

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA6
	:	
v.	:	
	:	
SONNY E. RIFFE,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 11-20-09

APPEARANCES:

Christopher J. Pagan, Middletown, Ohio, for Appellant.

J.B. Collier, Jr., Lawrence County Prosecutor, and Jeffrey M. Smith, Lawrence County Assistant Prosecutor, Ironton, Ohio, for Appellee.

Kline, P.J.:

{¶1} Sonny E. Riffe appeals his rape conviction in the Lawrence County Court of Common Pleas. On appeal, Riffe contends the trial court erred when it permitted the State to amend the indictment because he was then tried for crimes that were not presented to the grand jury. Because the amendment to the indictment changed neither the name nor the identity of the crime, we disagree. Riffe next contends that the evidence introduced at trial is insufficient to support his conviction. We disagree, because after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crime of rape proven beyond a reasonable doubt. Riffe next contends that he was afforded

ineffective assistance of counsel. Because Riffe failed to show that his counsel's performance was deficient, we disagree. Finally, Riffe contends that the cumulative errors of the lower court rendered his trial unfair and unconstitutional. Because Riffe has failed to show multiple errors, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} On November 13, 2007, the Lawrence County Grand Jury indicted Riffe for rape. Specifically, the indictment alleged that, on or about September 29, 2007, Riffe engaged in sexual conduct with the victim in violation of R.C. 2907.02(A)(1)(b). The State moved the court to amend the indictment to show that the rape occurred on or about September 22, 2007 through September 29, 2007. The court granted the same.

{¶3} The nine-year-old victim lived with Riffe, her grandfather, for several years preceding the events that gave rise to the indictment.

{¶4} The victim testified that Riffe would assault her whenever her grandmother left the house. The victim testified that her grandfather had "stuck his finger up in me sometimes, and he put his middle in mine sometimes."

{¶5} The State also produced two experts who testified that the victim's physiology was consistent with an individual who had been the victim of a sexual assault. The victim's cousin and brother both testified that the victim had frequently cried out when the grandmother was out of the house. And the cousin testified that he had seen Riffe and the victim together in various states of undress during the relevant time period.

{¶6} The victim then told Deborah Carmon about the abuse. Carmon is the victim's aunt and Riffe's daughter. Carmon testified that she was estranged from her mother, Riffe's wife, and Carmon worried that people would assume that she had fabricated the accusation as a part of an intra-family squabble. She told the victim to tell someone else whom the victim trusted.

{¶7} The victim then told another aunt, Teresa Riffe, who is Riffe's daughter-in-law. The victim told Teresa on September 30, 2007, and Teresa reported the abuse the next day on October 1, 2007, which was the last day the victim spent at Riffe's home.

{¶8} According to the defense, Carmon convinced the victim, as well as other children, to fabricate the allegations against Riffe. The defense argued that Carmon had been jealous of Riffe's wife (her mother), and that she had wanted to obtain custody of the victim because the victim was a social security beneficiary.

{¶9} The jury found Riffe guilty of rape as charged. The court found the same and sentenced Riffe accordingly.

{¶10} Riffe appeals his rape conviction and asserts the following assignments of error: I. "The court erred in permitting Riffe to be tried for offenses that were never presented or indicted by the grand jury." II. "The evidence was insufficient to convict Riffe of rape." III. "Riffe's counsel was ineffective." And, IV. "Riffe's trial was fundamentally unfair and unconstitutional."

II.

{¶11} Riffe contends in his first assignment of error that the amended indictment was flawed because it violated Section 10, Article 1, of the Ohio Constitution.

{¶12} Riffe failed to object at the trial court, and where a flawed indictment does not lead to multiple, inextricable errors the appropriate analysis is a plain error analysis. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7. Riffe presents no argument that the indictment led to multiple inextricable errors at trial. Therefore, he must demonstrate any error is plain error.

{¶13} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. “Inherent in the rule are three limits placed on reviewing courts for correcting plain error.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. “First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be ‘plain’ within the meaning of Crim.R. 52(B), an error must be an ‘obvious’ defect in the trial proceedings. * * * Third, the error must have affected ‘substantial rights.’ We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.” *Id.* at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (omissions in original). We will notice plain error “only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. And “[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error.” *State v. Hill*, 92 Ohio St.3d 191, 203.

{¶14} Section 10, Article 1, of the Ohio Constitution states, “[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury[.]” This requirement affords the accused adequate notice and an opportunity to defend, and it also enables the accused to protect himself from any future prosecutions for the same offense. *State v. Sellards* (1985), 17 Ohio St.3d 169,

170. The government is required therefore to aver all material facts constituting the essential elements of the offense. *Id.*

{¶15} “Ordinarily, the precise time and date are not essential elements of an offense and the failure to provide specific dates and times in the indictment, in and of itself, is not a basis for dismissal of the charges.” *State v. Murrell* (1991), 72 Ohio App.3d 668, 671-72, citing *Sellards* at 172. Here, of course, the initial indictment did not omit specific dates, instead the indictment contained a specific date, which the court later amended to include an eight day range.

{¶16} “The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.” Crim.R. 7(D). Here, the amendment to the indictment did not change the name of the crime charged. That is, the original indictment and the amended indictment alleged a rape in violation of R.C. 2907.02(A)(1)(b). As such, the only issue remaining is whether the identity of the crime changed. Stated differently, did changing the indictment from alleging the rape occurred “on or about September 29, 2007” to “on or about September 22, 2007 through September 29, 2007[,]” change the identity of the rape offense?

{¶17} Riffe maintains that the amended indictment “improperly charged [him] with new incidents and offenses never contemplated by the grand jury in the original indictment.”

{¶18} Riffe cites several cases in support of his position.

{¶19} After trial, in *State v. Steele*, Vinton App. No. 99CA530, 2001-Ohio-2535, the State conceded that going by the bill of particulars, the defendant's motion for judgment of acquittal should have been granted. According to the bill of particulars, the defendant solicited a minor to engage in sexual activity, and he did so by soliciting one girl to have sex with a second girl. However, there was no evidence introduced at trial in support of this accusation. And in response to the defendant's motion, the State argued that even if there was no evidence in support of the bill of particulars, nonetheless there was evidence that the defendant made other requests that the girls engage in sexual activity for hire on different dates with different sexual partners. This Court held that changing these circumstances changed the identity of the crime. However, we distinguish *Steele*. The amendment proposed by the prosecution in *Steele* changed far more than a simple date range. Further, the amendment conflicted with the bill of particulars that the prosecution had previously provided the defendant.

{¶20} Riffe also cites *State v. Plaster*, 164 Ohio App.3d 750, 2005-Ohio-6770. The State in *Plaster* moved to amend the indictment from alleging the offense occurred "on or about the 22nd day of March 2004" to "between February 1, 2004 and March 31, 2004." *Id.* at ¶3. The *Plaster* Court held that this amendment changed the identity of the crimes charged. *Id.* at ¶44. However, the *Plaster* Court did not consider whether the trial court committed plain error. In any event, we find the Ninth District Court of Appeals case of *State v. Guenther*, Lorain App. No. 05CA008663, 2006-Ohio-767, more persuasive.

{¶21} In *Guenther*, the trial court amended the indictment based on the State's motion in chambers and the defendant failed to object. *Id.* at ¶49. The indictment

charged the defendant with two counts allegedly committed “from December 1, 2001 through December 31, 2001[.]” *Id.* at ¶51. The amended indictment alleged the defendant violated the law in January as well as December. *Id.* at ¶53. The appellate court in *Guenther* overruled the defendant’s assignment of error because he failed to demonstrate any prejudice. *Id.* at ¶50, 54.

{¶22} Similarly, Riffe has failed to demonstrate any prejudice to his defense or that the outcome of his trial would have clearly been different. That is, even if we assume error and further assume that it was plain, Riffe has not demonstrated that the outcome of his trial would have been different absent the error. Like the indictment in *Guenther*, the original indictment charged the offense occurred on *or about* September 29, 2007. Therefore, “[Riffe] could reasonably anticipate that he would have to defend beyond the strict parameters [of that date.]” *Id.* at ¶53. The addition of the preceding week in the amended indictment is a minor addition. Consequently, Riffe has failed to show a manifest miscarriage of justice.

{¶23} Accordingly, we overrule Riffe’s first assignment of error.

III.

{¶24} Riffe contends in his second assignment of error that the evidence introduced at trial is insufficient to support his conviction for rape.

{¶25} When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function “is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶26} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, this test “gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson* at 319. Accordingly, the weight given to the evidence and the credibility of witnesses are issues for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶27} Specifically, Riffe claims that the State failed to produce sufficient evidence of penetration within the time frame of the amended indictment.

{¶28} Here, the State produced two different medical experts who each testified that the victim had suffered injuries consistent with sexual abuse. The victim testified that Riffe had raped her more than once *in the last week she lived with Riffe*. Transcript at 513-14. This corresponds with the date range given in the indictment. Further, a cousin testified that he had seen Riffe and the victim together in various states of undress *including the week referenced in the indictment*. Transcript at 451.

{¶29} Given the preceding testimony, we disagree with Riffe and find that the State introduced sufficient evidence of penetration within the time frame of the amended indictment to sustain the conviction. Consequently, after viewing the evidence in a light

most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crime of rape proven beyond a reasonable doubt.

{¶30} Accordingly, we overrule Riffe's second assignment of error.

IV.

{¶31} Riffe in his third assignment of error contends his trial counsel provided ineffective assistance.

{¶32} "In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness." *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

{¶33} In reviewing the performance of trial counsel, an appellate court must bear in mind that it should "ordinarily refrain from second-guessing strategic decisions

counsel make at trial, even where counsel's trial strategy was questionable." *State v. Rinehart*, Ross App. No. 07CA2983, 2008-Ohio-5770, at ¶50, quoting *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, at ¶152.

{¶34} Riffe contends his attorney provided deficient representation for four reasons. First, his attorney failed to object to the amended indictment "that introduced new offenses not considered by the grand jury[.]" However, we find any error could not have prejudiced Riffe because, as stated above, we find *Guenther* persuasive.

{¶35} Second, Riffe contends his attorney provided deficient representation because he failed to object to other acts evidence from before the time frame in the indictment. Riffe does cite to several portions of the record where various witnesses testified that Riffe had raped the victim prior to the date range charged in the indictment. The State contends the defense made use of the other acts evidence to impeach the credibility of the witnesses.

{¶36} The defense strategy throughout the trial was to demonstrate that Carmon harbored some resentment against Riffe and convinced the victim, the victim's brother, and the victim's cousin to fabricate these charges against Riffe. In order for this strategy to work, the defense needed to discredit the testimony of these three children.

{¶37} According to the defense, the prior acts evidence actually made the three children's testimony less likely to be true, and was in fact a sound reason to disbelieve their testimony. The counsel for the defense several times elicited testimony that Riffe had frequent, unannounced visitors who felt free to simply enter his home. And that under these circumstances, it was very unlikely Riffe could have perpetrated all of the acts he was accused of without one of these individuals seeing him. See Transcript at

720-21. Defense counsel, as a matter of trial strategy, decided to use this evidence to impugn the credibility of the prosecution's witnesses. Apparently, defense counsel believed that if he convinced the jury that the prosecution's witnesses were not credible about the "other acts" evidence, then the jury would not credit their testimony regarding the incidents the indictment specifically named. This is precisely the sort of strategy decision that trial lawyers are entitled to make.

{¶38} Third, Riffe contends that his attorney failed to object to the admission of Riffe's statement regarding Riffe's willingness to undergo a polygraph examination. Riffe apparently offered to take a polygraph examination during his initial police interrogation, and Riffe's counsel elicited this information from the investigating officer during cross examination. Transcript at 373.

{¶39} Again, Riffe's counsel may not have objected to this evidence because he may have concluded that this evidence was useful to the defense. The defense several times stressed the fact that Riffe offered to cooperate in any way the police requested in the course of the investigation. The defense argued this evidence demonstrated that Riffe had nothing to fear from the investigation and that Riffe believed any forensic evidence would exonerate him. As such, we find that this was a reasonable trial strategy.

{¶40} Fourth, Riffe contends his attorney repeatedly failed to object to hearsay evidence during the trial. Riffe points to statements introduced by several prosecution witnesses.

{¶41} Teresa Riffe repeated what the victim had told her about the rape. Riffe's trial counsel in fact objected to the admission, but the prosecution argued that the evidence was not offered for the truth of the matter asserted. Transcript at 125.

{¶42} Carmon also repeated what the victim had told her about the rape. Riffe's counsel again objected to the admission of the hearsay testimony. The prosecution again argued the evidence was not admitted for the truth of the matter asserted. Transcript at 151-52.

{¶43} Riffe also points to the hearsay statement of the victim's aunt contained in the records generated in the course of the victim's first examination for evidence of sexual abuse. The testimony of the examining physician is as follows: "Now there's some commentary on the portion called 'narrative', what is that?"

{¶44} "A. It says 'Client[]s Aunt told her that one was abused by her Grandpa.'"

{¶45} "Q. What is that?"

{¶46} "A. I'm not sure, because this isn't my paper, so I'm not sure." Transcript at 192.

{¶47} In other words, the witness was unwilling to testify how a hearsay statement was recorded.

{¶48} "[T]his was an isolated remark that defense counsel may have reasonably decided to ignore rather than call the jury's attention to it. Counsel is not ineffective for choosing, for tactical reasons, not to pursue every possible trial objection." *State v. Tibbetts*, 92 Ohio St.3d 146, 167-68, 2001-Ohio-132. For a similar reason, we reject Riffe's argument that his counsel was ineffective below for failing to seek a specific jury instruction on the testimony of Carmon and Teresa Riffe. Under the circumstances,

counsel may have chosen not to seek a specific instruction because he did not want to call the jury's attention to the evidence. Again, this is a reasonable trial strategy.

{¶49} A Children Services Investigator also repeated statements of the victim, which the victim gave during her interview. The investigator testified that the victim initially denied any abuse had taken place but later changed her story and admitted that she had been abused. Riffe's counsel did not object the testimony, but instead used the victim's contradictory statements for the purpose of cross examination. Transcript at 223, 268. Riffe's counsel attempted to demonstrate to the jury that the investigator did not follow appropriate procedure and as a result elicited a false accusation from an impressionable child.

{¶50} The victim's cousin testified that the victim would "holler out in pain, 'Get off of me.'" Transcript at 437. Riffe's counsel below did not object to the admission of this evidence. And on appeal, Riffe contends this demonstrates his trial counsel ineffectiveness. Presuming without deciding that this particular statement is an assertion of fact under the rule against hearsay, nonetheless the record demonstrates that the admission of this evidence was a part of the defense counsel's strategy. The cousin indicated that the victim would yell "[m]ostly every time my Grandma would be gone." Id. Riffe's counsel argued this testimony was a reason to disbelieve the cousin's testimony because people would just stop by. Transcript at 721. In other words, Riffe's counsel argued that the cousin's account should not be believed because if it were true other people would have walked in on Riffe's misconduct as well.

{¶51} The testimony of the victim's brother basically agreed with the cousin's. Riffe's counsel again did not object to the admission of this evidence, and he, again,

used the evidence as a part of his trial strategy to attack the credibility of the prosecution's witnesses.

{¶52} After careful review, we find that Riffe has failed to show that his trial counsel's performance was deficient and that his counsel's performance prejudiced him. Riffe's counsel pursued a consistent, logical, and well-thought-out, if ultimately unsuccessful strategy. Consequently, we do not find that Riffe's trial counsel provided him with ineffective assistance.

{¶53} Accordingly, we overrule Riffe's third assignment of error.

V.

{¶54} Riffe contends in his fourth assignment of error that the cumulative errors of the trial court violated his due process rights.

{¶55} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner* (1995), 74 Ohio St.3d 49, 64; *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "If, however, a reviewing court finds no prior instances of error, then the doctrine has no application." *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶108; *State v. Hairston*, Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶41.

{¶56} Here, even if we assume more than one error occurred, see our discussion in assignments of error one and three, we find that these errors did not deprive Riffe of his constitutional right to a fair trial.

{¶57} Accordingly, we overrule Riffe's fourth assignment of error.

VI.

{¶58} Having overruled each of Riffe's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay 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 Lawrence County Common Pleas Court to carry this judgment into execution.

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

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.