[Cite as *State v. Weems*, 2016-Ohio-701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102954

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRENDAN M. WEEMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586089-A

BEFORE: Stewart, J., E.A. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: February 25, 2016

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Brendan M. Weems appeals his rape and kidnapping convictions. On appeal, he challenges the sufficiency and weight of the evidence at trial. For the reasons that follow, we affirm.

{¶2} Weems was charged in a 12-count indictment with multiple counts of rape and kidnapping. Counts 1 and 2 charged Weems with the rape and kidnapping of his seven-year-old niece, A.H. Counts 3–12 charged rape and kidnapping as well as several other sexual offenses with a different victim, C.B., that allegedly occurred between July 1, 2001 and April 2003.

{¶3} A.H. testified that on a night in October 2013, she was sleeping at her aunt and uncle's house when Weems, the uncle, entered her room, pulled down her pants and underwear, and "sucked" her "private part." The following morning, A.H. told her aunt what happened and called her mother to come get her. At some point before the mother's arrival, the aunt drew a bath for A.H. and had her bathe. According to the aunt, she routinely makes the children take baths before their mom picks them up so that they are clean and ready to start the day. A.H. remembered her mother picking her up and taking her to the hospital but did not remember anything that happened at the hospital, including the sexual assault examination.

{¶4} A.H.'s mother testified that the aunt routinely babysits her children and was babysitting on the night in question. She testified that on the morning following the offense, A.H. called her initially to ask her to come pick her up from the home of the aunt

and uncle. Shortly thereafter, the mother received a second phone call, this time with A.H. whispering and telling her that the uncle pulled down her underwear and licked her private part while she was sleeping the night before. The mother immediately notified the police and went to pick up her children. Upon arrival, she gathered her daughter's things including the clothes she had worn the night before. The police arrived shortly after the mother and instructed her to take A.H. to Fairview Hospital for a sexual assault exam

{¶5} At trial, the mother testified that she and A.H. had a discussion about inappropriate touching as recently as the day before the incident. During this discussion, she told her daughter that nobody is allowed to touch or look at her private parts. She also told her daughter that if anyone touched her there, that person would get in trouble.

{¶6} The next person to testify was the sexual assault nurse examiner who examined A.H. She testified that prior to her examination, she spoke with the mother and A.H. separately. The nurse testified that A.H told her that she slept over at her aunt's house and that her uncle came in while she was sleeping and pulled down her pants and panties down to her knees and then started licking her on the "inside where she wipes." The nurse then examined A.H. using a sexual assault kit. The nurse took vaginal swabs and dry swabs of certain areas on A.H.'s stomach and collected the underwear A.H. had worn the night of the offense as part of the rape kit.

{¶7} The forensic analyst that processed the rape kit testified that as a forensic examiner at the Cuyahoga County Medical Examiner's Office, she routinely screens for

the presence of biological fluids and performs DNA analysis and comparisons on casework. She explained the difference between fluid DNA samples and "touch" DNA samples and that typically biological fluids contain more DNA than in a touch sample. The analyst testified that she found a mixture of two DNA profiles in the crotch area of A.H.'s underwear and that Weems and A.H. could not be excluded as possible contributors to the DNA. Both A.H. and Weems's DNA matched 16 positions (a full profile) of the DNA collected. She did not test whether the samples were saliva, however. She testified that she pulled a significant amount of DNA — more than she would expect to be present from a touch sample alone, therefore it would probably be from some kind of biological fluid. The analyst also explained that the amount of DNA found on the crotch of the underwear was a significant amount that she would not expect to come from a simple transfer of DNA (i.e. from another item containing Weems's DNA touching the underwear). She testified that it would not matter if the underwear had traveled in a grocery bag or was in Weems's car — she would not expect a significant amount of his DNA to transfer onto the underwear. She also would not expect a transfer of DNA to the underwear from showering in a bathroom shared with Weems or from the defendant simply touching the underwear. According to the analyst, the probability of selecting another individual, not Weems, at random from the population as being a possible contributor to the DNA mixture in this case was approximately one in a million. When asked whether DNA could transfer onto the underwear from it touching a toilet

seat, a bathroom floor, or a bag in which the defendant had sneezed, she said it is not likely, but not impossible.

{¶8} C.B., the other alleged victim in the case, is A.H.'s aunt, the mother's sister. C.B. testified that when she was between the ages of six and eight, Weems, on numerous occasions, sexually assaulted her when she spent the night at his house. Specifically, she testified that Weems would wake her up, move her from the bedroom where she was sleeping, take her to the living room, and then undress her and lick her vagina. She also recalled at least one occasion where Weems attempted to have vaginal intercourse with her and another time when he forced her to perform oral sex on him.

{¶9} The detective assigned to the case testified that he talked with the mother and A.H. separately and alone. He asked A.H. if anyone had ever touched her inappropriately and recorded the interview of her answer that he believed to be consistent with what the mother had told him. He then interviewed Weems and also spoke to C.B.

{¶10} In a video recording of the detective's interview with Weems, Weems maintains that he did not touch A.H. and that he has no idea why she would bring sexual assault allegations against him. Weems maintained his innocence despite numerous tactical efforts by the detective to get him to admit to the crime.

{¶11} Weems's daughter was the first to testify in her father's defense. She testified that A.H. is smart and creative and makes up a lot of stories. According to Weems's daughter, A.H. often lies to avoid punishment, blames others for her conduct, and tells lies advanced for her age. Two other defense witnesses, Weems's wife (the

aunt), and Weems's sister-in-law, also acknowledged and agreed that A.H. often lies. Weems's wife recalled an incident prior to the alleged events (exact time frame unknown) where Weems had to discipline A.H. She further testified that her husband had been sick the night of the alleged events.

{¶12} Lastly, Weems took the stand in his own defense. He testified that prior to the allegations, he thought he maintained a healthy relationship with A.H., one where he acted like a father to her. Weems recalled that on the day before the alleged incident, he had to get stern with A.H. because of her poor behavior. He said on the night of the alleged events, he carried A.H. to bed but stayed up with her brother watching T.V. He testified that they snoozed on the couch and watched a couple cartoons. He took the boy up to A.H.'s room and went to bed himself. He said that he laid down for a bit but that he got sick shortly thereafter and vomited in the toilet. He also testified that he used the bathroom that night and that he often clears his throat and spits into the toilet when he is urinating. He testified that he never molested A.H. or C.B.

{¶13} The judge found Weems guilty on Counts 1 and 2, the rape and kidnapping of A.H. However, the court found Weems not guilty on the remaining counts that related to C.B. The court merged Counts 1 and 2 and sentenced Weems to 15 years to life in prison.

{¶14} In his first assignment of error, Weems contends that there was insufficient evidence to support his kidnapping conviction. He maintains that the state failed to show that A.H. was moved during the acts or that Weems otherwise restrained the victim.

{¶15} When reviewing the record on sufficiency grounds, "'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. Dean*, Slip Opinion No. 2015-Ohio-4347, ¶ 150, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Thus, sufficiency is a question of law that tests the adequacy of the evidence by requiring that the state produce legally sufficient evidence on every element of the crime charged. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) (overruled on other grounds). "'On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.'" *State v. Williams*, 8th Dist. Cuyahoga No. 94261, 2011-Ohio-591, ¶ 12, citing *Thompkins* at 390.

{¶16} Count 2 of the indictment charged Weems with kidnapping in violation of R.C. 2905.01(A)(4), which states:

> (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:
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;

{¶17} Weems argues that the state failed to present any evidence that he either removed A.H. or restrained her liberty to the extent that his actions constituted a kidnapping within the meaning of R.C. 2907.01. The state contends that it provided

sufficient evidence of restraint by showing that the victim's liberty was psychologically restrained due to the parties' familial relationship.

{¶18} The insufficiency claim was first discussed during a hearing on the defense's Crim.R. 29 motion following the close of state's evidence. During the hearing, the state cited to *State v. Eskeridge*, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988), as support for its contention that it met it's duty of producing evidence sufficient to establish the kidnapping. The court overruled the objection as well as Weems's renewed Crim.R. 29 motion at the close of all evidence.

{¶19} In *Eskeridge*, the defendant was charged with raping his four-year-old daughter by force. At the time of the offense, the rape statute, R.C. 2907.02 provided:

> (A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:
>
> * * *
>
> (3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.
>
> (B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

{¶20} "Force" was, and still is, defined in R.C. 2901.01(A) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶21} The trial court found the defendant guilty of forcible rape despite a lack of any evidence that established that the defendant used actual physical force beyond that needed to effectuate the rape, or made any threats to use force if the child refused to submit. On appeal, this court reversed the "forcible" aspect of the rape conviction and remanded for resentencing. In doing so, the court acknowledged that a parent-child relationship can manifest an unspoken threat of force in rape situations, however it determined that R.C. 2907.02(B) required "an additional quantum of force or coercion," beyond that inherent in the parent-child relationship.

{¶22} On further appeal, the Supreme Court reinstated the conviction after concluding that there was sufficient evidence based on the child's testimony, the child's tender age, and the parental relationship between the defendant and his daughter for the trial court to find beyond a reasonable doubt that the defendant forcibly raped his daughter. The court went on to explain that:

> The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength.

Id. at paragraph one of the syllabus, citing *State v. Labus*, 102 Ohio St. 26, 38-39, 130 N.E. 161, 164 (1921).

{¶23} The court noted that the victim's testimony established that her father removed her underwear and laid her down on a bed — evidencing acts of compulsion and

restraint separate and aside from the force needed to commit the rape. The court further noted the age difference and disparity in weight between the 28-year-old defendant and his four-year-old daughter also created an element of threat and coercion in addition to the inherent coercion stemming from the parent-child relationship. The court concluded by explaining that the force element can be met not only through overt and brutal acts of physical force but also through subtle and psychological pressures.

{¶24} Weems argues that *Eskeridge*, 38 Ohio St.3d 56, 526 N.E.2d 304, is inapplicable to his case because it addresses the issue of force in the context of forcible rape, not kidnapping. He further argues that even if *Eskeridge* does apply to a kidnapping, the state failed to present sufficient evidence of the parent-child relationship to establish force or psychological restraint. We disagree with Weems on both points.

{¶25} When the Supreme Court elaborated on the definition of force pursuant R.C. 2901.01(A) in *Eskeridge*, it did not attempt to limit its application only to forcible child rape convictions. Rather, the import of the court's holding was that in certain scenarios, especially those involving parent-child relationships, a child may feel compelled or psychologically coerced into submitting to her aggressor for reasons other than an overt show of force or threats of force. It is upon this basis that the state referred to the holding in *Eskeridge* as support for its contention that it presented sufficient evidence of a kidnapping. Indeed, pursuant to the kidnapping statute, it is not necessary for the state to show that the defendant used "force" to remove or otherwise restrain the liberty of a child under the age of 13. Rather, the statute provides that the state need only

show that the child's liberty was restrained by "any means." Here, the state used *Eskeridge* as an example of how a child's liberty may be restrained through the inherent social/psychological pressures that accompany the parent-child relationship. *Accord State v. May*, 8th Dist. Cuyahoga No. 94075, 2010-Ohio-5841, ¶ 20.

{¶26} We also conclude that the state presented sufficient evidence of the parent-child relationship in this case. Although it is undisputed that Weems is not A.H.'s father, in his recorded interview with the detective, Weems admitted that he was "like a father" to A.H. and that the two of them shared a familial relationship. Moreover, testimony presented at trial established that Weems felt comfortable enough to discipline A.H. as a parent might, and that he took on a parenting role when A.H. was being babysat at his house (i.e. he put the children to bed). Based on the foregoing, we find that there was sufficient evidence for the court to conclude that a kidnapping occurred.

{¶27} Weems next contends that his rape and kidnapping convictions were against the manifest weight of the evidence. When reviewing a challenge to the verdict based on the manifest weight of the evidence,

> [t]he court, review[s] 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 [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

Thompkins, 78 Ohio St. 3d 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶28} In his brief, Weems contends his testimony was consistent, and that A.H.'s testimony was "inconsistent, contradictory, controverted, uncertain and unreliable." Specifically, Weems argues that A.H. was inconsistent on whether she was asleep or awake when the offense occurred, whether her brother was in the room with her at the time of the alleged conduct, and the number of people she spoke with about the assault prior to trial. Weems further contends that the victim's testimony that Weems was not in the bed with her during the assault and the fact that she testified that she could not remember the sexual assault examination at Fairview Hospital were improbable and cast doubt upon the reliability of her testimony.

{¶29} While we agree that there were some vagaries and inconsistencies in A.H.'s testimony, they were minor and overcome by her consistent retelling of the sexual assault and the DNA match found on the inside of her underwear. Throughout the investigation, which included conversations with her mother, the sexual assault nurse examiner, social workers, and the police, the victim's retelling of Weems's conduct on the night of the offense, remained consistent. A.H. then related the exact same details to the court during her testimony, despite manifestations of obvious distress, which included crying and telling the judge that she was scared.

{¶30} It is very clear that the defense's theory of the case was that A.H. lied about the assault to get back at her uncle for disciplining her, that A.H. was susceptible to pressure from her mother and C.B. to continue the lie through trial, and that Weems's DNA found its way to the crotch of A.H.'s underwear when she went to the bathroom and

came into contact with bodily fluids Weems expelled when he was sick and/or using the bathroom. However, unlike A.H.'s simple explanation of the events that led the trial court to the conclusion about how her uncle's DNA may have gotten on the crotch of her underwear, Weems's theory required the court to make numerous assumptions based on improbable arguments about the evidence and the possible motivations of the various family members. Accordingly, we cannot conclude that the trier of fact clearly lost its way by finding Weems guilty of the rape.

{¶31} Likewise, we cannot conclude that the trial court clearly lost its way in finding Weems guilty of the kidnapping. The facts of this case present a seven-year-old victim who testified that she was either asleep or startled awake when the assault began. Although the victim testified that she did not know whether she could have left the room, or otherwise stopped her uncle's advances, we find it reasonable for the trial court to conclude that the victim's liberty was restrained given Weems's action of removing A.H.'s pants and underwear, and the familial relationship between the child and Weems.

{¶32} Judgment affirmed.

It is ordered that appellee recover of said 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.

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and
TIM McCORMACK, J., CONCUR