[Cite as *State v. Nunez*, 2010-Ohio-5589.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93971

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VICTOR NUNEZ

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522573

BEFORE: Celebrezze, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 18, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Victor Nunez, appeals his convictions and sentence. Based on our review of the record and relevant case law, appellant's convictions are affirmed in part, reversed in part, and remanded for resentencing.

{¶ 2} J.L.[1] is appellant's sister-in-law. She testified about an incident that occurred between June 1 and August 31, 2008. J.L. testified that she was asleep on her mother's couch when appellant woke her and began touching her breasts. He then asked her to go to the basement, but she

[1]Pursuant to this court's established policy of not identifying victims in sex offense cases, the identity of the victims are shielded; therefore, they and their family members are referred to only by their initials.

refused. Appellant took off his pants as well as J.L.'s and began engaging in sexual activity with her. J.L. testified that she told appellant to stop, but he continued.

{¶ 3} J.L. also testified about an incident that occurred between August 1 and September 30, 2008. According to J.L., she was again sleeping on her mother's couch when appellant woke her. At this point, he asked J.L. to accompany him to the abandoned house next door to J.L.'s mother's house. J.L. first refused, but appellant threatened to call her probation officer and hurt her children if she did not comply. After they entered the abandoned house, one of appellant's acquaintances also entered the house without J.L.'s knowledge. Appellant grabbed J.L.'s ponytail and forced her to her knees. Appellant's acquaintance then forced his penis into J.L.'s mouth while appellant engaged in vaginal intercourse with her. J.L. testified that appellant and the acquaintance then switched places and continued to rape her.

{¶ 4} Several witnesses testified to an event that occurred during the weekend of February 13 to February 15, 2009. N.J., who is J.L.'s cousin and was visiting from Kentucky, testified that on February 13, 2009, she decided to spend the night at J.L.'s apartment while her mother and father stayed with other family members. At some point during the evening, appellant and his wife, who is J.L.'s sister, arrived at J.L.'s apartment with a bottle of

alcohol. J.L. and appellant were the only individuals who drank the alcohol. Appellant and his wife left later that evening.

{¶ 5} J.L.'s mother testified that, at around 3:00 or 3:30 a.m. on February 14, 2009, she and N.J.'s mother were playing cards when appellant, who was supposed to be sleeping, came out and said he was going to the emergency room to have his eye examined. Once appellant left, J.L.'s mother told N.J.'s mother that she felt appellant was "up to no good," and was not going to the hospital. J.L.'s mother called MetroHealth Medical Center, where appellant was allegedly going, several times throughout the night, but the hospital had no record of him ever being admitted as a patient.

{¶ 6} J.L. and N.J. both testified that at around 3:30 a.m. on February 14, 2009, they were sitting in J.L.'s apartment talking when J.L. received a phone call from appellant, who indicated that he and his wife were outside and needed J.L. to let them in. After opening the apartment door, J.L. saw appellant, but his wife was not there. J.L. attempted to shut the door, but appellant forced his way inside the apartment.

{¶ 7} J.L. testified that she went to her bedroom to avoid appellant, but he followed her. He came into her bedroom and began "ripping" her clothes off. She told him to stop, but he threw her on the bed and held her there. He pulled her hair and repeatedly asked whether she would like her cousin to watch what he was doing. J.L. testified that, at one point, appellant used his

knees to hold her down and repeatedly shoved his penis into her mouth. She was unable to escape because of the force appellant was exerting against her. Appellant then changed positions and engaged in vaginal intercourse with her.

{¶ 8} N.J. testified that after appellant forced his way into J.L.'s apartment, she excused herself to go to the restroom. When she returned, J.L. and appellant were in the bedroom with the door closed. N.J. heard J.L. screaming for appellant to stop and leave her alone. N.J. did not call the police because she was afraid of appellant, so she laid on J.L.'s couch and pretended to be asleep. Once appellant emerged from J.L.'s bedroom, he walked over to the couch where she was lying. He then began to digitally penetrate her vagina, and she was so afraid that she put a blanket over her face. After the digital penetration, appellant engaged in vaginal intercourse with her. Finally, he engaged in oral sex with her. N.J. testified that she did not scream, tell appellant to stop, or attempt to push him away because she was petrified.

{¶ 9} J.L. testified that she walked out of her bedroom and saw appellant on top of N.J. She did not call the police or seek other assistance because appellant had threatened to call her probation officer and had threatened her children.

{¶ 10} Appellant called J.L. shortly after he left her apartment and told her that he had informed his mother and sisters of what happened and, should he be arrested, they would hurt J.L. and her children.

{¶ 11} On February 15, 2009, N.J. and her family returned to Kentucky. N.J. then went to her best friend's house and told her what had happened. Her friend called N.J.'s mother and asked her to come over. N.J. then told her mother what had happened. Her mother then took her to the hospital for a physical examination. DNA samples collected during this examination matched DNA samples provided by appellant.

{¶ 12} N.J.'s father called J.L.'s mother to tell her that the two women had been raped. After learning who had raped the women, J.L.'s mother immediately called J.L.'s sister, who is appellant's wife, to inform her of the perpetrator's identity. According to appellant's wife, he admitted engaging in sexual intercourse with the women, but maintained that the activities were consensual.

{¶ 13} Appellant's wife testified that although she had no idea appellant was having a sexual relationship with her sister, she did know that appellant and her sister had a congenial relationship. For example, appellant and J.L. would buy drugs together, would go to the store together, and would go to the abandoned house next door to J.L.'s mother's house in order to smoke marijuana.

{¶ 14} Appellant's sister also testified at trial. She testified that she was sexually molested as a child and that appellant had been a constant source of comfort to her at the time. She also testified that, although she did not know that appellant and J.L. were having a sexual relationship, J.L. and appellant got along very well and spent time alone together.

{¶ 15} Appellant was indicted in a 13-count indictment on five counts of rape, four counts of kidnapping, three counts of intimidation of a crime victim or witness, and one count of aggravated burglary. After a trial by jury, appellant was found guilty of aggravated burglary,[2] three counts of rape,[3] two counts of kidnapping with sexual motivation specifications,[4] and one count of intimidation of a crime witness or victim.[5] The counts on which appellant was acquitted were those related to the incidents involving J.L. that occurred prior to February 2009. The trial court sentenced appellant to 22 years in prison. This appeal followed.

Law and Analysis

{¶ 16} On appeal, appellant argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence,

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[2]R.C. 2911.11(A)(1), a first-degree felony.

[3]R.C. 2907.02(A)(4), first-degree felonies.

[4]R.C. 2905.01(A)(4), first-degree felonies.

[5]R.C. 2921.04(B), a third-degree felony.

the trial court erred in failing to immediately charge the jury at the conclusion of closing arguments, he was denied the effective assistance of counsel, and the trial court erred in denying visitation with his son as part of his sentence.

Sufficiency and Manifest Weight

{¶ 17} In his first and second assignments of error, appellant argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 18} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's

disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he 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." Id. at 175.

{¶ 19} In making his sufficiency and manifest weight arguments, appellant first relies on the lack of physical evidence showing that he raped J.L. He incorrectly asserts, however, that J.L. was examined by medical personnel. According to J.L.'s testimony, she did not speak with the police about the rape until at least two days after it happened. By that point, J.L. had showered multiple times and had washed the clothing she was wearing on February 14, 2009. J.L. testified that the responding officer told her that, because any physical evidence would have been destroyed, going to the hospital and getting a rape kit performed would be futile.

{¶ 20} Appellant also challenges the credibility of J.L. and N.J. He specifically points to the fact that he and J.L. had a cordial relationship

despite the fact that J.L. alleges he had raped her multiple times throughout a nine-month period. He also points to N.J.'s testimony that she did not know appellant, when appellant's wife testified that she saw appellant and N.J. interacting at a family reunion in August 2008. Finally, appellant points to slight differences in the victims' testimony to argue that they are not credible and should not have been believed by the jury.

{¶ 21} Despite appellant's contentions to the contrary, ample evidence was presented to support his convictions. Both witnesses testified to the events that occurred on February 14, 2009. The timeline of events was consistent with the testimony of J.L.'s mother, and the phone calls made by appellant to J.L. were corroborated by J.L.'s cell phone records. Finally, the rape kit performed on N.J. was consistent with appellant's DNA. Viewing this evidence in a light most favorable to the state, we find that a rational jury could have found appellant guilty beyond a reasonable doubt.

{¶ 22} The testimony of the two victims did not differ in any significant way. Each witness was rigorously cross-examined. The jury heard and considered this evidence. We find this to be true, especially in light of the fact that the jury acquitted appellant of all charges relating to the incidents occurring prior to February 2009. As such, we do not find that the jury lost its way or that a manifest injustice occurred in this case. Appellant's first and second assignments of error are overruled.

Jury Charge

{¶ 23} In his third assignment of error, appellant argues that the trial court committed reversible error when it failed to charge the jury on the same day oral arguments ended. R.C. 2945.10(G) provides that "[t]he court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury." Appellant relies on the definition of "forthwith," which means "immediately," to argue that the trial court erred by taking a recess for the duration of the weekend and charging the jury on Monday morning.

{¶ 24} A thorough review of the record reveals that the trial judge had every intention of charging the jury Friday evening. For example, at 3:27 p.m. on Friday afternoon, the court took a ten-minute recess. During this time, the trial judge said to the attorneys, "We are, in fact, going to proceed now with closing arguments, gentlemen, and then I'm going to give the jury instructions to the jury. Jury instructions in this particular case look like they will take anywhere from 45 minutes to an hour to read based on what we've got.

{¶ 25} "So I'm going — it is my intention to, based on the hour right now, that you would do your close/close; we get that complete. I read the instructions to the jury and then I send them back to select a foreperson and

we conclude for the remainder of the day. I am — I try to be as efficient as I can, especially right now, but it has been a long week. That's my intention.

{¶ 26} "I don't want either of you to be the bad guys here. I'll let them know it's my determination that they go home and come back Monday morning to deliberate."

{¶ 27} When both sides finished with their closing arguments, the trial judge noted that it was 4:45 p.m. The judge then allowed the jury to vote on whether they would like to hear the jury instructions that evening or whether they would rather return and be charged Monday morning. Based on the jury's vote, the court adjourned for the day, and the jury was charged first thing Monday morning.[6]

{¶ 28} Although we are unable to find a case specifically on this issue, we do find two cases from this district to be persuasive. In *State v. Sheppard* (1955), 100 Ohio App. 345, 395, 128 N.E.2d 471 (overturned on other grounds), this court held that the court's duty to forthwith charge the jury "means to proceed within the regular hours of the court day[.]" Loc.R. 3(B) of the Court of Common Pleas of Cuyahoga County, General Division, provides

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[6]Although the record does not reflect at what time the court began reading the jury instructions on Monday morning, the prosecutor did say to the court, "the State would ask the record to reflect that after the jury was — closing arguments were on Friday and then today was charge of the Court, and there has been nothing in between."

that the court's hours end at 4:30 p.m. on Fridays and do not begin again until 9:00 a.m. on Monday.

{¶ 29} In *Kalhoun v. State* (1929), 33 Ohio App. 1, 10, 168 N.E. 550, this court was left to determine whether the trial court erred when closing arguments concluded at 3:30 p.m. and the court adjourned until the following morning and then proceeded to charge the jury. In *Kalhoun*, this court stated, "[h]ad the statute read, 'the court after the argument is concluded shall forthwith charge the jury,' the interpretation sought by counsel for the accused would be entirely correct, but it will be seen that the language of the statute is, 'the court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury.' Construing the language as a whole it lends itself to the reasonable interpretation that, after the argument has been made, no new matter shall be taken up by the court. It is conceded, on the record, that no new matter was taken up by the court between the conclusion of the argument and the giving of the charge to the jury, and, in our opinion, the action of the court was in compliance with the requirements of the Code. Were we to sustain the contention of counsel for the accused that the language of the section 'and before proceeding with other business' must be entirely disregarded, and that the duty of the trial court is to charge the jury immediately upon the conclusion of the argument, we would place an impediment in the path of the trial court, as the court would

be given no time for contemplation or preparation when it deemed the same necessary in order to give a proper charge to the jury." Id. at 10-11.

{¶ 30} In this case, closing arguments concluded after the court's normal hours had already expired. The trial judge then polled the jurors, who opted to adjourn for the day and return Monday morning for the jury charge. The state then took the necessary steps to point out, on the record, that the court engaged in no other court business during the adjournment. Based on the record, and the holdings in *Sheppard* and *Kalhoun*, we do not find that the trial court violated R.C. 2945.10(G). Appellant's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 31} In his fourth assignment of error, appellant argues that he was denied the effective assistance of trial counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 32} Appellant first argues that his trial counsel was ineffective in miscalculating the number of peremptory challenges he had. The record

reflects that appellant's counsel made a motion to excuse Juror No. 5 for cause, which was denied. Appellant's counsel later used peremptory challenges to excuse Jurors 5 and 11.[7] Then, when using a peremptory challenge to excuse Juror No. 7, appellant's counsel said, "I believe this is my final peremptory." Appellant relies on this language to argue that his trial counsel was ineffective. Unlike appellant, we read this language to mean that appellant's counsel did not intend to use his final peremptory challenge, and thus, in excusing Juror No. 7, he used his "final peremptory." Nonetheless, the record reveals that the trial judge told appellant's trial counsel that he had one peremptory challenge remaining. Trial counsel indicated that he was pleased with the composition of the jury and did not wish to use his final peremptory challenge. Not only is appellant unable to show that his trial counsel was seriously deficient, he is also unable to show that he was prejudiced by any error his trial counsel made in miscalculating his remaining number of peremptory challenges.

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[7] In his appellate brief, appellant argues that his trial counsel "did not exercise a peremptory as to Juror No. 5 (nor did the prosecutor), although he challenged for cause. The juror remained on the panel although trial counsel attempted to excuse her for cause. Perhaps he didn't know that he could use a peremptory after his earlier claim was rejected. This clearly falls below the accepted standards of criminal defense representation." Despite this contention, the record, at page 216, unequivocally shows that appellant's counsel used a peremptory challenge to excuse Juror No. 5.

{¶ 33} Appellant also argues that his trial counsel's performance was deficient because he elicited testimony relating to appellant's previous conviction. What appellant neglects to recognize is that, before defense counsel questioned appellant's sister regarding his prior conviction, J.L. had already mentioned appellant being in confinement for a period of time. Appellant's counsel cross-examined J.L. on the fact that appellant was incarcerated, yet she still chose not to inform anyone of the alleged rapes that occurred between June and September 2008. Based on this testimony, appellant's counsel may have found it necessary to fully discuss appellant's previous conviction so that the jury would understand that conviction was not for another sex crime. Regardless of his motive for engaging in this line of questioning, appellant has presented nothing to show that his trial counsel's actions were deficient or that he was prejudiced in any way.

{¶ 34} As a court, we are not to question the tactical decisions made by attorneys during trial. Nothing in the record reveals that the performance of appellant's trial counsel was seriously flawed or deficient. In fact, appellant's counsel rigorously cross-examined every witness, fought vigorously for his client, and even managed to obtain an acquittal on six counts. Appellant has also failed to show that he would have been acquitted had his counsel not committed these errors. Appellant has failed to meet the

burden for establishing an ineffective assistance of counsel claim; his fourth assignment of error is overruled.

Sentencing

{¶ 35} In his fifth and final assignment of error, appellant argues that the trial judge exceeded her authority in ordering that he be denied visitation with his infant son. In making this argument, appellant relies on *State v. Shamaly*, Cuyahoga App. No. 88409, 2007-Ohio-3409, in which this court held that the trial court exceeded its authority in sentencing the offender to one day per year of solitary confinement while at the state correctional institution. In this case, however, appellant's trial counsel merely asked the court to put in its sentencing entry that the county jail allow appellant contact visits with his son. When denying this request, the trial judge said, "I think that's a negative right now, Mr. Norton. I don't think your client deserves to have contact with his child[.]"

{¶ 36} Appellant's counsel construes this language and the trial court's sentencing entry, which states, "[v]isit with son denied[,]" to argue that the trial court exceeded its authority. We need not decide whether the trial judge exceeded her authority. Based on our interpretation of the request made by appellant's counsel at sentencing, the trial judge was merely referring to county jail visits when she said that appellant was denied visitation with his son. The docket reflects that appellant is no longer in the

county jail and is incarcerated in a state institution. As such, his argument that the trial judge exceeded her authority in denying him a visit with his son at the county jail must fail.

{¶ 37} Despite our holding that the trial judge did not exceed her authority, both parties concede that the state prison where appellant is incarcerated has used the trial court's sentencing entry to deny appellant visitation with his son. Because of the prison's misinterpretation, we must order the trial judge to issue a new sentencing entry clarifying exactly what she meant by "[v]isit with son denied."

Allied Offenses

{¶ 38} We must now determine whether appellant was convicted and sentenced for allied offenses of similar import. We note at the outset that appellant has not raised an assignment of error with regard to allied offenses, and thus we must apply a plain error standard of review. The Ohio Supreme Court has held that failure to merge allied offenses for sentencing does in fact constitute plain error and must be reversed on appeal. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31-32.

{¶ 39} R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one." It is well

established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)" Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 40} We first address Counts 12 and 13, rape and kidnapping respectively, related to the offense committed against N.J. It is well established that rape and kidnapping are allied offenses. *State v. Walton*, Cuyahoga App. No. 93659, 2010-Ohio-3875, ¶8, citing *Blankenship*, supra. There is nothing in the record that indicates appellant kidnapped and raped N.J. with a separate animus. He engaged in one continuous course of action, and thus he could be sentenced for only one of the two allied offenses.

{¶ 41} Appellant was also convicted and sentenced for two counts of rape and one count of kidnapping for the offenses committed against J.L. As

addressed above, rape and kidnapping are allied offenses. Similarly, the evidence reveals that appellant committed these offenses with a single animus, and thus he was improperly convicted and sentenced for allied offenses.

{¶ 42} This matter must be remanded to the trial court for a new sentencing hearing where the state shall choose which charge it wishes to proceed under.

Conclusion

{¶ 43} Nothing in the record demonstrates that appellant's convictions were based on insufficient evidence or were against the manifest weight of the evidence. The trial court did not err in adjourning court on Friday afternoon after closing arguments and then charging the jury first thing on Monday morning when oral arguments lasted until after the court's normal business hours and the court did not conduct any business between closing arguments and charging the jury. Appellant's trial counsel was not ineffective, and the trial court did not err in denying appellant's request to visit with his son while being held in the county jail.

{¶ 44} While we have affirmed appellant's convictions, we nevertheless reverse and remand for resentencing because the trial court sentenced appellant for multiple allied offenses. This matter must be remanded to the trial court for a new sentencing hearing wherein the state shall elect under

which count it wishes to proceed. In its new sentencing entry, the trial court must clarify that it was only denying appellant visits with his son while he was in the county jail and that the prohibition was not meant to continue once appellant was confined in a state prison.

Convictions affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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 common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY