

[Cite as *State v. Ingram*, 2010-Ohio-772.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92785

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TRISTAN INGRAM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505085

BEFORE: Sweeney, J., Gallagher, A.J., and Stewart, J.

RELEASED: March 4, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Tristan Ingram (“defendant”), appeals his convictions for multiple counts of gross sexual imposition and sexual battery following a jury trial. Defendant challenges his convictions as being based on insufficient evidence or against the manifest weight of the evidence, and also maintains that the trial court erred by admitting certain evidence. For the reasons that follow, we affirm.

{¶ 2} Defendant and co-defendant, Scott Page (“Page”),¹ were indicted with eight counts of rape and two counts of gross sexual imposition. The charges emanated from a party that took place at Page’s residence on October 14, 2007, which the victim attended after her high school homecoming dance. The victim, T.Z.,² testified that she had attended the school dance on October 13, 2007 with five of her girlfriends. Although T.Z. did not have a date to the dance, she was, at that time, in a relationship with a boy named Rob. Rob was working out of town.

{¶ 3} T.Z. drove to the dance but her step-father picked them up because her car battery died in the school parking lot. This was around 10:20 p.m. T.Z. and three of her friends went to get a change of clothes at T.Z.’s house and then went to Page’s house. Page was a good friend of T.Z.’s boyfriend Rob and she

¹C.A. 92719.

²It is this Court’s policy not to identify the victims of sexual offenses by name.

had been to his house on several previous occasions. She also knew defendant through Page and school.

{¶ 4} According to T.Z., every time she went to Page's house, they would drink alcohol, mostly vodka. On occasion some of them would also smoke marijuana.

{¶ 5} On October, 13, 2007, she arrived at Page's house around 11:00 or 11:30 p.m. T.Z. indicated that the following people were present: Ashley, Brittany F., Page, defendant, Crystal, Jeris, Michelle, and Brittany B. They were watching a baseball game and drinking alcohol.

{¶ 6} T.Z. began drinking alcohol between 11:30 and 11:45 p.m. but she did not smoke any marijuana. The last time she ate anything was before the school dance. She drank approximately five to six shots of cherry vodka, grape vodka, and Bacardi Limon within an hour or less. T.Z. felt dizzy and nauseous.

{¶ 7} At this point, T.Z.'s friend, Shane, picked her up and the two went to visit "Doug." When she got into Doug's car at around midnight, she described her condition as follows: "I was dizzy and I could definitely feel the shots and I had trouble standing, and I was slurring my speech."

{¶ 8} Fifteen minutes later, Page called her and asked her to come back to his house to watch the baseball game. She stayed at Shane's house for less than an hour and did not consume any alcohol. Doug then took her back to Page's house sometime between 1:00 and 2:00 a.m. T.Z. was told Ashley was passed out upstairs. She saw Michelle, Brittany B., Brittany F., Page, defendant,

and Jeris. They all appeared to her to be more drunk than they were before she had left. T.Z. said she was still feeling dizzy, slurring her speech, and could barely walk. She then “took six to ten more shots” and was dancing with everyone. She did this to “get drunk and have fun.”

{¶ 9} Jeris got sick, vomited, and passed out on the couch. They continued dancing and the last thing T.Z. remembered was going to the bathroom with Brittany F. and throwing up in the toilet as Brittany F. held her hair. At the same time, Brittany F. was vomiting in the bathtub. Then T.Z. “blacked out.”

{¶ 10} The next thing T.Z. recalled was being picked up off of the bathroom floor and placed into Page’s bed. She does not know who moved her. Then, Brittany B. woke her up saying T.Z. was “laying in puke,” and Brittany B. changed her shirt with one of Page’s shirts. When T.Z. woke again, defendant was kissing her neck, had her hands down his pants, had his hands up her shirt feeling her breasts, and down her pants feeling her vagina. She could barely move; she tried to push him away but she felt like she was “dead weight.” She could barely talk. Then, she passed out again.

{¶ 11} Brittany F. awoke her saying a friend, Luke, was in an accident and that she, Michelle, and Brittany B. were going to the hospital. T.Z. did not go because she could not move and was “nowhere in any state to go anywhere.” Ashley and Crystal were still upstairs passed out.

{¶ 12} She again awoke to defendant putting her hand down his pants to touch his penis. She did not want to do this. When Page entered the room, she

heard defendant say “we should run a train on [her].” T.Z. explained this means “two guys have sex with a girl going in each a different hole.” At this point, T.Z. was clothed in her jeans, Page’s shirt, and a bra. Page said, “yeah” and turned off the lights. T.Z. said she said “no, seriously Rob will kill us.” She said that because she was scared and did not know what else to say. She thought that they “were going to run a train on” her. She did not run away because she could not move. She said she did not scream because no one would hear her. She did not fight because she could not move.

{¶ 13} Page turned off the light and someone took off her pants. Again, she could not move to stop them. The two of them began kissing her. Defendant vaginally penetrated her first and then Page took a turn doing the same. They both had vaginal intercourse with her. She did not want them to do this.

{¶ 14} She could not move and maintained that she told them no at least three times. They said “none of us are going to tell Rob.” Defendant stuck his fingers inside of her vagina two or three times and moved her body up against the wall. They just continued to take turns and each vaginally penetrated her two or three times. At some point she was on top of Page but fell off because she was so weak. It lasted for about 30 minutes. Defendant also put his penis inside of her mouth twice.

{¶ 15} They turned on the lights and she said, “are you guys kidding me, you should have at least used a condom.” According to T.Z. they said “no” and

laughed. Page then put a condom on, the lights were turned off and the process began again but for a shorter period of time. She recalls Page engaging in vaginal intercourse with her.

{¶ 16} When asked if she resisted, T.Z. responded, “I would try to turn my body but there was nothing I could do. And I turned my head when they were trying to kiss me and [defendant] tried to put his penis in my mouth.”

{¶ 17} When it stopped, they went to the kitchen and Page told her that her pants were wet so he gave her a pair of shorts. T.Z. called Brittany F. to see if she was coming back and then laid down waiting for her to return. When Brittany F. arrived, they went to sleep in Page’s bed until morning.

{¶ 18} When she awoke, T.Z. spoke with Brittany F., Brittany B., and Michelle. She later went to eat with Ashley and Doug. She did not go to the police because she was afraid something would happen to her and her family. She told her friends what had happened but did not say “rape.” Doug took Ashley and T.Z. to T.Z.’s house, where they stayed the rest of the day.

{¶ 19} Rob called T.Z. throughout the day and detected that something was wrong. Finally, T.Z. told Rob what had happened. Rob called his dad who called the police. Rob’s dad also called T.Z.’s parents. The police collected her clothes and she went to the hospital. T.Z. missed the next 4-5 days of school. Multiple girls would call and threaten to beat her up, telling her to drop the charges or something bad would happen to her. None of the girls she was with

on October 13, 2007 were her friends any longer but all remained friends with defendant and Page.

{¶ 20} During cross-examination, T.Z. indicated that she said goodbye to defendant and Page the next morning, that she ate lunch, and then returned to Page's house to retrieve her coat. She also testified that when she told Doug and Ashley about the incident, she also told them it was against her will. She explained that she did not tell them she was raped because, according to her, Ashley just "bypasses it, doesn't think it's a big deal" and Doug "goes by whatever the crowd does."

{¶ 21} T.Z. also stated during cross-examination that she felt forced down when Page held and pushed down her hands during the incident. She was concerned about Rob feeling betrayed by defendant and Page. She was not worried about Rob being upset with her because she believed that Rob knew she "would never willingly do something like that."

{¶ 22} T.Z. said she did not tell Brittany F. what happened when she returned to Page's house because she felt Brittany F. would not believe her. Also, T.Z. said Brittany F. would rather see her with anyone besides Rob.

{¶ 23} The following day, Page sent text messages to T.Z. instructing her not to tell Rob what happened.

{¶ 24} The sexual assault nurse examiner ("SANE") who examined T.Z. at the hospital testified next. The exam took place on October 14, 2007. The nurse collected T.Z.'s underwear and bra. There is a further notation that

“Parma Police has clothing.” T.Z. identified her assailants as her friend Tristan and Scott Page. According to the medical records, T.Z. did not know whether vaginal penetration by penis occurred but stated digital penetration occurred. Likewise the records indicated anal penetration by penis or fingers unknown. Records indicate patient’s mouth to assailant’s genitals and patient’s stomach, neck, and lips “kissed, licked, or bitten.”

{¶ 25} Although there was some uncertainty as to the extent of vaginal penetration documented in the medical records, the patient’s narrative of the incident was substantially consistent with T.Z.’s trial testimony. The nurse documented a dark bruise on her upper right arm area and patient was unaware of source of injury. The nurse noted small skin tears in the vaginal area. A rape kit was also completed and specimens were sent to the lab.

{¶ 26} An employee from Ohio Bureau of Criminal Identification and Investigation (“BCI”) testified concerning his analysis of T.Z.’s rape kit evidence. His tests found spermatozoa on the vaginal samples and her underwear tested presumptively positive for seminal fluid. T.Z.’s jeans contained several areas that tested presumptively positive for seminal fluid. Eighteen stains were identified and three tested positive. Samples were submitted for comparison with defendant and Page’s DNA.

{¶ 27} A second BCI employee testified concerning the DNA analysis. According to her examination, a vaginal sample, external genital sample, a swab from the left side of T.Z.’s neck, and an underwear sample resulted in a mixed

DNA profile consistent with contributions from T.Z. and Page. Samples from a second pair of underwear, and samples from T.Z.'s jeans, resulted with a DNA mixture of contributions from T.Z., Page, and defendant. Another sample resulted in a mixed DNA profile consistent with contributions from T.Z., Page, and an unknown individual but not defendant.

{¶ 28} T.Z.'s mother also testified and essentially corroborated that T.Z. went to a school dance on October 13, 2007, and returned home the following day in the afternoon. At that time, she said T.Z. looked terrible and reeked badly of alcohol. Mother was very upset by the drinking and could tell something was wrong with her daughter. T.Z. and Ashley stayed in T.Z.'s room all day. Mother did not observe T.Z. crying throughout the day. Around 9:00 p.m., Mother received a call from Rob's father and she and her husband went outside to speak with him. Then, they called 911. When they returned, T.Z. was crying saying that she "could not push him off." Ashley was no longer there. T.Z. was hysterical and crying. A police officer came to the house, spoke with T.Z. and collected some items of her clothing. Mother took T.Z. to Fairview Hospital. Later they took her to the police station.

{¶ 29} Rob's father testified that he contacted the police to report suspected sexual assault. He further testified, over defense objection, that a few days later defendant appeared at his house demanding to see his son Rob. Defendant said something to the effect of "tell that bitch-ass nigger he better keep his mouth shut and he better come see me." Rob's father believed defendant was referring

to his son. While Rob's father was telling defendant and his friends to leave, Rob arrived in a car with his friend Ray. Defendant began hitting Ray in the face and a fight ensued, culminating in Rob getting hit in the head with a block of cement. The police arrived and made an arrest. Page was not present at this incident.

{¶ 30} Rob also testified. He spoke with T.Z. on October 14, 2007 by phone as he was out of town working. He then called his father to relay what T.Z. had told him. Two days later, Rob returned to Parma. Page called him multiple times. When Rob finally answered, Page claimed he did not know what he had done the night in question and said it was the "first time we ever had ten bottles at [his] house." The two began arguing and Page said, "I got ten people coming to your house right now." Rob stated this is when he sped home and ended up in a fight with defendant and others. According to Rob, the fight was over the "situation" with T.Z.

{¶ 31} Rob's friend Ray and Rob's brother also testified about the altercation on October 14, 2007. Rob's brother recalled defendant saying things like "tell Rob watch his back, we're looking for him * * *."

{¶ 32} Rob said he spoke with T.Z. on October 14, 2007 and she was upset and hysterical. His employer paid for his flight home after he told them what had happened.

{¶ 33} The defense also presented three witnesses, who were T.Z.'s former friends: Madalyn, Brittany F., and Ashley. Madalyn attended the dance with

T.Z. and the other girls. She stated that they had not planned to spend the night at Page's house. She only stayed at his house for ten minutes and T.Z. seemed happy when Madalyn left. When Madalyn tried to speak with T.Z. after the incident, T.Z. ignored her. Madalyn stated T.Z. did not tell her the same version of events that she told the SANE nurse. On cross-examination, Madalyn confirmed that she is good friends with Page and defendant and had previously been romantically involved with defendant. Although she estimated visiting defendant and Page on at least 10 occasions after the allegations were made against them, she maintained that she never discussed it with either of them. She did hear them talking about it to others but could not recall what was said.

{¶ 34} Brittany F. testified that she was best friends with T.Z. Although Brittany F. had dropped out of school, she attended the school dance with her friends on October 13, 2007. They planned to go to Page's after the dance, which they did. They began drinking alcohol. She saw T.Z. leave with Shane and did not see her stumbling. T.Z. later returned to Page's house, was drinking more alcohol, and was dancing. She saw T.Z. vomiting. Brittany F. was also vomiting. The two girls passed out on the bathroom floor. Brittany F. awoke to her friend, Dave's, phone call. He said he was hit by a drunk driver and wanted her to come pick him up from the hospital. So she did. T.Z. did not want to go. Not wanting to leave T.Z. on the bathroom floor, Brittany F. helped her get up and walk to the bedroom. When questioned why she did not take

T.Z. home at that point, Brittany F. said T.Z. “wouldn’t want me to take her home in the condition she was in.”

{¶ 35} Brittany F. returned and Page ran to the door. She found T.Z. in the bedroom with defendant. Brittany F. asked T.Z. if she had fun and T.Z. said “yeah,” she was “happy, she was all giggly.” Then, they all went to sleep in the same bed — Brittany F., T.Z., Page, and defendant. The next morning the girls left but nothing was said during the car ride home. At this time, Brittany F. was living with her friend because her mother had kicked her out of the house. Brittany F. slept the rest of the day due to being hung over. She never talked to T.Z. about that night. She is no longer friends with T.Z. due to this matter. She is also not particularly friendly with either Page or defendant.

{¶ 36} Brittany F. confirmed that Page and defendant would brag about how many girls they have had sex with. Page and defendant said they had been accused of rape but claimed it was a “threesome” among defendant, Page, and T.Z. They said it was consensual.

{¶ 37} Ashley testified that she knew both Page and defendant. She was at Page’s house on October 13, 2007. She drank alcohol until she passed out upstairs. Ashley did not wake up until the next day. She left with T.Z. and Brittany F. Later that day, Ashley went to eat with T.Z. and Doug. T.Z. said she had fun and told Ashley she thought she “might have had [her] first threesome.” T.Z. said she did not know how it happened. According to Ashley, T.Z. said “a bunch of stuff about how she liked it and she was happy about it.” T.Z. was

scared about telling Rob, which Ashley told her not to do. She and T.Z. returned to T.Z.'s house where they stayed in her room the rest of the afternoon. She left and did not hear about the rape allegations until a week later.

{¶ 38} Ashley said she is no longer friends with T.Z. because T.Z. will not talk to her. However, she is still friends with Page and defendant. She had sexual intercourse with defendant in January 2008. Ashley also confirmed that Page and defendant would brag about their sexual conquests.

{¶ 39} Ashley confirmed that she was passed out from intoxication and did not witness the incident involving T.Z., defendant, and Page. Ashley confronted them about the rape charges and they denied it. She knew T.Z. was drunk on the night it occurred. Specifically, Ashley testified as follows:

{¶ 40} "Q. He didn't tell you she was drunk?

{¶ 41} "A. Well, I already knew she was drunk.

{¶ 42} "Q. How?

{¶ 43} "A. Because I was there with her.

{¶ 44} "Q. You were passed out upstairs?

{¶ 45} "A. But I was drinking with her before I passed out.

{¶ 46} "Q. You passed out at 1:00?

{¶ 47} "A. And she was drunk when I passed out.

{¶ 48} "Q. Really drunk?

{¶ 49} "A. Yeah.

{¶ 50} "* * *

{¶ 51} “Q. Did [defendant] say to you that she was drunk?

{¶ 52} “A. Yeah.

{¶ 53} “* * *

{¶ 54} “Q. * * * so he knew she was drunk?

{¶ 55} “A. Yeah.”

{¶ 56} Ashley also acknowledged during cross-examination that her purpose in testifying at trial was to call T.Z. a liar. Ashley then authenticated pictures of herself smoking marijuana and drinking alcohol. She confirmed that her nickname is “Smashley” but said she did not know why her friends called her that. Ashley also confirmed that “everybody” was against T.Z. after she made the accusations. Later, Ashley said she abandoned T.Z. because T.Z. had told Ashley one thing but told Rob another.

{¶ 57} At this point the defense rested, the jury was charged, and the verdict was rendered as stated previously. Defendant appeals, assigning three errors for our review.

{¶ 58} “1. The State failed to present sufficient evidence to sustain a conviction against appellant.”

{¶ 59} When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 60} R.C. 2907.05(A)(1) and (5) provides:

{¶ 61} “(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:

{¶ 62} “(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶ 63} “* * *

{¶ 64} “(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.”

{¶ 65} R.C. 2907.03(A)(2) provides:

{¶ 66} “(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶ 67} “* * *

{¶ 68} “(2) The offender knows that the other person’s ability to appraise the nature of or control the other person’s own conduct is substantially impaired.”

{¶ 69} There is undisputed evidence in the record that T.Z. went to Page’s house and drank until she vomited and passed out on the bathroom floor.

Another girl moved her into Page's bed. This person decided not take T.Z. home due to the "condition" she was in. T.Z. said she could not move and was barely able to talk. Several defense witnesses also recognized that T.Z. was very intoxicated at Page's house that night. They said defendant knew T.Z. was very drunk. T.Z. testified that defendant kissed her neck and stomach, penetrated her vagina with his fingers and penis, put his penis in her mouth, and put her hands down his pants. T.Z. also said some of these acts occurred while Page was penetrating her vaginally. T.Z. maintained she did not engage in these acts voluntarily and that she tried to stop them. According to T.Z., defendant and Page "took turns" with her. After stopping briefly, Page put on a condom and had vaginal intercourse with T.Z. again in defendant's presence. Defendant's convictions on these counts were supported by sufficient evidence in the record.

{¶ 70} Assignment of Error I is overruled.

{¶ 71} "II. Appellant's convictions are against the manifest weight of the evidence."

{¶ 72} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 73} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in evidence, the jury 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. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 74} In support of this error, defendant generally posits that the victim was a “drunk female who participated in her own doing” and because he maintains “nothing corroborates her testimony” the jury clearly lost its way. To the contrary, the defense witnesses corroborated that T.Z. was, in fact, highly intoxicated at the time. None of them witnessed the incident between Page, T.Z., and defendant. However, T.Z. did drink so much that she vomited and passed out shortly before the events took place. Brittany F. indicated that she moved T.Z. from the bathroom floor into the bedroom. At that time, T.Z. was alone. When Brittany F. returned, Page “ran” to the door. Defendant was found in bed with T.Z. The only discrepancy in the testimony is that T.Z. maintained she did not consent, while some witnesses stated she told them a different story. The medical records and testimony are substantially consistent with T.Z.’s trial testimony. While some of T.Z.’s former friends chose to believe defendants rather than T.Z., the jury, within its province, clearly found otherwise. The convictions are not against the manifest weight of the evidence.

{¶ 75} Assignment of Error II is overruled.

{¶ 76} “III. The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 403, Evid.R. 404(B), and appellant’s rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.”

{¶ 77} Over defendant's objection, the trial court allowed witnesses to testify about an incident that took place at Rob's house after the alleged offenses occurred. The court allowed the evidence based on the following reasoning, "this only happened five days after the event that is being complained of here, its in proximity, I don't know how we can separate it."

{¶ 78} Defendant argues that the subject evidence has no relevance to the charged offenses and that it was admitted in violation of Evid.R. 403, 404 and R.C. 2945.59. We review the trial court's ruling under the abuse of discretion standard. *City of Cleveland v. Dillingham* (May 11, 1995), Cuyahoga App. No. 67693.

{¶ 79} "While most cases addressing other acts evidence, admitted pursuant to Evid.R. 404(B), involve prior crimes or acts of misconduct, it is clear that evidence of subsequent crimes or acts of misconduct is admissible if it is relevant to an issue at trial and its probative value is not outweighed by its prejudicial effect." *Id.*, citing *State v. Thompson* (1981), 66 Ohio St.3d 496.

{¶ 80} The Ohio Supreme Court has held that "evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as admission by conduct. * * * Hence intimidation of a witness is not 'wholly independent' of the charged offenses." *State v. Soke* (1995), 74 Ohio St.3d 226, 250, other citations omitted.

{¶ 81} There is no dispute that Rob's phone call to his father largely contributed to the police investigation that resulted in the charges against

defendant and Page in this case. At trial, several of the defense witnesses testified that defendant said the incident with T.Z. was consensual. However, the testimony at issue indicated that defendant went to Rob's house threatening him and his family to keep quiet. This could fairly be construed as "the admission by conduct" addressed in *Soke*. The trial court did not abuse its discretion by allowing the evidence nor was its probative value outweighed by its prejudicial effect.

{¶ 82} Assignment of Error III is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR