[Cite as *State v. McSwain*, 2017-Ohio-8489.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105451

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DORN MCSWAIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-609563-A

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: November 9, 2017

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PATRICIA ANN BLACKMON, J.:

{¶1} Dorn McSwain ("McSwain") appeals from his convictions for various sex offenses and his accompanying sentence of ten years in prison and assigns the following errors for our review:

> I. The trial court erred by failing to grant a judgment of acquittal, pursuant to Crim.R. 29(a), on the charges, and thereafter entering a judgment of conviction of those offenses as those charges were not supported by sufficient evidence, in violation of defendant's right to due process, as guaranteed by the Fourteenth Amendment for the United States Constitution.
>
> II. Appellant's convictions are against the manifest weight of the evidence.
>
> III. Appellant was denied his right to a fair trial when the trial court allowed expert testimony from a witness who was not deemed to be an expert.
>
> IV. The trial court committed plain error by ordering convictions 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.
>
> V. The trial court erred by ordering appellant to pay costs in the journal entry when it had previously suspended court costs on the record.

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

Procedural History

{¶3} On September 8, 2016, McSwain was indicted for the following offenses, alleged to have occurred on July 3, 2001: four counts of rape in violation of R.C. 2907.02(A)(2), a first-degree felony; gross sexual imposition ("GSI") in violation of R.C. 2907.05(A)(1), a fourth-degree felony; and kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motivation specification, a first- degree felony.

{¶4} McSwain's case was tried to the bench, and the court found him guilty of all but one count of rape. Appellant was sentenced on January 19, 2017, to ten years in prison for each rape and the kidnapping, and 18 months in prison for the GSI. All counts were to run concurrently for an aggregate sentence of ten years in prison.

Trial Testimony

{¶5} T.M. testified that on the night of July 2, 2001, she met her friend Joanne Kowalski at a bar called Fleet's Finest. T.M. drove by herself that night and parked across the street from the bar at a gas station. T.M. did not lock her car doors because she only had the key to the ignition. T.M. denied using "illegal narcotics," "prescription narcotics," or drinking alcohol "heavily" that night. T.M. and Kowalski drank Bud Light over the course of "maybe an hour," although T.M. could not remember how many beers she had. However, she felt "okay to drive." T.M. and Kowalski left the bar together and each went their separate ways toward their respective cars. According to T.M., her intention was to go to a friend's house on Gertrude Ave. in Cleveland that night.

{¶6} T.M. got into her car, heard a noise, and turned around to look in the backseat. A black male was there, and he put a knife to her throat. The male told T.M. not to look at him and "just * * * to drive." T.M. drove to the E. 88th St. and Union Ave. area, where the male told T.M. to get in the backseat with him. "I — it's so foggy, like all of that. But I do remember at some point in time like him having the knife to my throat and him just telling me like he just wants to be able to get off and he just wants some pussy, that's all he wants."

{¶7} T.M. testified that the male penetrated her vagina with his fingers and his penis, performed oral sex on her, made her perform oral sex on him, and touched her breasts. Eventually, the male ejaculated in T.M.'s vagina. After he "got off," the male told T.M. that she was going to drop him off somewhere. Asked if the male still had the knife, T.M. testified, "It was there somewhere, I just don't know where at." T.M. dropped the male off at the corner of Broadway Ave. and Union Ave. T.M. testified that the sex was not consensual, and she did not feel free to leave her car.

{¶8} T.M. went to a friend's house "and cried and cried and cried for hours." Eventually she took a shower, because she "felt nasty [and] dirty." T.M. went home, called her mother, and told her what happened. T.M.'s mother came to T.M.'s house. Although she could not recall an exact time frame, T.M. testified that her mother arrived at her house "probably about two or three hours" after the incident occurred. At this point, T.M. went to the hospital to report the rape. She told the hospital staff and the police what happened and was given a rape kit.

{¶9} T.M. testified that she had never met this man before and he was a "stranger" to her. T.M. described him as being taller than she was, and "[i]t seemed like maybe he had some acne on his face or like maybe he had acne prior to that." The police showed T.M. "books and books of pictures just to look at," but T.M. was unable to identify who raped her. "Not at that time. I didn't see anybody that looked even close to him."

{¶10} In 2016, investigators went to T.M.'s house and told T.M. there was a lead in the case. One of the investigators showed T.M. a photo lineup, and T.M. identified the male who raped her in 2001. During her trial testimony, T.M. made an in-court identification of McSwain as the man who raped her.

{¶11} Joanne Flynn [a.k.a. Kowalski] testified that, in July 2001, she met T.M. at Fleet's Finest for "a couple of beers." They were at the bar for "maybe an hour or so" before they got into their separate cars to leave. Several hours later, T.M. called Kowalski from the hospital and "[s]he said that when she got to her car that there was a guy in the backseat of her car and he pulled out a knife and told her where to drive and made her drive to a certain area, and then that he raped her, and that she had called the police and was at the hospital * * *."

{¶12} Kowalski further testified that, sometime after this incident occurred, T.M. developed a drug problem. Specifically, T.M. "smoked crack and marijuana * * * [m]aybe a year, maybe not even a year" after she was raped.

{¶13} T.M.'s mother testified that late one night in July 2001, T.M. called her "hysterical * * *, crying and carrying on," and told her that she was attacked. "And I asked her where she was, and she said she was at home. And I said, well, I'll be right there. And so I left my house and went to her house. And when I got to her she was just hysterical, crying. And I said, we have to call an ambulance. We have to get you to the hospital. So that's what we did."

{¶14} T.M.'s mother testified that T.M. "said she was raped. She was tortured for hours. This man had her in the car. I learned more once we got to the hospital and I went through everything with her. I was in the room. I was in the examination room. They put us in a room together."

{¶15} According to T.M.'s mother, after T.M. was released from the hospital, T.M. followed up at the Rape Crisis Center.

> So after this incident happened and she was just — she was just ruined. I mean, she was constantly crying and — upset, you know. * * * And it seemed like it took awhile. I don't know. I can't recall how long. But her getting all the help that she needed and then doctors and medicines they put her on, you know, different kind of medicines and stuff to treat her. * * * And I could hear all the things that — she would lay up there, her bed, and I would hear her screaming and crying. And I would just be downstairs and lay in my bed and cry right along with her, knowing of the stuff she was going through and how — what happened to her and stuff. So this kind of, I would say, pretty much almost destroyed my daughter.

{¶16} T.M.'s mother testified that T.M. did not have an issue with drugs "until after the situation that had happened to her. * * * I think she had the problems with different medications, different pills. They had * * * her on so many different

medications, for anxiety, depression. You know, you name it, she took it, I guess." T.M.'s mother was not aware that T.M. ever had a problem with crack cocaine.

{¶17} Cleveland Police Detective Rick Connolly testified that in July 2001, he was a patrol officer who responded to a rape allegation. He interviewed the victim, T.M., at the hospital. He learned that the offender used a knife to facilitate raping and kidnapping T.M. He did not learn the name of the suspect.

{¶18} Samuel Troyer testified that he is an Ohio Bureau of Criminal Investigations forensic DNA analyst, and in 2014, he analyzed DNA from a rape kit and prepared a report in the case at hand. According to Troyer, his tests generated a lead for an "unknown male profile." Eventually, this DNA profile was linked to McSwain. Troyer was given a "confirmatory swab" from McSwain, and he compared this to swabs from T.M.'s rape kit. The results showed that T.M.'s vaginal swab, skin swab, and pubic hair comb contained semen that was consistent with McSwain's DNA profile. According to Troyer, the margin for error regarding the DNA consistency is "rarer than one in one trillion."

{¶19} John Hupka testified that he is a retired patrolman for the Cleveland Police Department. On May 31, 2016, he administered a photo array to T.M. He was not associated in any other way with this case, and at the time he administered the photo array, he did not know who the suspect was. Hupka testified that this is "customary," so an officer "who does not know who the suspect is can administer the lineup just to

prevent the investigator possibly telling the victim who the suspect is." T.M. circled the picture of a male at the top right corner of the lineup.

{¶20} Sonya Dziuba, who is an investigator for Cuyahoga County Prosecutor's Sexual Assault CODIS Task Force, testified that she was assigned a case in which T.M. alleged being raped. Dziuba believes that the Cleveland Police Department sent the rape kit to the BCI in January 2014. The BCI analyzed the evidence and generated an investigative lead indicating McSwain as a suspect.

{¶21} Dziuba interviewed McSwain, who, when showed a photograph of T.M., stated that he did not know her. Asked if he was in the 88th St. and Union Ave. area on the night of July 2, 2001 or early morning of July 3, 2001, McSwain stated no and insisted that he was incarcerated at the time. McSwain stated specifically that he did not get out of jail until September 8, 2001, "so there was no way that he was involved in this case." However, McSwain's Cuyahoga County court records indicate that he was incarcerated beginning August 2002, and he was released August 8, 2005.

