

[Cite as *State v. Blazer*, 2010-Ohio-6367.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **93980**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SCOTT BLAZER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519588

BEFORE: Jones, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 23, 2010

ATTORNEY FOR APPELLANT

Russell S. Bensing
1350 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Anna M. Faraglia
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Scott Blazer (“Blazer”), appeals his conviction for rape. For the reasons that follow, we affirm his conviction.

{¶ 2} In 2009, Blazer was charged with four counts of rape, two counts of kidnapping, and one count of gross sexual imposition in the sexual assault of his brother’s step-daughter, “T.L.”¹

¹ We refer to T.L. by her initials in keeping with this court’s policy not to identify victims in sexual assault cases.

{¶ 3} The matter proceeded to a trial by jury, at which the following evidence was presented.

{¶ 4} T.L. knew Blazer because her mother was married to his brother and she considered Blazer her uncle. Life at home was rough for T.L. because her mother and step-father did not get along, so T.L. began spending more time with her 42-year-old uncle. In November 2006, 13-year-old T.L. spent the night at Blazer's house and stayed up late using the computer. The next morning, the state alleged that Blazer climbed into the bed T.L. was sleeping in and performed oral sex on her.² After this incident, T.L. continued her friendship with Blazer and, at one point, Blazer gave her a diamond "promise" ring. Blazer told T.L. that it meant that he would keep everything she told him and everything that happened between them a secret.

{¶ 5} On January 26, 2008, T.L. went to Blazer's house for a family dinner. After everyone left, Blazer and T.L. began making vodka drinks. T.L., who was now 15 years old, testified she consumed at least a quarter of the bottle of vodka. She was also smoking and she played on the computer while her uncle sat on a futon and listened to music. After a while, T.L. felt sick, ran to the bathroom, and vomited. Blazer followed her and helped her clean up her vomit, which was all over the bathroom. She called a friend and told him that she had been drinking and got sick. The friend recommended she eat some bread. At the time, T.L.

² The jury acquitted Blazer of all charges relating to this incident.

was wearing a shirt, underwear, boxer shorts over her underwear, and baggy sweat pants.

{¶ 6} T.L. testified that the next thing she remembered was waking up in Blazer's bed, with Blazer talking about "finishing." Her uncle was naked and T.L. realized she did not have any bottoms on, her bra was unhooked, and her shirt was pushed up. T.L. testified that Blazer was on top of her and had his penis inside of her. She told the jury she was scared and asked Blazer "what are you doing" and "what time is it." T.L. stated that after Blazer was "finished," he gave T.L. the boxer shorts she had been wearing. T.L. testified she was still drunk and tired so she fell back asleep. At some point, she received a phone call from a friend and fell back asleep. Blazer woke her up around 8:30 a.m., telling her breakfast was ready. T.L. testified she got dressed and went into the kitchen, where Blazer was sitting with his girlfriend, who had just arrived. At one point, Blazer told T.L. he was "sorry," but she just ignored him.

{¶ 7} When T.L. got home the next day, she threw her underwear and boxers in her trash can and showered. T.L. called a friend to tell her what happened, and also tried to call Blazer. A few days later, the police came to her house to investigate the incident after her friend's mother reported what had happened to the police. T.L.'s mother came home, and T.L. told her what happened. T.L.'s mother retrieved T.L.'s underclothes from the trash can and turned them over to the police. The Ohio Bureau of Criminal Investigation tested the underclothes, and the results showed that Blazer could not be excluded as a minor source of the DNA found on the boxer shorts.

{¶ 8} During cross-examination of T.L., defense counsel asked T.L. if she ever left a provocative message on Blazer's answering machine. T.L. stated she had not. Counsel sought permission from the court to play a tape recording, which was allegedly a message T.L. left on Blazer's answering machine. The state objected, claiming they had not been provided the tape recording during discovery. The trial court recessed the jury to discuss the recording. On the recording, a girl is heard saying: "Hey, Scott, um, could you call me back? I kind of miss you. I miss your big long d*** in me. So hot. Anyways, just call me back. All right. Bye, baby."

{¶ 9} The trial court excluded the recording from evidence finding that 1) it was error for the defense to fail to turn the tape over during discovery and 2) the tape had not been properly authenticated.

{¶ 10} At the close of the state's case, the trial court dismissed one rape count pursuant to Blazer's Crim.R. 29 motion for acquittal.

{¶ 11} Blazer testified in his own defense. He denied the 2006 incident ever happened. As to the January 28, 2008, incident, he testified that he had fallen asleep and woke up when he realized someone was in his bed. He testified that "someone" began kissing him and fondling him, but he did not know who it was. He stated he had sexual intercourse with the unknown person. He testified that he did not know who he was having sex with, but it was not uncommon for him to have sex with his girlfriend in the middle of the night. He further testified that he did not know if it was his girlfriend he was having sex with because he had been drinking. Finally, Blazer testified that he became aware he

had sexual intercourse with T.L. after he was called for a family meeting. He admitted he knew that something had happened between him and T.L. but he did not know “how far it went.”

{¶ 12} The jury convicted Blazer of one count of rape, pursuant to R.C. 2907.02(a)(1)(c), which requires proof that the other party’s “ability to resist or consent is substantially impaired,” and acquitted him on all other charges. The trial court sentenced Blazer to nine years in prison.

{¶ 13} Blazer now appeals, raising four assignments of error for our review:

“I. The trial court erred in excluding at trial a tape recording made by the alleged victim, in violation of Defendant’s rights of confrontation and right to present a defense under the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

“II. The trial court erred in excluding at trial any cross-examination of the alleged victim, or any presentation of defense testimony, as to a statement made by the alleged victim, in violation of Defendant’s rights of confrontation and right to present a defense under the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

“III. The defendant was denied the effective assistance of counsel, in violation of defendant’s rights under the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

“IV. The defendant was denied his right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 14 of the Ohio Constitution, by the trial court’s excessive and accusatory cross-examination of the defendant.”

{¶ 14} The first two assignments of error will be discussed together.

“I. Tape Recording

{¶ 15} In the first and second assignments of error, Blazer challenges the exclusion of the tape recording that he alleged consisted of statements left by the victim on his answering machine.

A. Discovery and Authentication

{¶ 16} First, Blazer argues that the trial court erred in prohibiting defense counsel from questioning T.L. about the tape recording.

{¶ 17} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512.

{¶ 18} As mentioned earlier, defense counsel asked T.L. during cross-examination if she had left a provocative message on Blazer's answering machine during the month of February 2009. T.L. answered in the negative, and counsel sought to play the tape for the jury. The state objected and argued to the court that the tape should be excluded from evidence and the defense prohibited from questioning anyone about the tape because counsel did not disclose the tape to the state during the discovery process. The state further argued that the tape was inadmissible because it had not been authenticated.

{¶ 19} The trial court questioned the victim about the tape outside the presence of the jury. Defense counsel played the full message for T.L., and the girl denied that it was her voice on the tape.

{¶ 20} The trial court ruled that the tape would be excluded from evidence because Crim.R. 16 required defense counsel to turn the tape over to the state during discovery. The court further questioned whether the tape could be

authenticated since T.L. had said she did not leave the message. We will look at each theory of exclusion in turn.

{¶ 21} Former Crim.R. 16(C)(1) addresses information that is known to the defendant and subject to disclosure.³ Crim.R. 16(C)(1)(a) provided:

“If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.”

{¶ 22} Crim.R. 16(C)(2) described evidence not subject to disclosure:

{¶ 23} “Information Not Subject to Disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.”

{¶ 24} Blazer maintains that he is his attorney’s “agent,” and since the statement was made to him (or his answering machine) after he was indicted, the statement should be considered work product. The state claims that the tape was discoverable because it was a “tangible object” not covered by Crim.R.

³ Crim.R. 16(C) was amended effective July 1, 2010. The trial occurred prior to the implementation of the new rule, and we will apply the version of Crim.R. 16 in effect at the time of trial.

16(C)(2). We disagree with both parties' arguments, but conclude that the tape was not discoverable.

{¶ 25} When questioned by the trial court, defense counsel explained that the tape was "impeachment evidence" and not a witness statement. The court opined that if Blazer's defense was consent, then the tape was direct evidence, not impeachment evidence. But we find that the tape was a witness statement and not a "tangible object" as the state argues. The defense sought to use the statement to impeach the victim's credibility. A party has no obligation to present impeachment material to the trial court before using it on a witness. See *State v. Soke* (1995), 105 Ohio App.3d 226, 663 N.E.2d 986. Therefore, we find that the trial court erred when it found that the tape needed to be turned over to the state pursuant to the state's request for discovery.

{¶ 26} We next consider whether the trial court erred when it ruled that the tape recording was not authenticated.

{¶ 27} Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(B) states:

"By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

"* * *

"(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion

based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.”

{¶ 28} “This rule invokes a very low threshold standard, requiring only sufficient foundational evidence for the trier of fact to conclude that the item is what the proponent claims it to be.” *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, appeal allowed by 125 Ohio St.3d 1461, 2010-Ohio-2753, 928 N.E.2d 737. This standard is less demanding than a preponderance of the evidence standard. *Id.* citing *State v. Winfield* (Feb. 7, 1991), Ross App. No. 1641.

{¶ 29} In this case, the trial court incorrectly assumed that the only way to authenticate the tape recording was if T.L. admitted that it was her voice on the tape. Pursuant to Evid.R. 901, an outside party could have authenticated the tape. Therefore, the trial court erred in finding that only T.L. could have authenticated the tape for purposes of Evid.R. 901.

B. Extrinsic Evidence

{¶ 30} In the second assignment of error, Blazer argues that the trial court erred when it prohibited defense counsel from introducing any evidence about the contents of the tape recording through extrinsic evidence. Blazer maintains that even if the tape recording was inadmissible due to the discovery violation, counsel still should have been allowed to use the recording to impeach T.L. by proof of her prior inconsistent statement.

{¶ 31} At trial, Blazer argued that he should be allowed to play the tape for the jury pursuant to Evid.R. 613(B), which provides:

“Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

“(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

“(2) The subject matter of the statement is one of the following:

“(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

“* * *”

{¶ 32} During cross-examination, counsel asked T.L., “Did you, in fact, leave a provocative telephone message on Scott’s answering machine in February of ‘09?” T.L. replied, “no.” Counsel then asked, “Did you leave a provocative telephone message on Scott’s answering machine at any time earlier this year.” T.L. again replied, “No.” But counsel did not explain to this teenaged victim what it meant by the word “provocative” or specifically ask T.L. if she left a message telling Blazer that she missed having sex with him. Therefore, we find that the tape was not evidence of a prior inconsistent statement.

{¶ 33} That being said, we do find that the defense should have been allowed to use the tape as impeachment evidence. The trial court’s ruling prevented the defense from presenting T.L. with the statement by playing the tape for her and obviated the necessity of giving the state the opportunity to also examine her on its contents. We also do not find that the contents of the tape pertained to a collateral matter. For example, had the defense asked T.L. if she attended church the previous Sunday and elicited an affirmative answer, no one

would contend that the defense would have been allowed to bring in witnesses to testify that she had not, as her attendance at church was of no relevance to the case.

{¶ 34} Therefore, although we do not find that the tape was evidence of a prior inconsistent statement pursuant to Evid.R. 613(B), the trial court should have allowed the statement into evidence for impeachment purposes.

C. Harmless Error Analysis

{¶ 35} Since we have found that the trial court erred in excluding the tape from evidence, we must next consider whether that error was harmless or if it affected Blazer's substantial rights.

{¶ 36} Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

{¶ 37} Blazer was convicted of rape under R.C. 2907.02(A)(1)(c), which states: "No person shall engage in sexual conduct with another * * * when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired * * *."

{¶ 38} The Ohio Supreme Court has held that substantial impairment must be established by demonstrating a present reduction, diminution, or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct. *State v. Zeh* (1987), 31 Ohio St.3d 99, 103-104, 509 N.E.2d 414. Substantial impairment need not be proven by expert medical testimony; it may be

proven by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct. *Id.* Furthermore, voluntary intoxication is a "mental or physical condition" that could cause substantial impairment under R.C. 2907.02(A)(1)(c). *In re King*, Cuyahoga App. Nos. 79830 and 79755, 2002-Ohio-2313.

{¶ 39} Blazer maintains that the taped message is clearly inconsistent with T.L.'s allegation that she was so impaired that she was incapable of resisting or consenting to sex with Blazer. But consent is not an element of rape under R.C. 2907.02(A)(1)(c). In other words, whether T.L. consented to sexual intercourse with Blazer is not relevant to a finding of rape under R.C. 2907.02(A)(1)(c). All the state was required to show was that T.L.'s *ability* to resist or consent was impaired and the defendant knew or had reasonable cause to believe that her *ability* to resist or consent was substantially impaired. (Emphasis added.)⁴

{¶ 40} T.L., who was 15 at the time of the rape, testified that she and Blazer made drinks, and she drank a quarter bottle of vodka. She stated that after vomiting, she called a friend before falling asleep. After the assault, T.L. called a friend and then fell back to sleep until Blazer later woke her. Blazer admitted T.L. was intoxicated, he acknowledged helping clean up her vomit, and he admitted he

⁴ We note that Blazer did not raise issues of sufficiency or manifest weight of the evidence on appeal; thus, we need not determine if the evidence was sufficient to support his conviction or if the conviction was against the manifest weight of the evidence.

had sexual intercourse with her. Although he denied he personally gave her anything to drink, he admitted he knew she was intoxicated.

{¶ 41} Based on the evidence presented at trial and because the tape recording was not relevant to a finding of guilt under R.C. 2907.02(A)(1)(c), we conclude any error in excluding the tape did not affect Blazer's substantial rights and was therefore harmless. We do note that had Blazer been convicted of rape or gross sexual imposition where an element of the crime was "force or threat of force," our analysis and conclusion based on this harmless error analysis would have been different.

{¶ 42} The first and second assignments of error are overruled.

II. Effective Assistance of Trial Counsel

{¶ 43} In the third assignment of error, Blazer argues he was denied effective assistance of trial counsel.

{¶ 44} "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 the 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.

Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 45} Blazer maintains that counsel was ineffective for not providing the tape to the state in discovery. We note that Blazer argues within the first assignment of error that counsel had a good faith belief that the tape was not discoverable and that is why counsel did not turn the tape over to the state. Within this assignment of error, Blazer wants us to forget his previous argument and find that counsel was indeed ineffective. But actions that “might be considered sound trial strategy” are presumed effective. *Strickland* at 687. “[E]ven ‘debatable trial tactics’ do not ‘constitute a deprivation of the effective assistance of counsel.’” *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189.

{¶ 46} We find that counsel’s decision to save the recording until cross-examination of the victim was an acceptable trial tactic. So although Blazer argues that the outcome of the trial would have been different had the tape recording been allowed into evidence, we conclude that the first prong of the *Strickland* test has not been met. Therefore, we find that Blazer was afforded effective assistance of counsel.

{¶ 47} The third assignment of error is overruled.

III. Trial Court’s Comments

{¶ 48} In the fourth and final assignment of error, Blazer argues that he was denied a fair trial due to the trial court’s inappropriate comments during trial.

{¶ 49} Evid.R. 614(B) provides that “[t]he court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.” “When exercising this duty, a judge must be cognizant of the effect of his or her comments upon the

jury.” *State v. Wade* (1978), 53 Ohio St.2d 182, 373 N.E.2d 1244, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157. Thus, it is incumbent upon the judiciary to remain detached and neutral in any proceeding before it. *State v. Hardy* (Oct. 10, 1997), 11th Dist. No. 96-P-0129. When determining whether or not a trial judge’s comments were appropriate, a reviewing court must decide whether the remarks were prejudicial to a defendant’s right to a fair trial. *Wade* at 188; *Hardy* at ¶¶20-21.

{¶ 50} “Generally, in determining whether a trial judge’s remarks were prejudicial, the courts will adhere to the following rules: (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.” *Wade* at 188.

{¶ 51} In the case at bar, we note that Blazer did not object to the content of any judicial statements as being prejudicial to his constitutional rights. Therefore, we review only for plain error. Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” An appellate court should invoke the plain error doctrine with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Jenks* (1991), 61 Ohio St.3d 259, 282, 574 N.E.2d 492; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804,

paragraph three of the syllabus. Thus, plain error does not exist unless, but for the error, the outcome of the proceeding would have been different. *Jenks* at 282, 574 N.E.2d 492; *Long* at paragraph two of the syllabus.

{¶ 52} Blazer alleges judicial bias with respect to interruptions during Blazer's cross-examination. While our review of the record shows the trial court posed a lot of questions to Blazer, we cannot conclude that the trial court displayed any bias against Blazer. We have reviewed the five *Wade* factors and do not find that Blazer has met his burden of showing that plain error occurred in this case.

{¶ 53} Moreover, we note the trial court admonished the jury to ignore any factual bent attributable to the court by stating "during the course of this trial, if the court said or did anything that you consider an indication on my view of this case, you are instructed to disregard it during your deliberations." See *State v. Djuric*, Cuyahoga App. No. 87745, 2007-Ohio-413, ¶21, appeal not allowed by 114 Ohio St.3d 1481, 2007-Ohio-3699, 870 N.E.2d 733.

{¶ 54} Based on the foregoing, we do not find prejudicial error in the trial court's comments.

The fourth assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., DISSENTS
WITH SEPARATE OPINION

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶ 55} I respectfully dissent. While I agree with the majority's statement that the audio recording at issue should have been admitted for impeachment purposes, I disagree with its conclusion that the exclusion of this recording was harmless error. Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(c), which provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶ 56} " * * *

{¶ 57} “(c) The other person’s ability to resist or consent is substantially impaired because of a mental or physical condition * * *, and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition * * *.”

{¶ 58} According to the majority, the audio recording would have no relevance to whether appellant was guilty of rape. The audio recording at issue presented evidence that, if believed, was relevant to whether T.L. was substantially impaired, and thus unable to consent to sexual activity.

{¶ 59} Accordingly, I would not find that the exclusion of the tape was harmless error. My position in this regard is bolstered by the fact that the jury questioned T.L.’s credibility enough to acquit appellant on all other charges. As such, I would sustain appellant’s second assignment of error and remand this case for a new trial.