[Cite as *State v. Jones*, 2015-Ohio-1818.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101311

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYREE JONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-578270-B

BEFORE: Celebrezze, A.J., Stewart, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 14, 2015

ATTORNEYS FOR APPELLANT

Aaron J. Brockler
P.O. Box 16747
Rocky River, OH 44116

Sarah R. Cofta
Michael J. Cheselka, Jr. L.L.C.
75 Public Square
Suite 920
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Margaret A. Troia
Brian D. Kraft
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Tyree Jones, appeals his convictions for rape, sexual battery, drug possession, and resisting arrest. After a careful review of the record and relevant case law, we affirm appellant's convictions.

I. Procedural and Factual History

{¶2} On September 24, 2013, the Cuyahoga County Grand Jury returned a five-count indictment against appellant charging him with one count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree; one count of rape in violation of R.C. 2907.02(A)(1)(c), a felony of the first degree; one count of sexual battery in violation of R.C. 2907.03(A)(2), a felony of the third degree; one count of drug possession in violation of R.C. 2925.11, a felony of the fifth degree; and one count of resisting arrest in violation of R.C. 2921.33, a misdemeanor of the second degree. On February 24, 2014, the matter proceeded to a jury trial on all charges, at which the following evidence was presented.

{¶3} Between 7:00 p.m. and 8:00 p.m. on July 23, 2013, the victim went to a friend's house and had approximately five to ten shots of tequila and vodka, and two alcoholic drinks. The victim remained at her friend's house for a few hours until her friend dropped her off at the Sportsman Lounge in East Cleveland near closing time. She had been to the bar previously and recognized two friends. At the Sportsman Lounge, the victim consumed five to ten more shots of tequila, danced, and socialized.

The victim testified that she did not remember anything after dancing in the bar, and her next recollection was waking up in the hospital. At trial, the victim stated that she neither recognized appellant in the courtroom nor consented to have sex with him. In a videotaped statement made to investigators, the victim said she "knew" the appellant. When presented with her statement at trial, the victim explained that she meant she saw him twice before in the Sportsman Lounge prior to this incident.

{¶4} Officer Shanika Armstead testified at trial that she responded to a call for a suspicious vehicle backed into a driveway on East 146th Street on the evening of July 24, 2013. When Armstead arrived on the scene, appellant was pulling up his pants beside the car with his buttocks exposed. Armstead witnessed Officer John Donitzen chase down and struggle to arrest appellant. Officer Armstead testified that she found the victim lying in the backseat of the vehicle, unresponsive, with her pants down. According to Armstead, the victim was making noises but was unable to speak.

{¶5} Officer Donitzen testified that he responded to the scene at approximately 3:00 a.m. He and Officer Armstead did not activate the patrol lights, but instead approached the vehicle with a flashlight. He saw a pair of buttocks in the backseat, with one pair at a higher level than the other. Officer Donitzen observed the appellant climb into the front seat and exit through the driver's side door with his pants around his ankles. When appellant ran, Officer Donitzen chased and tackled him. At trial, Officer Donitzen explained that appellant tried to push up off the ground and hid his hands under his chest. Additionally, Officer Donitzen was forced to use several strikes to gain

control and repeatedly told appellant to stop resisting. Once appellant was handcuffed, Officer Donitzen gave appellant his *Miranda* rights and obtained a statement. Appellant told Officer Donitzen that he met the victim at the Sportsman Lounge, and that he knew she was unconscious but wanted to have sex with her anyway. Furthermore, appellant told Officer Donitzen that the automobile was owned by his girlfriend.

{¶6} Officer Donitzen testified that he observed a condom protruding from the victim's vagina. The victim was unresponsive at the time. During his investigation of the scene, Officer Donitzen recovered a condom wrapper adjacent to the vehicle and a clear plastic bag containing crack-cocaine inside the driver's door compartment.

{¶7} Scott Damas, a firefighter and paramedic with the East Cleveland Fire Department, testified that he responded to the scene at approximately 3:00 a.m. He witnessed the victim lying on her stomach with her buttocks exposed and a condom inserted in her genitalia or anus. Damas attempted to preserve evidence of the incident, and found that the victim was unresponsive to verbal stimuli. In his testimony, Damas noted that the victim lightly responded to a sternal rub and was moaning, but could not provide her name. He also indicated that the victim appeared heavily intoxicated and that he recognized the smell of alcohol on her breath.

{¶8} Sexual Assault Nurse Examiner Denise Robinson testified at trial that she examined the victim and obtained the victim's account of what transpired. Although Nurse Robinson did not observe any injuries on the victim, she recovered a condom from the victim's vagina and completed a rape kit. She also obtained the victim's blood and

urine samples. Nurse Robinson testified that the victim could not remember any of the details of the incident.

{¶9} The victim's mother testified that officers came to her home and told her that her daughter was found unresponsive and taken to University Hospitals. At the hospital, the mother found the victim to be incoherent and personally observed the condom protruding from her daughter.

{¶10} Rindi Rico of the Cuyahoga County Medical Examiner's Office testified that she tested the victim's blood and urine samples for alcohol. The victim's alcohol concentration was 0.235 in her blood and 0.306 in her urine.

{¶11} Szabolics Sofalvi, a quality assurance officer for the Cuyahoga County Medical Examiner's Office, testified that at a 0.235 blood-alcohol concentration, the victim would have demonstrated decreased reaction time, increased risk-taking behavior, poor judgment, and emotional instability. Moreover, Sofalvi was able to extrapolate the ethanol levels in the victim's blood to determine that her blood-alcohol concentration during the incident was 0.274. At a 0.274 blood-alcohol concentration, the victim would have displayed stupor, lack of cognitive function, unconsciousness, lack of motor skills, and an inability to stand or walk. Finally, Solfalvi noted that the victim's urine tested positive for marijuana, and that her blood tested positive for a stimulant, benzylpiperazine (BZP).

{¶12} Detective Yashila Crowell, the lead investigator on the case, testified that she obtained videotaped statements from appellant and the victim. She explained that,

after waiving his *Miranda* rights in writing, appellant initially stated he did not have sex with the victim. Shortly after, appellant admitted he had consensual sex with the victim. Appellant stated that he met the victim a few times, and then told Crowell they always saw each other. When Crowell asked appellant why he ran from police that evening, he said "because I had drugs on me." Appellant's videotaped statement was played in its entirety for the jury. Detective Crowell further testified that she submitted the victim's rape kit for testing. The results showed that appellant's DNA matched the samples found in the victim's pants and in the condom.

{¶13} At the conclusion of trial, the state moved to dismiss Count 1, rape, in violation of R.C. 2907.02(A)(2). The trial court ordered that the remaining counts be numbered one through four. On February 27, 2014, the jury returned a guilty verdict on all counts. The parties stipulated that Count 1, rape, and Count 2, sexual battery, merged for the purposes of sentencing. On March 6, 2014, the trial court sentenced appellant to four years on the rape count, eleven months on the drug possession count, and ninety days on the resisting arrest count. The judge indicated that appellant's sentences were to be served concurrently. Furthermore, the trial court classified appellant as a tier III sex offender, and ordered appellant to receive jail-time credit for 222 days.

{¶14} Appellant now appeals his convictions, citing five assignments of error: (1) ineffective assistance of counsel; (2) the guilty verdicts were based on insufficient evidence; (3) appellant's convictions were against the manifest weight of the evidence; (4) prosecutorial misconduct; and (5) the trial court erred when it entered the guilty

verdict despite the cumulative errors in the trial. We consider each of these assignments of error out of order for the sake of economy.

II. Law and Analysis

A. Prosecutorial Misconduct

{¶15} In his fourth assignment of error, appellant argues that his convictions should be reversed for prosecutorial misconduct. Under this assignment of error, appellant contends the prosecutor engaged in misconduct when she: (1) initiated an improper line of questioning during voir dire; (2) violated appellant's Sixth Amendment due process rights by disclosing the victim's videotaped statements on the second day of trial; (3) failed to raise conflicts of interest between the prosecutor's office and the victim; (4) failed to raise the victim's Fifth Amendment rights; and (5) failed to dismiss one count of rape before trial commenced after announcing her intention to do so.

{¶16} Initially, we note that appellant's trial counsel failed to object to any of the prosecutor's alleged acts of misconduct during trial. Thus, pursuant to Crim.R. 52(B), appellant has waived all but plain error. Plain error may be invoked by an appellate court only to avoid a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 95, 372 N.E.2d 804 (1978). To establish plain error, the appellant must show that but for the error, the outcome of the trial clearly would have been otherwise. *Id.* at 97; Crim.R. 52(B).

{¶17} Generally, a prosecutor's conduct during trial is not grounds for error unless it deprived the defendant of a fair trial. *State v. Norman*, 8th Dist. Cuyahoga No. 80702, 2002-Ohio-6043, ¶ 12, citing *State v. Papp*, 64 Ohio App.2d 203, 412 N.E.2d 401 (9th

Dist.1978). A reviewing court should also consider whether the prosecutor's remarks prejudicially affected the defendant's substantial rights. *Id.*, citing *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984).

1. Improper Voir Dire

{¶18} The scope of voir dire is generally within the trial court's discretion. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 72, citing *State v. Lorraine*, 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993). During voir dire, a trial court has great latitude in deciding what questions should be asked. *Id.*, citing *Mu'Min v. Virginia*, 500 U.S. 415, 424, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). Furthermore, prejudicial error will not be found in the trial court's examination of the venire absent a clear abuse of discretion. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 28.

{¶19} The record in this case reveals that the prosecutor's remarks during voir dire did not prejudicially affect appellant's right to a fair trial, and that the trial court did not abuse its discretion. Appellant takes issue with the prosecutor's inquiry into: (1) the victim's drug and alcohol use at the time of the incident; (2) the credibility of witnesses; and (3) the types of evidence used to establish proof. After the prosecutor began to question the venire on these subjects, the trial judge interjected and prohibited any further inquiry. A review of the record demonstrates that the prosecutor complied with the judge's directions for the duration of the voir dire. Moreover, the trial judge provided the jury with accurate instructions at the conclusion of trial regarding the law, credibility

of witnesses, and methods of proof. Appellant fails to demonstrate how his trial or substantive rights were prejudiced. We therefore find that the prosecutor's conduct during voir dire did not rise to the level of plain error, and that the trial court did not abuse its discretion in prohibiting the prosecutor's line of questioning.

2. Fourteenth Amendment Due Process Violation

{¶20} The United States Supreme Court held that a criminal defendant may claim denial of due process when the prosecution fails to disclose the existence of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Exculpatory evidence is defined as evidence favorable to the accused, which "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, ¶ 70, citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶21} To establish a violation under *Brady*, the appellant must prove three elements: (1) the prosecution failed to disclose the evidence upon request; (2) the evidence was favorable to the defense; and (3) the evidence was material. *Moore v. Illinois*, 408 U.S. 786, 794-795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different if the prosecution had disclosed the evidence to the defense. *Braun* at ¶ 66. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph five of the syllabus, *following Bagley*. The *Brady* requirements apply to exculpatory evidence as well as to evidence used to impeach a witness's credibility. *Bagley* at 676. Furthermore, *Brady* requires that the discovery of the information known by the prosecution but unknown to the defense be made after trial. *Braun* at ¶ 76; *see also United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

{¶22} Initially, whether or not the state provided late discovery is unclear from the record. Prosecutors asserted that they produced the videotape during discovery, and defense counsel maintained that he did not receive it until the second day of trial. However, the record reflects that prosecutors provided defense counsel with the videotape when they became aware he did not have it.

{¶23} Assuming defense counsel did not receive the videotape until the second day of trial, we still believe there was no *Brady* violation. The Ohio Supreme Court, when addressing federal precedent, indicated that the disclosure of exculpatory material during trial may constitute a due process violation, unless the material was disclosed in time for its effective use at trial. *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 101, citing *State v. Iacona*, 93 Ohio St.3d 83, 100, 752 N.E.2d 937 (2001).

{¶24} Here, the victim's videotaped statements were disclosed before the victim testified. Defense counsel reviewed the videotape that morning before trial resumed. The trial judge addressed the late disclosure of the videotape, permitted defense counsel to play the videotape in open court, and read the victim's stipulated statement into the

record for the jury. Furthermore, defense counsel elected to use the victim's videotaped statements for impeachment. Thus, we believe that the videotape was disclosed in time for its effective use at trial.

{¶25} Appellant asks us to find that the prosecution's late disclosure prevented defense counsel from planning impeachment "to a greater effect." However, appellant neither explains nor cites to precedent describing what greater effect he believes his trial counsel's impeachment of the witness could have had. Because we conclude that there was no due process violation under *Brady* in this case, we find no prosecutorial misconduct under this claim.

3. Conflict of Interest Between Prosecutor's Office and Victim

{¶26} Where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. *State v. Gillard*, 64 Ohio St.3d 304, 311, 595 N.E.2d 878 (1992). The duty to inquire arises from the principle of fundamental fairness and from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest. *Id.* The defendant's rights to a fair trial and counsel are endangered when the trial court breaches its affirmative duty to inquire, and prejudice is assumed. *Id.*

{¶27} A review of the record in this case reveals that the trial court met its affirmative duty to inquire into the alleged conflict of interest. Defense counsel filed a motion for the state to reveal any agreements with the victim in light of her pending case.

The trial judge investigated this matter and the details of the victim's case on the record out of the jury's presence. The prosecutors explained they had been screened from having any influence on the victim's pending case, and that they had only contacted the prosecutor managing that case to address scheduling issues. Moreover, the major drug offender supervisor was notified of the issue and agreed to inform all attorneys in this case if the victim was given consideration for her testimony. The trial judge ruled that defense counsel could question the victim about her pending charges and whether she believed she was receiving consideration for her testimony, but could not inquire into the underlying facts of her pending case. Defense counsel complied with this ruling and cross-examined the victim accordingly. Thus, the trial judge complied with her affirmative duty to inquire into the alleged conflict of interest.

{¶28} Appellant asks us to find a conflict of interest because the victim eventually received a plea deal in her pending case. However, the record is clear: at the time of this trial, prosecutors were not involved in the victim's pending case, and the victim had not received any consideration in exchange for her testimony. Thus, we find no prosecutorial misconduct because no conflict of interest existed between the prosecutor's office and the victim.

4. Failure to Raise Victim's Fifth Amendment Rights

{¶29} The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution state that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." The protection afforded by these

clauses are also extended to witnesses who may make statements that could incriminate themselves. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), adopted by the Ohio Supreme Court in *In re Frye*, 155 Ohio St. 345, 349, 98 N.E.2d 798 (1951). However, the witness may invoke the privilege to avoid answering specific questions only when the danger of incrimination is real and appreciable, rather than imaginary and insubstantial, or when the answer could reasonably "furnish a link in the chain of evidence" against him. *State v. Jenkins*, 15 Ohio St.3d 164, 228, 473 N.E.2d 264 (1984); *see also United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980); *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

{¶30} In this case, the record reflects that the victim was never in danger of incriminating herself. The transcript clearly shows that the trial judge addressed the victim's unrelated pending charges prior to her testimony and prohibited both parties from inquiring into the underlying facts of that case. Both parties complied with the judge's direction. Because a factual inquiry into the victim's pending case was prohibited, there was no real, appreciable danger of incrimination. Thus, the prosecutor did not prejudice the defendant's right to a fair trial under this claim.

5. Failure to Dismiss Rape Count Prior to Trial

{¶31} Dismissal of criminal charges by the prosecution is governed by Crim.R. 48(A), which states: "The state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereon

terminate." Thus, the prosecution has discretion, with permission of the court, to determine when and which charges should be dropped. In this case, the prosecutor stated an intent to dismiss one count of rape after a jury had been impaneled and dismissed for the day, but did not move to dismiss the count until the conclusion of trial. Appellant maintains that this was done purposely to inflame the passions of the jury. However, it is unclear how the defendant's right to a fair trial could be prejudiced when the prosecutor's intent to dismiss the rape count was made outside the presence of the jury. Appellant neither cites to precedent nor provides any evidence substantiating his claim. Therefore, the prosecutor did not engage in misconduct by refraining until the end of trial to dismiss the rape count.

{¶32} Appellant's fourth assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶33} In his first assignment of error appellant contends that his conviction on all counts should be overturned for ineffective assistance of counsel. Under this assignment of error, appellant argues his trial counsel was ineffective because of his failure to: (1) object to the prosecution's line of questioning during voir dire; (2) move for a mistrial based on the prosecution's alleged *Brady* violation; (3) raise a conflict of interest between the prosecutor's office and the victim; and (4) raise the victim's Fifth Amendment rights.

{¶34} To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel's performance is deficient if counsel "made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland* at 687. To establish prejudice, the appellant "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." *Bradley* at 143.

{¶35} In determining whether counsel's performance fell below an objective standard of reasonableness, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland* at 689. A strong presumption that counsel's conduct falls within the wide range of reasonable conduct exists because of the difficulties inherent in evaluating whether counsel rendered effective assistance in any given case. *Id.*

{¶36} Pursuant to our analysis in the preceding assignment of error, we cannot say there was ineffective assistance of counsel in this case based on appellant's claims. Appellant has merely reiterated his arguments from the fourth assignment of error, contending that his trial counsel was ineffective for failing to object to or move for a mistrial based on the prosecutor's actions and alleged conflict of interest. Therefore, we cannot say that the failure to object to any prosecutorial misconduct in this case was error by defense counsel.

{¶37} Appellant's first assignment of error is overruled.

C. Sufficiency of the Evidence

{¶38} In his second assignment of error, appellant argues that his convictions were not based on legally sufficient evidence. Under this assignment of error, appellant contends that the evidence was insufficient to prove: (1) the victim was substantially impaired and that appellant knew or had reason to know the victim was substantially impaired; (2) appellant's knowing possession of a controlled substance; and (3) resisting arrest.

{¶39} When the sufficiency of the evidence is challenged, "'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.'" *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

1. Substantial Impairment

{¶40} Appellant argues that the evidence in this case was insufficient to demonstrate that the victim was substantially impaired and that he knew or should have known of her condition. The rape statute appellant was convicted under, R.C. 2907.02(A)(1)(c), provides in relevant part:

> No person shall engage in sexual conduct with another * * * when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition and * * * the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * *.

{¶41} The sexual battery statute appellant was convicted under, R.C. 2907.03(A)(2), provides that "[n]o person shall engage in sexual conduct with another * * * when * * * [t]he offender knows that the other person's ability to appraise the nature or control the other person's own conduct is substantially impaired."

{¶42} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). Whether a defendant acted "knowingly" must be inferred from the totality of the circumstances surrounding the alleged offense. *State v. Booth*, 133 Ohio App.3d 555, 562, 729 N.E.2d 406 (10th Dist.1999).

{¶43} The Ohio Revised Code does not define "substantial impairment." Rather, the phrase must be given the meaning understood by its common usage. *State v. Zeh*, 31 Ohio St.3d 99, 103, 509 N.E.2d 414 (1987). Substantial impairment may be shown by proffering evidence that demonstrates the victim's diminished ability to act or think. *Id.* at 103-104. Voluntary intoxication is a mental or physical condition that could cause substantial impairment. *State v. Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, ¶ 13, citing *In re King*, 8th Dist. Cuyahoga Nos. 79830 and 79755, 2002-Ohio-2313. Sexual conduct with an intoxicated person under the Revised Code becomes criminal when the victim's "ability to resist or consent is substantially impaired by reason of voluntary intoxication." *In re King* at ¶ 22, citing *State v. Martin*, 12th Dist. Brown No. CA99-09-026, 2000 Ohio App. LEXIS 3649 (Aug. 14, 2000). Substantial impairment can be demonstrated by the testimony of those who have interacted with the victim.

State v. Brady, 8th Dist. Cuyahoga No. 87854, 2007-Ohio-1453, ¶ 78. Additionally, whether an offender knew or had reasonable cause to believe a victim was impaired may be reasonably inferred from a combination of the victim's demeanor and others' interactions with the victim. *State v. Novak*, 11th Dist. Lake No. 2003-L-077, 2005-Ohio-563, ¶ 25.

{¶44} The record in this case is rife with evidence demonstrating that the victim was substantially impaired and that appellant had reasonable cause to believe the victim was substantially impaired. The victim testified she drank between ten and twenty shots of tequila and two alcoholic drinks throughout the course of the evening. Experts testified that the victim's blood-alcohol content during the incident was between 0.274 and 0.335, and explained that such levels are indicative of poor cognitive functioning, unconsciousness, an inability to stand or walk, or coma. When officers arrived on the scene, they observed appellant having sex with the victim. As they approached the vehicle, the police discovered the victim unconscious in the backseat with a condom protruding from her exposed buttocks. Officers testified that the victim was unresponsive and incoherent upon their arrival, and that it took nearly two hours to obtain her name. EMS personnel testified the victim was unconscious and highly intoxicated. Viewing the evidence in a light most favorable to the state, we find that a rational trier of fact could have found that the victim was substantially impaired and that appellant knew or should have known of the victim's condition.

2. Drug Possession

{¶45} Appellant contends that the evidence was insufficient to demonstrate possession. Appellant was convicted of drug possession in violation of R.C. 2925.11(A), which states that "[n]o person shall knowingly obtain, possess, or use a controlled substance or controlled substance analog." R.C. 2925.01(K) defines "possess" or "possession" as:

> Having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

{¶46} Possession may be either actual or constructive. *State v. Chandler*, 8th Dist. Cuyahoga Nos. 93644 and 93665, 2011-Ohio-590. Actual possession is ownership or physical control, whereas constructive possession is knowingly exercising dominion and control over an object, even if it is not within one's immediate physical possession. *Id*. Where a sizeable amount of readily usable drugs are in close proximity to the defendant, there is circumstantial evidence to support constructive possession. *State v. Williams*, 8th Dist. Cuyahoga Nos. 92009 and 92010, 2009-Ohio-5553, ¶ 68; *State v. Pruitt*, 18 Ohio App.3d 50, 480 N.E.2d 499 (8th Dist.1984); *State v. Braxton*, 8th Dist. Cuyahoga No. 56269, 1990 Ohio App. LEXIS 220 (Jan. 18, 1990); *State v. Walker*, 8th Dist. Cuyahoga Nos. 52485 and 52486, 1987 Ohio App. LEXIS 9176 (Oct. 15, 1987). Knowledge of an illegal object on one's property is sufficient to show constructive knowledge as long as the person is conscious of the object's presence. *State v. Santiago*, 8th Dist. Cuyahoga No. 95333, 2011-Ohio-1961, citing *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982).

{¶47} Appellant argues that it was impossible to prove possession beyond a reasonable doubt because the drugs were not found on his person and he did not know the

drugs were in the car. Here, neither party disputes that crack-cocaine was found in the driver's door compartment. Officers testified that they observed appellant jump into the front seat and exit through the driver's side door. Thus, the driver's side doorframe, where the drugs were found, was in close proximity to appellant at the time of the incident.

{¶48} Furthermore, appellant admitted to having drugs on his person during the incident. At trial, appellant's videotaped statement to investigators was played in open court for the jury. In the video, the officer asked appellant why he ran from police that evening. Appellant responded, "Because I had drugs on me." We find, after viewing the evidence in a light most favorable to the state, that a rational trier of fact could have found that the appellant had possession of the drugs.

3. Resisting Arrest

{¶49} Appellant argues that the evidence was insufficient to prove he resisted arrest. R.C. 2921.33(A) states that "[n]o person, recklessly or by force, shall resist or interfere with the lawful arrest of the person or another." Reckless interference with an arrest includes physical activity that delays or prevents arrest, such as "going limp." *State v. Keegan*, 67 Ohio App.3d 824, 588 N.E.2d 928 (1st Dist.1990).

{¶50} Here, appellant asserts he was merely moving during the arrest. However, the patrolmen testified that appellant ran from police, pushed off of officers, and placed his hands under his chest to avoid being handcuffed. Furthermore, one officer testified he was forced to use several strikes to gain control and handcuff the appellant.

Therefore, we find, after viewing the evidence in a light most favorable to the state, that a rational trier of fact could have found that appellant recklessly resisted officers' attempt to place him under arrest.

{¶51} Appellant's second assignment of error is overruled.

D. Manifest Weight of the Evidence

{¶52} In his third assignment of error, appellant argues that his convictions are against the manifest weight of the evidence.

{¶53} The Ohio Supreme Court, when evaluating a manifest weight challenge, stated in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25:

> [A] reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * "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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶54} Additionally, a court must find that "'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'" and should not substitute its own view. *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Thus, reversal on a claim of manifest weight is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" *Id*., quoting *Martin*.

{¶55} In addressing appellant's manifest weight of the evidence claim, we are guided by the presumption that the jury "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." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Therefore, great deference is given to the trier of fact's determination of witness credibility. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶56} First, appellant contends that there was no credible evidence that he committed rape or sexual battery. Specifically, appellant argues that the witnesses' testimonies were based on assumptions, and that the victim herself did not recall the evening's events. The record in this case is replete with testimony from police officers, experts, and medical professionals. The jury heard that the victim was found unconscious in the back seat of a car with a condom protruding from her vagina. This testimony was corroborated with other evidence, such as the DNA results and the victim's blood-alcohol content. Moreover, in our view, the fact that the victim was unable to recall the incident does not render her testimony false or imply that her testimony was less credible. In fact, the victim's testimony is probative of her substantial impairment. Under these circumstances, we believe the jury was in the best position to weigh the credibility of the witnesses and was free to believe the testimony that appellant raped and sexually battered the victim.

{¶57} Second, appellant argues that there was no credible evidence to support his conviction for drug possession. However, the record contains testimony that drugs were found in the driver's side door, from which appellant exited when police arrived. Moreover, appellant's videotaped statement to investigators was played in open court for the jury. On the video, appellant stated he ran from police, "[b]ecause I had drugs on me." Thus, we believe the jury was in the best position to evaluate the credibility of the evidence and find appellant possessed the drugs.

{¶58} Third, appellant asserts that there was no credible evidence to prove he resisted arrest. Two arresting patrolmen testified that appellant fled from police, hid his hands under his chest, and pushed off of the officers. Appellant summarily concludes that this testimony is not credible. However, we feel the jury, as the factfinder in this case, was in the best position to weigh the officers' credibility.

{¶59} In light of the considerable evidence supporting appellant's convictions, we conclude that the jury did not create a manifest miscarriage of justice or lose its way. Thus, appellant's convictions are not against the manifest weight of the evidence.

{¶60} Appellant's third assignment of error is overruled.

E. Cumulative Error

{¶61} In his fifth assignment of error, appellant argues that his convictions should be overturned because of the cumulative errors in his trial. In *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus, the Ohio Supreme Court recognized the doctrine of cumulative error. Under this doctrine, a conviction will

be reversed where the cumulative errors deprive a defendant of his constitutional right to a fair trial, even if the individual errors may not be cause for reversal. *Id.* Pursuant to our analyses under assignments one through four above, we find that the doctrine of cumulative error is not applicable to this case as we do not find multiple instances of harmless error.

{¶62} Appellant's fifth assignment of error is overruled.

{¶63} 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 be sent to the common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
SEAN C. GALLAGHER, J., CONCUR