[Cite as *State v. Landrum*, 2017-Ohio-389.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104511

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL LANDRUM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-601193-A

BEFORE: Stewart, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 2, 2017

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MELODY J. STEWART, J.:

{¶1} The court, sitting without a jury, found defendant-appellant Michael Landrum guilty of one count of rape, three counts of gross sexual imposition, and one count of kidnapping for raping his girlfriend's daughter, who at the time of the offenses was less than 13 years of age. He was sentenced to a prison term of ten years to life on the rape count; 15 years to life on the kidnapping count; and five years on the gross sexual imposition counts, all terms to be served concurrently. The court also classified Landrum as a Tier III sex offender.

{¶2} In this appeal from that judgment, Landrum complains that the state failed to offer sufficient evidence to prove he committed the offenses, that the court's verdict on all counts is against the manifest weight of the evidence, and that some of the offenses were allied and should have merged for sentencing. We find no error and affirm.

{¶3} The first assignment of error complains that there was insufficient evidence to establish that Landrum committed the charged offenses.

{¶4} The Due Process Clause of the United States Constitution requires criminal convictions to be based on legally sufficient evidence. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence is considered "legally sufficient" if, after viewing the evidence most favorably to the state, "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._ This is a quantitative standard of evidence that looks only at whether any rational trier of fact could find that the evidence existed; in other words, did the state offer any evidence going to each essential element of the offense. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). If so, the evidence is legally sufficient for purposes of the Due Process Clause. The sufficiency of the evidence standard requires great deference to the trier of fact. A reviewing court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011), citing *Jackson* at 326.

{¶5} Landrum first argues that the state failed to establish the elements of rape.

{¶6} The state charged Landrum with violating R.C. 2907.02(A)(1)(b): that he engaged in sexual conduct with a person less than 13 years of age.

{¶7} The victim testified that she was sitting on the living room couch at home when Landrum, her mother's boyfriend, joined her and "started to touch me and stuff." He touched her chest area over her clothes and then moved his hands to touch her vaginal area, again over her clothes. The victim said that she tried to "scoot away" when Landrum started to put his hand inside her pants. When she tried to get up, he grabbed her wrist and sat her back down on the couch. He put his hand inside her pants and began rubbing her vaginal area. After about a minute, he unzipped his pants and, while still holding the victim by the wrist, tried to touch her wrist to his penis. Landrum then pulled the victim's pants down and engaged in sexual intercourse with her.

{¶8} Landrum concedes that the victim testified that he penetrated her vagina. That concession alone is enough for us to find that the state established the elements of rape as charged under R.C. 2907.02(A)(1)(b). Landrum maintains, however, that the state failed to offer any evidence to corroborate her testimony. This argument is frivolous in connection with a claim that there was insufficient evidence to prove a charge of rape — "[c]orroboration of victim testimony in rape cases is not required." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 53.

{¶9} Landrum's entire argument with respect to the three counts of gross sexual imposition is: "For the record, Appellant submits that there was not ample evidence as the three convictions for Gross Sexual Imposition and those also should be vacated." Appellant's brief at 16. This merely states a conclusion; it is not an argument as required by App.R. 16(A)(7). We summarily reject it.

{¶10} As for the kidnapping charge, Landrum argues that there was no evidence that he removed or restrained the victim and that the court should have found that he released her in a safe place unharmed.

{¶11} The indictment charged Landrum with kidnapping under R.C. 2905.01(A)(4): that he purposely removed the victim from the place where she was found or restrained her liberty for the purpose of engaging in sexual activity. In this context, the word "restrain" means to limit a person's freedom of movement for any period of time. *State v. Shepherd*, 8th Dist. Cuyahoga No. 102951, 2016-Ohio-931, ¶ 45

{¶12} The victim testified that when Landrum started touching her, she tried to "scoot" away and then stood to leave. At that point, the victim testified that Landrum "grabbed my wrist and then was like holding my wrist." He sat her down and, while still holding her wrist, forced her to touch his penis. She stated that she was "struggling and trying to get away with my arm and stuff, but it — like it really wasn't doing anything." This was sufficient evidence to prove that Landrum restrained the victim's liberty.

{¶13} Landrum next argues that the court should have found he released the victim in a safe place unharmed — this finding, had it been made, would have reduced the degree of the offense to a felony of the second degree. *See* R.C. 2905.01(C)(1). Landrum forfeited this argument for appeal because he did not request the court to consider whether he released the victim in a safe place unharmed. *State v. Johnson*, 10th Dist. Franklin No. 12AP-35, 2013-Ohio-353, ¶ 36. And with Landrum making no claim of plain error on appeal, we decline to exercise our discretion to find that type of error exists. *See* Crim.R. 52(B); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22.

{¶14} Landrum's second assignment of error complains that the rape conviction is against the manifest weight of the evidence. He maintains that the victim failed to report the rapes immediately and that efforts to tape his telephone conversations with the victim's mother yielded nothing to incriminate him.

{¶15} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine 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. *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986). The use of the word "manifest" means that the trier-of-fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶16} Landrum's argument does not challenge any aspect of the victim's testimony regarding the commission of the charged offenses; but relies on after-the-fact events to call that testimony into question. For example, he notes that the victim did not immediately report what he had done to her and did not divulge the rape for more than three years

{¶17} The length of time it takes a victim to report a crime can be argued as a factor to indicate that a crime did not occur as charged, particularly in a case like this where any physical evidence of the sexual assault would have long disappeared. We recognize, however, that child victims of sexual assault present a special situation. They may not entirely understand what has happened to them. And when acts of sexual abuse are perpetrated by family members or those in relationships with family members, the child victim may be confused as to what happened or in doubt of being believed. These factors were present in this case. The victim testified that she did not tell anyone because:

> I was afraid that my family would like get hurt or something or like — I don't know. I was just — at the time I was just scared that like I would get in trouble or get judged. And I know my mom is like, I would never let your father do this, something like had happened to you. Or like I was scared that like if I did tell like and then like they were like why did you do, and then he would call come [sic] and hurt me or my mom or my sister or something.

{¶18} These were factors that the court, sitting as trier of fact, would certainly have considered in connection with the victim's delay in reporting the offenses. In addition, the court noted evidence showing that the victim had "social problems" immediately following the sexual assault, including "plummeting grades and bladder control issues and a few other things." The court could reasonably have considered these problems as a manifestation of the sexual assault that outweighed any delay in reporting the crimes.

{¶19} Landrum also argues that despite the efforts of the victim's mother and the police to surreptitiously tape record telephone conversations with him, he said nothing to indicate that he committed the crimes. This argument proceeds on the misguided premise that people who commit offenses will no doubt admit their illegal acts, so his not saying anything incriminating to the victim's mother was remarkable and proof of his innocence. In reality, it is more likely that it would be the unusual person who willingly tells the mother of his victim that he perpetrated acts of sexual assault against her child.

{¶20} In any event, those tape recordings did not necessarily portray Landrum as innocent. In one of the recorded conversations, Landrum told the victim's mother that he touched the victim's "private area." Landrum testified at trial and said that by "private area" he meant her breast — he explained that he and the victim were horsing around and while tickling her he inadvertently touched her breast. When announcing its verdict, the court characterized Landrum's testimony about the tape recordings as "contrived" and further noted that Landrum "was not very vocal in his denials." The court's conclusions were not so contrary to the other evidence that a miscarriage of justice occurred when it found Landrum guilty.

{¶21} The third assignment of error complains that the court erred by failing to merge the kidnapping count into the sexual assault counts for sentencing. Landrum concedes that he did not raise this issue to the court during sentencing and has forfeited all but plain error.

{¶22} We note at the outset that the court did not determine that any of the offenses were allied offenses of similar import that should have merged for sentencing. On that basis, the sentence imposed is not void. *See State v. Williams*, Slip Opinion No. 2016-Ohio-7658, ¶ 29 ("when the trial court concludes that the accused has in fact been found guilty of allied offenses of similar import, imposing separate sentences for those offenses is contrary to law and the sentences are void on the face of the judgment of conviction.").

{¶23} Rather, this assignment of error is controlled by the proposition that "an accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error and that a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice." *Id*. at ¶ 25, citing *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860. This proposition is merely a reinstatement of the plain error rule contained in Crim.R. 52(B), the application of which we previously noted is discretionary with the reviewing court.

{¶24} We decline to address whether plain error exists in this case because the court ordered Landrum to serve his sentence of 15 years to life for kidnapping concurrently with a sentence of ten years to life for the rape count. Even if error existed with respect to the sentence for kidnapping, merging the kidnapping sentence into the rape sentence would not affect the total number of years to be served.[1] No manifest miscarriage of justice exists.

{¶25} Judgment affirmed.

It is ordered that appellee recover of 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

MARY EILEEN KILBANE, P.J. and
SEAN C. GALLAGHER, J., CONCUR

[1] The state would no doubt elect the lengthier of the two sentences.