

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95095**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MAURICE MITCHELL**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-532378

**BEFORE:** Blackmon, P.J., Jones, J., and Keough, J.

**RELEASED AND JOURNALIZED:** March 17, 2011

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**ATTORNEYS FOR APPELLEE**

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Maurice Mitchell appeals his convictions and assigns the following errors for our review:

**“I. The trial court erred in denying appellant’s motion for acquittal when the state failed to present sufficient evidence to sustain a conviction.”**

**“II. Appellant’s convictions are against the manifest weight of the evidence.”**

**“III. Appellant was denied his right against double jeopardy when he was tried a second time for the same charge after the prosecutor by his continued misconduct caused a mistrial.”**

{¶ 2} Having reviewed the record and pertinent law, we affirm Mitchell's convictions. The apposite facts follow.

{¶ 3} On January 5, 2010, as a result of reopening the investigation into a 1994 case, a grand jury indicted Mitchell on one count each of kidnapping and rape, as well as two counts of aggravated robbery. All four counts had three-year firearm and aggravated felony specifications attached. The grand jury also indicted Mitchell on one count of having weapons while under disability. Mitchell pleaded not guilty at his arraignment, several pretrials were conducted, and on February 24, 2010, a jury trial commenced.

{¶ 4} Prior to the trial, Mitchell waived his right to a jury trial on the aggravated felony specification and having weapons while under disability. However, a day after trial commenced, the trial court declared a mistrial due to the misconduct of both the prosecuting and defense attorneys. The trial court recused herself from the case, and the matter was assigned to a visiting judge.

{¶ 5} On March 8, 2010, the trial court assigned Mitchell a new defense counsel, who subsequently filed a motion to dismiss based on double jeopardy.

The trial court denied the motion to dismiss. Mitchell renewed his waiver of a jury trial on the aggravated felony specification and having weapons while under disability. On April 12, 2010, the second trial commenced.

### **Second Trial**

{¶ 6} At the second trial, the state presented the testimony of seven witnesses, including 41 year old Bernice Curry. Curry testified that on June 4, 1994, she went to the California Club located on St. Clair Avenue in Cleveland, Ohio. Curry left the club at approximately 2:00 a.m. on June 5, 1994, and stopped at a pay phone at East 80th Street and Superior Avenue to call her roommate Jacqueline Barkley.

{¶ 7} While Curry was on the telephone with Barkley, she saw a man walking up and down East 80th Street. Curry told Barkley about the man and asked her to remain on the phone. Curry testified that immediately after completing the phone call, a man put a gun to her head, ordered her into her car, had her drive down Superior Avenue, and eventually ordered her to stop near an open field on East 83rd Street.

{¶ 8} The man ordered Curry to undress and to put her belongings on the hood of the car, then took her money. Curry testified that the man subsequently led her at gunpoint into the field where he raped her. Curry testified that she saw her attacker's face when he was raping her. After raping Curry, the attacker took her watch and then fled.

{¶ 9} After the attack, Curry gathered her belongings and drove home partially naked. When she arrived home, Curry told Barkley that she had been raped by the individual that she had seen while they were talking

earlier on the pay phone. Barkley called the police and Curry was taken to Euclid Hospital where a rape kit was performed.

{¶ 10} In July 2009, the Cleveland Police Department's Sex Crimes Unit contacted Curry regarding the 1994 sexual attack. Curry was shown a photo array containing pictures of six individuals; she picked out two individuals. Curry testified that she had never seen her attacker prior to being sexually assaulted.

{¶ 11} Barkley, who was Curry's roommate at the time of the sexual assault, testified that Curry had called her from a payphone earlier to tell her that she was on her way home. Barkley testified that during the conversation, Curry expressed concern that an unknown male was lurking nearby.

{¶ 12} Barkley stated that Curry, who later arrived home, crying, without her pants on, and with grass in her hair, indicated that she was raped by the man that she had seen while they were talking on the phone. Barkley called the police and later sought medical attention for Curry.

{¶ 13} Heather Bizub of the Ohio Bureau of Criminal Investigation testified at the trial. Bizub testified that she conducted DNA testing of the rape kit that was performed on Curry in 1994, because of a profile match provided by the Federal Bureau of Investigation's National Database. Bizub

testified that the semen found on the swab was consistent with Mitchell's and that the frequency of such an occurrence is one in one quadrillion.

{¶ 14} Detective Christina Cottom of the Cleveland Police Department's Sex Crimes Unit testified that she began following up on the 1994 sexual assault case because of the DNA match involving Mitchell. Detective Cottom met with Curry, obtained a written statement of the assault, and showed her a photo array. Detective Cottom testified that Curry picked out two individuals from the photo array and one of them was Mitchell.

{¶ 15} At the close of the state's case, Mitchell motioned the court for acquittal pursuant to Criminal Rule 29. The trial court granted the motion as to Count 4 of the indictment, but denied it as to the remaining counts. The jury returned guilty verdicts as to the remaining counts including the firearm specifications. The trial court found Mitchell guilty of the bifurcated portions of the charges including that of having weapons while under disability.

{¶ 16} On April 19, 2010, the trial court sentenced Mitchell to a prison term of 23 to 50 years. Mitchell now appeals.

### **Motion for Acquittal**

{¶ 17} In the first assigned error, Mitchell argues the trial court erred when it denied his motion for acquittal.

{¶ 18} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386.

{¶ 19} In analyzing the sufficiency issue, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965.

{¶ 20} In this case, the jury found Mitchell guilty of kidnapping, rape, and aggravated robbery. Kidnapping, in violation of R.C. 2905.01(A)(2)(4) and (C), provides as follows:

**"(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:**

**"(2) To facilitate the commission of any felony or flight thereafter;**

**"\* \* \***

**“(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim’s will;**

**“(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.”**

**{¶ 21} Rape, in violation of in violation of R.C. 2907.02(A)(2):**

**“(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:**

**“(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.”**

**{¶ 22} Aggravated robbery, in violation of R.C. 2911.01(A)(1) and (C),**

provides as follows:

**“(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:**

**“(1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;**

**“\* \* \***



**“(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.”**

{¶ 23} Here, in addition to the obvious significance of the DNA evidence linking Mitchell to the sexual assault, Curry testified that Mitchell abducted her at gunpoint, ordered her to drive down Superior Avenue, ordered her to stop at an open field, ordered her to undress, and then proceeded to rape her. Curry testified that Mitchell had the gun pointed at her face when he was committing the rape. Curry stated that Mitchell took her money and watch before fleeing the scene.

{¶ 24} After reviewing the evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found that the essential elements of kidnapping, rape, and aggravated robbery, as outlined above, were proven beyond a reasonable doubt. Consequently, the trial court properly denied Mitchell’s motion for acquittal. Accordingly, we overrule the first assigned error.

### **Manifest Weight of Evidence**

{¶ 25} In the second assigned error, Mitchell argues his convictions were against the manifest weight of the evidence.

{¶ 26} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

**“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state’s or the defendant’s? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. ‘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.’ *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.”**

**{¶ 27}** In this assigned error, Mitchell argues the jury lost its way as to the convictions.

Given the undisputed evidence of the DNA linking Mitchell to the crime, Mitchell could only be suggesting that the encounter with Curry was consensual. However, Curry testified that she had never seen Mitchell before the morning of the attack.

**{¶ 28}** The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses’ manner and

demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

{¶ 29} Accordingly, an appellate court may not substitute its view for that of the jury, but our role "in resolving conflicts in the evidence" is to determine whether the jury lost its way thereby creating a manifest miscarriage of justice that requires a new trial. *Thompkins* at 387.

{¶ 30} Here, we are not disposed to reach such a conclusion. After reviewing the entire record, we cannot conclude that any of the evidence weighs heavily against the jury's finding of guilt. Accordingly, we overrule the second assigned error.

### **Mistrial and Double Jeopardy**

{¶ 31} In the third assigned error, Mitchell argues he was denied his right against double jeopardy.

{¶ 32} The Fifth Amendment's Double Jeopardy Clause protects a criminal defendant from repeated prosecutions for the same offense. *Oregon v. Kennedy* (1982), 456 U.S. 667, 671, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416. The reasons behind the prohibition against double jeopardy are that "the State with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to

live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.” *Green v. United States* (1957), 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199.

{¶ 33} This right, however, is not absolute. A narrow exception applies to the Double Jeopardy Clause when the defendant’s request or the judge’s actions are prompted or instigated by prosecutorial misconduct designed to goad the defendant into seeking a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 72 L.Ed.2d 416. Double Jeopardy also bars retrial when the trial court abuses its discretion in granting a mistrial. *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900.

{¶ 34} An abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶ 35} In the instant case, a day after the first trial began, defense counsel motioned the court to declare a mistrial. The trial court granted the motion and stated in pertinent part as follows:

**“Defendant moves for a mistrial due to prosecutorial misconduct. Due to misconduct by both plaintiff and defendant attorneys in open court, the Court grants**

**motion for mistrial. Mistrial declared. Jury dismissed. Court recuses itself from further proceedings.” Journal Entry, February 25, 2010.**

{¶ 36} The following exchange, which occurred during the cross-examination of Mitchell, illustrates the basis for defense counsel’s request, and the trial court’s ultimate decision to grant the mistrial:

**“Q. So. You have respect for the law, right?**

**“A. Yes.**

**“Q. You are no stranger to firearms, are you?**

**“A. Yes, I am a stranger to firearms.**

**“Q. Well, the sixteen year old that you killed in 1991, that was a firearm, wasn’t it?**

**“Mr. Vegh: Objection, your Honor. May we approach?**

**“The Court: Mr. Vegh?**

**“Mr. Vegh: Yes.**

**“The Court: Make your record.**

**“Mr. Vegh: Your Honor, this Court told the prosecutor specifically not to do what he did. \* \* \* He directly disregarded the instructions from this Court and he is going to ask that question, damn anybody else. \* \* \*”**

**“\* \* \***

**“Mr. Kirvel: Okay. This defendant sat here and said that he was a stranger to firearm. All through this trial I have been trying to strictly adhere to the evidence rules. \* \* \* I am allowed to cross-examine on all matters affecting credibility. \* \* \* He’s got at least three felony convictions for possessing firearms or crimes committed with firearms. I don’t know how in the**

world this is so offensive to anybody that we are dealing with a criminal defendant who has so many convictions with firearms. He has killed people. Everything that he has ever been involved with, all of these police reports — every time he is armed with a firearm. He is armed with a firearm in this case according to the victim and he can sit here and tell the jury that I am a stranger to firearms and I can't ask that?"

Tr. 385-388.

{¶ 37} After a discussion off the record between the trial court and the attorneys, the trial court instructed the jury to disregard the state's questions and Mitchell's responses. The cross-examination continued as follows:

**"Q. Now who were you in the bar with?**

**"A. Juvis.**

**"Q. Juvis, and where is Juvis today?**

**"Mr. Vegh: Objection, your Honor.**

**"The Court: Sustained.**

**"Q. Did you want to bring Juvis in here?**

**"Mr. Vegh: Objection, your Honor.**

**"The Court: Sustained.**

**"Q. Who is Juvis to you?**

**"A. A friend from 87<sup>th</sup> and Superior.**

**"Q. You put him on the witness list, didn't you?**

**"Mr. Vegh: Objection, your Honor.**

**"The Court: Sustained, the jury will disregard it." Tr. 422-423.**

{¶ 38} After the above discussion, defense counsel again moved that the court declare a mistrial, specifically because of the prosecutor's reference to Juvis Montgomery, and the trial court declared a mistrial. In declaring the mistrial, the trial court stated in pertinent part as follows:

**“Number one, I’m not sure that this was reported, but I am going to declare a mistrial. I will recuse myself, because I find I am in a rare position of feeling very irritated and angry and more than in a few situations during this trial and I think it would be better perhaps to have a new set of eyes and perhaps someone who can be a little more objective in dealing with you two because both of you have really pressed a few buttons with this Court during this trial.”**

Tr. 430.

{¶ 39} Initially, we note, a review of the above excerpt of the state's cross-examination of Mitchell does not indicate that the prosecutor's conduct was designed to goad Mitchell into seeking a mistrial. Given the undisputed DNA evidence linking Mitchell to the crime, it would have been imprudent for the prosecutor to manufacture a mistrial. Given that the prosecutor did not goad Mitchell into seeking a mistrial, there was no Double Jeopardy violation. *Oregon v. Kennedy*, supra.

{¶ 40} Since the prosecutor's conduct was not designed to goad Mitchell into seeking a mistrial, we now consider whether the trial court abused its discretion in declaring the mistrial. In determining whether the trial court properly exercised its discretion, reviewing courts look to whether (1) “there

[was] a ‘manifest necessity’ or a ‘high degree’ of necessity for ordering a mistrial, or (2) ‘the ends of public justice would otherwise be defeated.’” *State v. Gresham*, 2d Dist. No. 22766, 2009-Ohio-3305, quoting *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717. A “manifest necessity” for a mistrial does not mean that a mistrial was absolutely necessary or that there was no other alternative. *Arizona v. Washington*, 434 U.S. at 311.

{¶ 41} Here, given that the trial court had already given a curative instructions in the first instance when defense counsel moved for a mistrial, the trial court must have found that the taint from the prosecutor’s question regarding Juvis Montgomery was so great that a curative instruction would not suffice. Because of the possible taint, coupled with the trial court’s stated irritation and anger due to the conduct of both attorneys, Mitchell’s right to a fair and objective trial would have been compromised.

{¶ 42} Under the circumstances, presented in the instant case, we find that the trial court did not abuse its discretion when it declared a mistrial and Mitchell’s right to be free from Double Jeopardy was not violated. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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. 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.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR