

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-100390
Plaintiff-Appellee,	:	TRIAL NO. B-0907977
vs.	:	<i>JUDGMENT ENTRY.</i>
BRIAN BRUMFIELD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant Brian Brumfield was convicted of burglary,² rape,³ and sexual battery.⁴ The trial court imposed an aggregate prison term of ten years. Brumfield appeals his convictions, bringing forth six assignments of error. For the following reasons, we affirm the trial court's judgment.

We consider the first five assignments of error together. In his first two assignments of error, Brumfield contests the sufficiency and weight of the evidence underlying his conviction for rape. In the third assignment of error, Brumfield challenges the weight of the evidence underlying his burglary conviction. And in the fourth and fifth assignments of error, Brumfield contests

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11-1.1.

² R.C. 2911.12(A)(1).

³ R.C. 2907.02(A)(1)(c).

⁴ R.C. 2907.03(A)(2).

the sufficiency and weight of the evidence underlying his conviction for sexual battery.

Standard of Review

In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”⁵ To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.⁶

Sufficiency—Rape

R.C. 2907.02(A)(1)(c) provides that “no person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition.”

Brumfield first argues that the state failed to produce sufficient evidence of penetration, an element of sexual conduct required to support a rape conviction.⁷ But the record demonstrates that the victim, who had been diagnosed with mild mental retardation and mixed receptive and expressive language disorder, testified that Brumfield had anal sex with her. She gave the following testimony on cross-examination:

⁵ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

⁶ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁷ See R.C. 2907.01(A).

“Q. Did [Brumfield] put his d--- in your butt?”

“A. Yes.

“Q. Okay. Did it go in?”

“A. Yes.”

Brumfield argues that the testimony about the victim’s “butt” was vague, but during direct examination, the prosecutor had the victim identify all of her body parts, and while she used some slang to identify her anatomy and Brumfield’s anatomy, it was clear that she understood what her body parts were.

Brumfield next argues that his conviction for rape was based on insufficient evidence because the state failed to prove that he knew or had reasonable cause to believe that the 20-year-old victim’s ability to consent to sexual conduct was substantially impaired. We disagree.

Here, the two police officers who interviewed the victim testified that it was apparent when questioning her that she had some type of mental disability. Lieutenant Ungruhe testified that the victim seemed “off” because while she was answering questions about the rape, she smiled pleasantly the whole time. Detective Matheson also testified that the victim seemed “off” because she always seemed to agree with the last thing he had said. He realized shortly after beginning to question her that she needed to be interviewed by a person from the Mayerson Center for Safe and Healthy Children, an organization that specializes in forensic interviewing of child victims. Andrea Ritchey from the Mayerson Center interviewed the victim and testified that the victim had mental problems. Carla Dreyer, a staff psychologist with the Court Clinic Forensic Services, testified that it was apparent within minutes after speaking with the victim that she was mentally impaired. Dreyer testified that the victim tried to please people, and that when a question called for a specific answer, the victim would just smile and nod

her head. Finally, Dreyer testified that a layperson, after talking with the victim, would recognize that the victim suffered from some type of mental deficiency.

Given that all of the other witnesses recognized that the victim had a mental disability, we cannot say that Brumfield did not have reasonable cause to believe that the victim's ability to consent was substantially impaired because of a mental condition. The 40-year-old Brumfield knew the victim prior to the rape and had spoken with her on several occasions. When asked by Detective Matheson if he knew if anything was wrong with the victim, Brumfield smiled, lowered his head, and said, "She's cocoo for cocoa puffs."

Based on the foregoing, we hold that the state presented sufficient evidence that Brumfield knew that the victim's ability to consent to or resist sexual conduct was impaired. The first assignment of error is overruled.

Rape—Manifest Weight

Brumfield maintains that the greater weight of the evidence showed that the victim was a "functioning, mildly mentally retarded" individual whose ability to consent to sexual activity was not substantially impaired. We disagree.

Although the victim appeared to be a more functional mentally disabled individual during the interview at the Mayerson Center, her interviews with the Court Clinic and the police officers, as well as her trial testimony, were more indicative of her daily interaction with other people. Therefore, we cannot say that the trial court lost its way and created a manifest miscarriage of justice when it convicted Brumfield of rape.

The second assignment of error is overruled.

Burglary—Manifest Weight

Brumfield contends that his conviction for burglary was against the manifest weight of the evidence where the victim admitted that she had invited

Brumfield into her grandfather's house, and thus, Brumfield was not trespassing. We are unpersuaded.

The crime of burglary cannot take place without a "trespass in an occupied structure."⁸ A trespass occurs when a person knowingly enters or remains on the land or premises of another, without privilege to do so.⁹

On August 21, 2009, the St. Bernard police responded to a call that a black male, later identified as Brumfield, was entering a house on Greenlee Avenue through an open bathroom window. That house belonged to the victim's grandfather, who was home at the time. The victim stayed with her grandfather when her mother had to work. Brumfield testified that he knew the victim and that she had invited him into the house through the bathroom window. After police arrived, the victim told Lieutenant Ungruhe that she had not wanted Brumfield to come into the bathroom. The victim also told Detective Matheson that she had not invited Brumfield into the house, but she then stated that she had let him in the house. But this change in her testimony could have been related to her desire to please and acquiesce to the person she was speaking with. Detective Matheson testified that the victim was very agreeable to everything he asked her, which was why he thought that he should stop the interview and contact the Mayerson Center.

Finally, although the victim told the sexual-assault nurse at the hospital that she had unlocked the bathroom window, the victim did not relate this statement to giving permission to Brumfield to enter the house through the bathroom window.

⁸ R.C. 2911.12.

⁹ R.C. 2911.21.

Under these circumstances, we cannot conclude that the trier of fact lost its way and created a manifest miscarriage of justice by finding Brumfield guilty of burglary. The third assignment of error is overruled.

Sexual Battery

In his fourth and fifth assignments of error, Brumfield maintains, this time with respect to his sexual-battery conviction, that the state did not prove that he knew that the victim's ability to consent to sexual conduct was substantially impaired, and that the conviction for sexual battery was against the manifest weight of the evidence where the victim was only "mildly mentally retarded." Brumfield raises the same arguments that we rejected in the first and second assignments of error. Thus, we overrule the fourth and fifth assignments of error for the same reasons stated in our discussions of the first two assignments of error.

Consecutive Sentences

In his final assignment of error, Brumfield maintains that the trial court erred by imposing consecutive sentences without making the statutorily required findings under R.C. 2929.14(E)(4), citing the United States Supreme Court's decision in *Oregon v. Ice*.¹⁰ But the Ohio Supreme Court recently rejected Brumfield's argument in *State v. Hodge*.¹¹ *Hodge* addressed the effect of *Oregon v. Ice* on Ohio's sentencing law and held that "[t]he United States Supreme Court's decision * * * does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*."¹² Thus, Brumfield's argument is without merit on the authority of *Hodge*.

¹⁰ (2009), 55 U.S. 160, 129 S.Ct. 711.

¹¹ 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraph two of the syllabus.

¹² *Id.*

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Therefore, the sixth assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and FISCHER, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 13, 2011

per order of the Court _____.

Presiding Judge