realized the house was abandoned. The floor of the basement was littered with trash. A dirty mattress lay on the center of the basement floor.

{¶7} T.L. testified she went to leave and Brown asked her for a hug. T.L. said no and Brown grabbed her into a bear hug. T.L. asked him to get off her. He reached down and grabbed her butt and she tried to wrestle him off her. She testified Brown pulled a kitchen knife out of his back pocket and held it to her throat. When he pulled the knife out, Brown told her not to make him use it. He wanted to have oral sex for a half hour, smoke crack, and get high. T.L. pulled her cell phone out of the pocket of her hoody. She stated that she was able to hold the phone behind his back while Brown held her in a bear hug. She dialed 9-1-1.

{¶8} After she dialed 9-1-1, T.L. said Brown tried to push her down on the mattress. He got on top of her and tried to put her legs down. He put his hand over her mouth and nose because she kept telling him to get off her. It made it difficult for her to breathe. He kept telling her he had the knife and not to make him use it.

{¶9} While he was straddling her, she saw her phone and moved it so Brown could not see that she had dialed 9-1-1. Brown saw her move the phone and he took it out of her hand. He put her cell phone in his back pocket.

{¶10} The 9-1-1 call center received an "open call" from a female. The call was traced to an address in Alliance, Ohio. Two patrol officers with the City of Alliance Police Department were dispatched in response to the 9-1-1 call. Patrol Officer John Capper and Patrol Officer Donald Bartolet reported to the address and walked around the house with their flashlights. The officers were wearing a "point of view" camera that recorded the incidents that occurred that night. The recording was downloaded and provided to the State of Ohio. The recording was played for the jury and entered as State's Exhibit 1.

{¶11} T.L. saw the flashlights and yelled. The police officers heard T.L. call from the basement of the house and responded to her. The officers proceeded down the steps to the basement. As they entered the basement, they witnessed Brown laying on top of T.L. Officer Capper drew his pistol and Officer Bartolet drew his taser out. They yelled to Brown to get off the girl and to show his hands. Brown jumped up and began to run out of the basement. Officer Bartolet deployed the taser and hit Brown, but Brown was able to escape up the basement stairs. Officer Capper followed Brown through the home, jumping out of window, where he found Officer Bartolet subduing Brown outside. Brown was handcuffed and given his Miranda rights. Brown was searched and the search revealed a kitchen knife, the cell phone belonging to T.L., and a change purse that contained crack cocaine and marijuana.

{¶12} Brown was taken to the hospital and later interviewed by the officers, which was recorded on the point of view camera. The recording of the interview was played for the jury. During the interview, Brown said he and T.L. were in the basement to get high and to exchange oral sex for drugs. Brown ran from the officers in the

basement because he had drugs on him. Officer Capper asked why he had T.L.'s cell phone in his pocket. Brown answered that he had been in possession of her cell phone from the time T.L. and Brown were driving together in T.L.'s van.

{¶13} After the State rested, counsel for Brown moved for a dismissal based on Crim.R. 29. In the motion, Brown asked the trial court to dismiss the repeat offender violation specifications because the State rested its case without presenting evidence to allow the trial court to make a finding as to prior convictions. (T. II, p. 15). The trial court overruled the motion. (T. II, p. 16). The defense rested its case.

{¶14} The jury found Brown guilty of the charges in the indictment.

{¶15} The trial court held the sentencing hearing on May 15, 2014. The State submitted Exhibits 14 and 15 to the trial court, which showed Brown was convicted in the Stark County Court of Common Pleas. (T., p. 4). He was convicted of two offenses, both felonies of violence that were first or second degree. (T., p. 4). The defense renewed its objection made during the Crim.R. 29 motion. Based on the evidence presented, the trial court found Brown guilty beyond a reasonable doubt of the repeat offender violation specifications and that Brown was a repeat violent offender pursuant to R.C. 2929.01. (T., p. 5, 6).

