[Cite as *State v. Rodriquez*, 2009-Ohio-6101.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92231

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FARLEY RODRIQUEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AS MODIFIED, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502705

BEFORE: Kilbane, J., Cooney, A.J., and Jones, J.

RELEASED: November 19, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Farley Rodriquez ("Rodriquez"), appeals his convictions for two counts of rape, each with one- and three-year firearm specifications. Rodriquez argues that his convictions are against the manifest weight of the evidence, that he was convicted under a defective indictment, and that the trial court abused its discretion by failing to merge the one- and three-year firearm specifications because they were part of a single criminal transaction. After reviewing the facts and the pertinent law, we affirm Rodriquez's rape convictions, vacate the sentence for one firearm specification, and remand for correction of the journal entry.

Facts and Procedural History

{¶ 2} On April 11, 1999, at approximately 11:30 p.m., V.M.,[1] then age 17, had just gotten off work from the Taco Bell located near West Boulevard and Lorain Avenue, in Cleveland, Ohio. She was standing at a payphone in her work uniform on the corner of West 47th Street and Lorain Avenue, engaged in a three-way telephone conversation with her sister and another friend, when Rodriquez approached her from behind, pressed a gun in her back, and ordered her into his car. Rodriquez drove V.M. to the area of West

[1]Victims of sexual violence are referred to herein by their initials or as "the victim" in accordance with this court's established policy regarding nondisclosure of their identities.

28th Street and Detroit Avenue, also in Cleveland, Ohio, near the Lakeview Terrace Estates, where he pulled over to the side of the road and ordered V.M. to disrobe in his car. Rodriquez then ordered V.M. to perform oral sex on him. After a time, Rodriquez compelled V.M. to lay down in the front seat, and then he vaginally raped her. Afterward, Rodriquez ordered V.M. out of his car and forced her to turn her back to the vehicle and walk away while he drove off.

{¶ 3} V.M. then ran through the neighborhood surrounding West 28th Street and Detroit Avenue and into the Flats until she flagged down a Cleveland police car and told them of her rape and abduction. The Cleveland police transported her to Lutheran Hospital for treatment, where V.M. was examined, counseled, and interviewed by hospital staff and Cleveland police. Samples of DNA were taken as part of the rape kit that was administered to her at that time.

{¶ 4} Although the Cleveland police interviewed V.M. at the hospital and investigated the incident, they were unable to apprehend Rodriquez until the Bureau of Criminal Identification ("BCI") matched a sample of Rodriquez's DNA taken during the investigation of a separate incident with a sample of his DNA taken from V.M. at Lutheran Hospital on the night of the rape.

{¶ 5} On October 29, 2007, a Cuyahoga County Grand Jury indicted Rodriquez in a three-count indictment charging two counts of rape, in violation of R.C. 2907.02(A)(2), with sexually violent predator specifications in violation of R.C. 2941.148, and one- and three-year firearm specifications in violation of R.C. 2941.141 and 2941.145, respectively, and one count of kidnapping, in violation of R.C. 2905.01(A)(2) and/or (A)(4).

{¶ 6} On June 18, 2008, Rodriquez validly executed a jury waiver and proceeded to a bench trial. At that time, Rodriquez's trial counsel moved the court to dismiss the indictment as defective for failing to state a mens rea requirement on the authority of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*).

{¶ 7} On July 29, 2008, after the issues were fully briefed, the court denied Rodriquez's motion to dismiss with respect to the two rape counts, but dismissed the kidnapping charge against Rodriquez because it found the indictment defective for failing to state a mens rea requirement as to that count.

{¶ 8} On August 1, 2008, the court found Rodriquez guilty of two counts of rape, together with the sexually violent predator specifications, and the one- and three-year firearm specifications in each count.

{¶ 9} At the sentencing hearing on September 18, 2008, the State dismissed the sexually violent predator specifications before the court

sentenced Rodriquez to a sixteen-year term of incarceration, which included consecutive three-year terms of incarceration on the firearm specifications, followed by two concurrent ten-year terms of incarceration on the two counts of rape, for a total of sixteen years of incarceration.

{¶ 10} On October 14, 2008, this appeal followed, asserting three assignments of error for our review.

{¶ 11} Rodriquez's first assignment of error states:

> **"Where rape and firearm convictions are based solely on the unreliable statements of an accuser, the State has failed to prove guilt by the manifest weight of the evidence."**

{¶ 12} In Ohio, sufficiency of the evidence arguments present questions of law, while claims based upon the manifest weight of the evidence present questions of fact. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the Supreme Court illuminated its test for manifest weight of the evidence as follows:

> **"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a**

question of mathematics, but depends on its *effect in inducing belief*." Id., quoting Black's Law Dictionary (6th Ed. 1990) 1594. (Emphasis in original.)

{¶ 13} This court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721. In so doing, we consider the credibility of witnesses and determine 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." Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id. In this matter, we cannot say that the court, as the factfinder, clearly lost its way and created a manifest miscarriage of justice in convicting Rodriquez of the instant offenses.

{¶ 14} Rodriquez argues essentially that his version of events is more believable than the victim's version of events. Rodriquez admits that he had sexual intercourse with the victim that night, but argues that V.M. was a prostitute who was unhappy with the fee that Rodriquez paid her. He argues that there were inconsistencies among the hospital records, the police records, and the testimony at trial with respect to whether a gun was present or used in committing the crimes. We find these inconsistencies, to the extent they

exist, are immaterial to the major events of the encounter: that Rodriquez threatened V.M. with what he said was a gun, that V.M. told the authorities that the gun was present throughout the encounter, that she observed the gun and even described it in detail, and that Rodriquez repeatedly raped her.

{¶ 15} While there is no physical evidence that a gun was actually used to commit these crimes, V.M. testified as follows:

> **"[H]e walked up to me behind my back, he had something what he said was a gun in my back, and said I needed to get off the phone. * * * I'm trying to get their attention, and he said, hang up the phone now. And that's when I hung up the phone." (Tr. 43-44.)**

{¶ 16} In addition, the Cleveland Police Department's field report from the night of the rape, admitted as State's Exhibit 10, indicates that Rodriquez used a "blue steel automatic" weapon in committing the crime.

{¶ 17} We note further, that although this incident took place in 1999, V.M. was still able to give strong and consistent testimony in 2008 regarding the events of that night, and she positively identified Rodriquez as her assailant independent of the DNA match.

{¶ 18} V.M. testified that she was employed at Taco Bell. She related the events surrounding the rape and abduction, which included a phone call, Rodriquez threatening her with the gun, and the subsequent acts that occurred in the area of the Lakeview Terrace Estates.

{¶ 19} Officer Jeffrey Ryan of the Cleveland Police Department testified that he was the officer V.M. flagged down after the rape and abduction, that he transported V.M. to the hospital, and that she appeared excited, shaken, and upset. In addition, a Lutheran Hospital nurse who examined and interviewed V.M. on the night of the incident wrote in her nursing notes that a gun was involved in the crime and that the assailant "had a gun lying next to him all the time." (Tr. 74.)

{¶ 20} Finally, Cleveland Police Detective Christine Cottom ("Detective Cottom") testified that she interviewed V.M. first in 1999, and then again in 2007, after BCI notified the Cleveland police of the DNA match. Detective Cottom further testified that she was present when V.M. positively identified Rodriquez as her attacker, independent of the DNA analysis.

{¶ 21} In light of this evidence, these arguments do not support Rodriquez's assertion that his convictions are against the manifest weight of the evidence, simply because his version of events is more believable. We are not at all persuaded that the evidence in this matter weighs heavily against conviction. Rodriquez's first assignment of error is overruled.

{¶ 22} Rodriquez's second assignment of error states:

> **"By proceeding to judgment on a defective indictment, the trial court violated appellant's constitutional rights to due process and presentment."**

{¶ 23} Within this assignment of error, Rodriquez argues that the indictment charging him with rape was defective because it failed to include the mens rea element within the rape and kidnapping charges. Rodriquez argues that the trial court committed reversible error in not dismissing the rape charges against him, while the trial court did dismiss the kidnapping charges. Rodriquez frames his arguments by analogizing this case to *Colon I*, supra, wherein the Supreme Court reversed a robbery conviction because the indictment failed to specify the culpable mental state for an element of the offense. The *Colon I* court found that "recklessness" was the culpable mental state for the "infliction of physical harm" element of robbery after finding that the mens rea requirement was not clear either in the indictment or the jury instructions. Id. at ¶14.

{¶ 24} In *Colon I*, the Supreme Court held, inter alia, that when an indictment fails to charge a mens rea element of a crime, the error is structural error. Id. at ¶24. In that case, the indictment did not meet constitutional requirements, as it did not include all the essential elements of the offense charged against the defendant. Thus, the defendant was not properly informed of the charge so that he could put forth his defense. Id. at ¶28.

This, among many other errors permeating the trial, compelled reversal in *Colon I*. Id. at syllabus.[2]

{¶ 25} Rodriquez argues that because the elements of rape in R.C. 2907.02(A)(2) do not include a mental state within the first element, structural errors permeated this case from indictment through trial, and it should therefore be dismissed in light of *Colon I*. We disagree.

{¶ 26} Rodriquez was charged under R.C. 2907.02(A)(2), which states in pertinent part that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 27} It is apparent from the face of the statute that the requisite mens rea for rape in Ohio is "purposely." That it does not appear until the second sentence of the statute does not mean that the elements of the crime, or even the first element alone, do not require a mental state. We therefore reject Rodriquez's argument.

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[2]On reconsideration, the *Colon II* court limited the case to its facts, stating: "We assume that the facts that led to our opinion in *Colon I* are unique. As we stated in *Colon I*, the defect in the defendant's indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant's rights. * * * In *Colon I*, we concluded that there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. * * * Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. * * * In closing argument, the prosecuting attorney treated robbery as a strict-liability offense." *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, at ¶6.

{¶ 28} The Ninth District considered this same argument and rejected it in *State v. Ralston*, Lorain App. No. 08CA009384, 2008-Ohio-6347, with a thorough analysis, stating as follows:

> **"Section 2907.02(A)(2) provides that, '[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.' * * * This Court does not agree with Mr. Ralston's argument that the mens rea of recklessness applied to the actus reus for either count. * * * The statutory language indicates that 'purposely' applies to both the conduct and the result. *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio-4738, at ¶90 (quoting R.C. 2907.02(A)(2)). Thus, 'a defendant is guilty of rape [or gross sexual imposition if] he purposely compels the victim to submit' to the sexual activity described by the statute. Id. Mr. Ralston's second assignment of error is overruled." Id. at ¶17. (Brackets in original.)**

{¶ 29} Rodriquez argues that *Ralston* and its progeny were wrongly decided and that we need not engage in either a structural error or plain error analysis under *Colon I*. However, Rodriquez fails to suggest an alternative means by which the court should analyze this case. Yet, because we have already decided that the statute itself contains the requisite mens rea for commission of the crime of rape, engaging in either analysis is inapposite to our determination of this case.

{¶ 30} Because *Colon I* is inapplicable, we need not engage in a structural error analysis. Moreover, because R.C. 2907.02(A)(2) contains the requisite mens rea of "purposely," which applies to both the conduct and

the result of the crime of rape, the trial court did not commit plain error in failing to dismiss these counts of the indictment.[3] Rodriquez's second assignment of error is overruled.

{¶ 31} Rodriquez's third assignment of error states:

> **"The trial court abused its discretion by failing to merge firearm specifications on offenses that were part of a single transaction."**

{¶ 32} Rodriquez argues that the one- and three-year firearm specifications underlying the two counts of rape in this case are but a single transaction or event, and that the individual firearms specifications for each crime should be merged for sentencing purposes. Rodriquez argues that the trial court's failure to merge the firearm specifications for sentencing purposes is contrary to law and constitutes an abuse of discretion. We agree.

{¶ 33} In support of this argument, Rodriquez cites *State v. Santana*, Cuyahoga App. No. 87170, 2006-Ohio-3843, ¶15, which relied on R.C. 2929.14(D)(1)(b)[4] in holding, inter alia, that a trial court may not impose

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[3]Rule 52(B) of the Ohio Rules of Criminal Procedure permits this court to take notice of a plain error that affects a substantial right despite that error not having been brought to the attention of the trial court: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Id. We will not reverse based on plain error unless it determines that, "but for the error, the outcome of the trial would clearly have been otherwise." *State v. Wogenstahl*, 75 Ohio St.3d 344, 357, 1996-Ohio-219, 662 N.E.2d 311. In this case, there is no obvious error that affected Mr. Rodriquez's substantial rights.

[4] R.C. 2929.14(D)(1)(b) states in pertinent part: "Except as provided in

multiple terms of incarceration on firearm specifications when the underlying offenses are part of a single transaction.

{¶ 34} The State relies on *State v. Wills*, 69 Ohio St.3d 690, 691, 1994-Ohio-417, 635 N.E.2d 370, for the proposition that there can be no merger for purposes of sentencing where a separate animus exists with intervening factors, however slight and close in time. We agree with the analysis presented in *Wills*, where the armed robberies of two victims were not part of a series of continuous acts and, thus, each robbery was a separate "transaction" within the meaning of the firearm specification statute and supported a separate mandatory sentence on each firearm specification. Id. at 691. However, where, as here, the evidence reveals one single animus throughout a single course of conduct with no intervening events, a "separate animus" finding is inapplicable.

{¶ 35} As the *Wills* court stated, a single "transaction" is a "series of continuous acts bound together by time, space, and purpose, and directed toward a single objective for purposes of firearm specification statute imposing mandatory sentence for each 'transaction' performed with assistance of firearm." Id. at syllabus. While R.C. 2929.14(D)(1)(a)(ii) imposes a

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division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction."

mandatory three-year prison term when a defendant is convicted of a firearm specification pursuant to R.C. 2941.145, pursuant to R.C. 2929.14(D)(1)(b), a court is not authorized to "impose more than one prison term on an offender [for a firearm specification] for felonies committed as part of the same act or transaction." See *State v. Hamilton*, Cuyahoga App. No. 91896, 2009-Ohio-3595, at ¶39, citing *State v. Covington*, Franklin App. No. 06AP-826, 2007-Ohio-5008. See, also, *Santana*, supra: "Pursuant to R.C. 2929.14(D)(1)(b), when the underlying felonies are committed as part of one transaction, the trial court is limited to sentencing the defendant to one three-year prison term for a single firearm specification." Id. at syllabus.

{¶ 36} From the facts presented, we find that the use of the firearm to commit these crimes is related by time and space to a series of continuous acts, and directed toward a single criminal objective. This criminal conduct was therefore part of a single transaction for sentencing purposes related to the firearm specification. In such cases where "the underlying felonies were clearly committed * * * as part of the same transaction * * * the trial court, pursuant to R.C. 2929.14(D)(1)(a)(i)," is required to sentence offenders "to only one three-year prison term for a single firearm specification." *State v. Evans* (Sept. 3, 1998), Cuyahoga App. No. 73018, at 6. See, also, *State v. Kaszas* (Sept. 10, 1998), Cuyahoga App. Nos. 72546 and 72547; *State v. Gregory*

(1993), 90 Ohio App.3d 124, 628 N.E.2d 86. Accord, *State v. Hamilton*, Cuyahoga App. No. 91896, 2009-Ohio-3595:

> **"[Where] the record indicates that the offenses were a series of continuous acts with a single objective and were also part of a single criminal adventure, with a logical relationship to one another, which were bound together by time, space, and purpose[,] [t]he trial court err[s] in imposing two separate and consecutive sentences for the firearm specifications * * *." Id. at ¶41.**

{¶ 37} We find that the two counts of rape were committed as a part of the same criminal transaction for purposes of R.C. 2929.14(D)(1)(b), bound together by time in that they were committed successively, within minutes of one another. The successive line of behavior in this transaction was bound by space in that the events all transpired in the front seat of Rodriquez's car. The crimes, though distinct, were bound together by the same purpose: to compel V.M. to submit to sexual contact by force or threat of force. Accordingly, we sustain Rodriquez's third assignment of error.

{¶ 38} Rodriquez's rape convictions are affirmed. The sentence for one firearm specification is vacated, and the matter is remanded for correction of the journal entry to reflect one term of incarceration on the accompanying firearm specification.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
LARRY A. JONES, J., CONCUR