

[Cite as *State v. Mitchell*, 2010-Ohio-5775.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94287

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN MITCHELL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521326

BEFORE: McMonagle, J., Gallagher, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 24, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Marvin Mitchell, appeals his convictions, rendered after a jury trial, for aggravated burglary, felonious assault, rape, kidnapping, and disrupting public service. We affirm in part and reverse and remand in part.

I

{¶ 2} Mitchell was indicted in March 2009 as follows: Count 1, aggravated burglary; Count 2, felonious assault; Count 3, rape, with a sexually violent predator specification; Count 4, rape, with a sexually violent predator

specification; Count 5, kidnapping, with a sexual motivation specification and sexually violent predator specification; Count 6, domestic violence; and Count 7, disrupting public service.

{¶ 3} Count 6, domestic violence, was nolle prior to trial. The remaining counts were tried to a jury.¹ At the conclusion of the state's case, the defense made a Crim.R. 29 motion for acquittal, which was denied. The defense did not present any witnesses. The jury found Mitchell not guilty of rape, as charged in Count 3, but guilty of the remaining counts;² the court found him guilty of the remaining two sexually violent predator specifications. The trial court sentenced him to a prison term of 13 years to life.³

II

{¶ 4} The trial testimony demonstrated the following. The victim, J.L., was Mitchell's girlfriend. J.L. resided in an apartment with her two young children. She gave Mitchell a key to the apartment because he would often

¹The sexually violent predator specifications attendant to Counts 3, 4, and 5 were bifurcated and tried to the court.

²But the jury found him not guilty of the sexual motivation specification attendant to Count 5, kidnapping.

³He was sentenced to three years on Count 1, aggravated burglary, to be served concurrent with a four-year sentence on Count 2, felonious assault; the four-year sentence was ordered to be served consecutive to a nine-years-to-life sentence on Count 4, rape (which merged with Count 5, kidnapping, for sentencing). The trial court also sentenced Mitchell to six months on Count 7, disrupting public service.

spend the night there after he got off work late in the evening or early morning hours.

{¶ 5} On the day of the incident, J.L. had driven one of her children's grandmother to Trumbull County. During the trip, she had communicated with Mitchell via her cell phone, but during one of the conversations, her phone "died," cutting off the conversation.

{¶ 6} J.L. arrived home from the trip around 8:00 p.m. and went to bed. She was awakened by an "angry" Mitchell in the early morning hours. J.L. testified that Mitchell forcibly removed her from her bed and began assaulting her. At one point, she ran into the living room, but Mitchell followed her and continued assaulting her. J.L. told Mitchell that she was going to call the police or her brother; Mitchell ripped the phone connection from the wall. Mitchell stopped assaulting J.L. after he threw a basket and it hit one of J.L.'s children.

{¶ 7} Following the altercation, J.L.'s child went back to sleep in the living room, and Mitchell suggested that he and J.L. go to sleep. The two went to J.L.'s bedroom, and Mitchell asked her to perform oral sex on him; J.L. said "no." He then asked her if she wanted to have sex and she again said "no." She testified that Mitchell then raped her digitally and with his penis. Afterward, the two went to sleep.

{¶ 8} When they woke up, J.L. told Mitchell that she thought it best he should leave. Accordingly, J.L. drove him from her west-side apartment to his cousin's house on the east side. J.L. testified that because of her condition, mainly her swollen face, the trip took two hours each way. When she arrived back home, J.L. called her mother and a neighbor; both came to her apartment and the neighbor called the police. She was transported by ambulance to the hospital, where she was admitted for a day and a half.

{¶ 9} A rape kit was administered to J.L. at the hospital. Semen was identified in the vaginal and anal samples. A nurse from the hospital testified that J.L. told her that Mitchell did not digitally penetrate her. Police photos depicted severe bruising on J.L.'s face and bruising and/or abrasions to her arm, neck, and leg.

III

{¶ 10} In his first assignment of error, Mitchell contends that the evidence was insufficient to support his convictions.⁴

{¶ 11} The Ohio Supreme Court has recognized that “[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, [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

⁴Although the assignment of error is termed as relating to all the convictions, only the aggravated burglary and rape convictions are addressed in the argument in support of the assignment. We nonetheless address all the charges.

found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

A. Aggravated Burglary

{¶ 12} R.C. 2911.11(A)(1), governing aggravated burglary, provides that “[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * with purpose to commit * * * any criminal offense, if * * * [t]he offender inflicts * * * physical harm on another[.]” Mitchell contends that the state failed to present evidence of a trespass, and cites the fact that he and J.L. were in a relationship and J.L. had given him a key to her apartment. The Supreme Court of Ohio, however, has held that even assuming a lawful initial entry, a defendant’s privilege to remain in a private residence terminates if he assaults a resident. *State v. Steffen* (1987), 31 Ohio St.3d 111, 115, 509 N.E.2d 383.

{¶ 13} In *Steffen*, the victim allowed the defendant, a door-to-door salesman, to enter her home to demonstrate his product. However, once inside her home, the defendant assaulted, raped, and killed the victim. He was convicted of aggravated murder, aggravated burglary, and rape. In upholding the aggravated burglary conviction, the Ohio Supreme Court noted the following definition of criminal trespass: “No person, without privilege to

do so, shall do any of the following: (1) Knowingly enter *or remain* on the land or premises of another * * *.” (Emphasis sic.) Id. at 115, quoting R.C. 2911.21(A).

{¶ 14} In finding that the defendant trespassed, the Court held that “even assuming lawful initial entry, the jury was justified in inferring from the evidence that [the defendant’s] privilege to remain in [the victim’s home] terminated the moment he commenced his assault on her. [The defendant] does not deny striking [the victim] repeatedly before killing her. From that undisputed fact, a powerful inference arises that [the defendant] was no longer privileged to remain in [the victim’s] home, and that he knew his privilege had been terminated.” Id.

{¶ 15} In sum, the Ohio Supreme Court has ruled that a violent crime committed in the residence of one other than the defendant always constitutes aggravated burglary (i.e., the commission of the crime terminates the privilege to remain in the home). While critical of this holding, we are bound to follow it. In accordance with *Steffen*, therefore, even if Mitchell lawfully gained entry to J.L.’s apartment, that privilege terminated once he began assaulting her. Thus, there was sufficient evidence to support the aggravated burglary charge.

B. Rape and Kidnapping

{¶ 16} R.C. 2907.02(A)(2), governing rape, provides that “[n]o person shall engage in sexual conduct with another person when the offender purposely compels the other person to submit by force or threat of force.” Mitchell contends that the evidence was insufficient to support the rape conviction because the victim’s “credibility certainly leaves a lot of questions unanswered.” But courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim. See *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶79.

{¶ 17} Under the standard set forth above for reviewing sufficiency claims, we find the evidence was sufficient to support the rape conviction. J.L. testified that she was “scared” when she went into her bedroom with Mitchell and she told him “no” to his requests for sex. She further testified that Mitchell “forced himself” on her and she tried to resist, but he raped her. Moreover, the rape occurred after Mitchell had assaulted J.L.⁵ Semen was identified in the vaginal and anal samples taken from J.L. This evidence was sufficient to support the rape charge.

{¶ 18} In regard to the kidnapping count, Mitchell was charged under R.C. 2905.01(A)(4), with restraining J.L. by force, threat, or deception, for the purpose of engaging in sexual activity with her against her will. Thus, the

⁵A threat of force can be inferred from the circumstances surrounding sexual conduct. *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, 600 N.E.2d 661, paragraph one of the syllabus.

kidnapping was incidental to the rape. Because we find that the evidence was sufficient to support rape, we necessarily find that it was sufficient to support kidnapping.⁶

C. Disrupting Public Services

{¶ 19} In regard to disrupting public services, R.C. 2909.04(A)(1) prohibits a person from “purposely by any means, or knowingly by damaging or tampering with any property” interrupting or impairing telephone service. J.L. testified that after Mitchell assaulted her in her bedroom, she ran out to the living room and told him that she was going to call the police or her brother and he ripped the phone line from the wall. This evidence was sufficient to support the disrupting public services conviction.

