[Cite as *State v. Hardy*, 2009-Ohio-2677.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24480
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LEE E. HARDY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 04 1147

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Lee Hardy, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} Undisputed facts in the record establish that on the night of April 6, 2008, Kelly Roberts arrived home to find Hardy visiting with her boyfriend and another friend. Roberts had met Hardy on several occasions prior to this evening. Accordingly, when Roberts indicated that she needed to go to a nearby gas station and Hardy volunteered to drive her, Roberts accepted Hardy's offer. Over the next several hours, Hardy drove Roberts to several different locations. In particular, Hardy stopped at a drive-thru store on South Main and purchased several cans of beer and a condom. Eventually, Hardy drove Roberts to his mother's house on Sherman Street. Roberts went inside to use the bathroom.

{¶3} Roberts testified to the following. When she exited the bathroom and sought to leave, Hardy stopped her and told her that he wanted to have sex. Roberts refused, and Hardy forced her to the loveseat and floor. Hardy performed oral sex on Roberts and had sexual intercourse with her while holding her down. Afterwards, Hardy allowed Roberts to get dressed and drove her home. Roberts immediately called 911 when she got home and reported that Roberts had raped her. Hardy testified that he had sex with Roberts, but that it was consensual.

{¶4} On April 18, 2008, the grand jury indicted Hardy on the following counts: (1) kidnapping, in violation of R.C. 2905.01(B)(2); and (2) rape, in violation of R.C. 2907.02(A)(2). The rape count included a sexually violent predator specification, in violation of R.C. 2941.148. On May 19, 2008, a supplemental indictment was issued, adding a sexually violent predator specification to the kidnapping count and a sexual motivation specification, in violation of R.C. 2941.147, to the rape count. The matter proceeded to a bench trial, and the trial court found Hardy guilty on all counts, including the three specifications. The trial court classified Hardy as a Tier III sex offender and sentenced him to a total of twenty years to life in prison.

{¶5} Hardy now appeals from his convictions and raises three assignments of error for our review.

II

Assignment of Error Number One

"APPELLANT HARDY'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} In his first assignment of error, Hardy argues that his convictions are against the manifest weight of the evidence. Specifically, Hardy argues that his convictions should be reversed because Roberts was not a credible witness.

{¶7} When considering a manifest weight argument, the Court:

> "[M]ust 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* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶8} Initially, we note that Hardy's argument only addresses his convictions for rape and kidnapping. Hardy's argument does not address his two sexual violent predator specifications and one sexual motivation specification. As such, we confine our analysis to a determination of whether Hardy's convictions for rape and kidnapping are against the manifest weight of the evidence. App.R. 16(A)(7).

{¶9} R.C. 2907.02(A)(2) 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."

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

"'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person[.]" R.C. 2901.01(A)(1).

{¶10} R.C. 2905.01(B)(2) provides that "[n]o person, by force, threat, or deception *** shall knowingly [restrain another of the other person's liberty], under circumstances that create a substantial risk of serious physical harm to the victim[.]" "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. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶11} Roberts testified that during the evening hours of April 6, 2008 and the early morning hours of April 7, 2008, Hardy drove her to several places, including the gas station, a drive-thru, his cousin's house, his grandmother's house, a friend's house, and finally his mother's house. According to Roberts, she repeatedly told Hardy during the course of their travels that she needed to go home. Roberts admitted that she was only about two blocks away from her home at one point during the evening, but explained that she did not feel comfortable walking home by herself through the neighborhood at that hour. Roberts testified that Hardy indicated his interest in having sex with her before they arrived at his mother's house. When driving between locations, Hardy "made a comment that he was horny [and] he wanted to have sex with [Roberts.]" Roberts indicated that when Hardy purchased a condom at a Main Street drive-thru and she said "I hope you're not going to use [that] for me," Hardy "[j]ust kind of chuckled about it." Roberts testified that she told Hardy that she did not want to have sex with him.

{¶12} Roberts testified that after she used the bathroom at Hardy's mother's house and attempted to leave the house, Hardy "blocked *** the front door *** bolted the locks and ***

told [her] [she] wasn't leaving until [she] gave him what he wanted." Hardy then pushed Roberts down on the loveseat, kissed her body, and briefly performed oral sex on her while holding her down. Roberts testified that Hardy vaginally penetrated her with his penis once while on the loveseat, but then picked her up and put her on the floor. Hardy then briefly performed oral sex on Roberts again and proceeded to have sexual intercourse with her. Roberts repeatedly told Hardy to stop and cried during the encounter. According to Roberts, Hardy took out the condom that he purchased at the drive-thru earlier in the night, but did not use it. Once Hardy was finished, he allowed Roberts to get dressed and took her back to the car. Roberts testified that she studied the house address and Hardy's license plate number on her way out to the car so that she would have the information to tell the police. Roberts further testified that Hardy repeatedly told her on the way home that what had occurred was not rape.

{¶13} Several officers testified that when they responded to a dispatch for a rape and saw Roberts between approximately 6:30 to 7:00 a.m. on April 7, 2008, Roberts appeared "emotionally wrecked," was sobbing, and had a difficult time talking. Carol Powell, a registered nurse at the DOVE Unit who examined Roberts, also testified that Roberts was tearful, shaky, and distraught during her examination. Powell testified that Roberts described what had happened to her, indicating that she had been forced onto the floor and held there while her attacker had sexual intercourse with her. Powell noted that Roberts had scratch marks on her back and some redness and tenderness to her vagina.

{¶14} Hardy testified that he and Roberts did drive to several places on the night of April 6, 2008 and the morning of April 7, 2008, but that Roberts did so willingly. According to Hardy, he and Roberts had consumed beer and used crack cocaine together on several occasions and were interested in doing so again when they went out driving around together. Hardy

admitted that he purchased a condom at the drive-thru on Main Street, but said that he did so at Roberts' request. Hardy testified that he and Roberts had consensual sexual relations twice before this occasion and that Roberts willingly had sex with him when he took her to his mother's house. According to Hardy, he and Roberts smoked crack cocaine together and had consensual sex, after which he returned Roberts to her home without incident. Hardy admitted on direct examination that he had previously been convicted twice for sexual battery, twice for robbery, once for burglary, and once for possession of cocaine.

{¶15} Officer Russ McFarland testified that he interviewed Roberts on the morning of April 7, 2008 and that she did not display any signs of intoxication during her interview. Officer McFarland further testified that he went to speak with Hardy about the incident after officers found Hardy's residence. According to Officer McFarland, when he told Hardy that "a woman had made an allegation against him of sexual assault," Hardy immediately responded that "it was consensual." Officer McFarland specified that Hardy responded in this manner despite the fact that Officer McFarland had not identified the woman who had made the allegation and had not asked Hardy if the allegation was true.

{¶16} The trial court concluded from the foregoing evidence that Hardy and Roberts did go out "for an evening of partying" on the night of April 6, 2008. In this respect, the trial court noted that it was "not sure [Roberts] was honest with anyone about what all she was doing that night." Yet, the trial court found Roberts to be a credible witness with regard to her testimony that Hardy had forced her to engage in sexual intercourse with him. The trial court specifically noted that the injuries Roberts sustained to her back were evidence of the force that Hardy exerted while holding Roberts down on the floor during the encounter.

{¶17} Based on our review of the record, we cannot conclude that Hardy's convictions are against the manifest weight of the evidence. Roberts testified that Hardy prevented her from leaving his mother's house and then physically forced Roberts to the floor and held her there while he engaged in nonconsensual sexual intercourse with her. Despite Hardy's testimony that he and Roberts shared beer and smoked crack cocaine shortly before they had sex, Officer McFarland testified that when he interviewed Roberts shortly after his dispatch, Roberts did not display any signs of intoxication. Furthermore, multiple officers testified that Roberts cried uncontrollably and had difficulty speaking during her interviews. Even if the trial court found Roberts less credible in some respects, the trial court chose to believe her testimony with regard to the rape and kidnapping. This Court will not reverse Hardy's convictions simply because a trial court chose to believe the testimony of Roberts over the testimony of Hardy. As the trier of fact, the trial court "was in the best position to weigh the credibility of the witnesses before [it]." *State v. Peterson*, 9th Dist. No. 23434, 2007-Ohio-2091, at ¶19. Because the record supports Hardy's convictions, his argument that his convictions are against the manifest weight of the evidence lacks merit. Hardy's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN FAILING TO GRANT HARDY'S MOTION TO CONSIDER THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY."

{¶18} In his second assignment of error, Hardy argues that the trial court erred in failing to consider the lesser included offense of sexual battery. Specifically, Hardy argues that the trial court could have found that his conduct amounted to coercion rather than force in light of Robert's unreliable testimony. We disagree.

{¶19} To determine whether the trier of fact must consider a lesser-included offense, the court must determine whether "the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Divincenzo*, 9th Dist. No. 05CA0105-M, 2006-Ohio-6330 at ¶34, quoting *State v. Carter* (2000), 89 Ohio St.3d 593, 600. The sexual battery statute provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when *** [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." R.C. 2907.03(A)(1). The Ohio Supreme Court has found sexual battery, as defined in R.C. 2907.03(A)(1), to be a lesser included offense of rape, as defined in R.C. 2907.02(A)(2). *State v. Wilkins* (1980), 64 Ohio St.2d 382, 385-86. Yet, "[t]he mere fact that an offense can be a lesser included offense of another offense does not mean that a court must [consider] both offenses where the greater offense is charged." Id. at 387.

{¶20} The record supports a finding that Hardy physically forced Roberts to the floor and held her there while engaging in sexual conduct with her. Roberts' conduct satisfies the definition of rape. R.C. 2907.02(A)(2) (defining rape as "engage[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force"). In a bench trial, the court is the fact finder. The trial judge in the present matter was entitled to believe that Hardy used force to compel Roberts to submit. In making such a finding, the court necessarily rejected Hardy's theory that other facts, if believed (i.e. use of drugs and alcohol to impair Roberts' ability to resist), could support a conviction on the lesser included offense of sexual battery. Because the evidence at trial, as found by the trial court, supports a conviction the charge of rape and would not have supported a conviction on a charge of sexual battery, the trial court did not err if, as Hardy contends, it failed to also consider the lesser

included offense of sexual battery. *Divincenzo* at ¶34. Hardy's second assignment of error is overruled.

Assignment of Error Number Three

> "THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT FINDING THAT ROBERTS WAS RELEASED IN A SAFE PLACE UNHARMED, WHICH WOULD HAVE MITIGATED THE KIDNAPPING AND REDUCED IT TO A SECOND DEGREE FELONY OFFENSE."

{¶21} In his third assignment of error, Hardy argues that the trial court committed plain error in failing to consider that he released Roberts in a safe place unharmed. Specifically, Hardy argues that the trial court should have sua sponte considered Roberts' safe release as a mitigating factor and reduced his kidnapping charge to a second-degree felony. We disagree.

{¶22} While usually a first-degree felony, the offense of kidnapping is a second-degree felony if "the offender releases the victim in a safe place unharmed." R.C. 2905.01(C)(1). Apart from the fact that safe, unharmed release is a statutory defense that Hardy, not the trial court, was obligated to raise, see *State v. Porter* (Oct. 21, 1992), 9th Dist. No. 15511, at *2, this Court has held that "[t]he fact that a rape occurred is ample evidence of the harm contemplated by R.C. 2905.01(C)." *State v. Royston* (Dec. 15, 1999), 9th Dist. No. 19182, at *6. Accordingly, Hardy's third assignment of error is overruled.

III

{¶23} Hardy's three assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.