[Cite as *State v. French*, 2010-Ohio-6517.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1087

Appellee — Trial Court No. CR0200803386

v.

Shaheem R. French — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer L. Donovan, Assistant Prosecuting Attorney, for appellee.

Ann M. Baronas, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas. Appellant, Shaheem R. French, was found guilty by a jury of: (1) four counts of rape, all violations of R.C. 2907.02(A)(2) and (B) and felonies of the first degree; (2) two counts of kidnapping in violation of R.C. 2905.01(A) and (C), and felonies of the first degree; (3) three counts of aggravated burglary in violation of R.C. 2911.11(A)(1), all felonies of the first degree; (4) three counts of aggravated

robbery, in violation of R.C. 2911.01(A) and felonies of the first degree; (5) one count of attempted rape, a violation of R.C. 2923.02 and 2907.02(A)(2) and (B), a felony of the second degree; and (6) one count of gross sexual imposition in violation of R.C. 2907.05(A)(1) and (C), a felony of the fourth degree. The trial court imposed an aggregate sentence of 108.5 years in prison. French appeals and claims that the following errors occurred in the proceedings below:

{¶ 2} " Assignment of Error One

{¶ 3} "The trial court erred in sentencing appellant to consecutive sentences and the sentence imposed was cruel and unusual punishment.

{¶ 4} "Assignment of Error Two:

{¶ 5} "The trial court erred in denying appellant's motion to suppress [the] suggestive identification process.

{¶ 6} "Assignment of Error Three:

{¶ 7} "The trial court erred in denying appellant's motion to suppress statements.

{¶ 8} "Assignment of Error Four:

{¶ 9} "The trial court erred in denying appellant's motion to sever counts."

{¶ 10} On the morning of September 19, 2005, E.J., a 14-year-old girl, was walking to school on Cherry Street in Toledo, Lucas County, Ohio[1], when she was

[1]It is undisputed that all of the offenses perpetrated by appellant occurred in Toledo, Lucas County, Ohio.

grabbed by a man who said that he had a gun. The assailant dragged the girl to a nearby backyard and told her to take off her clothes. When E.J. refused, the man punched her in the face. He then dragged the girl to a second backyard where he again demanded that she remove her clothing. When she refused, her attacker pulled off her jeans and top and had sexual intercourse with her. The girl ran to a nearby house, the police were notified, and E.J. was taken to the hospital where a rape kit was performed. At French's trial, the state's expert, Jennifer Akbar, opined that the semen obtained from the rape kit was consistent with that of appellant.

{¶ 11} On September 6, 2008, C.P., a 30-year-old woman, was sleeping on her side in the bedroom of her home when she woke to find a man rubbing her arm. It was dark in the bedroom so the woman could hardly see the man, who was sitting on the bed and holding a screwdriver pressed against her neck. Her attacker turned C.P.'s head to the side and told her not to look at him. When she was allowed to turn and lay on her back, C.P. saw that he had the lower part of his face covered. Because she was menstruating, the man placed a pillow on her face and masturbated on her chest. When he was finished, her assailant wiped C.P.'s chest with her shirt and took the shirt, the money from her purse, and her cell phone with him. The results of DNA testing of the semen found on C.P.'s chest was consistent with that of appellant.

{¶ 12} On the evening of September 12, 2008, E.S. decided to stay at her boyfriend's house for the night. The following morning, her boyfriend left for work around 6:15 a.m. After moving her motor vehicle, E.S. went back into the house and

decided to go back to bed. She subsequently heard someone knock on the side door, but did not get out of bed. Then she heard a loud bang, but thought that "something fell in the bathroom." The victim, however, heard someone coming up the stairs toward the bedroom. E.S got out of bed and locked the door. At that point, she thought that it was her boyfriend's roommate walking up the stairs.

{¶ 13} After trying to open the bedroom door and finding that it was locked, the individual went downstairs and walked through the rooms on the first floor, where he obtained a key or keys to the doors in the house. When he returned, he first unlocked the roommate's bedroom door and then, the boyfriend's bedroom door. E.S. turned on a light and started to call her boyfriend. Nevertheless, her assailant, who held a knife, quickly entered the room, turned off the light, told her to "put down" the cell phone, and sat on the bed next to her. He told E.S., "If you scream, I'll kill you." The attacker walked E.S. out of the house into the backyard, where he raped her, took her cell phone, told her he would kill her if she screamed or looked at him, and left. The only description of the man E.S. could provide to the police was that he was African American and wore black clothing. Testing of the semen sample in the rape kit performed on E.S. was consistent with that of appellant.

{¶ 14} On the morning of September 17, 2008, A.B., a 13-year-old girl, was walking to the school bus stop when a man came up to her, grabbed her by the neck, and told her to walk the other way. As they were walking, the girl noticed that the man had a screwdriver in his other hand. Her assailant forced A.B. into an alley where he took her

money and her cell phone. At that point, the man loosened his hold on the child's neck, allowing her to break away and run home. A.S. later identified appellant in a photo array as the person who assaulted her.

{¶ 15} On September 25, 2008, A.C. was asleep in her bedroom when she "woke up to someone crawling" on the floor. At first she thought it was her boyfriend trying to "sneak" into the house. A.C. realized it was not her boyfriend and asked the intruder what he was doing in her bedroom. He replied, "I'm about to rape you." The man got on the bed, put a knife in front of the woman's face, pulled down her pants, and raped her. He then fled, taking the victim's clothes, money, and cell phone with him. It was later discovered that A.C.'s attacker also took her boyfriend's gray "hoodie." A rape kit was performed on A.C. at the hospital. Subsequent analysis of the semen by Akbar revealed it was consistent with that of appellant.

{¶ 16} Any other facts necessary for the resolution of a particular assignment of error shall be set forth therein.

{¶ 17} In his first assignment of error, appellant initially contends that the trial court erred and abused its discretion by imposing consecutive sentences without making the requisite factual findings as mandated in *Oregon v. Ice* (2009), ___U.S.___, 129 S.Ct. 711. The Ohio Supreme Court eliminated judicial fact finding prior to imposing, inter alia, consecutive sentences in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. This court previously declined to re-examine *Foster* in light of the United States Supreme

Court's decision in *Ice*, finding that such a review is a matter solely within the purview of the Supreme Court of Ohio. See *State v. Harthorne*, 6th Dist. Nos. L-09-1207, L-09-1208, L-09-1209, 2010-Ohio-5645, ¶ 10; *State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164, ¶ 8. Consequently, appellant's initial argument is without merit.

{¶ 18} Appellant, however, further argues that the aggregate 108.5 year sentence and fines in the amount of $193,000 violate his constitutional right against cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, Ohio Constitution. The language in the Eighth Amendment to the Constitution of the United States and the Ohio Constitution are identical and provide: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *State v. Hairston*, 118 Ohio St.3d 290, 2008-Ohio-2338, at the syllabus, the Supreme Court of Ohio held:

{¶ 19} "Where none of the individual sentences imposed on an offender are not grossly disproportionate to their respective offenses, an aggregated prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

{¶ 20} Appellant was found guilty of 14 first degree felonies. The range of prison terms for a first degree felony is from three to ten years. R.C. 2929.14(A)(1). All of the sentences imposed on appellant for these first degree felonies fall within the statutory range. For the second degree felony, the court imposed a sentence of eight years. This is also within the statutory range. See R.C. 2929.14(A)(2). Finally, the court imposed an

18 month sentence for the fourth degree felony; this sentence is within statutory range. See R.C. 2929.14(A)(4). Consequently, we cannot say that any of these sentences was grossly disproportionate for the charged offenses; that is, considering the extent of the sexual and theft offenses committed by appellant, the sanctions imposed for these violations are not so disproportionate that they can be deemed shocking either to a reasonable person or to the community's sense of justice. *Hairston* at ¶ 13-14. (Citation omitted.) Therefore, the trial court's imposition of a 108.5 year aggregated prison term resulting from consecutive impostion of those sentences does not constitute cruel and unusual punishment.

{¶ 21} We agree with appellant that the court imposed fines in an aggregate amount of over $190,000. Nonetheless, the trial judge was permitted to impose such fines under R.C. 2929.18(A) and none of these fines, taken separately, exceeded the maximum amount for the specific degree of the felony as provided in R.C. 2929.18(A)(3). Moreover, the court ordered that these fines were "to be paid out of any potential profit that Mr. French would ever possibly receive from this or any other act he endeavors in the rest of his life from any which way, royalties or anything else included." Thus, the payment of the fines are contingent only on any "potential profit" made by appellant. Accordingly, we cannot say that the imposition of said fines constitutes cruel and unusual punishment. For the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 22} Appellant's second and third assignments of error claim that the trial court erred in denying both his motion to suppress the "suggestive" photo array "identification process" and to suppress statements made by French during a portion of his interview with the police.

{¶ 23} A review of a motion to suppress involves a mixed question of law and fact. *State v. Davis* (1999), 133 Ohio App.3d 114, 117. Specifically, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 41. After accepting those facts as true, we must then independently determine whether, as a matter of law and without deference to the trial court's conclusion, that they satisfy the applicable legal standard. Id. Keeping this standard in mind, we now turn to a separate consideration of appellant's second and third assignments of error.

{¶ 24} In his second assignment of error appellant argues that E.J.'s photo array identification of him as her rapist should have been suppressed due to the fact that the array was overly suggestive. In particular, he points out that his photograph was the "only photo with a square highlighted background around it." It is undisputed that a suspect was not found until a year after E.J. was raped. At that time a photo array was assembled and shown to E.J. at her new school. E.J., however, initially refused to go forward with the case. At some point, the original photo array was destroyed. Thus, the subsequent photo array(s) shown to E.J. were copies. In these photo arrays, appellant's photograph is the only one that has a light gray box framing his face.

{¶ 25} Photo array evidence is suppressed only if the identification, or method of identification, is unduly suggestive and unreliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Neil v. Biggers* (1972), 409 U.S. 188. Factors to be considered in determining the reliability and suggestiveness of a challenged identification include: (1) the victim's opportunity to view the defendant during the crime; (2) the victim's degree of attention; (3) the accuracy of the victim's prior description, if any, of the defendant; (4) the victim's certainty; and (4) the amount of time that has elapsed between the offense and the identification. *Neil v. Biggers* at 200. "In addition, if a pretrial photographic identification is followed by an eyewitness identification at trial, the photographic identification can be suppressed only if the procedure was suggestive enough to create 'a very substantial likelihood of irreparable misidentification.'" *State v. Gaines*, 6th Dist. No. WD-08-058, 2010-Ohio-91, ¶ 15, quoting, in part, *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶ 26} Although a year passed before E.S. identified appellant as her rapist, she had ample time to see him at the time of the attack, her attention was focused on him, and she was absolutely certain that it was appellant who raped her and punched her in the face. In addition, on redirect examination, she testified that she did not notice any particular background in any specific photograph. Moreover, E.S. identified appellant at trial as the individual who punched and raped her. Based upon these facts, we find that the light gray background around appellant's photograph in the photo array shown to E.J.

was not suggestive enough to create a very substantial likelihood of irreparable misidentification. Appellant's second assignment of error is found not well-taken.

{¶ 27} Appellant's third assignment of error asserts that the trial court erred in failing to grant his motion to suppress statements he made while he was "in custody" at the Northwest District Police Station in Toledo, Lucas County, Ohio, on October 1, 2010.

{¶ 28} We start with the proposition that law enforcement officers are not required to give warnings pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, to every person they question, even if the person being questioned is a suspect. *State v. Biros* (1997), 78 Ohio St.3d 426, 440. Rather, *Miranda* warnings are required only for custodial interrogations. Id. The determination of whether a custodial interrogation occurred "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Id., quoting *California v. Beheler* (1983), 463 U.S. 1121, 1125.

{¶ 29} In the present case, appellant was brought to the station to talk about a rape that a friend might have committed. At the outset of their conversation, Detective Bonnie Weis of the Special Victims Unit ascertained whether appellant could read and write and then verbally informed him of all of his rights under *Miranda*. French waived those rights both verbally and in writing. In fact, he insisted that he did not want an attorney and was there to help his friend, "J.Z."

{¶ 30} Later during the interview, Detective Weiss left the room and Detective Gina Lester came in and spoke with appellant about a "hoodie" that his friend was

wearing. Lester again asked appellant whether he understood that all of the rights that Detective Weis explained to him were still in effect. Appellant indicated that he understood. Lester then continued to discuss his friend's possible commission of a rape. At no time during this conversation was French formally under arrest or restrained from a freedom of movement that is associated with a formal arrest. Instead, he was arrested and placed in a holding cell for transportation to the jail at a later point in time. Consequently, we find appellant's third assignment of error not well-taken.

{¶ 31} In his fourth and final assignment of error, appellant claims that the trial court erred in failing to sever certain counts in the indictment because, in this case, "there were multiple and varied offenses separated by months and even years, questionable identifications by witnesses and no identifications at all by two witnesses." Appellant also argues that the trial court erred in failing to sever the counts because, during the course of his trial, the state never introduced any evidence pursuant to Evid.R. 404(B).

{¶ 32} Prior to trial, appellant asked the trial court to sever the counts in the sixteen count indictment in such a way that there would be four separate trials. The trial court denied this motion. Appellant renewed the motion to sever at the close of all evidence, but the trial court again denied that motion.

{¶ 33} We start with the proposition that, under Crim.R. 8(A), the law favors the joinder of multiple crimes allegedly committed by the same offender when those offenses are of the same or similar character. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 76. (Citations omitted.) Nevertheless, sometimes it may be necessary to require separate

trials to prevent prejudice to the defendant. See Crim.R. 14; *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 29.

{¶ 34} On appeal, the burden is on the defendant to show that he was prejudiced by the trial court's refusal to sever the counts in the indictment. *State v. Robinson*, 6th Dist. No. L-09-1001, 2010-Ohio-4713, ¶ 22, citing *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus. We review the trial court's decision on a motion to sever under an abuse of discretion standard. *State v. Lott* (1990), 51 Ohio St.3d 160, 163. A trial court abuses its discretion when its attitude in reaching its judgment is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 35} Here, the offenses alleged against appellant were of the same or similar nature in that they all involved sex offenses and the taking of the property of some of the victims. Thus, they were properly joined pursuant to Crim.R. 8(A). Therefore, we shall not disturb the trial court's decision unless appellant demonstrated how he was prejudiced by the trial court's denial of his motion to sever. He failed to do so.

{¶ 36} Furthermore, even if we would find that appellant demonstrated prejudice, we cannot say that the trial court abused its discretion in denying appellant's motion to sever. Specifically, the state may rebut a defendant's claim of prejudice by one of either two methods. *State v. Ashcraft*, 12th Dist. No. CA2008-12-305, 2009-Ohio-5281, ¶ 16, citing *State v. Lott*, 51 Ohio St.3d at 163. First, the state may rebut a defendant's claim of prejudice by demonstrating that it could have introduced evidence of the joined offenses at separate trials pursuant to the "other acts" provision found in Evid.R. 404(B). *State v.*

Coley, 93 Ohio St.3d 253, 259. In the alternative, the state may negate a claim of prejudice by satisfying the less rigorous "joinder test," which requires the state to establish "that evidence of each crime joined at trial is simple and direct." Id. at 260. Here, the state established that the evidence of each offense was simple and direct, that is, each involved unlawful sexual conduct and theft offenses. Accordingly, we find that the trial court's attitude in denying appellant's motion to sever was not unreasonable, arbitrary, or unconscionable. Appellant's fourth assignment of error is found not well-taken.

{¶ 37} On consideration whereof, this court finds that substantial justice was done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE