[Cite as *State v. Peterson*, 2005-Ohio-398.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84583

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
JAMES PETERSON	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 3, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-437246
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
BY: MICHAEL D. HORN, ESQ.
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant:

DREW SMITH, ESQ.
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} James Peterson appeals his conviction for rape and kidnapping handed down by the Cuyahoga County Court of Common Pleas. After a review of the record and arguments of the parties, we affirm the decision of the trial court for the reasons set forth below.

{¶ 2} Appellant was charged with seven counts of rape, with firearm specifications, and two counts of kidnapping on June 13, 2003. Appellant waived his right to a jury trial, and the case was tried to the bench on April 20, 2004. On April 21, 2004, appellant was acquitted by directed verdict on three counts of rape and one count of kidnapping; the directed verdict was unopposed by the state. Appellant was found guilty, however, as to four counts of rape with one- and three-year firearm specifications and one count of kidnapping with a sexual motivation specification and one- and three-year firearm specifications.

{¶ 3} The trial court sentenced appellant to four years for each rape and kidnapping count, to run consecutively with three years for each specification, for a total of seven years per count. The court further ordered the seven-year sentences to run concurrent with each other, and it classified appellant as a sexually oriented offender.

{¶ 4} The facts which gave rise to this case are as follows. The victim, L.D.[1], testified that she went to Josephine's, a bar and restaurant, on May 10, 2002 at approximately 9:00 p.m. She testified that the bar portion of the establishment was not open that evening, only the restaurant. She testified that, after having dinner, she asked a friend for a ride home, but the friend was unable to drive her. She then began walking home along Central Avenue when a truck pulled up beside her. She stated that the driver of the truck, the appellant, pointed a gun at her and ordered her to get in the truck. The appellant then ordered her to lay on the floor of the truck, take off her clothes, and perform oral sex on him while he was driving. She testified that the interior of the truck was a small area, and that both she and the appellant were larger people. The victim next stated that the appellant eventually stopped the vehicle and instructed her to lay across the front seat so that he could insert his fingers and tongue into her vagina. He also had vaginal sex with her, according to her testimony. He then put the gun to her head and ordered her out of the vehicle, after she had put on her clothes.

{¶ 5} After the victim returned home, she called 911 and was taken to the hospital where a rape kit was performed. The next day, she was able to give police the license number of the truck

[1]The victim is referred to herein by her initials in accordance with this court's established policy.

and to escort police to the spot where the truck had been parked during the assault (despite her testimony that she did not know where she was when she was ordered out of the vehicle). While riding as a passenger in a police car, the victim spotted a used condom laying near a tire on the road, which police recovered and took into evidence. She also identified photos of the truck, which police determined was registered to the appellant's cousin. When shown a photo lineup by investigating officers, the victim identified Ronnie Linder, appellant's cousin, as her assailant. The parties agree that appellant and Linder are quite similar in appearance. Both Ronnie Linder and the appellant were initially arrested during the investigation, but laboratory testing revealed appellant's DNA in the condom that was recovered at the scene of the assault. No DNA was recovered from the rape kit performed on the victim after the assault because it was not tested by the Bureau of Criminal Investigation ("BCI") lab. No DNA or fingerprints belonging to the victim were recovered from the interior of the truck according to BCI analysis.

{¶ 6} Other witnesses in the case were Patrolman Brian Lanasa, Detective Alan Strickler, and former officer William Conn of the Cleveland Police Department, who gave testimony regarding the initial 911 call and subsequent investigation of the charges. The state also presented the testimony of Eva Taylor, who had been with the victim at Josephine's on the night in question. Her testimony

differed from that of the victim in that she testified that she had arranged to meet the victim and several other girlfriends at approximately 6:00 p.m. and that no one stayed at Josephine's because the bar area was closed. She confirmed that the victim had asked her for a ride home and that she was unable to provide one. She further testified that she saw the victim several weeks later and that the victim told her she had been raped on the night in question.

{¶ 7} The defense presented only the testimony of the appellant, who stated that he met the victim at Josephine's on May 10, 2002 sometime after 9:00 p.m. He remembers the bar being open on the night in question, that the victim approached him, and they had drinks and talked for 30 minutes. The defense produced no witnesses who saw appellant drinking with the victim. Appellant then testified that he offered the victim a ride home and she accepted. On the way, the victim indicated that she would perform sexual favors for money. Appellant offered her ten dollars for oral sex, and she complied. Appellant claims he used a condom, which he dropped outside of the vehicle window when the encounter concluded.

{¶ 8} Appellant now sets forth three assignments of error for our review:

{¶ 9} "I. JAMES PETERSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 10} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, at 141, 142.

{¶ 11} Appellant argues that he was denied effective assistance of counsel because trial counsel failed to move to exclude the DNA evidence introduced by the prosecution and because trial counsel stipulated to the BCI laboratory results introduced by the prosecution.

{¶ 12} First, DNA is an exact science, universally accepted in the scientific community and constitutes reliable evidence. *State v. Stokes* (Dec. 11, 1997), Cuyahoga App. No. 71654, citing *State v. Pierce* (1992), 64 Ohio St.3d 490, 497, 597 N.E.2d 107; State v. Nicholas (1993), 66 Ohio St.3d 431, 437, 613 N.E.2d 225. In the instant case, BCI failed to analyze the rape kit submitted by the

Cleveland Police; trial counsel's decision to stipulate to the findings as reported was a viable trial strategy, considering that inquiry into the BCI findings may have incriminated his client further. In evaluating trial counsel's strategy, a reviewing court must try to eliminate hindsight and attempt to evaluate the conduct from counsel's perspective at the time. *Strickland*, supra, 466 U.S. at 689, 80 L.Ed.2d at 694-695. Great latitude is given to defense counsel in matters of trial strategy. *State v. Smith* (1985), 17 Ohio St. 3d 98, 100-101, 477 N.E.2d 1128. Therefore, we find defense counsel's stipulation to the BCI findings a matter of trial strategy. Moreover, appellant has failed to demonstrate how the outcome of the trial would have been different but for defense counsel's stipulation -- the DNA match would still have been made, and the prosecution could have brought in a BCI investigator to testify to that match.

{¶ 13} Appellant further argues that trial counsel's performance was deficient when he failed to file a motion to suppress the evidence uncovered as a result of the DNA test performed on appellant because there did not exist probable cause to issue a search warrant to compel appellant to submit to a genetic screening. However, appellant himself testified that he consented to the saliva swab prior to being served with a search warrant. It is therefore reasonable to conclude that trial counsel's failure to file a motion in this instance was another trial tactic, and his

actions did not fall below the standard of reasonableness. In light of these facts, we cannot find that trial counsel's performance was deficient, and this assignment of error is overruled.

{¶ 14} "II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIREARM SPECIFICATION."

{¶ 15} A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. However, a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *State v. Trembly* (2000), 137 Ohio App.3d 134, 139, citing *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407. "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 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" *State v. Jenks*

(1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph 2 of the syllabus. See, also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 16} R.C. 2929.14(D)(1)(a)(ii) authorizes the imposition of a three-year mandatory prison term upon an offender if the offender "had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." The state must not only prove that the firearm existed but that it was operable at the time of the offense. *State v. Murphy* (1990), 49 Ohio St.3d 206, 208, 551 N.E.2d 932. "However, such proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." Id. at syllabus.

{¶ 17} In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm. *State v. Thompkins*, 78 Ohio St.3d 380 at 385, 1997-Ohio-52, 678 N.E.2d 541. A firearm specification can be proven beyond a reasonable doubt by circumstantial evidence. Id.

{¶ 18} Appellant argues that there exists insufficient evidence to support a conviction with respect to the gun specification. The victim testified that appellant brandished a "small, chrome automatic" during the attack, but acknowledged on cross-examination that she may have made a statement sometime during the two years between the assault and trial that the gun was black. Defense counsel, however, did not confront the victim with a prior inconsistent statement, and, on redirect examination, the victim again described the gun. Viewing this evidence in the light most favorable to the prosecution, and in light of *Thompkins*, supra, we cannot find that the victim's testimony is insufficient evidence to support a conviction. Appellant's second assignment of error is overruled.

{¶ 19} "III. THE VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 20} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. Instead, "the [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 752.

{¶ 21} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony. *Thompkins*, 78 Ohio St.3d 380, 387, citing *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. In the instant case, the only two witnesses to any of the activity alleged in the indictment were the victim and the appellant. Both parties agreed that there was a sexual encounter, but the appellant claims the acts were consensual, while the victim testified that she was forced into the appellant's truck at gunpoint and made to perform sexual acts. There is no evidence, however, that the trier of fact clearly lost its way in its decision to find the victim's testimony more credible as to the counts on which appellant was convicted. Moreover, both the victim's and Eva Taylor's testimony contradicted appellant's assertion that he and the victim were drinking together in Josephine's bar on the night in question; Eva Taylor was the bar manager and corroborated the victim's statement that the bar portion of the establishment was closed that night. Therefore, we cannot find that a manifest miscarriage of justice has been created with this conviction, and appellant's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
JUDGE

ANN DYKE, P.J., AND

SEAN C. GALLAGHER, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for

review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).