

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

STATE OF OHIO,	:	APPEAL NO. C-100441
	:	TRIAL NO. B-0905868A
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
BRANDON RYAN,	:	
Defendant-Appellant.	:	

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

Defendant-appellant, Brandon Ryan, appeals a conviction for rape under R.C. 2907.02(A)(1)(a). We find no merit in his seven assignments of error, and we affirm his conviction.

The record shows that Amber Hodges and Amber Johnson, who were long-time friends, arranged to meet Ryan and his friend Thomas Helton, whom they had met online. They went to several clubs together and eventually drove to the home a third man, Mike Fuller.

At Fuller's house, Hodges said that she was thirsty. Ryan and Helton gave the two women a bottle of rum. Johnson took one swig from the bottle. Hodges took two swigs and drank some light beer. Helton and Ryan also brought Hodges and Johnson 12-ounce cups of Kool-Aid, and they drank from the cups. Neither of them saw the men drink any of the Kool-Aid.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

About 15 minutes later, the two women went to the bathroom to talk. Johnson wanted to leave and visit her boyfriend in Covington, Kentucky. Hodges did not want to leave, so Johnson told her she would come back in an hour to get her. Johnson stated that Hodges “was absolutely fine whenever I left her.”

After Johnson left, Hodges smoked a cigarette and listened to music while sitting on a couch. After that, she remembered nothing else until Helton woke her up the following morning. He called her name, handed her her shoes, and told her that Johnson had come to get her. Hodges did not see Ryan or Fuller. When she asked Helton where the others had gone, he did not answer.

She was fully clothed when she awoke, but as she walked, she realized her vaginal area was sore. Her stomach hurt, and she felt dizzy. As she walked outside the house to Johnson’s car, she realized that she had never been to that house before. Johnson testified that, on the way home, Hodges, who was usually talkative, was quiet.

When she got home, Hodges discovered that she was bleeding from her vaginal area. She sent a text message to a friend, Ashley Monday. Monday and her mother immediately came to Hodges’s house. They took her to their house, where Hodges described what she remembered about the prior evening.

Unbeknownst to Hodges, Monday’s mother had called Hodges’s mother. Hodges’s mother took her to the hospital. A sexual-assault nurse examiner examined Hodges and took blood samples. She kept Hodges’s dress and underwear for further examination.

Three tubes of Hodges’s blood and a urine sample were sent to the Hamilton County Coroner’s Office. A toxicologist conducted a number of tests on the samples. One test was to detect the presence of gamma-hydroxybutyrate (“GHB”), which can

render a person unconscious. The toxicologist did not detect any GHB in Hodges's blood, but stated that he did not find that result to be unusual. He testified that the body eliminates GHP quickly, and that it can only be detected for a short time after it has been ingested, from "minutes to hours."

A serologist from the coroner's office testified that she had recovered DNA from semen found on vaginal and oral swabs taken from Hodges and her underwear. She compared that DNA with DNA samples from Ryan and Helton. Ryan's DNA matched the DNA profile found on all those items, but Helton's did not. The serologist also found DNA that did not match either Ryan's or Helton's.

The nurse who had examined Hodges testified that she had found trauma to her vaginal and rectal areas and an abrasion on her buttocks. She found three vaginal tears, one of which had been oozing blood during the examination. The nurse said that the amount of tears was unusual and that consensual intercourse would not likely have caused that many tears. She also testified that she had seen similar injuries in victims of sexual assault who had been conscious during the assault and had reported that the event was physically painful.

We begin our analysis with Ryan's fourth assignment of error, in which he contends that the trial court erred in failing to grant his motion for a mistrial. He moved for a mistrial after the toxicologist from the coroner's office had testified that Hodges's blood samples were not available at the time of trial because they had been destroyed. The policy of the coroner's office was to destroy samples after six months unless the office received a request to keep them longer. Ryan argues that the state's destruction of the blood samples violated his due-process rights. This assignment of error is not well taken.

The state's failure to preserve materially exculpatory evidence violates a defendant's right to due process.² The defendant bears the burden to show that the evidence was exculpatory.³

Ryan discovered at trial that, at the time of the offense, Hodges was taking a low dose of Wellbutrin, an antidepressant. He argued that the Wellbutrin could possibly have interacted with alcohol in Hodges's blood. He did not claim that it would have caused the same effect as GHB. Further, the state's toxicologist conducted a general test that would have revealed the presence of Wellbutrin in Hodges's blood, but he found no trace of it. Under the circumstances, Ryan did not show that, had the state disclosed the evidence, a reasonable probability existed that the result of the trial would have been different, or that the destruction of the evidence denied him a fair trial. Therefore, he failed to meet his burden to show that the evidence was materially exculpatory.⁴

The failure to preserve potentially useful, but not materially exculpatory, evidence violates a defendant's due-process rights if the police or the prosecution acted in bad faith.⁵ Bad faith implies something more than bad judgment or negligence. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."⁶

² *California v. Trombetta* (1984), 467 U.S. 479, 488-489, 104 S.Ct. 2528; *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, 796 N.E.2d 566, ¶16.

³ *State v. Battease*, 1st Dist. Nos. C-050837 and C-050838, 2006-Ohio-6617, ¶14; *Ritze*, supra, at ¶16.

⁴ See *Kyles v. Whitley* (1995), 514 U.S. 419, 434-437, 115 S.Ct. 1555; *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus; *State v. Kalejs*, 150 Ohio App.3d 465, 2002-Ohio-6657, 782 N.E.2d 112, ¶16-18.

⁵ *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶14; *Battease*, supra, at ¶13; *Ritze*, supra, at ¶17.

⁶ *Ritze*, supra, at ¶17, quoting *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶14.

The blood samples were destroyed under a policy of the coroner's office, and neither the prosecutor nor the police were notified. The record does not demonstrate that any state agent's conduct rose to the level of bad faith.⁷

Consequently, the failure to preserve the blood samples did not violate Ryan's due-process rights. The trial court did not err in overruling Ryan's motion for a mistrial,⁸ and we overrule his fourth assignment of error.

In his first assignment of error, Ryan contends that the evidence was insufficient to support the conviction. In his third assignment of error, he contends that the trial court erred in overruling his Crim.R. 29 motion for a judgment of acquittal, which is the same as a claim that the evidence was insufficient to support the conviction.⁹ These assignments of error are not well taken.

Our review of the evidence shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of rape under R.C. 2907.02(A)(1)(a). Therefore, the evidence was sufficient to support the conviction.¹⁰

We note that the trial court did state that "the State can't really prove that they gave this drug to her to prevent resistance." But the record shows that the court was referring to the lack of direct evidence due to the destruction of the blood vials, not to the evidence in general. The state presented sufficient circumstantial evidence to support the finding that the victim was drugged and did not consent to sexual

⁷ Compare *Battease*, supra, at ¶17-19.

⁸ See *State v. Jones*, 1st Dist. No. C-080518, 2009-Ohio-4190, ¶26.

⁹ Id. at ¶41; *State v. Brundage*, 1st Dist. No. C-030632, 2004-Ohio-6436, ¶27.

¹⁰ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824, ¶13.

conduct. Circumstantial evidence and direct evidence inherently possess the same probative value.¹¹

Ryan's main argument is that the Hodges's and Johnson's testimony was not credible. But matters as to the credibility of evidence are for the trier of fact to decide.¹² The trier of fact may believe some, all, or none of any witness's testimony.¹³

Further, a court speaks only through its journal, not through oral pronouncements.¹⁴ The court's judgment entry specifically states that it had found Ryan guilty of rape under count two in the indictment. Count two of the indictment charged him with violating R.C. 2907.02(A)(1)(a). The judgment entry incorrectly states that he was convicted under R.C. 2907.02(A)(1)(c), which is obviously a typographical error. Both parties agree that Ryan was convicted under subsection (A)(1)(a). App.R. 9(E) gives us power to correct misstatements in the record on our own initiative.¹⁵ Therefore, we correct the judgment entry to reflect that Ryan was convicted under R.C. 2907.02(A)(1)(a), and we overrule Ryan's first and third assignments of error.

In his second assignment of error, Ryan contends that his conviction was against the manifest weight of the evidence. After reviewing the record, we cannot hold that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Ryan's conviction and order a new trial. Therefore, his conviction was not against the manifest weight of the evidence,¹⁶ and we overrule his second assignment of error.

¹¹ *State v. Treesh*, 90 Ohio St.3d 460, 485, 2001-Ohio-4, 739 N.E.2d 749.

¹² *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116.

¹³ *Sate v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶45.

¹⁴ *State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, 855 N.E.2d 35, ¶28; *State v. Smith*, 1st Dist. Nos. C-080712 and C-090505, 2009-Ohio-6932, ¶38.

¹⁵ *In re Holmes*, 104 Ohio St.3d 664, 2004-Ohio-7109, 821 N.E.2d 568, ¶19.

¹⁶ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Jones*, supra, 2009-Ohio-4190, at ¶44.

In his fifth assignment of error, Ryan contends that the trial court erred by admitting hearsay into evidence. He argues that the trial court should not have allowed Monday to testify about Hodges's statements about the rape when Hodges had not yet testified. This assignment of error is not well taken.

Evid.R. 801(D)(1)(b) provides that a statement is not hearsay if “the declarant testifies at a trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with his testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive[.]” Ohio courts have interpreted this rule to include only those prior consistent statements that have been made before the prior inconsistent statements or before any motive to falsify testimony.¹⁷

The trial court allowed Monday to testify over Ryan's objection about statements Hodges had made the morning after the rape. The court acknowledged that technically Hodges should have testified before Monday for the statements to be admissible under Evid.R. 801(D)(1)(b). But it went on to say, “[T]his is a trial to the Court, and I'll just overrule it subject to connection.”

Ryan's defense was that Hodges had fabricated the rape because she was angry that her cellular phone had been taken. He thoroughly cross-examined Monday, as well as Hodges when she testified later. The trial court has discretion to control the proceedings before it,¹⁸ and we cannot hold that it abused that discretion. Further, since this case was tried to the court, we presume that it considered only

¹⁷ *Jones*, supra, 2009-Ohio-4190, at ¶35.

¹⁸ *State ex rel. Butler v. Demis* (1981), 66 Ohio St.2d 123, 128, 420 N.E.2d 116; *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶70.

relevant, material, and competent evidence in arriving at its judgment,¹⁹ and we overrule Ryan's fifth assignment of error.

In his sixth assignment of error, Ryan contends that he was prejudiced by the state's misconduct. He argues that the state defied the trial court's order for a separation of witnesses by having a detective, who was also a witness, personally serve a subpoena on Fuller, who had been subpoenaed to testify for the defense. This assignment of error is not well taken.

Though Ryan claims to have subpoenaed Fuller, no subpoena appears in the record prior to trial. Helton was tried at the same time, and his attorney stated that "there's never been any personal service of this witness from any parties whatsoever." During trial, the prosecutor realized that Fuller had made a statement to the detective that could have been important on rebuttal. Consequently, the prosecutor, who was also aware of the time constraints of the trial, requested that the detective serve a subpoena on Fuller personally. He asked the detective, not another officer, because the detective had personal knowledge of the case and knew where Fuller might be located.

Ryan claimed that Fuller had been sitting outside the courtroom during the trial, but that he disappeared after the detective's failed attempt to serve the subpoena. The detective said that he never saw Fuller outside the courtroom, and that he could not find him when he attempted to serve Fuller at his last known residence and at his parents' home.

The trial court stated that the state had not committed any misconduct. Nevertheless, the court offered to continue the case and send "deputies over to get

¹⁹ *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶90; *State v. Kendrick*, 1st Dist. Nos. C-100141 and C-100142, 2011-Ohio-212, ¶18.

him, bring him in.” The parties all declined the court’s offer and decided not to call any more witnesses.

The prosecuting attorney’s conduct cannot be grounds for error unless it deprives the defendant of a fair trial.²⁰ Nothing in the record demonstrates the state committed any misconduct or that Ryan was denied a fair trial. Consequently, we overrule his sixth assignment of error.

In his seventh assignment of error, Ryan contends that the trial court abused its discretion in imposing sentence. He argues that the five-year sentence he received was excessive. This assignment of error is not well taken.

The Ohio Supreme Court has set forth a two-part test for appellate review of felony sentencing. First, the appellate court must examine the sentencing court’s compliance with the applicable rules and statutes in imposing sentence to determine whether the sentence is clearly and convincingly contrary to law.²¹

Then, if the sentence is not contrary to law, the appellate court must determine whether the sentencing court abused its discretion in imposing the sentence.²² The trial court has discretion to determine the most effective way to comply with the purpose and principles of sentencing.²³

The trial court imposed a sentence that was within the statutory range for a first-degree felony.²⁴ Further, R.C. 2907.02(B) specifically states, “If the offender under division (A)(1)(a) of this section substantially impairs the other person’s judgment or control by administering any controlled substance described in section

²⁰ *State v. Keenan* (1993), 66 Ohio St.3d 402, 405, 513 N.E.2d 203; *State v. Lukaacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶155.

²¹ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26; *State v. Jones*, 1st Dist. No. C-090137, 2010-Ohio-4116, ¶50.

²² *Kalish*, supra, at ¶29; *Jones*, supra, 2010-Ohio-4116, at ¶50.

²³ R.C. 2929.12(A); *Jones*, supra, 2010-Ohio-4116, at ¶52.

²⁴ See R.C. 2907.02(B); R.C. 2929.14(A)(1).

3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years.” Since GHB is a controlled substance listed in R.C. 3719.41, the trial court’s sentence of five years was the minimum term that Ryan could have received.

In fact, the trial court could have imposed a ten-year sentence. In imposing sentence, the court discussed the severity of the victim’s injuries and Ryan’s prior convictions. Even though the court said that it probably would have given him the maximum sentence, it had “cut Ryan a little bit of a break” because it wanted to give him and Helton the same prison term.

Under the circumstances, we cannot hold that the sentence was contrary to law or that the court abused its discretion in imposing it. Therefore, we overrule Ryan’s seventh assignment of error and affirm the trial court’s judgment as corrected.

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 April 6, 2011

per order of the Court _____
Presiding Judge