{¶16} The trial court proceeded with sentencing. It determined the offense of attempting to commit rape and the offense of kidnapping were allied offenses and merged as a matter of law. (T., p. 7). The State elected to have Brown sentenced under the attempted rape offense. (T., p. 7).

{¶17} The trial court sentenced Brown as follows: eight years for the attempt to commit the offense of rape; eight years for felonious assault; eleven years for

aggravated robbery; and twelve months for possession of cocaine. The trial court ordered the sentences to run consecutively pursuant to the factors of R.C. 2929.14(C)(4) for a total sentence of 28 years. The trial court found that the available sentences for each offense were sufficient to punish Brown and to protect the public; therefore, the trial court did not impose a sentence with respect to the repeat violent offender specifications.

{¶18} The sentencing entry was journalized on May 21, 2014.<sup>1</sup> It is from this judgment entry Brown now appeals.

### **ASSIGNMENTS OF ERROR**

{¶19} Brown raises two Assignments of Error:

{¶20} "I. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶21} "II. THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF THE REPEAT VIOLENT OFFENDER SPECIFICATIONS WITH EVIDENCE ERRONEOUSLY ADMITTED AFTER THE STATE OF OHIO RESTED ITS CASE."

### **ANALYSIS**

#### **I.**

{¶22} Brown argues in his first Assignment of Error that his conviction was against the manifest weight and sufficiency of the evidence. We disagree.

{¶23} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio

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<sup>1</sup> A nunc pro tunc sentencing entry was filed on June 5, 2014. The May 21, 2014 sentencing entry contained a typographical error as to the sentence for the offense of possession of cocaine. The May 21, 2014 sentencing entry sentenced Brown to prison term of 11 years for that offense. The June 5, 2014 sentencing entry corrected the prison term for that offense to 12 months.

St.3d 380, 1997–Ohio–52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

{¶24} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the “thirteenth juror,” and after “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 overturned and a new trial ordered.” *State v. Thompkins, supra*, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶25} In his argument on appeal, Brown contends the testimony provided by T.L. was not credible because there were critical flaws in her testimony. Brown does not

elucidate in his appellate brief as to what he contends were the critical flaws. A review of the evidence presented shows the convictions for attempted rape, kidnapping, felonious assault, aggravated robbery, and possession of cocaine were supported by the sufficient evidence and were not against the manifest weight of the evidence.

{¶26} T.L. testified that she went into the basement with Brown, but Brown's sexual advancements were not welcome. She resisted, but he held her and put a knife to her throat. She testified she was able to call 9-1-1 while Brown was holding her. The 9-1-1 call center received an "open line" call and because of the 9-1-1 call, two police officers were dispatched to the house where the cell phone was located. T.L. testified Brown discovered her cell phone after she dialed 9-1-1. He took her cell phone and put it in his pocket. The police officers arrived on the scene and heard T.L. call to them from the basement. They entered the basement and found Brown on top of T.L. The point of view camera, the recording of which was played for the jury, supported the police officers' testimony as to the scene.

{¶27} Upon the search of Brown by the police officers, the officers discovered a knife, a change purse with cocaine, and T.L.'s cell phone. When asked how Brown came into possession of T.L.'s cell phone, Brown said on the point of view camera recording that he had been in possession of T.L.'s cell phone ever since they were driving around Alliance in T.L.'s van. Brown's version of events do not follow the evidence because without possession her cell phone, T.L. could not have made the 9-1-1 call from the basement. T.L.'s testimony corroborates the evidence presented by the State. The jury in this case found T.L. to be credible.



{¶28} Brown's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Brown's first Assignment of Error is overruled.

## II.

{¶29} Brown contends in his second Assignment of Error that the trial court erred when it found Brown guilty of the repeat violent offender specifications because the State offered the evidence of Brown's prior convictions after it had rested its case.

{¶30} In this case, the parties agreed prior to the start of the jury trial that the issue of the repeat violent offender specifications was not an issue for the jury and would be tried to the court. At the conclusion of the State's case, the State did not submit evidence of Brown's prior convictions. The defense moved to have the repeat violent offender specifications dismissed for lack of evidence. The trial court denied the motion. At the sentencing hearing, the trial court took evidence on Brown's prior convictions and found Brown was a repeat violent offender. The trial court, however, did not give Brown an enhanced sentence as a result of his conviction by the trial court.

{¶31} By statute, the repeat violent offender specification is to be determined by the trial court, not the jury. R.C. 2941.149(B).

{¶32} In support of the scenario by which the trial court found Brown was a repeat violent offender, the State cites to *State v. Hunt*, 10th Dist. Franklin No. 12AP-103, 2013-Ohio-5326. In *Hunt*, after the jury found the defendant guilty of other offenses, the court recessed and resumed the next week. *Id.* at ¶ 77. At the next hearing, the State submitted evidence supporting a weapons under disability charge and a repeat violent offender specification after the parties had rested their respective

cases. *Id.* at ¶ 75, 79. The defense objected to the introduction of the evidence but the trial court overruled the objection. *Id.*

{¶33} The argument raised by the defendant-appellant in *Hunt* was that the submission of evidence as to the WUD charge and RVO specifications after the parties had rested their cases violated his constitutional double jeopardy rights. *Id.* at ¶ 75. The Tenth District Court of Appeals found that the scenario of *Hunt* did not implicate the double jeopardy principles. The court recognized that whether a state's case-in-chief may be reopened for the presentation of further evidence is within the sound discretion of the trial court. *State v. Hunt*, 2013-Ohio-5326, ¶ 80 citing *Columbus v. Grant*, 1 Ohio App.3d 96, 97, 439 N.E.2d 907 (10th Dist.1981). The defendant-appellant relied on *State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997), in support of his argument. The court found *Lovejoy* to be distinguishable from the scenario presented in *Hunt*.

As our citation to the record reflects, this case presents a scenario significantly different than that presented in *Lovejoy*. To prevail on a double jeopardy claim, a defendant must show there has been an event, such as an acquittal, which terminates the original jeopardy. *State v. Whiteside*, 10th Dist. No. 08AP-602, 2009-Ohio-1893, ¶ 15, citing *Richardson v. United States*, 468 U.S. 317, 325 (1984). In this case, there had not been an event to terminate the original jeopardy on the WUD charge and RVO specification at the time the state submitted evidence of appellant's prior conviction. Rather, the trial court allowed the state to introduce evidence of a charge for which appellant waived his right to a

jury and for which there had not yet been a finding made. Therefore, appellant's reliance on *Lovejoy* is misplaced, and we conclude double jeopardy principles do not apply in this instance to bar the court's finding of guilty on the WUD charge and the RVO specification.

*State v. Hunt*, 2013-Ohio-5326, ¶ 84.

{¶34} We find the scenario presented in *Hunt* to be similar to that in the present case. The parties in this case agreed the RVO specifications were to be determined by the trial court. The jury trial commenced on May 12, 2014. At the conclusion of the State's case, the State did not submit evidence of Brown's prior convictions. The defense moved to have the repeat violent offender specifications dismissed for lack of evidence. The trial court denied the motion. The jury found Brown guilty as charged on May 13, 2014. The sentencing hearing was held on May 15, 2014. At the sentencing hearing, the trial court took evidence on Brown's prior convictions and found Brown was a repeat violent offender.

{¶35} Pursuant to statute, the repeat violent offender specification can only be determined by the trial court. We find the trial court was acting within its discretion to allow the State to reopen its case-in-chief for the presentation of further evidence as to the RVO specifications.

{¶36} Brown's second Assignment of Error is overruled.

**CONCLUSION**

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

By: Delaney, J.,

Hoffman, P.J. and.

Wise, J., concur.