{¶22} Dziuba also testified that she interviewed T.M., who "stated that she could not recall everything about the situation and she wasn't sure how she felt about going forward with the investigation."

{¶23} McSwain testified that investigators came to his house, showed him a picture of a woman, and told him about allegations of rape in the summer of 2001. McSwain told the investigators that he was in prison at that time and that he did not

recognize the person in the photo. Subsequently, McSwain gave the investigators an oral swab for DNA testing purposes.

{¶24} During trial, McSwain testified that eventually he realized he was mistaken about the dates of his prior incarceration; McSwain was in prison in 2002, rather than 2001.

{¶25} McSwain testified about his recollection of the night of July 2, 2001, and the morning of July 3, 2001. He was working at a temporary service on the corner of E. 52nd Street and Fleet Avenue. At the time, he was using crack cocaine. He was on his way to a friend's house at approximately 11:00 p.m. on July 2, 2001. McSwain testified as to what happened next:

> On the way there walking down Fleet Avenue I seen a white chick coming across the street, which is [T.M.], going to her car. I stopped, talked to her. I yelled at her as she was coming out of the bar.
>
> * * *
>
> I asked her about, did she want to get high. She told me — asked me for what. And I told her, do she smoke crack cocaine. And I guess she didn't believe me at first, so I pulled it out of my pocket because I had it on me and I showed her. And then she said, how do I know it's not fake. So I pulled it out and let her taste.
>
> * * *
>
> After I let her taste it she seen that it was real. So I asked her, where can we go. So she let me in the — get in the car with her. So like I said, I'm not familiar with the area where we went to. So we started going up Fleet. We were talking. I told her my name. She told me her name [although] I don't remember what name she told me.
>
> So we went up Fleet. We were talking. That's when we made the deal, what was going to happen.

> * * *
>
> I asked her what do I get from her when I give her what she wanted, which was crack cocaine. And I told her I wanted oral sex.
>
> * * *
>
> So we drove to the area. It was up Union, I remember, because it is a Kentucky Fried Chicken on Broadway. So we went up Union to some side street, 79th, 88th, whatever. Like I would say, I didn't know the area. I'm not from down there.
>
> So we parked on the side of the street. Her and I took a couple hits of crack cocaine. We took a couple of good hits, each other. And so then I told her, I gave you what you wanted, so what do I get now, and that's when she gave me oral sex in the front seat of the car.

{¶26} Asked if he and T.M. also had vaginal sex, McSwain testified as follows: "Yes. This was after we had oral sex. We both jumped in the backseat of the car. But I couldn't perform so she gave me more oral sex for the second time, and that's when the — we had sex." McSwain testified that, after he ejaculated, T.M. asked him for more crack, "because I did promise her I would give her more after we had sex, but I did not give her any more [b]ecause we had been there for awhile and I didn't know the area and I didn't know if the police was coming or not."

{¶27} According to McSwain, "[t]he reason why [T.M.] is claiming the rape and kidnapping, because I did not give her any more crack cocaine after we had sex. * * * Because she kept saying, is that how you going to play me. * * * I gave you what you wanted and you promised me some more crack cocaine after we had sex, which I did not give her any more."

{¶28} At trial, McSwain testified that he stopped using crack cocaine "[a]bout over ten years ago."

Sufficiency of the Evidence

{¶29} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of the evidence require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134.

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Driggins, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶30} 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. Vickers*, 8th Dist.

Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶31} R.C. 2907.02(A)(2) defines forcible rape as: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶32} R.C. 2907.05(A)(1) defines GSI as: "No person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force."

{¶33} R.C. 2905.01(A)(4) defines kidnapping as: "No person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity * * * with the victim against the victim's will * * *."

{¶34} In the case at hand, T.M. testified that McSwain forcibly raped her, and McSwain testified that he and T.M. smoked crack cocaine and had consensual sex. T.M.'s testimony alone, if believed, is sufficient to sustain convictions for rape, GSI, and kidnapping. *See State v. Blankenship*, 8th Dist. Cuyahoga No. 77900, 2001 Ohio App. LEXIS 5520 (Dec. 13, 2001) (a victim's "testimony, if believed, is sufficient to prove each element of the offense of rape. There is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction"). Accordingly, McSwain's first assigned error is overruled.

Manifest Weight of the Evidence

{¶35} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

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

{¶36} An appellate court may not merely substitute its view for that of the jury, but 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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case that the evidence weighs heavily against the conviction." *Id.*

{¶37} In the case at hand, the trial testimony, as well as the scientific evidence, showed that T.M. and McSwain engaged in sexual conduct. According to T.M., McSwain hid in the backseat of her car, held a knife to her throat, and forced her to have sex with him. According to McSwain, however, he and T.M. had consensual sex in exchange for crack cocaine. Witness credibility becomes the most important issue in this he-said-she-said rape case. *See State v. Crymes*, 8th Dist. Cuyahoga No. 104705, 2017-Ohio-2655, ¶ 19 ("rape cases where consent is the only issue often [turn] on a credibility contest between the accused and the accuser").

{¶38} McSwain argues that there are inconsistencies in T.M.'s testimony, which render it incredible. First, T.M. did not tell her mother, the hospital staff, or the police that she stopped at a friend's house after the incident but before she called her mother. However, she testified about going to this friend's house at trial. Second, when the police interviewed T.M. at the hospital, she did not mention anything about digital penetration. Again, she testified about digital penetration at trial.

{¶39} Upon rendering its verdict, the court acknowledged minor differences between what was said in 2001 and what was said in 2016. However, the court concluded that "the central gist of the testimony that I heard relative to the incident from [T.M.] is essentially consistent throughout this entire period of time."

{¶40} Upon review, we cannot say that the court lost its way in finding T.M.'s testimony more persuasive than McSwain's. Accordingly, McSwain's convictions are not against the manifest weight of the evidence, and his second assigned error is overruled.

Expert Testimony

{¶41} McSwain argues that Troyer was not deemed an expert on the record prior to testifying. However, upon review, we find that defense counsel stipulated that Troyer, who is an Ohio Bureau of Criminal Investigations forensic DNA analyst, is an expert witness. The court accepted the stipulation. Accordingly, McSwain's third assigned error is overruled.

Allied Offenses

{¶42} We review a trial court's R.C. 2941.25 allied offenses determination under a de novo standard. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. Pursuant to R.C. 2941.25(A), "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, * * * the defendant may be convicted of only one."

{¶43} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 896, ¶ 30-31, the Ohio Supreme Court detailed the allied offenses analysis:

> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant's conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
>
> As 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 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.

{¶44} In the case at hand, McSwain was convicted of three counts of rape (digital penetration, penile penetration, and oral sex), one count of GSI (fondling breasts) and one count of kidnapping with sexual motivation. He argues on appeal that his conduct and animus were the same for all offenses, and "[t]here is no temporal or spatial separateness to the offenses."

{¶45} In *State v. Nicholas*, 66 Ohio St.3d 431, 435, 613 N.E. 2d 225 (1993), the Ohio Supreme Court held that vaginal intercourse, cunnilingus, and digital penetration are "three separate crimes involving distinct sexual activity. * * * Since each constitutes a

separate crime with a separate animus, they do not constitute allied offenses of similar import."

{¶46} Furthermore, kidnapping, in violation of R.C. 2905.01(A)(4), and rape, in violation of R.C. 2907.02(A)(2), may constitute allied offenses. *State v. Mitchell*, 6 Ohio St.3d 416, 418, 453 N.E.2d 593 (1983). However, "movement from one location to another, even at times in the same house or apartment, may demonstrate that the kidnapping was committed with a separate animus from the rape." *State v. Ortiz*, 8th Dist. Cuyahoga No. 95026, 2011-Ohio-1238, ¶ 17.

{¶47} Upon review, we find that McSwain committed all three acts of rape and one act of GSI separately and with separate animus under *Nicholas*. Furthermore, he held T.M. at knife-point and forced her to drive to another area before raping her in the backseat of her car. We find that this kidnapping was committed with a separate animus from the sex offenses. As such, the court did not err by failing to merge McSwain's convictions, and his fourth assigned error is overruled.

Court Costs

{¶48} At the sentencing hearing, the court stated to McSwain, "Because you are indigent, the Court will suspend the court costs in this matter." However, the January 19, 2017 sentencing journal entry states "the court hereby enters judgment against the defendant in an amount equal to the costs of this prosecution." The state conceded this assigned error.

{¶49} Trial courts may "correct certain types of errors in judgments by nunc pro tunc entry to reflect what the court actually decided." *State v. Thompson*, 8th Dist. Cuyahoga No. 104226, 2016-Ohio-7404, ¶ 8. Accordingly, McSwain's fifth and final assigned error is sustained.

{¶50} Convictions and sentence are affirmed. Case remanded for the limited purpose of correcting the sentencing journal entry to reflect what transpired at the sentencing hearing regarding costs.

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 be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction and execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR