[Cite as *State v. Cunningham*, 2010-Ohio-3183.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93167

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY D. CUNNINGHAM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521147

BEFORE: Rocco, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Anthony D. Cunningham appeals from his convictions and the sentences imposed after a jury found him guilty of the following offenses: two counts of aggravated robbery, one count of kidnapping with a sexual motivation specification, one count of attempted rape, one count of felonious assault, one count of robbery, one count of gross sexual imposition, and one count of possessing criminal tools.

{¶ 2} Cunningham presents two assignments of error. He argues his convictions are against the manifest weight of the evidence, and his sentence is improper pursuant to the United States Supreme Court's decision in *Oregon v. Ice* (2009), __U.S.__, 129 S.Ct. 711, 172 L.Ed.2d 517.

{¶ 3} Upon a review of the record, this court finds Cunningham's particular arguments unpersuasive. The trial court erred, however, in sentencing Cunningham in that, at the sentencing hearing, the court imposed a total of ten years in prison, whereas the court's journal entry states Cunningham was sentenced to a total prison term of eleven years. Therefore, although his convictions and sentences are affirmed, this case is remanded for correction of the journal entry of sentence.

{¶ 4} Cunningham's convictions result from an incident that occurred just before 1:00 a.m. on July 3, 2008. The victim, TR,[1] parked her car in the rear lot of one of the buildings of the Rockside Towers Apartments, intending to use the rear entrance as access to her cousin's residence.

{¶ 5} As TR approached the door, she noticed a blue bicycle leaning against the enclosure that shielded the dumpster. Since it was a damp night, she thought the bicycle's presence unusual.

{¶ 6} TR's progress stopped when a man came up on her left; suddenly, "he was in [her] face." TR described the man as "a young black male," standing "maybe 5'3, 5'4" inches tall, thin, wearing dark "work pants and like a dark work shirt," and with "a bandanna covering his face." The man carried what appeared to her to be "a single barreled shotgun" that he pointed at her.

{¶ 7} TR began to scream, but the young man, whom TR later identified as Cunningham, told her to "shut up" unless she "want[ed] to die." Cunningham took the cell phone TR had in her hand and demanded money. TR told him she did not have any. Cunningham "grab[bed] her butt" with his right hand and informed her she would have to "pay him another way."

{¶ 8} At that point, Cunningham pushed TR into the fenced area, placed her face-forward against the fence, and pulled down her clothing to her mid-thigh.

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[1]This court's policy is to protect the privacy of victims of sexual assault by using initials when possible.

Holding his penis in his hand, he attempted to penetrate her vagina with it, but she "clenched" her muscles to prevent his success. At the same time, TR looked around and "grabbed the gun" from Cunningham.

{¶ 9} The two of them wrestled for the weapon; they "ended up on the ground" with him regaining his hold on the gun. He began hitting her in the face with both the butt of the gun and his fists. After Cunningham struck her several times with the gun, it "broke" open. TR realized the gun was "not real," but was merely a pellet gun. Emboldened, TR screamed louder for help.

{¶ 10} Cunningham decided to "take off"; he got on the bicycle while TR arose and tried to rearrange her clothing. By this time, the noise attracted attention of the apartment complex residents. Brandon Shumpert called "911,"[2] and another, Devante Richmond, came to lend aid. TR pointed out Cunningham as he rode away, and told Richmond to "get him."

{¶ 11} Richmond saw "a boy riding away on a bike." Richmond described the "boy" as "thin, short, brown skinned, and with small dreads, dreadlocks." Richmond grabbed at Cunningham, forcing him to abandon the bicycle and to escape on foot. Richmond did not continue his pursuit of TR's assailant, however, beyond the parking lot. In her excited state, TR picked up the gun and

[2] Witnesses testified the Bedford Heights Police Station was, in driving distance, "15 to 20 seconds away" from the apartment complex.

the bicycle herself and attempted to give chase, but several police officers arrived and prevented her from proceeding.

{¶ 12} TR provided a description of her assailant. The Bedford Heights police broadcast the description, then continued to investigate the incident. TR required medical treatment for the injuries she received in the assault.

{¶ 13} Bedford police officer Benjamin Lang was in the area and began looking for the suspect. Lang spotted eighteen-year-old Cunningham "walking southbound on Perkins Road towards Price." Since Cunningham fit the description provided by TR, Lang stopped and questioned him.

{¶ 14} Cunningham willingly provided his name and told Lang "he came from [the] nearby Sunoco station and he had purchased some Black-n-Mild cigars." Lang knew that gas station was on the corner of Rockside and Perkins, close to the apartment complex. As Lang continued to speak to Cunningham, Cunningham "asked [Lang] for a ride to get Black-n-Milds," despite having just indicated he already bought some.

{¶ 15} Bedford Heights officer Gary Harris was at the station investigating a different incident when he heard a police radio broadcast mentioning a "shotgun." Harris immediately responded; he arrived at Lang's location during his questioning of Cunningham.

{¶ 16} The officers decided to arrest Cunningham and to return him to the scene for a "cold stand." Richmond identified Cunningham during the "cold stand"; TR, too, identified Cunningham, but only after hearing his voice.

{¶ 17} Cunningham subsequently provided two written statements to Det. Kenneth Hatcher. In them, Cunningham claimed to have taken his mother's bicycle to the "Speedway" gas station just before 1:00 a.m. on July 3, 2008 to buy "a Black-n-Mild," but found the bicycle missing when he emerged. He asserted he wrongly was identified as the suspect in the attack on TR.

{¶ 18} When Hatcher confronted Cunningham with information that he did not see Cunningham in the Speedway's videotape, Cunningham provided an oral statement in which he claimed that "an unknown male that he realized matche[d] the description of the man that attacked [TR] grabbed him off the bike" when he was riding in that area. Cunningham claimed the unknown male "punched" him before taking the bicycle, but he nevertheless chased the man until giving up in front of the Rockside Towers. Cunningham admitted the bicycle left at the apartment complex was the one he was riding that night.

{¶ 19} Cunningham eventually was indicted on eight counts. He was charged with two counts of aggravated robbery, kidnapping, attempted rape, felonious assault, robbery, gross sexual imposition, and possession of criminal tools. His case proceeded to a jury trial.

{¶ 20} The state presented the testimony of TR, Richmond, another resident of the apartment complex who called 911, the responding police officers, and Det. Hatcher. After the trial court denied his motions for acquittal, Cunningham presented the testimony of Regina Glenn.

{¶ 21} Glenn stated she awakened on the night of the incident because she heard "a lady screaming." Glenn looked out from her balcony to see a woman on the ground with a man on top of her, "punching her in the face." Glenn described the man as wearing a "light colored shirt and dark pants," with a "low cut" hair style. On cross-examination, Glenn admitted that, because she had seen only the attacker's silhouette, she "couldn't have made that out" if the attacker had "short braids" in his hair.

{¶ 22} The jury found Cunningham guilty on all counts. After obtaining a presentence report and ascertaining which counts the state would merge pursuant to R.C. 2941.25(A), the trial court proceeded to sentence Cunningham.

{¶ 23} The court imposed consecutive prison terms of four years each for the aggravated robbery and kidnapping counts, to be served consecutively to two years for the felonious assault count. According to the transcript of the sentencing hearing, the terms of twelve months for gross sexual imposition and six months for possession of criminal tools were to be served "concurrent" to the others. The trial court told Cunningham that, in total, he was "going to do 10 years."

{¶ 24} However, the journal entry of sentence states that the final two counts were to be served concurrently with each other, but "consecutive to" the others, for a total of eleven years.

{¶ 25} Cunningham presents two assignments of error in this appeal, but does not directly challenge the foregoing discrepancy. His assignments of error state:

{¶ 26} "I. The weight of the evidence did not support the eight verdicts of guilt.

{¶ 27} "II. The trial court erred by sentencing the appellant to serve consecutive sentences."

{¶ 28} In his first assignment of error, Cunningham argues the jury became misled by TR's and Richmond's testimony; he asserts "he was the victim of mistaken identification," so the verdicts should be reversed.

{¶ 29} This court recently set forth the analysis applicable to Cunningham's argument as follows:

{¶ 30} "In evaluating a challenge to the verdict based on the manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury that has 'lost its way.' *Thompkins*, supra, at 387, 678 N.E.2d 541. As the Ohio Supreme Court declared:

{¶ 31} "'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." * * *

{¶ 32} "'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. 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.

{¶ 33} "In *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862, we stated that the court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Moreover, in reviewing a claim that a conviction

is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact 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. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814." *State v. Wells*, Cuyahoga App. No. 92130, 2009-Ohio-4712, ¶13-15.

{¶ 34} With the foregoing standard in mind, this court cannot agree that the jury "lost its way" in this case. TR described her attacker as a young black man, short and thin, wearing a bandanna, dark pants, and a "dark work shirt." She stated he spoke to her often during the course of the incident, then attempted to flee on a bicycle. A man who came to her aid knocked the assailant off the bicycle, so he ran.

{¶ 35} When the police later brought Cunningham to the scene, TR heard his voice and positively identified him. At trial, she identified Cunningham as the man she saw and heard in the police car, and also identified Cunningham's clothing from the incident.

{¶ 36} Richmond described the escaping suspect as a thin, short, "boy" with "small dreads" who wore dark clothing. Richmond saw the suspect's face, too, because, by the time he was attempting to flee, he wore no bandanna. Richmond positively identified Cunningham when the police brought him to the scene and also positively identified him at trial.

{¶ 37} TR and Richmond provided testimony consistent with each other and corroborated by other evidence.

{¶ 38} The apartment resident who called 911 stated he heard a woman screaming for help, heard her being struck, and looked out to see a male figure wearing "complete dark clothes" take a bicycle that had been leaning against the dumpster fence and try to "pedal off," but "a guy running from building C hits him, he falls off the bike and gets up and runs * * *." The same witness testified that by the time the police brought the suspect back for Richmond to observe, the suspect no longer wore a dark shirt, but wore "[d]ark pants and a white T-shirt."

{¶ 39} Officer Kimberly Callieham testified that TR described her attacker as being "18 to early 20s," wearing "black clothing," and who was "thin built and shorter than she was." Officer Lang remembered the dispatch description of the suspect as "black male, wearing darker clothing, shorter in stature," and stated he stopped to speak with Cunningham because he matched the description and was walking in the area of the apartment complex.

{¶ 40} Glenn's testimony did not contradict the evidence presented by the state's witnesses. Moreover, although the defense pointed out that the Bedford Heights police were investigating another man for committing crimes that same night, Officer Harris testified he was interviewing that man when the 911 call came concerning the attack on TR. Thus, the jury knew the other man already was in custody at the time of the incident.

{¶ 41} A review of the record in this case, therefore, reflects the manifest weight of the evidence supports the jury's verdicts of guilt on each count. *State v. Knight*, Cuyahoga App. No. 89534, 2008-Ohio-579. Cunningham's first assignment of error, accordingly, is overruled.

{¶ 42} In his second assignment of error, Cunningham argues that the decision in *Oregon v. Ice*, has "abrogated" the holding of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He argues the trial court, therefore, erred in failing to make findings and to provide reasons before imposing consecutive sentences upon him.

{¶ 43} This court, however, continues to follow *Foster* until the Ohio Supreme Court directs otherwise. *State v. Munson*, Cuyahoga App. No. 93229, 2010-Ohio-1982, ¶9, citing *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237, *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. Consequently, Cunningham's second assignment of error also is overruled.

{¶ 44} Cunningham's convictions and sentences are affirmed.

{¶ 45} However, Cunningham was informed at his sentencing hearing that the concurrent sentences imposed for counts 7 and 8 were to be served concurrently with the sentences imposed on counts 2, 3, and 5, for a total of ten years. Since the journal entry of Cunningham's sentence incorrectly reflects the sentences on counts 7 and 8 were to be served consecutively to the sentences

imposed on counts 2, 3, and 5, for a total of eleven years, this case is remanded to the trial

{¶ 46} court for correction of the journal entry of sentence.

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 constiute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR