[Cite as *State v. Cherryholmes*, 2015-Ohio-3063.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CARL J. CHERRYHOLMES Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 14 CA 37 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 38
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	July 29, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREGG MARX PROSECUTING ATTORNEY 239 West Main Street Suite 101 Lancaster, Ohio 43130	SCOTT P. WOOD DAGGER, JOHNSTON, MILLER, OGILVIE & HAMPSON 144 East Main Street Post Office Box 667 Lancaster, Ohio 43130

Wise, J.

{¶1}. Appellant Carl J. Cherryholmes appeals his conviction, in the Court of Common Pleas, Fairfield County, for attempt to commit rape, kidnapping, and other offenses. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. On or about January 9, 2013, Appellant Cherryholmes was at home with his wife, J.C., and their two children. After the children went to bed, J.C. went to the master bedroom to go to sleep. However, appellant got into bed and rolled J.C. over onto her back. He then got on top of her and proceeded to straddle her chest area. Appellant then tried to put his penis in J.C.'s mouth, against her will. Appellant continued his efforts until J.C. became exhausted from resisting, and he eventually put his penis in her mouth. Appellant also forcibly attempted vaginal intercourse with J.C., during which time he choked her with his hand. He later admitted to "getting a little rough" with J.C.

{¶3}. Appellant eventually let J.C. go downstairs to go to sleep. J.C. instead called her brother and asked him to come over for assistance. In the meantime, appellant came downstairs and apologized to J.C., but nonetheless called her a "bitch" during the ensuing conversation.

{¶4}. J.C.'s brother contacted law enforcement, and an investigation ensued.

{¶5}. On January 18, 2013, appellant was indicted by the Fairfield County Grand Jury on one count of rape (R.C. 2907.02(A)(2)), a felony of the first degree; one count of attempt to commit rape (R.C. 2923.02 and 2907.02(A)(2)), a felony of the second degree; one count of kidnapping (R.C. 2905.01(A)(4)), a felony of the first

degree; one count of abduction (R.C. 2905.02(A)(2)), a felony of the third degree; and one count of domestic violence (R.C. 2919.25(A)), a misdemeanor of the first degree.

{¶6}. Appellant pled not guilty to all counts. In addition, appellant filed a motion to suppress statements he had made during his police interrogation. The trial court denied the motion to suppress.

{¶7}. The matter proceeded to a jury trial on January 21 through 24, 2014. At the conclusion of the State's case, appellant moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court. After the presentation of evidence, arguments of counsel, and the reading of jury instructions, the jury returned a verdict of not guilty as to the rape count, but guilty on the counts of attempt to commit rape, kidnapping, abduction and domestic violence.

{¶8}. On February 7, 2014, appellant filed a post-verdict motion for acquittal and, in the alternative, for a new trial, which was overruled by the trial court on March 27, 2014.

{¶9}. The trial court sentenced appellant on May 9, 2014. A sentencing entry was issued on May 23, 2014. At the sentencing hearing, appellant unsuccessfully argued that the offenses of attempted rape, kidnapping and abduction should all merge for sentencing purposes as allied offenses of similar import. Appellant was thereupon sentenced to a total of ten years and eleven months in prison, with the three felony counts to run consecutively and the misdemeanor count of domestic violence to run concurrently with the second count (attempt to commit rape). The entry also states the third count (kidnapping) would be “suspended for community control.” Appellant was also classified as a Tier-Ill sex offender for registration purposes.

{¶10}. On May 27, 2014, appellant filed a notice of appeal. He herein raises the following four Assignments of Error:

{¶11}. "I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO POLICE.

{¶12}. "II. THE TRIAL COURT ERRED IN IMPROPERLY ADMITTING PRIOR BAD ACTS EVIDENCE AT TRIAL.

{¶13}. "III. THE JURY'S VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶14}. "IV. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO CONSECUTIVE SENTENCES ON ALLIED OFFENSES OF SIMILAR IMPORT."

I.

{¶15}. In his First Assignment of Error, appellant contends the trial court erred in overruling his motion to suppress evidence, specifically regarding his statements to law enforcement investigators. We disagree.

{¶16}. The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *See Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. Generally, there are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress.

When reviewing this third type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. The United States Supreme Court, in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, held that "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶17}. At the suppression hearing in this matter, the audio recording was played of appellant's interview with Detective Brian Underwood of the Lancaster Police Department, which took place after appellant had signed a *Miranda* waiver. The transcript of the recording reveals that when Detective Underwood asked what the argument with J.C. had been about, appellant replied: "I'd rather not say. *** I'd rather wait for a lawyer." Tr., Suppression Hearing ("Tr.-S."), at 29. Underwood said "okay" and then asked the question of *where* the argument had taken place. Appellant replied that it had "started in the bedroom." *Id*. The interview then continued with Underwood asking appellant if the argument had been about "sex between you two?" Tr.-S. at 30. Appellant responded: "Right now, I'd rather not say." *Id*.

{¶18}. Underwood then went back to the issue of the location of the argument, with appellant essentially indicating that the argument was limited to the bedroom. *Id.* The detective proceeded to ask if the argument involved "anything physical," at which point appellant said: "I'd rather not say right now, so *** I'd like to wait for an attorney." *Id*. Underwood asked appellant if he wanted to stop the interview "or do you still want to

answer some of the questions ***." *Id.* Appellant responded: "we can go through -- I mean, if there's anything that I may be able to ---." Tr.-S. at 31.

{¶19}. After some more questioning, Underwood inquired of appellant if he had been harmed or injured by J.C. during the events in question. Appellant stated: "I would like to not comment about that until I speak to a lawyer." Tr.-S. at 34. After some discussion about whether J.C. had been injured, during which appellant indicated J.C. was not hurt, just "upset," Underwood again asked appellant if he had been injured in any way. Appellant answered: "Not that I'm aware of at the moment. Like I said, I'd like to not comment completely about that. *** I mean, I may. Let's just put it at that. So I want to talk to my lawyer about that first." Tr.-S. at 35.

{¶20}. Throughout the remainder of the interview, appellant responded with variations of "I'd rather not talk about that" to several other individual questions by the detective. *See* Tr.-S. at 37, 41, 42, 43, 44, 52.

{¶21}. Police investigators must honor an invocation of the right to cut off questioning only if such invocation is unambiguous. *See State v. Murphy* (2001), 91 Ohio St.3d 516, 520, 747 N.E.2d 765, citing *Davis v. United States* (1994), 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362. A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation in progress. *People v. Silva* (1988) 45 Cal.3d 604, 629-630, 247 Cal.Rptr. 573, 754 P.2d 1070. *See*, *also*, *State v. Leary*, 12th Dist. Butler No. CA2013–01–009, 2013-Ohio-5670, ¶ 16 (noting that while the defendant therein "state[d] that he can't answer certain questions without an attorney, he [made] this request ambiguous and equivocal by

continuing to speak and expressing a willingness to continue answering more questions.").

{¶22}. We find appellant's actions in the case sub judice reveal he chose a "question-by-question" approach during the interview regarding consulting counsel. As such, we conclude appellant failed to make an unambiguous or unequivocal request for counsel and full invocation of his right to remain silent. Accordingly, the trial court did not commit reversible error in denying appellant's motion to suppress.

{¶23}. Appellant's First Assignment of Error is overruled.

II.

{¶24}. In his Second Assignment of Error, appellant contends the trial court erred in admitting certain testimony from J.C. regarding her prior sexual victimization by appellant during their relationship. We disagree.

{¶25}. The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case sub judice, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman*, 5th Dist. Stark No. 1999CA00027, 2000 WL 222190.

{¶26}. Evid.R. 404(A) provides that evidence of a person's character is not admissible to prove the person acted in conformity with that character. Evid.R. 404(B) sets forth an exception to the general rule against admitting evidence of a person's other bad acts. The Rule states as follows: “Evidence of other crimes, wrongs, or acts is

not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶27}. In *State v. Williams*, 134 Ohio St.3d 521, 983 N.E.2d 1278, 2012-Ohio-5695, the Ohio Supreme Court stated that trial courts should conduct a three-step analysis when considering the issue of "other acts" evidence:

{¶28}. "The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403."

{¶29}. *Id.* at ¶ 20.

{¶30}. Furthermore, "other acts" evidence is admissible only if there is substantial proof that the alleged other acts were committed by the defendant and such evidence tends to show one of the matters enumerated in Evid.R. 404(B). *State v. Wagner*, 5th Dist. Licking 03 CA 82, 2004-Ohio-3941, ¶ 43, citing *State v. Echols* (1998), 128 Ohio App.3d 677, 692, 716 N.E.2d 728. This Court has recognized that the Ohio Revised Code does not define "substantial proof" in this context. *See State v. Burden*, 5th Dist.

Stark No. 2012–CA–00074, 2013-Ohio-1628, ¶ 58. This Court also summarized as follows in *State v. King*, 5th Dist. Richland No. 08-CA-335, 2010-Ohio-4844: "We *** do not believe that the substantial proof requirement necessitates that independent evidence corroborate other acts testimony. Instead, we believe that the substantial proof requirement is satisfied if at least one witness who has direct knowledge of the other act can testify to the other act. The jury may then fulfill its duty and evaluate the witness's testimony and credibility. ***." *Id.* at ¶ 45.

{¶31}. In the case sub judice, appellant's trial counsel filed a motion in limine regarding any prior acts testimony by J.C. On the first day of the trial, the trial court conducted a hearing on said motion, which included voir dire examination of J.C. outside the presence of the jury. The court then took the issue under advisement. *See* Trial Tr. at 87. The next morning, the trial court orally ruled in favor of admissibility, holding *inter alia* as follows:

{¶32}. "The victim of these alleged offenses testified on the first of these alleged occasions of forced sexual conduct that the Defendant said, quote, that he swore never to do it again. This evidence, if believed, is reflective and probative of the Defendant's state of mind, of his intent, of his awareness that on later occasions, conduct of that nature would be unwelcomed, that it was unwanted." Tr. at 93.

{¶33}. The jury trial thereafter resumed. The gist of the disputed testimony heard by the jury, pertinent to the present issues, is largely captured in the following questioning of J.C. by the prosecutor on direct examination, over defense objection:

{¶34}. "Q. (By Ms. Bennett) Was January 9th, 2013, the first time that you had had contact with the police concerning what - - a violent sex act committed against you?

{¶35}. "A. Yes.

{¶36}. "Q. Okay. Was this the first time that the Defendant had forced sex on you, though?

{¶37}. "A. No.

{¶38}. "Q. About how often did this occur - - daily, weekly, monthly, yearly, something else?

{¶39}. "A. Well, it didn't occur all at once. I mean, there was an incident when I first got married, and then nothing happened for like over - - like a year or so. And then more incidents started to happen, but not as - - not like real often, like maybe every few months. And then it just became more and more over time. From during the summer of 2012, like there was a week straight, and then it went back to like a couple of times in like a month or so.

{¶40}. "Q. Okay. So at the time in January, the frequency was at that same amount, a couple of times a month or so?

{¶41}. "A. Yes.

{¶42}. "Q. Had you spoken to the Defendant in the past about not wanting him to force you to have sex?

{¶43}. "A. Yes.

{¶44}. "Q. And during these prior incidences, would you tell him no or stop?

{¶45}. "A. Yes.

{¶46}. "Q. How many times? Just once and a while?

{¶47}. "A. Every ---

{¶48}. "Q. Every time he did it?

{¶49}. "A. Every time that - - yeah.

{¶50}. "MR. WOOD: Can the witness answer the question, Your Honor? I'm going to object to the - - -

{¶51}. "THE COURT" Sustained.

{¶52}. "MR. MEADE: Could the witness also speak up. I'm sorry.

{¶53}. "Q. Could you please speak up so we can hear your response to the question about how often you told the Defendant no or stop during these instances?

{¶54}. "A. Every time that I didn't want to do something, I told him no and I asked him to stop.

{¶55}. "Q. Okay. Did you speak with the Defendant after the fact about not wanting him to do this?

{¶56}. "A. Yes.

{¶57}. "Q. Did you take - - did you and the Defendant go to marriage counseling to speak about you not wanting him to force sex on you?

{¶58}. "A. Yes.

{¶59}. "Q. And he was present during these sessions?

{¶60}. "A. Some of them.

{¶61}. "Q. Okay. Is there any way the Defendant didn't know you did not like him to force sex on you?

{¶62}. "A. I don't think so.

{¶63}. "Q. You told him no in the past?

{¶64}. "A. Yes.

{¶65}. "Q. After these instances, did you tell him, 'I didn't like it'?

{¶66}. "A. Yes.

{¶67}. "Q. How many times - - once, twice, three times?

{¶68}. "A. Many.

{¶69}. "Q. Many? How did the Defendant respond when you were telling him these things?

{¶70}. "A. He was - - -

{¶71}. "MR. MEADE: I'm sorry. I can't hear.

{¶72}. "A. He kind of didn't really - - he just kind of - - I don't know how to explain it. Like if I was talking to him about being upset with the way he was treating me, he would be like, 'Oh, no, it's not really that bad. You just think it's that bad. It's that bad in your head.' That's kind of how he talked to me about it. But, I mean, when it was like during the sex, he would - - he would just be like, 'No, you're going to do what I tell you to.'

{¶73}. "Q. On these prior instances, did he smack you? * * *.

{¶74}. "A. In the bedroom.

{¶75}. "Q. Okay. While you were having sex?

{¶76}. "A. Yes.

{¶77}. "Q. Okay. Did he ever choke you?

{¶78}. "A. Yes.

{¶79}. "Q. And was this when he was forcing sex on you?

{¶80}. “A. Yes.

{¶81}. “Q. Did you tell anybody besides a counselor about the Defendant?

{¶82}. “A. Not at first.”

{¶83}. Tr. at 155-159.

{¶84}. We additionally note the trial court gave a limiting instruction to the jury, including the following: "If you believe this testimony, you can only consider it for the purposes of determining what the Defendant's state of mind -- that is, what his purpose was -- on January 9, 2013, when he allegedly engaged in sexual conduct with [J.C.]." Tr. at 153. It is well-established that juries are presumed to follow and obey the limiting instructions given them by the trial court. *State v. Dorsey*, 5th Dist. Licking No. 11 CA 39, 2012-Ohio-611, ¶ 44, citing *State v. DeMastry,* 155 Ohio App.3d 110, 127, 799 N.E.2d 229, 2003–Ohio–5588, ¶ 84.

{¶85}. Upon review of the record, we hold the trial court's decision as to the disputed testimony by J.C. in regard to Evid.R. 404(B), and its further determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice pursuant to Evid.R. 403(A) (*see* Tr. at 94), did not constitute an abuse of discretion warranting reversal.

{¶86}. Accordingly, appellant's Second Assignment of Error is overruled.

III.

{¶87}. In his Third Assignment of Error, appellant maintains his convictions were not supported by the sufficiency of the evidence and were against the manifest weight of the evidence. We disagree.

{¶88}. In reviewing a claim based on the sufficiency of the evidence, “[t]he 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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶89}. Appellant was convicted of three felony offenses in the case sub judice, as well as a first-degree misdemeanor count of domestic violence. He was found not guilty of rape.

{¶90}. The first offense of the four was attempt to commit rape. R.C. 2923.02(A) states that "[n]o 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." Further, pursuant 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."

{¶91}. Appellant was also convicted of kidnapping. R.C. 2905.01(A)(4) states as follows:

{¶92}. "(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: *** (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

{¶93}. Furthermore, appellant was convicted of abduction. R.C. 2905.02(A)(2) states that "[n]o person, without privilege to do so, shall knowingly *** [b]y force or

threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear."

{¶94}. Finally, the offense of domestic violence was charged under R.C. 2919.25(A), which provides as follows: “(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶95}. Because the events of January 9, 2013, occurred within the privacy of the marital residence, there was significant utilization at trial of the testimony of the victim, J.C. In her recollection of the events to the jury, J.C. stated that appellant climbed on top of her, held her down and tried to force his penis into her mouth, and thereafter into her vagina. Tr. at 125-132. She testified that appellant told her to "open her fucking mouth" and forced open her jaw in order to insert his penis for oral sex. Tr. at 120-126. She recalled that appellant, a former high school wrestler and U.S. Navy veteran, slapped her, pinned her, choked her, and threatened to punch and "beat the shit" out of her. Tr. at 123, 128. At one point, appellant grabbed her leg, put it in an arm hold, and threatened to break it. Tr. at 124. At various points, J.C. was squirming and trying to get away. Tr. at 131. J.C. noted that she had told him she did not like forced sex in the past. Tr. at 135. Eventually, although appellant did not ejaculate, appellant was pushed off to the side of the bed and told to sleep downstairs. Tr. at 132. Appellant later came downstairs to apologize. Tr. at 133.

{¶96}. Additional evidence at trial included the testimony of J.C.'s brother, Shawn, who came over to the house on January 9, 2013 after J.C. called him for help. Shawn saw J.C. was upset and had red marks on her face. Tr. at 664. J.C. gave him a note she had written after she got out of the bedroom. The note "shocked" him when he

read it. Tr. at 666. Shawn thereupon went outside and contacted the Lancaster Police Department. Tr. at 667. After the officers arrived and went upstairs, appellant was heard to admit that he "guessed [he] did get a little rough with her." Tr. at 671. One of the testifying police officers, Brian St. Clair, a twenty-two year veteran of law enforcement, observed that J.C. was the most frightened victim that he had seen in his career. Tr. at 728.

{¶97}. Dr. Marc Darnell, the emergency medical physician, testified that he examined J.C. and found a red mark on her arm as well as tenderness to her wrist, neck and jaw. Tr. at 629, 632, 633. Dr. Darnell also noted that she looked depressed and had a flat affect when he examined her. Tr. at 633. He testified that J.C.'s reaction was appropriate from what he has seen of rape victims in the past and that her statements did not show signs of malingering or exaggeration. Tr. at 635-637.

{¶98}. The State also presented a recording of a telephone call appellant made from the jail to his father. Appellant admitted in the call that he "got rough" with J.C., and he asked his father if he could talk to J.C. about avoiding criminal charges. At one point, the father asked appellant " *** for everything and everything I stand for and that, you can't hold your temper at all?" Appellant then replied: "No, I tried." Tr. at 849.

{¶99}. A victim's testimony alone can be sufficient to support sex offense convictions. *See*, *e.g*., *State v. Whitt*, 5th Dist. Coshocton No. 10–CA–10, 2011-Ohio-3022, ¶ 46. In the instant case, upon review of the record and transcript in a light most favorable to the prosecution, we find that a reasonable finder of fact could have found the elements of attempted rape, kidnapping, abduction, and domestic violence beyond a reasonable doubt.

{¶100}. Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See, also, State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717.

{¶101}. Appellant herein asserts a number of claimed weaknesses or contradictions in the State's case, particularly as to the victim's testimony. He notes, for example, that J.C. had not mentioned in her divorce deposition what happened on January 9, 2013, and that she admitted to an incident several years earlier where she had exaggerated about taking "some pills" in order to manipulate appellant to come over and discuss their relationship. He urges that J.C. was shown to have experience in local theater acting, and that her trial testimony was inconsistent with the letter she wrote on the night of the events in question and with various oral and recorded statements to law enforcement and hospital personnel. He adds that there were no photographs of any injuries presented, and that J.C. decided not to submit to a rape kit at the hospital.

{¶102}. However, even in addressing a manifest weight claim, we remain mindful that the jurors, as the firsthand triers of fact, are patently in the best position to gauge the truth. *See State v. Durbin,* 5th Dist. Holmes No. 13 CA 2, 2013–Ohio–5147, ¶ 53.

Upon review, we are unpersuaded that the jury lost its way in assessing the evidence in this case. We find the jury's decision did not create a manifest miscarriage of justice requiring that appellant's convictions be reversed and a new trial ordered.

{¶103}. Appellant's Third Assignment of Error is overruled.

IV.

{¶104}. In his Fourth Assignment of Error, appellant argues, based on a claim of allied offenses of similar import, that the trial court erred in imposing consecutive sentences on the three felony counts.

{¶105}. R.C. 2941.25 protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions. *See State v. Jackson,* Montgomery App.No. 24430, 2012–Ohio–2335, ¶ 133, citing *State v. Johnson,* 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010–Ohio–6314, ¶ 45. Appellate review of an allied offense question is de novo. *State v. Williams,* 134 Ohio St.3d 482, 2012–Ohio–5699, ¶ 12.

{¶106}. R.C. 2941.25 states as follows:

{¶107}. "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶108}. "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶109}. For approximately the first decade of this century, law interpreting R.C. 2941.25 was based on *State v. Rance,* 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999–Ohio–291, wherein the Ohio Supreme Court had held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.* The *Rance* court further held that courts should compare the statutory elements in the abstract. *Id.*

{¶110}. However, the Ohio Supreme Court, in *State v. Johnson, supra,* specifically overruled the 1999 *Rance* decision. The Court held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.,* at the syllabus. As recited in *State v. Nickel,* Ottawa App.No. OT–10–004, 2011–Ohio–1550, ¶ 5, the test in *Johnson* for determining whether offenses are subject to merger under R.C. 2921.25 is two-fold: "First, the court must determine whether the offenses are allied and of similar import. In so doing, the pertinent question is 'whether it is possible to commit one offense *and* commit the other offense with the same conduct, not whether it is possible to commit one *without* committing the other.' (Emphasis sic.) *Id.* at ¶ 48. Second, 'the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." ' *Id.* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008–Ohio–4569, ¶ 50 (Lanzinger, J., concurring in judgment). If both questions are answered in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Johnson,* at ¶ 50."

{¶111}. Recently, the Ohio Supreme Court again considered the issue of allied offenses under R.C. 2941.25. In *State v. Ruff*, --- N.E.3d ---, 2015-Ohio-995, the Court

further developed the analytical framework for courts to apply on the issue, this time focusing on the concept of "import," holding in part as follows: "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id*., at paragraph two of the syllabus.

{¶112}. In reaching its decision, the Court recognized that the *Johnson* decision was "incomplete" and that Johnson's syllabus language "does not offer the complete analysis necessary to determine whether offenses are subject to merger rather than multiple convictions and cumulative punishment." *Id*. at ¶ 16.

{¶113}. However, we note *Ruff* was decided subsequent to the time of the filing of the briefs in the case sub judice We faced a similar dilemma in regard to the impact of *Johnson* when that decision was first issued in 2010. *See State v. Mowery*, 5th Dist. Fairfield No. 10–CA–26, 2011-Ohio-1709, ¶ 26. In *Mowery*, because the trial court had not been afforded the opportunity to review the pertinent issues under *Johnson*, we remanded the matter for a new sentencing hearing on the limited issue of potential merger. *See Mowery* at ¶ 27 - ¶ 28. This result comports with the general view that the trial court should make such a determination in the first instance. *Cf. State v. Vitt,* 9th Dist. Medina No. 10CA0016–M, 2011–Ohio–1448, ¶ 8.

{¶114}. Therefore, in the interest of justice, borrowing from our approach in *Mowery*, we hereby sustain appellant's Fourth Assignment of Error to the extent that the matter will be remanded for a new, albeit limited, sentencing hearing to analyze the offenses at issue pursuant to *Ruff*, and if necessary, to further consider potential merger of the offenses for sentencing.

{¶115}. For the foregoing reasons, the decision of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed in part, reversed in part, and remanded for a new sentencing hearing.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

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