**[Cite as *State v. Foster*, 2023-Ohio-2466.]**

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

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| STATE OF OHIO<br><br>Appellee<br><br>v.<br><br>ANTWANE FOSTER<br><br>Appellant | C.A. No. 30443<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CR 20 08 2128 |

DECISION AND JOURNAL ENTRY

Dated: July 19, 2023

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SUTTON, Presiding Judge.

**{¶1}** Defendant-Appellant Antwane Foster appeals the judgment of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms.

I.

**Relevant Background Information**

**{¶2}** On July 25, 2020, at approximately midnight, S.A. was attacked at her Kling Street apartment by an unknown assailant. The assailant turned off S.A.'s bedroom light and tackled her on the bed. The assailant touched S.A. underneath her clothing, kissed her on the face and neck, touched her breasts and vagina, choked her when she began to scream, and performed oral sex on her without her consent. After the assailant left, S.A. called the police and was taken to the hospital where a sexual assault kit was performed. Further, a DNA sample was taken from a handprint found near an open window and from S.A.'s underwear and mons area. Two weeks after the incident, S.A. identified Mr. Foster, through a police photo array, as the assailant with 60%

certainty. Subsequently, Mr. Foster turned himself in on a warrant and provided a DNA sample to the police. Mr. Foster's DNA matched the DNA procured from the sexual assault kit and window at S.A.'s apartment.

**{¶3}** Mr. Foster was indicted for: (1) rape, in violation of R.C. 2907.02(A)(2)/(B), felonies of the first degree, with a sexually violent predator specification; (2) aggravated burglary, in violation of R.C. 2911.11(A)(1)/(B), a felony of the first degree; (3) kidnapping, in violation of R.C. 2905.01(A)(2)/(A)(4)/(C)(1), felonies of the first degree, with sexual motivation specifications and sexually violent predator specifications; and (4) gross sexual imposition, in violation of R.C. 2907.05(A)(1)/(C)(1), a felony of the fourth degree. Mr. Foster pleaded not guilty and waived his right to a jury trial on the specifications. Prior to trial, the State dismissed one count of rape and one count of kidnapping.

**{¶4}** A jury found Mr. Foster guilty of rape, aggravated burglary, kidnapping, and gross sexual imposition. Further, the trial court found Mr. Foster guilty of the sexual motivation specifications and sexually violent predator specifications. After performing an allied offenses of similar import analysis, the trial court determined the counts for kidnapping and gross sexual imposition merged and the State elected to proceed to sentencing on one count of kidnapping, in addition to rape, aggravated burglary, and the specifications. The trial court sentenced Mr. Foster to a minimum term of 30 years to a maximum term of life imprisonment.

**{¶5}** Mr. Foster now appeals raising three assignments of error for our review.

II.

**ASSIGNMENT OF ERROR I**

**[MR. FOSTER]'S CONVICTIONS WERE NOT BASED UPON SUFFICIENT EVIDENCE AS A MATTER OF LAW.**

**{¶6}** In his first assignment of error, Mr. Foster argues his convictions for rape, gross sexual imposition, and kidnapping, along with the specifications thereto, are not supported by sufficient evidence. Specifically, Mr. Foster argues the DNA evidence is not indicative of "threat or force[,]" and S.A.'s testimony "could not convince the average mind that the sexual encounter was a result of force or threat by [Mr. Foster]."

**{¶7}** "Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo." *State v. Williams*, 9th Dist. Summit No. 24731, 2009-Ohio-6955, ¶ 18, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins* at 390 (Cook, J., concurring). For purposes of a sufficiency analysis, this Court must view the evidence in the light most favorable to the State. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We do not evaluate credibility, and we make all reasonable inferences in favor of the State. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). The evidence is sufficient if it allows the trier of fact to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

**{¶8}** Pursuant to R.C. 2907.02(A):

> (2) 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.

An individual who violates R.C. 2907.02(A)(2) is guilty of rape.

**{¶9}** Pursuant to R.C. 2907.05:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

An individual who violates R.C. 2907.05(A)(1) is guilty of gross sexual imposition.

**{¶10}** Pursuant to R.C. 2905.01:

> (A) 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, for any of the following purposes:
>
> (2) To facilitate the commission of any felony or flight thereafter; [or]
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

An individual who violates R.C. 2905.01(A)(2)/(4) is guilty of kidnapping.

**{¶11}** Here, S.A. testified she was living at 395 Kling Street on July 25, 2020, and all but one of her roommates had moved out that day. S.A.'s one remaining roommate was staying at his parents' house for the summer. After hanging out with her friends all day, S.A. returned to her Kling Street residence around 9 p.m. for dinner and then went back to campus, which is a few blocks away. S.A. returned home for the evening around midnight, but could not find her keys, so she climbed into the residence through an unlocked living room window where she historically kept her standing air conditioning unit. S.A. went upstairs to her bedroom on the second floor and commenced her bedtime routine. After using the bathroom, S.A. was sitting on her bed, with the lights on, looking at TikTok videos on her cell phone. S.A. testified:

> all of a sudden the lights go off and the door swings open and I begin to get tackled. And he begins to both restrain me and hold me down, and I try to fight back but not really much is doing anything because I am just, like, small. I don't have much muscle strength.
>
> He begins to molest me and grab at my body and the private parts of my body.
>
> He doesn't take any of my clothes off or anything like that, but he's touching underneath them. He's grabbing underneath them.
>
> * * *

> I was screaming for help, because no one was in the house but I did see some neighbors outside so I thought maybe they could hear me.
>
> * * *
>
> Once I screamed he began to, like, grasp onto my neck and choke me.
>
> * * *
>
> He was holding both of his hands around my neck as hard as he could.
>
> * * *
>
> After he choked me I had stopped [fighting] because I began to fear for my life. And * * * he began to kiss me.
>
> He grabbed all over my body and then at some point he decided he wanted to put his mouth on my vagina and tried to perform oral sex.
>
> * * *
>
> He moved my underwear over to the side and continued to push me down onto my bed while * * * putting his head down into my vagina and licking it.[1]
>
> * * *
>
> Once he seriously started molesting me and assaulting me, I asked him if he could at least use a condom because I was so scared I would get an STD or another disease from this event.
>
> * * *

At that point, S.A. testified her assailant asked, "[y]ou don't want this[,]" and she responded, "[n]o." The assailant apologized and left. S.A. locked her bedroom door, stepped out her window onto the roof, and called her mother. S.A.'s mother told S.A. to call the police. S.A. called the police and stayed on the phone with the dispatcher until officers arrived. After the officers checked the entire house to make sure the assailant had left, S.A. came out of her room and went downstairs to speak with the police and go to the hospital. S.A. indicated she remembered "thinking that [she] was not going to make it out of the situation alive." Further, S.A. described the attack as a "very fast-paced [] quick but violent event." S.A. sustained some scratches and light bruising from the incident, and stated her vocal chords were "a little scratchy for probably about three weeks to a

[1] S.A. testified she felt the assailant's mouth or tongue on her vagina.

month" after the attack. S.A. testified she is in counseling and suffers from depression, anxiety, and post-traumatic stress disorder. Additionally, S.A. testified she did not know her attacker and did not previously know Mr. Foster, invite him into her home, or have consensual sex with him.

**{¶12}** Ashley Chaney, a sexual assault nurse employed with Akron General Hospital, testified she examined S.A. after the assault and performed a sexual assault kit. Nurse Chaney testified about S.A.'s examination, as indicated in her medical chart, as follows:

* * *

> Patient presents with a sexual assault. 20-year old female presents to emergency department for chief complaint of sexual assault. Patient states that she lives in a house with five roommates. Reports that multiple people were moving out today. Patient was laying in her bed [] when an unknown male entered into her room and proceeded to get in bed with her. She stated she was choked for a brief period of time; however, she did not lose consciousness. He then kissed her and gave her oral sex. She told him to stop and he said sorry then left her house. No ejaculation [or] vaginal or anal penetration. Patient states the incident occurred around 12:20 today. She does not know the individual. She has not showered or changed clothes. She denies any physical complaints at this time. No vaginal pain or bleeding.

* * *

Further, Nurse Chaney testified S.A. was described in the chart as "[t]earful and emotionally upset," and she complained of being lightheaded with throat pain. Nurse Chaney testified, however, there were no physical injuries noted in the chart regarding S.A.'s neck, which is not unusual in someone who has been choked or strangled due to "hand placement, pressure, length, and [] genetic makeup." S.A. reported her assailant "was a black male in his 30s or 40s and he had a beard."

**{¶13}** Sarah Horst, a Bureau of Criminal Investigation forensic analyst, testified she examined the submitted evidence, including the sexual assault kit, window swabs, and DNA sample taken from Mr. Foster. Ms. Horst testified Mr. Foster's DNA was found on S.A.'s underwear and mons area, as well as the window swabs.

**{¶14}** Edward Hornacek, a detective with the Akron Police Department, testified S.A. gave a general description of her assailant as "a taller, huskier, possibly black or Latino male, and she remembered feeling a large beard all over her body during the incident[.]"

**{¶15}** Viewing this evidence in a light most favorable to the State, this Court determines a trier of fact could reasonably conclude beyond a reasonable doubt that Mr. Foster used threat or force to commit rape, gross sexual imposition, and kidnapping against S.A., and was guilty of the same. As such, Mr. Foster's convictions for rape, gross sexual imposition, kidnapping, and the specifications thereto, are based upon sufficient evidence.

**{¶16}** Accordingly, Mr. Foster's first assignment of error is overruled.

## ASSIGNMENT OF ERROR II

**[MR. FOSTER'S] CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

**{¶17}** In his second assignment of error, Mr. Foster argues his convictions for rape, gross sexual imposition, and kidnapping were against the manifest weight of the evidence. Specifically, Mr. Foster argues no rational trier of fact could find Mr. Foster guilty of these crimes based upon S.A.'s testimony and identification of Mr. Foster.

**{¶18}** As this Court has previously stated:

> [i]n determining whether a criminal conviction is against the manifest weight of the evidence 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*, 33 Ohio App.3d 339, 340 (9th Dist.1986). "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 fact[-]finder's resolution of the

conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

**{¶19}** Moreover, an appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340. "[W]e are mindful that the [trier of fact] is free to believe all, part, or none of the testimony of each witness." (Internal quotations and citations omitted.) *State v. Gannon*, 9th Dist. Medina No. 19CA0053-M, 2020-Ohio-3075, ¶ 20. "This Court will not overturn a conviction on a manifest weight challenge only because the [trier of fact] found the testimony of certain witnesses to be credible." *Id*.

**{¶20}** Here, although S.A. could not see Mr. Foster's face during the attack, S.A. consistently described her attacker to the police and the SANE nurse as a black man with a husky build and a beard. Further, on cross-examination, S.A. explained she would not have been able to identify Mr. Foster by name, because she did not know him, but she "could recognize some facial features." S.A. picked Mr. Foster out of a photo array as the assailant with 60% certainty. Importantly, DNA evidence placed Mr. Foster in S.A.'s residence and proved Mr. Foster physically touched S.A.'s underwear and mons area on July 25, 2020, which is consistent with S.A.'s description of the sexual assault.

**{¶21}** As such, based upon the foregoing, this is not an exceptional case that warrants reversal. The jury did not clearly lose its way and create such a manifest miscarriage of justice that Mr. Foster's convictions must be reversed and a new trial ordered.

**{¶22}** Accordingly, Mr. Foster's second assignment of error is overruled.

## ASSIGNMENT OF ERROR III

**[MR. FOSTER] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION; AND ARTICLE, I, SECTION 10, OHIO CONSTITUTION.**

**{¶23}** In his third assignment of error, Mr. Foster argues he was denied the effective assistance of counsel. Specifically, Mr. Foster argues his counsel failed to: (1) obtain and present evidence Mr. Foster and the victim previously knew each other prior to the incident; and (2) object to the admission of Mr. Foster's jail calls due to improper foundation.

**{¶24}** "[I]n Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 62. To prevail on a claim of ineffective assistance of counsel, Mr. Foster must establish (1) that his counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. To establish prejudice, Mr. Foster must show that there existed a reasonable probability that, but for his counsel's errors, the outcome of the proceeding would have been different. *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, ¶ 138.

**{¶25}** Each of Mr. Foster's arguments fail to establish his trial counsel provided ineffective assistance. First, with regard to trial counsel's failure to obtain and introduce evidence Mr. Foster and the victim met prior to the incident, Mr. Foster's argument relies upon evidence that was never made part of the record in the trial court. "This is problematic because '[w]hen an appellant argues that trial counsel was ineffective based on evidence that is outside of the trial court record, it is 'impossible' for this Court to determine the merits of the argument.'" *State v. Walter*, 9th Dist. Wayne No. 20AP0020, 2022-Ohio-1982, ¶ 39, quoting *State v. Price*, 9th Dist. Medina No. 14CA0070-M, 2015-Ohio-5043, ¶ 35, quoting *State v. Alston*, 9th Dist. Lorain No.

14CA010612, 2015-Ohio-4127, ¶ 21. "Thus, we cannot conclude based on the record before us that there was any ineffective assistance of trial counsel's part in this regard." *Id*.

**{¶26}** Second, with regard to trial counsel's failure to object to the admissibility of Mr. Foster's jail calls due to lack of authentication, "[t]his Court has consistently held that trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Sandin*, 9th Dist. Medina No. 21CA0040-M, 2023-Ohio-174, ¶ 22, quoting *State v. Smith*, 9th Dist. Wayne No. 12CA0060, 2013-Ohio-3868, ¶ 24, quoting *State v. Guenther*, 9th Dist. Lorain No. 05CA008663, 2006-Ohio-767, ¶ 74.

**{¶27}** Moreover, Rebecca McCutcheon, the inmate services registrar and supervisor with the Summit County Sheriff's office, testified as to the authenticity of the jail calls. Specifically, Ms. McCutcheon explained an inmate uses a jail ID number, which consists of 6 numbers, and the last four digits of their Social Security number to make a telephone call from the jail. Further, Ms. McCutcheon explained these calls are immediately recorded and kept in the regular course of business at the Summit County Sheriff's office. Ms. McCutcheon then identified State's exhibits 40 and 41 as telephone recordings of Mr. Foster. On cross-examination, Ms. McCutcheon further explained there is voice verification on all the calls as well, which prevents an inmate from using another inmate's jail ID number and Social Security number. Prior to making their first telephone call, an inmate must say "United States of America" several times to create a voice verification in order for a telephone call to go through.

**{¶28}** In *State v. Vrona*, 47 Ohio App.3d 145, 149 (9th Dist.1988), this Court stated:

> Testimony as to a telephone call is admissible where there is a reasonable showing, through testimony or other evidence, that the witness placed or received a call as alleged, plus some indication of the identity of the person spoken to. There is no fixed identification requirement for all calls. * * * Each case has its own set of facts.(Internal quotations and citations omitted.)

Further, as indicated in *State v. Teague*, 8th Dist. Cuyahoga No. 90801, 2009-Ohio-129, ¶ 7:

> Circumstantial evidence, as well as direct, may be used to show authenticity. Moreover, the threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and "does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that * * * [the evidence] is what its proponent claims it to be." (Internal citations omitted.)

Therefore, based upon this record, we cannot conclude Mr. Foster's counsel was deficient in failing to object to the authenticity of the jail calls due to Ms. McCutcheon's testimony.

**{¶29}** Accordingly, Mr. Foster's third assignment of error is overruled.

III.

**{¶30}** For the foregoing reasons, Mr. Foster's three assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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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(C). 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.

BETTY SUTTON
FOR THE COURT

CARR, J.
HENSAL, J.
CONCUR.

APPEARANCES:

WESLEY C. BUCHANAN and ANNA K. LEY, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.