D. Felonious Assault

{¶ 20} The felonious assault conviction was also supported by sufficient evidence, as admitted by Mitchell, who states in his brief that “[t]here appears to be ample evidence as to counts relating to [felonious assault].” That evidence consisted of J.L.’s testimony that Mitchell threw her to the floor, punched her, and slapped her. The evidence also consisted of testimony from the treating medical personnel about, and pictures depicting, the injuries sustained by J.L.

E. Sexually Violent Predator Specifications

⁶We note that the rape and kidnapping convictions were properly merged at sentencing.

{¶ 21} Mitchell also contends that the evidence was insufficient to find him guilty of the sexually violent predator specifications. R.C. 2971.01(H)(1) defines a “sexually violent predator” as “a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.” Mitchell contends that the evidence was insufficient for a finding that he is a sexually violent predator because he did not have a prior criminal sexual history, there was “no evidence that he was likely to engage in sexually violent behavior in the future,” and J.L.’s trial testimony was inconsistent with what she told a nurse at the hospital.

{¶ 22} Although Mitchell had prior convictions, the convictions in this case were his first for sexually-oriented offenses. An issue arises, then, as to whether the convictions here can be used for a sexually violent predator finding. In *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, the Ohio Supreme Court considered the former version of R.C. 2971.01(H)(1)⁷ and determined that the statute required a person to have at least one prior sexually violent offense conviction outside of the offenses listed in the current indictment to be labeled as a sexually violent predator. *Smith* at ¶18-29.

{¶ 23} The Court focused on the language “has been convicted of or pleaded guilty to committing,” stating that “[t]hese words clearly indicate that at the

⁷The former version read: “‘Sexually violent predator’ means a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.”

time of indictment, the person has already been convicted of a sexually violent offense. A grand jury cannot indict based on a conviction that has not occurred and may not ever occur.” Id. at ¶18. The Court provided the following reasoning: “Had the General Assembly intended that a conviction on a sexually violent offense [] be sufficient to prove a sexually-violent-predator specification alleged in the same indictment, it would have used language like * * * a sexually violent predator is a person who ‘committed’ a sexually violent offense.” (Emphasis sic.) Id. at ¶27.

{¶ 24} Thus, in *Smith*, the Court concluded that the then version of R.C. 2971.01(H)(1) could not apply to first-time sexually violent offenders “without an unambiguous mandate from the General Assembly.” Id. at ¶29. Post-*Smith*, the General Assembly amended the statute to its current version, which defines a sexually violent predator as “a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.” (Emphasis added.) R.C. 2971.01(H)(1).

{¶ 25} The Ninth Appellate District considered the effect of the amendment in *State v. Hardges*, Summit App. No. 24175, 2008-Ohio-5567. The court stated, “[w]e consider the amended language of R.C. 2971.01(H)(1) to be ‘an unambiguous mandate from the General Assembly.’ Based on the statute’s current language, a person need not have already been convicted of a sexually violent offense at the time of indictment to be indicted for and subsequently found guilty of a sexually violent predator specification. The person need only have

committed a sexually violent offense after January 1, 1997. We find that the amendments to R.C. 2971.01(H)(1) track the Supreme Court's suggestion in *Smith* that the legislature could have used language such as 'a sexually violent predator is a person who "*committed*" a sexually violent offense' if it wished for the statute to apply to first time offenders. (Emphasis sic.) * * * As such, the trial court did not err in finding Hardges to be a sexually violent predator based on his present convictions." (Internal citations omitted.) *Hardges* at ¶50, quoting and citing *Smith*.

{¶ 26} We agree with the Ninth Appellate District and therefore overrule Mitchell's argument that he could not be found to be a sexually violent predator because he was a first-time sex offender. We now consider whether the evidence was sufficient to support the second part of the definition of a sexually violent predator, that is, "a person who * * * is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1).

{¶ 27} The statute provides that in making that determination, courts may consider, in part, whether: "The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims[;] [and] [t]he person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy." R.C. 2971.01(H)(2)(d) & (e). Courts may also consider "[a]ny other relevant evidence." R.C. 2971.01(H)(2)(f).

{¶ 28} In determining that Mitchell is a sexually violent predator, the trial court considered the medical records, J.L.'s statement to hospital personnel, the presentence investigation report, the psychiatric report, and the sexual offender evaluation completed by a psychologist at the court's clinic. The trial court noted Mitchell's prior convictions for assault, domestic violence, and attempted felonious assault, and that one of the victims was a female.

{¶ 29} The court found that the assault of J.L. "amounted to torturing her[,] and that "it put not only her life in danger, but this was a pregnant woman as well[,] and thus, her unborn baby's life was also endangered. On this record, sufficient evidence supported the trial court's finding that Mitchell "is likely to engage in the future in one or more sexually violent offenses," and thus that he is a sexually violent predator.

{¶ 30} In light of the above, the first assignment of error is overruled.

IV

{¶ 31} For his second assigned error, Mitchell contends that his convictions were against the manifest weight of the evidence. He concedes the felonious assault conviction, but states that "there is no substantive or credible evidence of kidnapping, rapes [sic] or aggravated burglary." We disagree.

{¶ 32} To warrant reversal from a verdict under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the jury clearly lost its way and created

such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 33} Although we review credibility when considering the manifest weight of the evidence, the credibility of witnesses is primarily a determination for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact is best able “to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273.

{¶ 34} Mitchell bases this assignment of error on his contention that J.L. was not credible. Upon review, we do not find that J.L.’s testimony was so incredible that the judgment must be reversed and a new trial ordered. Her testimony was corroborated by other evidence — photos depicted her injuries after the assault and semen was identified in the vaginal and anal samples taken from her. Accordingly, we overrule the second assignment of error.

V

{¶ 35} In his third and fourth assignments of error, Mitchell challenges his sentence. He contends in the third assignment that he should not have been sentenced to a “life tail” under R.C. 2971.03(A)(2). In his fourth assignment of

error, he contends that under *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, the trial court improperly sentenced him to consecutive terms.

{¶ 36} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4. If the sentence is not clearly and convincingly contrary to law, we then review the trial court's decision under an abuse-of-discretion standard. *Id.*

{¶ 37} In regard to the "life tail" sentence, the state concedes error, but for a different reason than that advanced by Mitchell. Specifically, Mitchell contends that "life tail" sentences for rape convictions are only permissible for a defendant who has a prior similar conviction or if the victim was less than ten years of age, and cites R.C. 2971.03(A)(2). The state, on the other hand, contends that Mitchell was subject to a "life tail," but should have been sentenced to ten years to life, rather than nine years to life, and cites R.C. 2971.03(A)(3)(d).

{¶ 38} Upon review, R.C. 2971.03(A)(2) is inapplicable here, because it relates to a rape conviction under R.C. 2907.02(A)(1)(b).⁸ Mitchell was convicted of rape under R.C. 2907.02(A)(2). Sentencing for that conviction is governed by R.C. 2971.02(A)(3)(d), which provides as follows: "(d) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is

⁸R.C. 2971.03(A)(2) governs "rape committed in violation of division (A)(1)(b) of section 2907.02 of the Revised Code."

being imposed is rape for which a term of life imprisonment is not imposed under division (A)(2) of this section or division (B) of section 2907.02 of the Revised Code, it shall impose an indefinite prison term as follows:

{¶ 39} “* * *

{¶ 40} “(ii) If the rape is committed prior to January 2, 2007, or the rape is committed on or after January 2, 2007, other than in violation of division (A)(1)(b) of section 2907.02 of the Revised Code, it shall impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment.”

{¶ 41} Thus, Mitchell’s conviction for rape in violation of R.C. 2907.02(A)(2) with a sexually violent predator specification requires a mandatory minimum sentence of ten years to life. The nine-years-to-life sentence imposed by the trial court was therefore contrary to law, the first prong of sentencing review under *Kalish*, supra. Accordingly, the third assignment of error is sustained, albeit for a different reason than that advanced by Mitchell.

{¶ 42} Finally, in response to the fourth assignment of error, wherein Mitchell cites *Oregon v. Ice*, supra, for the proposition that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, is no longer applicable to consecutive sentences, this court has declined to depart from *Foster* until the Ohio Supreme Court orders otherwise.⁹ Accordingly, the fourth assignment of error is overruled.

⁹See, e.g., *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; and *State v. Eatmon*,

Affirmed in part; reversed and remanded in part.

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 resentencing.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR