[Cite as *State v. Quinones*, 2010-Ohio-5240.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94082

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TONY C. QUINONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522702

BEFORE: Blackmon, J., McMonagle, P.J., and Jones, J.

RELEASED AND JOURNALIZED: October 28, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Tony C. Quinones appeals his convictions for two counts of rape and two counts of sexual battery. He assigns eight errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision in part and reverse and remand for a merger of allied offenses. The apposite facts follow.

Facts

[1]See appendix.

{¶ 3} The victim, L.E.,[2] who was 15 years old, attended a New Year's Eve party on December 31, 2007. The party was at the home of one of her friends, D.L., who was also 15 years old. L.E. arrived at the party at approximately 11:30 p.m., with another friend, S.F. There were approximately 20 to 30 people at the party, which took place in the kitchen and the basement. The basement was occupied mainly by teenagers. It is in dispute whether L.E. arrived intoxicated, or became intoxicated at the party. However, it is agreed that L.E. was very intoxicated sometime after midnight.

{¶ 4} S.F. noticed that Quinones was paying attention to L.E. and thought it was odd that he was in the basement with the younger crowd. Quinones was 21 years old at the time. Prior to Quinones approaching L.E., he asked S.F. how old L.E. was. S.F. thought the question was odd, but told him that L.E. was 15 years old. She did not have a "good feeling" about the attention Quinones was giving L.E. She later observed Quinones talking on L.E.'s cell phone. She grabbed the cell phone from him and discovered he was talking with L.E.'s boyfriend. The boyfriend was furious because Quinones told him that "he was f***ing his bitch right now." At one point, S.F. observed L.E. sitting on a couch with a male by the name of Stefan.

[2] In compliance with this court's policy of not revealing the identity of juveniles, we will refer to the minors by their initials.

Quinones was sitting on the other side of her in a rocking chair. She observed Stefan refilling L.E.'s cup with Vodka.

{¶ 5} Later, L.E. became so intoxicated that she fell down the basement steps, broke an ashtray, knocked a picture off a wall, and also broke a camera. Because people were becoming angry with L.E., S.F. assisted in putting L.E. to sleep sometime between 2:00 a.m. and 3:00 a.m. A blanket was laid next to a couch in the basement, with a pillow. Although there were still party activities going on, some others had also decided to go to sleep on the two couches available in the basement.

{¶ 6} S.F. occasionally checked on L.E. to make sure she was okay. At about 3:30 a.m., she saw that Quinones was laying next to L.E. She told D.L.'s mother that she did not think Quinones's presence was appropriate. However, the mother reassured her that Quinones was just taking care of L.E. She checked on L.E. again at 4:15 a.m.; at that time she did not see Quinones. She checked again at 5:00 a.m., before going to sleep upstairs in D.L.'s room. Around 6:00 a.m., S.F. woke up and went downstairs. D.L. came out of the basement and indicated that S.F. needed to tell Quinones to leave. Quinones came up the stairs soon after. He was fixing his pants and his belt and pulling his shirt down. S.F. told him to leave, and he did. However, prior to leaving, he again asked S.F. how old L.E. was.

{¶ 7} When S.F. went down the basement, she saw that L.E.'s halter top was untied, revealing her breasts, and her bra was on backwards. She also saw what she thought were several enormous hickeys on L.E.'s neck. She put L.E.'s top back on and woke her up. L.E. was incoherent and dazed and had no recollection of what had occurred.

{¶ 8} N.M. also attended the party. She stated she was sleeping on the couch next to L.E. She wanted to make sure that L.E. did not become sick during the night and choke. She stated that she was awakened by the sound of moaning. She saw Quinones with L.E. under the blanket. In her statement to police, N.M. stated that they were having sex because she heard the moaning, Quinones was on top of L.E., and the blanket moved. She also stated in her statement, "He was stroking it and every time he went in, he was making noise."

{¶ 9} At trial, N.M. stated that she only assumed they were having sex, but could not tell because the blanket was covering them. She also explained that Quinones was not on top of L.E., but was laying next to her and leaning over her. She could not tell if their pants were down because they were covered by the blanket. She was positive the person was Quinones because the lights from a nearby Christmas tree provided some light. N.M. went upstairs to alert D.L. to what was occurring. She claimed she told D.L. that

Quinones was having sex with L.E. in order to get D.L. to do something, not because she actually saw them having sex.

{¶ 10} D.L. testified that when she went into the basement at N.M.'s insistence, she saw L.E. and Quinones laying on the couch. L.E. was sleeping with her feet by Quinones's face, and Quinones's feet were by L.E.'s face. She claimed their pants were on, and that L.E.'s top was also on. She found a used condom in the bathroom. However, according to D.L., when Quinones left the basement, he went directly out of the house and did not stop in the bathroom. By the time police questioned her almost two weeks later, the condom had been thrown in the trash and was disposed of by garbage collectors.

{¶ 11} L.E.'s mother testified that when L.E. came home the next day, she was incoherent and dazed. She was concerned regarding L.E.'s mental condition and put her in a cold shower. She then took L.E. to the hospital. She stated that L.E. could not recall anything that had happened at the party.

{¶ 12} Christine LaPrairie works at Hillcrest Hospital as a Sexual Assault Nurse ("SANE"). In this position she received specialized training caring for patients who have been sexually abused. She was on call when L.E. arrived at the hospital. She stated that her examination of L.E. revealed a hymenal abrasion or tear in an area that indicated it was caused

by penetration while L.E. was on her back. She could not say whether the injury occurred within hours or days before the examination.

{¶ 13} Although L.E. had taken a shower, LaPrairie swabbed L.E.'s upper inner thighs by her genitalia for DNA. She explained that this area is sometimes shielded from the shower. The DNA obtained from L.E.'s inner thighs indicated it was L.E.'s DNA mixed with an unknown individual. It could not be determined if the DNA was from a male or female, but Quinones was excluded as a contributor of the DNA. Testing on L.E.'s underwear revealed there was DNA from someone else, but the amount was too small to determine to whom it belonged.

{¶ 14} The jury found Quinones guilty of two counts of rape and two counts of sexual battery. The trial court sentenced him to three years on each of the rape counts to be served concurrent to each other and two years on each of the sexual battery counts to be served concurrently with each other, but consecutive to the rape counts. Thus, Quinones was sentenced to a total of five years in prison.

Use of Unsworn Statement on Direct Examination

{¶ 15} In his first assigned error, Quinones argues the trial court erred by allowing the state to use leading questions on direct examination and to use N.M.'s unsworn statement to police to impeach her testimony in violation of Evid.R. 607, 611, and 612.

{¶ 16} We conclude that the state did not violate Evid.R. 607 or 612, which deal with impeachment and refreshing recollection with a prior statement. Review of the record indicates that the state did not impeach N.M. or refresh her recollection with the prior statement. N.M. never denied that she made the statement to police. When she testified that she only "assumed" Quinones was having sex with L.E., she was merely explaining what she meant in her statement to police in which she gave a detailed account of what she observed. She did not actually see the "act," but her perception of what was occurring indicated that they were having sex. This explanation does not conflict with the statement she gave police.

{¶ 17} We also conclude the state did not violate Evid.R. 611 by using leading questions when examining N.M. Evid.R. 611 provides that "leading questions should not be used on direct-examination of a witness except as may be necessary to develop his testimony * * *." Here, the state was using leading questions in order to develop N.M.'s testimony as to the specific details she observed when she saw Quinones under the blanket with L.E. Thus, Evid.R. 611 was not violated. Accordingly, Quinones's first assigned error is overruled.

Limiting Instruction

{¶ 18} In his second assigned error, Quinones argues the trial court should have instructed the jury that N.M.'s statement to police could be

considered for impeachment purposes only. Given our discussion above, the state was not using the statement to impeach N.M. Thus, a limiting instruction was not required. Accordingly, Quinones's second assigned error is overruled.

Expert Witness

{¶ 19} In his third and fifth assigned errors, Quinones argues the trial court improperly concluded the SANE nurse, Christine LaPrarie, was an expert witness and erred by declaring her to be an expert to the jury.

{¶ 20} Evid.R. 702 reads as follows in pertinent part:

> **"A witness may testify as an expert if all of the following apply:**
>
> **"(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;**
>
> **"(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;**
>
> **"(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *."**

{¶ 21} Qualification as an expert witness does not require any special education, certification, or complete knowledge of the field in question. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶113. It is only necessary that the witness's specialized knowledge, skill,

experience, training, or education "will aid the trier of fact in performing its fact-finding function." Id. A trial court's decision to allow a witness to testify as an expert will not be reversed absent an abuse of discretion. *State v. Mack* (1995), 73 Ohio St.3d 502, 511, 653 N.E.2d 329; *Drummond* at ¶31.

{¶ 22} The trial court did not abuse its discretion by allowing the SANE nurse to testify as an expert. The evidence indicated that LaPrairie had been a sexual assault nurse for seven years and a registered nurse for 14 years. She was also certified by the International Association of Forensic nurses to be a SANE nurse for adults and adolescents, and separately certified to be a SANE nurse for pediatrics. Additionally, her testimony was based upon reliable procedures and information utilized within the medical field. Based on LaPrairie's experience, the trial court properly permitted her to testify as an expert.

{¶ 23} We note that when the trial court inquired if defense counsel had any objection to LaPrairie being declared an expert, counsel replied, "no." Nonetheless, even under a plain error review, the trial court did not err by declaring LaPrairie to be an expert given her qualifications. Accordingly, Quinones's third and fifth assigned errors are overruled.

Ineffective Assistance of Counsel

{¶ 24} In his fourth assigned error, Quinones argues his counsel was ineffective because he (1) failed to obtain an expert to refute the SANE

nurse's testimony; (2) failed to voir dire the nurse or object to her testimony; and (3) failed to discuss the victim's motivation to lie.

{¶ 25} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. Id. at paragraph two of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 26} Counsel was not ineffective for failing to voir dire LaPrairie or object to her testimony. As we concluded in the third assigned error, LaPrairie's testimony was properly admitted because she met the qualifications required to be an expert. Counsel was also not ineffective for failing to obtain an expert to refute LaPrairie's testimony. The Ohio Supreme Court has held that "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel."

State v. Nicholas (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225. Where "[n]othing in the record indicates what kind of testimony an [expert witness] could have provided," resolving the issue of whether counsel was deficient in failing to employ an expert is "purely speculative." *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 2000-Ohio-448, 721 N.E.2d 52; *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶221 (rejecting as conjectural an ineffective assistance claim based on defense counsel's failure to request funds for an expert). Here, it is mere speculation whether an expert would have refuted LaPrairie's findings.

{¶ 27} Finally, Quinones argues that counsel was ineffective for failing to expose L.E.'s motivation to lie. He claims counsel should have explored whether L.E. lied because she did not want to upset her boyfriend or mother by revealing she was drunk and had sex. He also notes that L.E. may have had a financial reason to lie as three weeks after trial, her parents brought a civil lawsuit against D.L.'s mother.

{¶ 28} The record shows that defense counsel asked L.E. questions on cross-examination for the purpose of impeaching her credibility. Because L.E. had no recollection of the events, her testimony as to what occurred was of limited value. The record also does not reveal that defense counsel was aware of L.E.'s parents' intent to file a civil lawsuit three weeks after the

verdict. Thus, defense counsel was not ineffective in how he handled L.E.'s testimony. Accordingly, Quinones's fourth assigned error is overruled.

Allied Offenses

{¶ 29} In his sixth assigned error, Quinones argues the court erred by failing to merge his convictions for rape and sexual battery because they are allied offenses.

{¶ 30} The state concedes that there was only one act of rape, not two distinct acts. At oral argument, the state agreed that the rape count concerning substantial impairment would be the surviving count, because the rape with force did not apply given the victim was unconscious.

{¶ 31} Likewise, because there was only one act of penetration, Quinones's sexual battery counts would merge with the rape. Once the offenses are merged, Quinones can only be sentenced for one count of rape or one count of sexual battery, but not both. The determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182. This court, however, is required to reverse the judgment of conviction and remand for a new sentencing

hearing at which the state must elect which allied offense it will pursue against Quinones. Id., paragraphs one and two of the syllabus. Accordingly, Quinones's fifth assigned error is well taken and sustained.

Manifest Weight of the Evidence

{¶ 32} In his seventh assigned error, Quinones argues his convictions are against the manifest weight of the evidence. He specifically argues the evidence did not support the conclusion that Quinones engaged in sexual conduct with L.E.

{¶ 33} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient**

to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 34} However, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly,

reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 35} Quinones's convictions for rape and sexual battery required evidence that he engaged in "sexual conduct" with L.E. R.C. 2907.01 defines sexual conduct as follows:

> **"(A) 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."**

{¶ 36} When the victim is not conscious during the sexual conduct, it is difficult to have direct evidence of penetration. Here, the totality of the circumstances indicate that Quinones engaged in sexual conduct with L.E. The evidence showed that he was interested in L.E., followed her around the party, and tried to interject himself into her conversations. He asked S.F. how old L.E. was, which was odd. He took L.E.'s cell phone from her and told her boyfriend, "I'm f***ing your bitch right now."

{¶ 37} At trial N.M. testified she only "assumed" they were having sex; however, in her statement she stated that Quinones was "stroking it and every time he went in he moaned." While she could not see under the blanket, based on how the blanket was moving, how Quinones was positioned, and the moaning, she concluded they were having sexual intercourse.

Although Quinones suggests that another male at the party may have raped L.E., N.M. was positive the person with L.E. was Quinones. She had a clear view because they were positioned right next to her on the floor next to the couch.

{¶ 38} Additionally, S.F. observed Quinones as he came up the basement stairs. He was adjusting his belt and pants and again asked her how old L.E. was. The nurse testified that L.E.'s hymenal tear indicated penetration while L.E. was laying on her back, which is the position N.M. observed her in when Quinones was under the blanket with her.

{¶ 39} No one witnessed L.E.'s pants down; however, her halter top was pulled down to her waist and her bra was on backwards. All of these facts considered together support the jury's conclusion that sexual conduct between Quinones and L.E. occurred. Accordingly, Quinones's seventh assigned error is overruled.

Jury Instruction on Lesser Included Offenses

{¶ 40} In his eighth assigned error, Quinones argues the trial court erred by failing to instruct the jury regarding gross sexual imposition and sexual imposition, which are lesser included offenses of rape and sexual battery.

{¶ 41} We note that counsel failed to object to the trial court's instruction; therefore, he has waived all errors except plain error regarding

the instructions. Crim.R. 52(B). Plain error as to jury instructions is proven when the outcome of the trial would have been different but for the alleged error. *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339. We conclude plain error did not occur.

{¶ 42} Although gross sexual imposition and sexual imposition are lesser included offenses of rape and sexual battery, the fact that an offense is a lesser included offense does not automatically entitle a defendant to such an instruction. A charge on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶ 43} Here, an instruction on gross sexual imposition and sexual imposition would not be appropriate given the evidence of penetration. Gross sexual imposition and sexual imposition only require sexual contact. Moreover, the trial court did give an instruction as to gross sexual imposition as a lesser included offense to rape, and the jury still found Quinones guilty of rape. We, therefore, conclude no prejudice resulted from the trial court's failure to instruct as to the other lesser included offenses. See, *State v. Daniels*, Cuyahoga App. No. 93545, 2010-Ohio-3871 (reckless homicide instruction was not warranted given the jury found defendant guilty of

aggravated murder in spite of being instructed regarding the lesser included offense of murder.) Accordingly, Quinones's eighth assigned error is overruled.

Judgment affirmed in part and reversed and remanded in part for the trial court to merge the allied offenses.

It is ordered that appellee and appellant share the costs herein taxed equally.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR

Appendix

"I. The trial court abused its discretion and committed prejudicial error by permitting the prosecuting attorney to impeach a key prosecution witness with her unsworn statement to police and to use leading questions to get her to repeat out-of-court statements which amounted to nothing more than speculation."

"II. The trial court abused its discretion and committed prejudicial error by refusing to give a requested jury instruction that the unsworn statement of a witness made prior to trial and used by the state on cross-examination could be used only for the limited purpose of impeachment and not as substantive evidence."

"III. The trial court abused its discretion and committed prejudicial error by allowing a nurse to give opinion testimony about the cause of an alleged abrasion on the alleged victim's hymen."

"IV. Appellant was denied the right of effective assistance of counsel."

"V. The trial court committed plain error by commenting on the evidence and telling the jury that the court 'declares' the witness to be an expert in the area of sexual assault nurse practitioner."

"VI. Appellant's convictions for rape (two counts) and sexual battery (two counts) all of which involved the same victim and arose from the same conduct, are improper under Ohio Rev. Code §2941.25 and constitutes plain error."

"VII. Appellant's convictions are against the manifest weight of the evidence."

"VIII. The trial court committed plain error by giving an incomplete and/or inaccurate instructions on the elements of the lesser included offense of gross sexual imposition and by failing to give an instruction on the lesser include offense of sexual imposition under Counts I and II of the indictment and by failing to give any instructions on lesser included offenses under Counts III and IV."