

Not Reported in N.E.2d, 1988 WL 86417 (Ohio App. 8 Dist.)

(Cite as: **1988 WL 86417 (Ohio App. 8 Dist.)**)

## H

Only the Westlaw citation is currently available.

### CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,  
Cuyahoga County.

STATE of Ohio, Plaintiff-Appellee,

v.

Donte BOOKER, Defendant-Appellant.

**No. 53961.**

May 26, 1988.

Criminal Appeal from Common Pleas, Case No. 216213.

John T. Corrigan, Cuyahoga County Prosecutor by  
Melody A. White, Assistant Prosecuting Attorney,  
Cleveland, for plaintiff-appellee.

Michael E. Murman, Lakewood, for defendant-appellant.

### JOURNAL ENTRY and OPINION

McMANAMON, Judge.

\*1 Donte Booker was convicted of aggravated robbery (R.C. 2911.01), kidnapping (R.C. 2905.01), rape (R.C. 2907.02[A][2] ), and gross sexual imposition (R.C. 2907.05[A][1] ) involving Kimberly Loving. In the same trial the jury also found Booker guilty of the robbery (R.C. 2911.02) of Betty Bloch. Booker raises four assignments of error <sup>FN1</sup> in this timely appeal. Since none of his arguments are well taken, we affirm the convictions.

Kimberly Loving's trial testimony included the allegations which follow. At approximately 5:30 p.m. on November 11, 1986 a man she later identified as Booker bumped into her as she left her office build-

ing on 24700 Chagrin Boulevard in Beachwood, Ohio. The man asked to use a telephone and Loving directed him to a public phone in the building. The conversation occurred directly under a light above her office door and lasted three minutes.

Later as Loving warmed up her auto, the same man opened her auto door and threatened her with a fillet knife. The man forced her into the passenger seat and instructed her to keep her face towards the side window. Loving's auto was parked under a light and she caught additional glimpses of the man after he entered the vehicle. Upon demand, Loving gave the man eight dollars from her purse.

Loving averred the man drove her auto approximately five minutes to loading docks behind the Sylvester Building. She said her assailant then cut her stockings, fondled her and inserted his gloved finger into her vagina. Loving testified the man raped her while holding the knife to her throat. Before driving away, Loving's assailant instructed her to get out of the car, at which point Loving ran to a nearby building and summoned police. According to Loving the entire incident lasted twenty to twenty-five minutes.

Beachwood police officers testified Loving described her assailant as a light skinned black man, approximately 5' 10" to 6' 1", medium build, clean shaven with "beagle" eyes. She stated he wore gray sweatpants, a dark jacket over a gray sweatshirt, leather gloves and white tennis shoes. Loving assisted the officers in constructing a composite of the man. After a nightmare three days following the incident, Loving told officers the man had a "vague" mustache.

Beachwood police recovered Loving's auto on the evening of the alleged rape. After police returned the vehicle to Loving, she discovered a small toy gun was missing from the auto. In the weeks following the rape, Loving viewed numerous photo arrays, none of which contained the defendant's photo.

Not Reported in N.E.2d, 1988 WL 86417 (Ohio App. 8 Dist.)

(Cite as: 1988 WL 86417 (Ohio App. 8 Dist.))

tograph. Three months later Loving selected the defendant's photo from an array of six pictures. At that time police also showed her a small toy gun which she identified as similar to hers. At trial Loving averred she had "no doubt" Booker raped her.

Booker's claimed second victim, Betty Bloch, testified that at approximately 9:00 p.m. on February 18, 1987 a black man opened her auto door, threw her to the ground and drove the vehicle, which contained her purse, from the parking lot of the Beachwood Pub on 23360 Chagrin Boulevard According to Bloch, her assailant, whom she identified at trial as the defendant, carried either a black jack or a gun.

University Heights police officer Damian Pasternak testified that at 9:15 p.m. he received a radio report of Bloch's stolen auto and soon thereafter observed the vehicle travelling west on Cedar Road. Pasternak chased the vehicle for two and one-half miles until the driver abandoned the car on Blanche Avenue. University Heights officer John O'Donnell subsequently found the defendant hiding under a nearby auto. A search of Bloch's vehicle revealed a small toy gun on the front passenger seat. Bloch testified the gun did not belong to her. Booker told the officers he stole the auto so he could go to a job interview in Youngstown, Ohio. The defendant explained that he carried the toy gun for protection.

\*2 Cleveland Heights police officer Patrick Sullivan testified he compiled a photo array with Booker's photograph after reading the police report on the Bloch robbery and noting Booker's possession of a toy gun. After Loving identified the defendant's photo and the toy gun, Sullivan interviewed Booker. The defendant admitted the Bloch robbery and explained he had been unemployed for the past year and needed the auto for a job interview. According to Booker, he took Bloch's purse so he would know to whom he should return the auto. Booker claimed he held a Cleveland Heights high school diploma and had a wife and two-year-old son, Donte, Jr. The defendant denied Loving's rape and stated the toy gun belonged to his five-year-old

cousin. Sullivan testified he spoke with the defendant's mother and was unable to "locate" any son or cousin. Sullivan also told the jury he contacted Cleveland Heights High School and could not confirm Booker held a diploma from the school. Booker's former employer testified the defendant worked at the Montefiore Nursing home until December 20, 1986 when he was fired for missing work.

Cleveland Heights police officers executed a search warrant at the home of the defendant's mother. The search produced a pair of sweat pants and gloves. Loving testified the sweat pants were similar to those worn by her assailant but the gloves were not. At trial, Loving averred a gray sweatjacket worn by Booker on the day of his arrest was "very similar" to the sweatshirt worn by the rapist.

James Wurster of the Ohio Bureau of Criminal Identification testified his comparison of the defendant's blood, saliva and pubic hair to semen and a negroid pubic hair found on Loving were inconclusive. Wurster told the jury he could find nothing in these samples to associate Booker with the crime but that these tests did not exclude the defendant as a suspect. Tests produced no fingerprints on the toy gun.

Donte Booker took the stand and admitted lying to police about having a son and a high school diploma. The defendant also admitted the Bloch robbery and reiterated his need for the car to attend a job interview. Booker denied Loving's charges and stated he purchased the toy gun at a drugstore. He denied telling police the gun belonged to a cousin.

## I

In his first and third assignments of error Booker disputes the sufficiency and manifest weight of the evidence supporting the convictions relating to Loving.

\*3 A challenge to the sufficiency of the evidence requires us to view the evidence in a light most favorable to the prosecution and determine whether

Not Reported in N.E.2d, 1988 WL 86417 (Ohio App. 8 Dist.)

(Cite as: 1988 WL 86417 (Ohio App. 8 Dist.))

rational minds could have found each material element of an offense was proven beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307. Our review of a challenge to the manifest weight of the evidence is broader. *State v. Martin* (1983), 20 Ohio App.3d 172. As the *Martin* court stated:

“The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.* at 75. (Citations omitted.)

We are mindful that evaluation of witness credibility primarily lies with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230.

It is undisputed the crimes against Loving occurred. The sole issue raised by these assignments is the identity of Loving's assailant.

Initially Booker argues Loving's identification of him is so unreliable as to render the evidence insufficient as a matter of law. We note Booker did not file a motion to suppress the out-of-court identification and his argument on appeal does not suggest the identification procedure violated his right to due process. See *Manson v. Brathwaite* (1977), 432 U.S. 98; *Neil v. Biggers* (1972), 409 U.S. 188; *State v. Madison* (1980), 64 Ohio St.2d 322.

Loving testified she initially conversed with the defendant for approximately three minutes under a light in her office building. According to Loving, an additional twenty to twenty-five minutes elapsed while she was in the auto with Booker. During part of this later period her vehicle was parked under a light and she “caught glimpses” of her assailant. Loving also averred the flood lights at the loading docks and the dome light in her car permitted her to

observe the defendant during and after the rape.

We find Booker's assertions that Loving's initial identification varied significantly from the defendant's physical characteristics to be unpersuasive. For example, Booker is 6' and Loving's descriptions ranged from 5' 10" to 6' 1". Loving's initial uncertainty about whether her assailant wore a gray sweatshirt under his jacket or whether the jacket had a large collar is insignificant.

Loving chose Booker's photograph from the array with certainty. At trial she positively identified the defendant. The weight to be given her identification was for the jury to evaluate. See *Brathwaite, supra*, at 116.

We also reject Booker's argument that Wurster's inability to match the defendant's blood, saliva and hair to samples taken from Loving after the rape renders the verdict against the manifest weight of the evidence. Wurster testified the tests did not rule out the possibility Booker was Loving's assailant. On the basis of all the evidence, including Loving's identification of the defendant and the toy gun, we find the jury reasonably could find the defendant guilty of the crimes charged.

\*4 Accordingly, the defendant's first and third assignments of error are overruled.

## II

In his second assignment Booker posits the trial court erred in denying his motion to sever the Bloch robbery charge from the remaining counts.

The record demonstrates Booker did not move for severance until the day of trial. *Crim.R. 12(C)* requires the defendant to file such a motion within thirty-five days after arraignment or seven days before trial, whichever is earlier. However, the rule allows the court to extend the deadline if the interests of justice so require. Booker nonetheless waived any error in this regard by failing to renew his motion at the close of the state's case or at the

Not Reported in N.E.2d, 1988 WL 86417 (Ohio App. 8 Dist.)

(Cite as: 1988 WL 86417 (Ohio App. 8 Dist.))

conclusion of all the evidence. *State v. Owen* (1975), 51 Ohio App.2d 132; *State v. Hamlin* (Sept. 19, 1986), Cuyahoga App. No. 49975, unreported.

Finally, we note the record demonstrates no actual prejudice to Booker's rights. See *State v. Torres* (1981), Ohio St.2d 340. The evidence going to each offense was direct, distinct and uncomplicated. See *State v. Roberts* (1980), 62 Ohio St.2d 170; *State v. Hammon* (Jan. 16, 1986), Cuyahoga App. No. 49934, unreported. Further, there exists ample evidence to support each conviction.

Accordingly, this assignment of error is not well taken.

### III

In his fourth assignment Booker contends the prosecutor committed reversible error during closing arguments.

In *State v. Smith* (1984), 14 Ohio St.3d 13, 14, the supreme court stated:

“The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and if so whether they prejudicially affected substantial rights of the defendant.”

Booker cites the prosecutor's statement to the jury that “He took the stand and gave you nothing but lies, sheer lies ...” (Tr. 450).

We note the defendant admitted numerous lies to the police following his arrest. We have held references to such conduct proper. See *State v. Wronko* (May 14, 1987), Cuyahoga App. No. 52132, unreported; *State v. Nobles* (Oct. 13, 1983), Cuyahoga App. No. 46223, unreported. However, in this case the prosecutor's comment was directed to Booker's trial testimony and thus was arguably improper. However, in light of the substantial evidence of Booker's guilt, we hold any misconduct in this regard was harmless beyond a reasonable doubt.

Accordingly, this assignment of error is overruled and the trial court's judgment affirmed.

Judgment affirmed.

PRYATEL, P.J., and DYKE, J., concur.

\*5 N.B. This entry is made pursuant to the third sentence of [Rule 22\(D\), Ohio Rules of Appellate Procedure](#). This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

### APPENDIX

#### I

“Defendant was convicted on counts 2, 3, 4, and 5 with evidence insufficient as a matter of law where the state's only evidence linking defendant to the crime is a suspect identification made by one witness.”

#### II

“The trial court improperly overruled defendant's motion for separation of trials thereby prejudicing his right to a fair trial.”

#### III

“The jury's verdict of guilty on counts 2, 3, 4, and 5 was against the manifest weight of the evidence.”

#### IV

“The trial court erred in overruling defendant's motion for a mistrial where the prosecution's remarks in rebuttal closing argument prejudiced defendant's right to a fair trial.”

Not Reported in N.E.2d, 1988 WL 86417 (Ohio App. 8 Dist.)

**(Cite as: 1988 WL 86417 (Ohio App. 8 Dist.))**

[FN1](#). See Appendix.

Ohio App.,1988.

State v. Booker

Not Reported in N.E.2d, 1988 WL 86417 (Ohio

App. 8 Dist.)

END OF DOCUMENT