[Cite as *State v. Keeler*, 2015-Ohio-1831.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101748

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMAL D. KEELER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584513-A

BEFORE: Jones, P.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 14, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, Ramal Keeler, appeals his rape and kidnapping convictions. We affirm.

{¶2} Keeler was charged with two counts of rape and one count of kidnapping with a sexual motivation specification. The matter proceeded to a bench trial at which the following pertinent evidence was presented.

{¶3} On October 1, 2009, T.C. left her job at a pizza place around 11:00 p.m. She went home from work to change clothes and then met her brother, Chris, and his girlfriend, Amanda, at a local bar in Cleveland. During the one and a half hours she was at the bar, T.C. consumed 10 to 14 shots of Bacardi, some with a "Coca-cola chaser." She went to a second bar by herself and tried to get a drink at the bar, but the bar was too crowded. She got into an argument with another patron and dropped her purse. A "white male"[1] in a red and white Ohio State shirt helped her pick her stuff up and took her outside of the bar. He asked her if she needed a ride home and she got into his car. They sat and drank from a bottle of liquor before a black man got into the backseat of the car, after which the white man began driving.

{¶4} T.C. offered the driver five dollars to stop at a gas station so she could buy cigarettes. At some point, T.C. lost consciousness; she woke up as the car passed the gas station and then the street she lived on. The next thing T.C. remembered was waking up in the car outside a house on Trowbridge Avenue.

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[1] The assailants in this case are repeatedly referred by the witnesses during trial as "white man" or "white male" and "black man" or "black male"; we will use the same terms to reference the suspects.

{¶5} T.C. asked to use the restroom. The men said "[n]o," and went inside the house. T.C. went to the bathroom in the backyard of the Trowbridge Avenue house and got back into the car. At this point T.C. could barely talk or walk: "I was just coming in and out, blacking — just coming to consciousness, trying to keep myself from falling asleep, and trying to stay awake and pay attention to what was going on."

{¶6} The men came out of the house and they all left. T.C. blacked out and next woke up in a hotel room with the two men. T.C. could not recall what hotel she was at, but later found out she was at the Days Inn in Lakewood.

{¶7} T.C. decided to take a shower to "sober up." She blacked out in the shower and was laying in the tub. The black male helped her out of the tub, got her dressed, and the white male made her drink something out of a paper cup. T.C. testified that she remembers telling the men that she was drunk and did not want the drink.

{¶8} T.C. remembered sitting on the bed, laying down, and the white male taking her clothes off. The white male maneuvered her on her stomach and held her down with his hands and legs. T.C. testified that she could not move, could not talk, and could not defend herself; she remembers telling the man "no," but testified she could not fight him off because she was too intoxicated to move. He proceeded to have sex with her vaginally and anally.

{¶9} The white man then told the black man it was "his turn" and the black man made T.C. get to her knees. He then assaulted her, she remembered he had sex with her and believed it was both vaginal and anal sex. T.C. testified that she did not consent to having sex with the black man, but was unable to tell him "no" because she was too weak

and tired. She also remembered that it was less painful with the black male because she had been "loosened up and traumatized" by the white man.

{¶10} After the black man was finished, T.C. blacked out. The next thing she remembered happening was two to three other men entering the room. One of the men said "I'm not gonna do this, I know her," and then all the men left, including the two men who brought her to the hotel. She remembered that her cell phone was broken.

{¶11} The next morning, T.C. woke up in the hotel room, alone. Her purse contents were spilled on the floor. She could not find her clothes, so she wrapped herself in a sheet and went to the front desk. She asked to use the phone and called her brother to come pick her up. T.C. testified that at this time she was still drunk and felt pain in her butt, vagina, and thighs.

{¶12} A family friend, Frank Gullatta, drove T.C.'s brother to the hotel. Once inside the hotel room, her brother found her clothes under the mattress. He thought something "bad" had happened to her and insisted that she go to the hospital. Gullatta testified that he drove T.C. to MetroHealth Hospital because T.C. said "she had been raped." At the hospital, T.C. told the nurse that she had been drinking the night before and "sexual things may have happened," but testified she did not remember much of what she told the nurses and doctors that day.

{¶13} T.C. admitted she was an alcoholic at the time of the assault and commonly drank a fifth of Bacardi a night. She testified that she was able to tell when she was intoxicated because she would start to feel dizzy, nauseous, and sick. At this point, T.C. would usually stop drinking. But on the night of the assault, T.C. testified she never

stopped drinking, thinking that drinking more would help her feel better. She "kept stumbling everywhere trying to keep [her] balance" and felt "light-headed, dizzy," and "slurred everything [she] said."

{¶14} Dr. Stephanie Casey performed a standard sexual assault examination, collected evidence and put the results in a rape kit that was later transferred to the Lakewood Police Department. Dr. Casey testified that T.C. had trouble remembering any details of the sexual assault, but reported pain in her anus, vagina, and thighs. Dr. Casey stated that in most cases of sexual assault that she has treated, she does not find trauma to the genital region, as was in this case. But, Dr. Casey testified, in cases of anal sexual assault, trauma to the anal region is common, although the doctor was unsure if she had personally observed an examination that included an anal sexual assault.

{¶15} Officer Ken Kulczycki of the Lakewood Police Department responded to MetroHealth Hospital. During her interview, Officer Kulczycki stated that T.C. had trouble staying awake and "reeked" of alcohol.

{¶16} Lakewood Police Detective Larry Kirkwood testified that he was assigned to the case on October 5, 2009. He met with T.C. four or five times to investigate the case, but was unable to develop any suspects.

{¶17} In 2012, Kirkwood sent the rape kit from T.C.'s case to be tested in accordance with the Ohio Attorney General's Sexual Assault Testing Program.

{¶18} Ohio Bureau of Criminal Investigation ("BCI") forensic scientist Hallie Garofalo testified that she was able to identify samples with the Y (male) chromosome DNA evidence from the anal swabs taken from the victim, but Garofalo testified that

there was not enough DNA material present on the anal sample that she tested in order to make any conclusion as to who the DNA belonged to. BCI forensic scientist Lindsey Rausch identified trace amounts of semen on the victim's vaginal samples, a single sperm cell on the anal samples, and no semen on the oral or skin stain samples. The vaginal swabs resulted in two DNA profiles: one consistent with T.C. and the other from an unknown male. The anal swabs resulted in a single DNA profile from T.C.

{¶19} In May 2013, BCI notified Detective Kirkwood that a DNA notification came back on T.C.'s case showing Keeler, a black male, as a possible suspect. The detective obtained a buccal swab from Keeler and sent it to BCI for further analysis. Detective Kirkwood met with T.C., but she did not recognize Keeler as one of the people who had assaulted her.

{¶20} In November 2013, Rausch received a standard of Keeler's DNA, analyzed it, and determined that Keeler's DNA standard was consistent with the male DNA profile on the vaginal swabs taken from T.C.

{¶21} Billy Joe Clark testified on Keeler's behalf. He stated he met Keeler at a clothing shop on Cleveland's westside the day of the incident. They got into Keeler's SUV and drove to a bar. Clark went inside, but Keeler remained outside. When Clark went back outside, he saw Keeler talking to a young woman. According to Clark, Keeler tossed him his car keys and told him to drive. Keeler and the woman got into the backseat. Clark saw the woman perform oral sex on Keeler while he, Clark, was driving. Clark described the woman as "eager," and testified it was her idea to get a hotel room.

{¶22} Clark waited in the car while Keeler and the woman went inside the hotel. After about an hour, Clark went to get Keeler. He testified that both Keeler and the woman were dressed and the woman seemed normal. She was not stumbling, slurring her speech, or having trouble walking. The men told the woman they were going to the store to get something to drink and would return, but left and did not go back to the hotel.

{¶23} Clark admitted to being a convicted felon who had spent five years in prison for felonious assault and had been subsequently convicted of felony possession of marijuana. He could not recall his current address.[2]

{¶24} The trial court convicted Keeler of all counts, merged the two rape counts, and determined the rape and kidnapping convictions were not allied offenses of similar import and would not merge. The court sentenced Keeler to nine years in prison.

{¶25} Keeler filed a timely notice of appeal and raises the following assignments of error:

> I. The trial court erred in denying appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.
>
> II. Appellants convictions are against the manifest weight of the evidence.
>
> III. The trial court erred by ordering conviction and a sentence for separate counts because the trial court failed to make a proper determination as to whether those offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14.

{¶26} In the first and second assignments of error, Keeler claims that his convictions were not supported by sufficient evidence and were against the manifest

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[2]It is unclear from the record whether Clark was ever considered as a suspect in the case.

weight of the evidence.

{¶27} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

> 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.

Id. A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541.

{¶28} While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Id.* Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue:

> 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. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶29} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶30} Keeler was convicted of kidnapping and two counts of rape. Kidnapping, pursuant to R.C. 2905.01(A)(4), provides that no person by force, threat, or deception, purposely shall remove another from the place where she was found or restrain her liberty for the purpose of engaging in sexual activity with that person against her will.

{¶31} Keeler argues that the state failed to provide sufficient evidence that T.C. was taken to the hotel and had sexual intercourse with him against her will.

{¶32} Keeler cites to *State v. Doss*, 8th Dist. Cuyahoga No. 88403, 2008-Ohio-449, in which this court vacated a kidnapping conviction when the victim did not remember anything that had happened the previous night and there was no testimony that the victim went with appellant against her will or he restrained her in any way. The *Doss* court held

> J.P.'s testimony that she does not remember anything about the incident is not evidence that she did not consent to the sexual encounter or that appellant knew that she may have been substantially impaired.

Id. at ¶ 21. This case is distinguishable.

{¶33} Here, T.C. testified at length about what she could and could not remember the evening she was assaulted. Highly intoxicated, T.C. was led out of a bar by an unknown white male in an Ohio State shirt. She asked him for a ride home. T.C. sat in the man's car and they drank liquor from a bottle for awhile before a black male got into the backseat of the car. T.C. testified she offered the driver five dollars to stop at a gas station so she could buy cigarettes. Instead, she was taken to a house on Trowbridge Avenue and was refused access to a bathroom. She relieved herself in the backyard of the house and was having a hard time walking. She was losing consciousness and slurring her words. T.C. was then taken to a hotel in a neighboring suburb and still having a hard time walking and continued to fall in and out of consciousness.

{¶34} Once at the hotel, T.C. took a shower to "sober up," but lost consciousness again and had to be helped out of the shower and dressed by Keeler. Then the unknown white male held T.C. down and had sexual intercourse with her and then told Keeler that it was "his turn." Keeler made T.C. change positions so he could have sexual intercourse with her. During this time, T.C. was extremely intoxicated and unable to move, defend herself, or talk, other than to say "no" to the white male.

{¶35} In light of these facts, the state showed sufficient evidence to support a kidnapping conviction.

{¶36} The state also had to show that the kidnapping was with a sexual motivation.

The state showed sufficient evidence that Keeler and the other male took T.C. from the bar in Cleveland to the Lakewood hotel to sexually assault her.

{¶37} The state also provided sufficient evidence to support convictions for rape, pursuant to R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force" and rape, pursuant to R.C. 2907.02(A)(1)(c), which provides, in part, that 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 or because of advanced age, 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 or because of advanced age.

{¶38} The evidence showed that after she was sexually assaulted by the unknown white male, T.C. was unable to move, talk, or defend herself, but Keeler made her get on her hands and knees and had vaginal intercourse with her. T.C.'s testimony was substantiated by the presence of Keeler's sperm in her vagina.

{¶39} As to her substantial impairment, T.C. testified that she drank 10-14 shots of liquor in a short period of time and did not eat anything. She was having trouble walking and talking and repeatedly lost consciousness after she got into the car with Keeler and the other assailant. At the hotel, T.C. went to shower, but passed out again, and was found by Keeler lying in the bathtub with the shower on. Keeler helped T.C. out of the bathtub and got her dressed before both he and the other man had sex with her without her consent. The white male held her down, assaulted her, and then told Keeler it was his turn. Keeler made T.C. change positions so he could assault her. T.C. was

unable to talk, move, or defend herself, and continued to go in and out of consciousness.

{¶40} In light of these facts, we find sufficient evidence to support the two rape convictions.

{¶41} Keeler also argues that his convictions were against the manifest weight of the evidence. We disagree.

{¶42} Keeler argues that any sex that occurred was consensual. He points to T.C.'s lack of memory of the events that transpired and that she originally told police and hospital staff that she did not know if she had sex or not. Keeler wants this court to find it incredible that T.C. remembered more about what happened to her months after the incident then she told the police in the days after the event. The trial court, however, stated that it found T.C.'s lack of recollection added to her credibility because one would not expect an extremely intoxicated person who had just suffered a traumatic event to have precise memories of what occurred.

{¶43} We agree with the trial court's analysis. T.C. consistently explained that although she could not remember what happened to her immediately after the events transpired, she started to have memories of the events as the months passed. She admitted, however, that she could not remember all the events of the evening. To illustrate this point, when questioned on cross-examination about supposedly contradicting statements, T.C. testified:

> I don't remember exactly what I told [the police]. To my knowledge I had told the detectives what I remembered at that time. * * * I don't know what I remembered at the time. Now I remember more. I don't remember exactly what I've said in any of the [police] reports.

{¶44} Keeler also notes that Frank Gullatta and Dr. Casey did not notice that Keeler was intoxicated. But Officer Kulczycki testified that T.C. was hardly able to stay awake while he interviewed her at the hospital and her body "reeked" of alcohol.

{¶45} The trial court, as the trier of fact in this case, was in the best position to judge witness credibility and resolve any inconsistencies in witness testimony. We do not think this is the rare case in which the trier of fact lost its way.

{¶46} In the light of the above, the first and second assignments of error are overruled.

{¶47} In the third assignment of error, Keeler argues that the trial court erred when it failed to merge his kidnapping and rape convictions.

{¶48} In *State v. Johnson*, 128 Ohio St.3d 153, 2012-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court created a two-part test to determine if offenses should merge. The first prong requires that the court determine if the multiple offenses "were committed by the same conduct." *Id.* at ¶ 47. The second prong is whether "it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." *Id.* If both of these questions are answered affirmatively then the offenses should be merged.

> [I]f the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Id. at ¶ 51. Recently, the Ohio Supreme Court clarified that "[a]s a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of

R.C. 2941.25, courts must ask three questions when a defendant's conduct supports multiple offenses:

> (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

State v. Ruff, 2015-Ohio-995, ¶ 31.

{¶49} In this case, the trial court considered that Keeler and the other assailant took T.C. from a Cleveland bar, ostensibly to give her a ride to the gas station to buy cigarettes and then home. Instead, the men took her to a house on Trowbridge Avenue, denied her entrance to use the bathroom, and then took her to a hotel in Lakewood. Once inside the hotel, the men made her drink an unknown substance and then the white male held her down on the bed and raped her. When he was finished assaulting her, he told Keeler it was "his turn," and Keeler made T.C. change positions so he could rape her. The men then left T.C. alone at the hotel. T.C. woke up the next morning, alone and naked, and wrapped herself in a sheet to go to the front desk to find out where she was because she could not find her clothes and her cell phone was broken.

{¶50} We agree with the trial court that the kidnapping was a "long chain of events" that was not merely incidental to the rape; therefore, on these facts, we agree with the trial court that the offenses of rape and kidnapping do not merge.

{¶51} The third assignment of error is overruled.

{¶52} 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 issue out of this court directing 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.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR