[Cite as *State v. Walker*, 2011-Ohio-517.]

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

STATE OF OHIO Appellee v. NATHANIEL D. WALKER Appellant	C. A. No. 10CA0011 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 09-CR-0220

DECISION AND JOURNAL ENTRY

Dated: February 7, 2011

MOORE, Judge.

{¶1} Appellant, Nathaniel D. Walker, appeals from the judgment of the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶2} On May 29, 2009, the Wayne County Grand Jury indicted Mr. Walker on one count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree, and one count of sexual battery in violation of R.C. 2907.03(A)(1), a felony of the third degree. Mr. Walker pleaded not guilty and the charges were tried to a jury from December 7, 2009, through December 8, 2009. The jury found Mr. Walker guilty of sexual battery but not guilty of rape. The trial court sentenced Mr. Walker to two years of incarceration and ordered the sentence to be served concurrently with the sentence in an unrelated case. The trial court also designated him a Tier-III sex offender.

{¶3} Mr. Walker timely filed a notice of appeal. He has raised four assignments of error for our review.[1]

II.

ASSIGNMENT OF ERROR I

> "THE EVIDENCE OF SEXUAL BATTERY WAS INSUFFICIENT AS A MATTER OF LAW, AND THE COURT SHOULD HAVE GRANTED THE DEFENSE MOTION FOR CRIMINAL RULE 29 ACQUITTAL."

{¶4} In his first assignment of error, Mr. Walker contends that his conviction is supported by insufficient evidence with respect to the element of coercion. We do not agree.

{¶5} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶6} R.C. 2907.03(A)(1) provides that: "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following applies: [t]he offender

[1] Walker attempted to file pro se a fifth assignment of error related to his constitutional and statutory right to a speedy trial. His appellate counsel did not join in this assignment of error. On June 7, 2010, this Court's magistrate ordered that the pro se supplemental brief be stricken from the record.

knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." "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). "Coercion means to compel by pressure, threat, force or threat of force." *In re Jordan* (Sept. 12, 2001), 9th Dist. No. 01CA007804, at *1, citing *State v. Dunn* (Apr. 3, 1985), 9th Dist. Nos. 11745 & 11746, at *6; *State v. Tolliver* (1976), 49 Ohio App.2d 258.

{¶7} "Intent need not be proved by direct evidence." *State v. Elwell*, 9th Dist. No. 06CA008923, 2007-Ohio-3122, at ¶26. This is because, "'[n]ot being ascertainable by the exercise of any or all of the senses, [intent] can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances[.]'" *In re Washington* (1998), 81 Ohio St.3d 337, 340, quoting *State v. Huffman* (1936), 131 Ohio St. 27, paragraph four of the syllabus. "Furthermore, if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.' (Internal quotations omitted.)" *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2; *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Circumstantial evidence has the same probative value as direct evidence. See *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶8} Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that, on August 11, 2007, Mr. Walker coerced A.S. into sexual conduct.

{¶9} On August 10, 2007, Mr. Walker, whose wife, Latoya, was out with a friend for the evening, decided that he would go out with friends, as well. He called his niece, A.S., who was sixteen years old at the time, to babysit the couple's children at their home. This was a common occurrence and A.S. frequently ended up sleeping over in the guest bedroom afterward. After A.S. arrived, Mr. Walker and a friend decided not to go out but instead to drink at Mr. Walker's home. They left to purchase some beer and returned to drink together on the porch. In addition to beer, the two also took shots of tequila. Mr. Walker's friend left and he entered the home.

{¶10} A.S. testified that while she was painting her nails and watching a movie, Mr. Walker entered the room and asked her to rub his back. He sat very close to her on the couch. He began talking to her about a time when she ran away and was living with various older men and whether she liked being with older men. Eventually she went upstairs to sleep in the guest bedroom.

{¶11} A.S. testified that Mr. Walker entered the bedroom, pulled his penis out of his shorts and attempted to have her perform oral sex. She pushed his penis away from her mouth. She testified that he then climbed on top of her and raped her. She testified that she told him no. She further testified that no means no. When he was on top of her, he placed his arms over her shoulders, which she described as holding her. A.S. also testified that she had seen him beat her aunt so she knew she would be unable to overpower him.

{¶12} Christine Hawkins, a sexual abuse nurse specialist, examined A.S. She testified that at the time of the exam, A.S. reported that Mr. Walker was holding her shoulders and that she tried to get up but he kept pushing her down.

{¶13} Viewed in the light most favorable to the State, A.S.' testimony indicates that she was sixteen years old at the time and Mr. Walker knew that he did not have consent for sexual intercourse. She further testified that even though she said no to him, he held her by placing his arms over her shoulders and that she could not physically overpower him. The State thus provided sufficient evidence to demonstrate that Mr. Walker at least should have known that he did not have consent Finally, the evidence is sufficient to demonstrate coercion under the definition set forth in *In re Jordan*, 9th Dist. No. 01CA007804, at *1. Mr. Walker's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE FINDING OF GUILT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶14} In his second assignment of error, Mr. Walker contends that his conviction was against the manifest weight of the evidence. Essentially, he contends that the jury should have believed his version of events. We do not agree.

{¶15} "While the test for sufficiency requires a determination of 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." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶ 11. Rather,

> "an appellate court must 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.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶16} In addition to the previously discussed testimony, A.S. testified that after Mr. Walker finished the sexual assault he left the guest bedroom and returned to the master bedroom. Shortly thereafter, in the early morning hours, Mrs. Walker returned home. When she reached the master bedroom she said that she "smelled sex" and flew into a rage. She accused A.S. of sleeping with her husband and ruining her family. As a result of Mrs. Walker's angry confrontation, A.S. fled from the residence, attempting to run home. At approximately 3:15 a.m. she was running down the street with Mrs. Walker chasing her and Mr. Walker running behind his wife. This drew the attention of Officer Cory Momchilov of the Wooster Police Department who was responding to a call from another home. A.S. was hysterical and informed the officer that Mr. Walker had sexually assaulted her. Another officer escorted the Walkers back to their home. Mrs. Walker had contacted A.S.' mother who arrived shortly thereafter. Officer Momchilov asked A.S.' mother to transport her to the hospital for an examination.

{¶17} Detective Anthony Lemmon of the Wooster Police Department interviewed A.S., who reaffirmed her explanation of events to him. He also interviewed Mr. Walker, who denied having any sexual contact with A.S. Mr. Walker later contacted Detective Lemmon in order to provide an additional statement but he failed to appear for their scheduled meeting.

{¶18} Nurse Hawkins testified that A.S. reported that Mr. Walker held her down by her shoulders and continued to push her down when she tried to get up. She admitted that A.S. did not appear to have any traumatic injuries but explained that because A.S. was on her period at the time of the assault, she would not expect to find physical injuries. DNA testing performed on

samples from A.S. and Mr. Walker indicated a strong likelihood that Mr. Walker's sperm was present on A.S.' person.

{¶19} Mrs. Walker testified that she and Mr. Walker separated following the incident. At the time of trial, however, they had reconciled and were living together in Columbus. She testified that she arrived home in the early morning hours and "kind of snuck in." She said she then heard some stomping from the master bedroom towards the bathroom or guest bedroom. She testified that she immediately went upstairs and spoke with A.S. in the guest bedroom. She knew that something was amiss. She then entered the master bedroom and stated that she immediately smelled sex. Mrs. Walker testified that she went ballistic and started cussing and that A.S. said, "why would you say something like that? I just stayed here to watch the kids tonight. I would never do something like that to you." She chased A.S. down the street. A.S. was crying. Mrs. Walker stated that she returned to her home and called her sister, A.S.' mother, and said that "you better come get your daughter because I just caught her sleeping with my husband." Contrary to Officer Momchilov's testimony, she stated that she and her husband were back at home when the police arrived, not running down the street. She stated that a few days after the incident A.S. told a friend that Mr. Walker raped her. She testified that approximately one year after the incident, Mr. Walker admitted that he and A.S. had consensual sex. On cross-examination she admitted that she could not recall but did not deny a portion of her written statement in which she wrote that A.S. told her that Mr. Walker kept coming on to her and she did not want to have sex. On re-direct examination, she stated that A.S. never told her that she was raped by Mr. Walker.

{¶20} Mr. Walker testified in his own behalf. He stated that he called A.S. to babysit because he and a friend intended to go out for the night. Instead, they decided to drink on the

porch together. A.S. had already arrived by the time that decision was made. Mr. Walker testified that A.S. elected to stay. He testified that when his friend left and he came inside to go to bed he joked with A.S. about doing his nails, as she was painting her nails and watching a movie. He sat down and they began talking about her time as a runaway. The conversation eventually turned to the fact that she had been with older men during that period of time. He further stated that they began to intertwine their bodies. He testified that they eventually arrived at the conclusion that they would have sex, but that they both knew that it was wrong.

{¶21} He testified that they went upstairs to the guest bedroom together and that she took off her own clothes. Midway through vaginal sex he decided that what they were doing was not right so he stopped and went to the master bedroom to go to sleep. He stated that fifteen to twenty minutes later A.S. entered his bedroom and began performing oral sex on him. That led to vaginal sex. After ten or fifteen minutes of vaginal sex, Mrs. Walker arrived home and A.S. ran to the guest bedroom and feigned sleep. Mrs. Walker observed that the master bedroom smelled like sex and she attempted to smell Mr. Walker's genitalia. She then chased A.S. from the home. Mr. Walker explained that when the police interviewed him outside he did not admit to intercourse with A.S. because he believed he would be arrested and he wanted to speak with his lawyers beforehand. He testified that he was aware that he needed a lawyer because he had previously been in trouble with the law, including DUI, drug trafficking, theft and misdemeanor assault charges. He stated that he and A.S. engaged in consensual sex in which he did not force, threaten or coerce her.

{¶22} On cross-examination, Mr. Walker testified that A.S. was mistaken when she testified that she went upstairs first and when she testified that she told him "no." He acknowledged that when he spoke with Detective Lemmon he denied all sexual contact, not just

rape. He also explained that he failed to appear for the scheduled interview with Detective Lemmon because he was working two jobs at the time and had been too busy to retain an attorney at that time. On re-cross examination, when asked why he failed to retain an attorney despite the fact that he thought he was being investigated for rape, he explained that he knew that a lawyer "would consist of money."

{¶23} A.S. and Mr. Walker provided similar descriptions of events until his friend left for the night and Mr. Walker reentered the home. At that point, their narratives diverged significantly. Mr. Walker testified that the two began to intertwine their bodies and that they resolved to have sex despite a mutual understanding that it would have been wrong to do so. He testified that they went up to the guest bedroom together and she removed her own clothes. He also stated that he determined that what they did was wrong and left midway through intercourse. He further testified that A.S. later voluntarily entered his bedroom and performed oral sex before they resumed vaginal sex. Mrs. Walker's testimony implied that the first police contact occurred when they entered her home, rather than as the three family members chased each other down the street. The evidence essentially created a question of credibility between the Walkers and A.S.' testimony. "The weight to be given the evidence and the credibility of the witness[es] are primarily for the trier of the facts[;]" in this case, the jury. *State v. Jackson* (1993), 86 Ohio App.3d 29, 32, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 363. After reviewing the entire record, weighing the inferences and examining the credibility of the witnesses, we cannot say that the jury in finding Mr. Walker guilty of sexual battery created a manifest miscarriage of justice. *Otten*, 33 Ohio App.3d at 340. Mr. Walker's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT PROVIDING A REQUESTED CLARIFICATION OF THE DISTINCTION BETWEEN

> 'PURPOSE[LY] COMPELLED BY FORCE OR THREAT OF FORCE' AND 'KNOWINGLY COERCED TO SUBMIT BY ANY MEANS THAT WOULD PREVENT RESISTANCE BY A PERSON OF ORDINARY RESOLUTION.'"

{¶24} In his third assignment of error, Mr. Walker contends that the trial court committed plain error when it failed to clarify the distinction between "purpose[ly] compelled by force or threat of force" and "knowingly coerced to submit by any means that would prevent resistance by a person of ordinary resolution." We do not reach the merits of Mr. Walker's third assignment of error because he waived the issue for purposes of appeal.

{¶25} Although Mr. Walker has argued plain error on appeal due to the fact that his counsel did not object to the jury instructions, his ability to appeal this issue was extinguished. "Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right 'cannot form the basis of any claimed error under Crim.R. 52(B).'" *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23, quoting *State v. McKee* (2001), 91 Ohio St.3d 292, 299, fn. 3 (Cook, J., dissenting). A defendant, through the statements of his counsel, may waive a jury instruction. *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶7, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, fn. 2. The exchange between trial counsel and the judge demonstrates that Mr. Walker, through his attorney, waived any further jury instructions.

{¶26} During deliberations, the jury submitted in writing the following question: "What specifically is the difference between the definition of Rape and Sexually [sic] battery? In laymens [sic] terms[.]"

{¶27} Out of the jury's presence, the judge stated to counsel that "I don't know that it can be made any clearer. I think it's pretty clear to the Court. I don't think I can even in layman's terms explain it any better than the jury instructions do."

{¶28} Mr. Walker's trial counsel stated: "Well, the jury instructions do put it out pretty clearly. I don't know that there's -- I mean, it's a difference of knowing or purposefully and the force issue. I think it's pretty well explained."

{¶29} The judge replied: "All right, my response will be this[:] 'I cannot define any element in terms other than those allowed by the Ohio Jury Instructions. If you have additional questions regarding the instructions please submit them.'" The judge provided an identical written response to the jury.

{¶30} This exchange demonstrates that the issue of jury instructions and the jury's confusion was brought to the attention of the trial court and Mr. Walker's counsel. The jury's question crystallized the issue before the court. The judge sought counsel's input and counsel agreed that the instructions as originally provided were appropriate and could not be improved upon. Compare *Feliciano*, at ¶6-8 (forfeiture rather than waiver occurred when trial counsel was given the opportunity to review the jury instructions prior to publication to the jury, asked to assent to them, trial counsel assented and defendant attempted to raise claim of erroneous instruction on appeal). Accordingly, Mr. Walker waived any defect in the instructions and cannot now raise the issue on appeal. Mr. Walker's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "MR. WALKER'S CASE WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF U.S. CONST. AMEND. VI AND XIV AND OHIO CONST. ART. I, SEC. 10."

{¶31} In his fourth assignment of error, Mr. Walker contends that he was prejudiced by ineffective assistance of counsel insofar as his counsel "should have been prepared to provide a workable legal definition for 'coercion' as it applied to the sexual battery statute, [which] would

have cleared up the confusion the jury was experiencing" and led to Mr. Walker's acquittal. We do not agree.

{¶32} In order to show ineffective assistance of counsel, Mr. Walker must satisfy a two-prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a "'substantial violation of any * * * essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel." *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Mr. Walker fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶33} On appeal, Mr. Walker contends that if the jury had properly understood the instructions then trial counsel could have successfully argued that coercion was not proven, resulting in his acquittal. This argument fails to account for the fact that counsel could not discover the jury's confusion regarding the instructions until that confusion manifested – *after* the parties rested and made their closing arguments, and the judge had instructed the jury. No subsequent change to the jury instructions would allow trial counsel to then argue that the clarifications should result in acquittal.

{¶34} Mr. Walker contends that his trial counsel was deficient for failing to provide "a workable legal definition for 'coercion' as it applied to the sexual battery statute, and that would have cleared up the confusion the jury was experiencing." Appellate counsel, however, has not

provided a suggested instruction, instead listing three "principles" that are already embodied in the instructions. Appellate counsel would have us adopt a rule that when a jury indicates confusion regarding the jury instructions in a close case and trial counsel does not provide a "workable" alternative to the Ohio Jury Instructions, trial counsel is per se ineffective. We will not create such a rule. Nor can we agree that trial counsel's acceptance of the standard Ohio Jury Instructions with regard to the relevant culpable mental states, purposely and knowingly, and coercion rendered his performance deficient. The trial judge agreed that he, too, was unable to better formulate the instructions. Accordingly, Mr. Walker has failed to demonstrate that his counsel's representation substantially violated any essential duties. *Bradley*, 42 Ohio St.3d at 141. His fourth assignment of error is overruled.

III.

{¶35} Mr. Walker's assignments of error are overruled. The judgment of the Wayne 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 Wayne, 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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.