

[Cite as *State v. Russell*, 2009-Ohio-5130.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|-------------------------|---|---------------------------|
| State of Ohio, | : | |
| | : | No. 09AP-226 |
| Plaintiff-Appellee, | : | (C.P.C. No. 08CR-09-6492) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Joseph V. Russell, Jr., | : | |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on September 29, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Joseph V. Russell, Jr., defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of felonious assault, in violation of R.C. 2903.11(B)(1), a felony of the second degree.

{¶2} On August 26, 2008, at approximately 1:00 am, the female victim was walking on a sidewalk to a friend's home when appellant, who was driving a sport utility vehicle, drove by her. The victim testified at trial that appellant jumped out of his vehicle,

abducted her at gunpoint, and proceeded to rape her inside his vehicle. The victim testified that appellant was not wearing a condom. Appellant claimed in an interview with police that the victim was actually a prostitute, that he paid her \$10 to perform oral sex on him, and that she became angry and left because he was getting "too aggressive" with her. After the incident, the victim went to a friend's house and telephoned police who eventually arrested appellant based upon his license plate, which the victim memorized after leaving the vehicle. Appellant was charged with two counts of rape, one count of kidnapping, and one count of felonious assault, all with firearm specifications.

{¶3} Amy Welsh, a detective with the Columbus Police Department, interviewed appellant, during which appellant indicated he was HIV positive. At trial, Detective Welsh testified that she told the victim appellant was HIV positive. Appellant's counsel objected, claiming that, because a positive HIV test was a crucial element of the case for the State of Ohio, plaintiff-appellee, evidence of such must be introduced via a medical record or testimony of a medical professional. At the close of the state's case, appellant's counsel moved for a judgment of acquittal pursuant to Crim.R. 29 on all charges. With regard to felonious assault, defense counsel argued that corpus delicti first required other evidence of appellant's HIV-positive status prior to submitting appellant's admission of such. The trial court denied the motion. The jury eventually acquitted appellant of the rape and kidnapping charges but found him guilty of felonious assault without specification. The trial court sentenced appellant to seven years of incarceration. Appellant appeals the judgment of the trial court, asserting the following three assignments of error:

I. APPELLANT'S RIGHTS UNDER OHIO LAW AS WELL AS HIS DUE PROCESS RIGHTS UNDER THE U.S. AND OHIO CONSTITUTIONS WERE VIOLATED WHEN THE TRIAL

COURT DID NOT GRANT HIS REQUEST FOR DISMISSAL UNDER RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE[.]

II. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE[.]

III. WHEN COUNSEL'S PERFORMANCE IS DEFICIENT IN THE CONDUCT OF TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT, HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL ARE VIOLATED CONTRA THE OHIO AND FEDERAL CONSTITUTIONS[.]

{¶4} Appellant argues in his first assignment of error that the trial court erred when it denied his motion to dismiss based upon Crim.R. 29. The appellate standard of review of a Crim.R. 29 motion for acquittal and a jury's verdict based upon sufficiency of the evidence are the same. *State v. Messer-Tomak*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶7-8. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2003-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an

appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319, 99 S.Ct. 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶5} Here, appellant contends, under the concept of corpus delicti, the state could not present appellant's admission that he was HIV positive until it presented some other evidence of the felonious assault. The corpus delicti of an offense consists of the act and the criminal agency of the act. *State v. Edwards* (1976), 49 Ohio St.2d 31. Before a confession of a crime may be admitted at trial, the state must introduce evidence independent of the confession to establish the corpus delicti of the offense. See *State v. Maranda* (1916), 94 Ohio St. 364, paragraphs one and two of the syllabus; see also *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261. The corpus delicti rule is designed to protect persons who confess to crimes that they not only did not commit themselves but that were never committed by anyone. *State v. Nobles* (1995), 106 Ohio App.3d 246, 261-62. Accordingly, this rule does not require evidence, other than the confession, showing that the accused committed the crime but, rather, requires some evidence that a crime was, in fact, committed. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 561.

{¶6} The evidence presented need not be so strong that it is capable of persuading a fact finder on some element of the crime beyond a reasonable doubt. *Nobles* at 262. Nor must the evidence be even enough to make it a prima facie case.

Maranda, paragraph two of the syllabus. Rather, it is sufficient if there is some evidence outside of the confession that tends to prove some material element of the crime charged. *Id.* The corpus delicti rule does not require evidence related to all elements of the crime. *Van Hook* at 262. Furthermore, the evidence need not be direct but, rather, may be circumstantial. *State v. Nicely* (1988), 39 Ohio St.3d 147, 152. Although the rule remains applicable, the Supreme Court of Ohio has indicated that it need not be applied with a "dogmatic vengeance." *Edwards* at 36.

{¶7} R.C. 2903.11(B)(1) provides:

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct[.]

Thus, the elements of felonious assault under R.C. 2903.22(B)(1) are: (1) knowledge by the offender that he or she has tested positive for the HIV virus; (2) knowing engagement in sexual conduct with another person; and (3) failure to disclose knowledge of the positive HIV test result to the other person prior to the sexual conduct.

{¶8} Here, appellant's sole argument is that corpus delicti required the state to first present some evidence that he knew he had tested positive for HIV prior to the presentation of his admission that he was HIV positive, but no other evidence was admitted. However, as indicated above, the evidence adduced pursuant to corpus delicti need not meet all of the elements of the crime. The corpus delicti rule does not require evidence upon all elements of the crime but only some material element. *Van Hook* at

262, citing *Maranda* at paragraph two of the syllabus. Thus, here, to satisfy corpus delicti, the state was not required to first present evidence that appellant knew he was HIV positive but was required only to present some evidence of any of the elements of the offense. After reviewing the record, we find there was adequate evidence presented to support the other elements of felonious assault under R.C. 2903.22(B)(1). Appellant admitted he engaged in sexual conduct with the victim, and the victim testified to the same. The victim also testified that appellant never told her that he was HIV positive. There was also evidence that the victim sought medical advice and medication as a result of her exposure to HIV after the incident with appellant. Police officers testified that the victim was upset and scared after the incident, and, during the interview, Detective Welsh said the victim was positively hysterical, scared out of her mind, and petrified. This evidence provided more than "some evidence" outside of appellant's confession that tended to prove some of the other material elements of the crime charged. Therefore, appellant's first assignment of error is overruled.

{¶19} Appellant argues in his second assignment of error that the jury's verdict was based upon insufficient evidence and against the manifest weight of the evidence. We have already discussed our standard of review with regard to an insufficiency of the evidence claim. This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio

App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as appellee, the State of Ohio, presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533; *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

{¶10} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is

not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202.

{¶11} Appellant's only argument under this assignment of error is that there existed insufficient evidence, and the jury's verdict was against the manifest weight of the evidence, as to the elements of testing positive for HIV and possessing knowledge thereof. Appellant contends that there was insufficient evidence and the verdict was against the manifest weight of the evidence because the only evidence of these two elements was via the tape-recorded interview between appellant and Detective Welsh. Appellant maintains that he is not a medical doctor and is not an expert on whether he actually tested positive for HIV. We find this argument without merit. Appellant's confession was sufficient evidence to support the element of having a positive HIV test and knowledge thereof. The following conversation took place between appellant and Detective Welsh during the police interview:

Q Did you use a condom?

A No.

Q Do you think that's right knowing that you have – you're HIV?

A No, I don't think it's right.

* * *

Q Then why would you do that to someone? I mean, you know, you should at least tell them, and let them have the option to decide for themselves [sic]. No?

A Yeah. You're right.

Q You know you have to cover up?

A Yeah, I know.

(Tr. 137-38.)

{¶12} It is unclear from the record how Detective Welsh became aware that appellant had HIV. Also, in the above exchange, appellant does not explicitly state that he has HIV. However, appellant's answers to the detective's questions sufficiently confirmed that he did, in fact, have HIV, and he knew he had HIV. It would be expected that appellant would have denied the detective's allegation that he had HIV were it not true. Appellant stated in the interview that he had "some college," and he spoke plainly and had no problem articulating his opinions and thoughts. Throughout the interview, appellant also had no problem aggressively refuting claims and allegations asserted by Detective Welsh, and we are left with no doubt that appellant would have objected to the detective's statements regarding HIV and his knowledge of having HIV if they were not true. We find appellant's responses and tacit acknowledgement of his HIV-positive status during the interview provided sufficient evidence to prove the pertinent elements in R.C. 2903.11(B)(1), and the jury's verdict was supported by the manifest weight of the evidence on this element. Furthermore, although appellant does not raise any error with respect to the other elements of the offense, our review of the record reveals sufficient evidence was presented to demonstrate appellant knowingly engaged in sexual conduct with the victim and failed to disclose his knowledge of his positive HIV status to the victim prior to the sexual conduct, and the jury's findings on these elements were not against the manifest weight of the evidence. Therefore, the jury's verdict was based upon sufficient evidence and not against the manifest weight of the evidence, and appellant's second assignment of error is overruled.

{¶13} Appellant argues in his third assignment of error that he received ineffective assistance of counsel in that his trial counsel failed to object to the tape recording when appellant's statements were introduced and failed to explain the corpus delicti issue to the court. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial where the result is reliable. *Id.*

{¶14} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶15} In the present case, appellant argues that his counsel was ineffective because he failed to object to appellant's adoptions of Detective Welsh's HIV-related questions when they were presented prior to the presentation of some evidence of corpus

delicti. Appellant maintains that his counsel should have objected to the presentation of the interview recording based upon corpus delicti. However, as explained above, the state was not required, under corpus delicti, to present evidence of appellant's positive HIV status prior to introducing appellant's admission thereof. It was sufficient that the state had presented some evidence of the other material elements of the offense prior to appellant's statements in the interview. By the time the recording of the interview was presented to the jury, two police officers had testified as to the victim's appearance and emotional state soon after the incident, the victim had testified as to the facts surrounding the crime, and Detective Welsh had testified as to the victim's statement to her at the hospital and the victim's appearance and emotional state. Therefore, the state, in fact, presented some evidence of material elements of the offense prior to presenting appellant's admissions in the interview. Thus, as there was no corpus delicti error, appellant's counsel could not have been ineffective by failing to raise this issue prior to appellant's admissions in the recorded interview. For these reasons, appellant's third assignment of error is overruled.

{¶16} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.
