[Cite as *State v. Ross*, 2009-Ohio-5366.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92289

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEROME R. ROSS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507705

BEFORE: Celebrezze, J., Gallagher, P.J., and McMonagle, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Jerome Ross, brings this appeal challenging his conviction on two counts of rape, for which he was only sentenced to five years in prison. Appellant argues that the trial court inappropriately accepted his waiver of trial by jury, that his trial counsel was ineffective, and that his conviction was against the manifest weight of the evidence. After a thorough review of the record, and for the following reasons, we affirm appellant's conviction.

{¶ 2} On March 5, 2008, appellant was indicted by a Grand Jury on two counts of rape in violation of R.C. 2907.02(A)(2), two counts of rape in violation of R.C. 2907.02(A)(1)(c), and one count of kidnapping in violation of 2905.01(A)(2). A bench trial commenced on September 22, 2008, which resulted in the trial court finding appellant guilty of two counts of rape in violation of R.C. 2907.02(A)(1)(c). On October 14, 2008, the court sentenced appellant to five years in prison for each count, to be served concurrently.

{¶ 3} Appellant's conviction stems from an incident that took place several years prior to trial, in the summer of 2002, when appellant was approximately 32 years of age. S.H. ("the victim"),[1] testified that during that summer, when she was 15, she was at home in A.V.'s one-bedroom apartment babysitting A.V.'s daughter. A.V. was the victim's appointed

[1] Pursuant to this court's established policy, the identity of the victim is shielded; therefore, she and her family members are referred to only by their initials.

guardian at the time. The victim further testified that on that day, appellant knocked on their door, and she let him into the apartment. Appellant had a bottle of Apple Pucker, and she and appellant began drinking together. The victim testified that she and appellant would often drink together at an apartment upstairs rented by a mutual friend. The victim became extremely intoxicated to the point where she was "falling down drunk."

{¶ 4} The victim testified that upon going into the bedroom to answer a telephone call, she passed out on the bed. When she awoke, appellant was performing oral sex on her. She testified that she screamed and tried to resist, but appellant pinned her arms above her head and she again passed out. She testified that upon waking the second time, she found herself on the floor of the bedroom next to the bed with appellant having vaginal intercourse with her. She again screamed and tried to fight off appellant unsuccessfully. The victim testified that appellant threw a 20-dollar bill at her, told her to take her boyfriend to the movies, then he left the apartment.

{¶ 5} A.V., the victim's guardian, testified that upon arriving home that night, she found the door locked with the security chain, and she was unable to get into the apartment. After pounding on the door for several minutes, the victim finally removed the chain so A.V. could enter. A.V. further testified that the victim was wearing only a T-shirt and panties and that her pants were in A.V.'s bedroom. A.V. also testified that the house smelled

strongly of alcohol. The victim was unable to answer questions due to her intoxication at that time. A.V. testified that the next day, she and the victim had a "tussle" about what had happened the prior evening. A.V. found a condom wrapper in her bedroom. The victim testified that she remembered a condom box like that had been distributed at "the free clinic."

{¶ 6} According to the testimony of both the victim and A.V., the next day, A.V., her boyfriend, her daughter, and the victim went to appellant's apartment and asked him what had occurred the previous day. Their testimony was consistent in regard to appellant denying that he "forced" the victim to have sex with him or that he was even in the apartment. A.V. testified that the victim did not tell her appellant raped her until a year later, while the victim testified that she told A.V. the day after the incident that appellant had raped her.

{¶ 7} A.V. reported the incident to children's services, but not in a way that would lead them to believe the victim had been raped, only that the victim was being unruly by drinking and having sex in A.V.'s apartment. Nothing further was done until a year later, when A.V. was trying to rid herself of custody of the victim. In an interview with a Cuyahoga County Department of Child and Family Services case worker, A.V. testified she was told that she must report the rape to the police, that she could not ignore such an accusation. A.V. testified that she and the victim went to the Euclid

Police Department, and both made statements. The case did not result in an arrest at that time.

{¶ 8} In 2007, the victim was attending college and taking a sociology class that dealt with rape. She decided to contact the Euclid Police Department to see if anything had been done on her case. She contacted Detective Kucinski, and in November 2007, Detective Kucinski reviewed the victim's prior statement and asked her to give another statement. Detective Kucinski reopened the investigation, which led to appellant's arrest and indictment.

{¶ 9} Appellant now appeals his conviction citing three errors:

{¶ 10} "I. "Defendant's waiver of a trial by jury was not knowingly and intelligently made."

{¶ 11} "II. "Defendant was deprived a fair trial due to ineffective assistance of counsel."

{¶ 12} "III. "The court decision was against the manifest weight of the evidence."

Law and Analysis

Invalid Waiver of Right to Trial By Jury

{¶ 13} Appellant's first assignment of error alleges that the waiver of trial by jury was improperly accepted by the trial court because the waiver was not knowingly and intelligently made. Appellant cites to the fact that

trial counsel did not explain to him the ramifications of his decision to waive this right.

{¶ 14} In order for the trial court to accept a waiver of trial by jury, the waiver must be voluntary, knowing, and intelligently made. *State v. Ruppert* (1978), 54 Ohio St.2d 263, 375 N.E.2d 1250. R.C. 2945.05 states that "the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof." This section goes on to require that "[s]uch waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel."

{¶ 15} Crim.R. 23 also requires that any waiver of a defendant's right to a trial by jury be "knowingly, intelligently, and voluntarily [made] in writing * * *. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney." These provisions combine to delineate what is required in order for a court to accept a valid waiver of trial by jury. If these rules are complied with and "if the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made." *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, at

¶37, citing *Adams v. U.S. ex rel. McCann* (1942), 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268.

{¶ 16} It appears from the record that appellant did not discuss his decision to waive trial by jury with his counsel and instead relied on discussions with others. Appellant stated that he believed the judge knew the law better than "12 other people from the street." The trial court discussed with appellant at length the reasons why appellant believed he would be better served by a bench trial, informed him of the unanimity requirement of a jury trial, warned him of her reputation as a tough judge, gave appellant ample opportunity to discuss his decision with counsel, and all but told him not to waive the jury.

{¶ 17} "There is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel." *State v. Jells* (1990), 53 Ohio St.3d 22, 25-26, 559 N.E.2d 464.

{¶ 18} The trial judge went beyond what is required in Ohio for a valid waiver; therefore, appellant's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 19} 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, 102 S.Ct. 2211, 72 L.Ed.2d 652; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 20} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 21} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57

L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *.

{¶ 22} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 (101 S.Ct. 665, 667-68, 66 L.Ed.2d 5640 (1981).' *Strickland*, supra, 466 U.S. 668, at 691, 104 S.Ct. at 2068. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland*, supra, at 694. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley*, supra, at 142.

{¶ 23} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at 143.

{¶ 24} Appellant points to several aspects of trial counsel's performance that he believes resulted in prejudice to him. First, he cites counsel's failure to instruct him on the implications of waiving a jury trial. Appellant was given the opportunity to consult with counsel about this matter and declined to do so. Appellant then made clear his reasons for choosing a bench trial. Those reasons satisfied the trial court as well as appellant's trial counsel. Trial counsel was not ineffective in counseling appellant about his decision to forego a jury trial because appellant did not want his advice.

{¶ 25} Appellant also claims that trial counsel failed to request or participate in in camera reviews of statements by prosecution witnesses and failed to cross-examine witnesses regarding inconsistencies. Appellant specifically alleges that trial counsel should have requested in camera reviews of the written statements of Detective Kucinski and the victim and cross-examined them on inconsistencies.

{¶ 26} Trial counsel did cross-examine these individuals about inconsistencies. In fact, trial counsel questioned the victim at length about inconsistencies in her testimony and prior statements. The record further indicates that trial counsel did review the prior statements before cross-examining the victim and did highlight for the court inconsistencies between those statements and her testimony at trial. Appellant cites to instances of inconsistent testimony that were not brought to the court's

attention. This court is unconvinced that these inconsistencies, in light of other questions trial counsel did ask, would have led the trial court to doubt the victim's testimony.

{¶ 27} Appellant also argues that trial counsel was prejudicially deficient by waiving closing arguments. The Ohio Supreme Court has found that "debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶101, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶45; *State v. Campbell*, 90 Ohio St.3d 320, 339, 2000-Ohio-183, 738 N.E.2d 1178. Here, the decision to waive closing arguments was a valid trial tactic. Appellant argues that had trial counsel highlighted inconsistences in the victim's testimony, the trial court would not have found her testimony credible. Even if trial counsel had highlighted these inconsistencies in closing arguments, appellant has presented no evidence that this would have made the outcome of the trial any different. The waiver of closing arguments does not automatically constitute ineffective assistance of counsel. *State v. Burke*, 73 Ohio St.3d 399, 404-405, 1995-Ohio-290, 653 N.E.2d 242.

{¶ 28} The judge found the victim's testimony credible even with the inconsistencies drawn out on cross-examination by trial counsel. A few more inconsistencies, which did not bear directly on the prosecution's case, do not convince this court that appellant was prejudiced by the alleged errors he

argues were made by trial counsel. Trial counsel's decision to forego closing argument is a valid trial tactic when the prosecution has the opportunity to highlight, in graphic detail, appellant's actions constituting the elements of rape that occurred that summer day in 2002. Rather than let the prosecutor make the last statement in the case, trial counsel made a tactical decision that would allow appellant's testimony to be the last thing the trial court would hear. This is a valid tactical decision. Appellant's second assignment of error is overruled.

Manifest Weight

{¶ 29} Finally, appellant argues that his conviction is against the manifest weight of the evidence. 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: "There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. * * * See *Tibbs v. Florida* (1982), 457 U.S. 31, 38,

42[.]" *Martin*, supra, at 175. Moreover, the weight of the evidence and credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *State v. Martin*, supra.

{¶ 30} Appellant was convicted on the testimony of the victim. The trial court found the victim's testimony credible and the testimony of appellant not so. The trier of fact is in the best position to determine the credibility of witnesses. *DeHass*, supra.

{¶ 31} Appellant was convicted of two counts of rape in violation of R.C. 2907.02(A)(1)(c). This section makes it unlawful for one to engage in sexual conduct when "[t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, 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 or because of advanced age." The victim's testimony established that it was apparent she was intoxicated to the point where she was "falling down drunk"; that appellant supplied the alcohol that caused her inebriation; that she "passed out"; and that appellant engaged in sexual conduct with her while she was in and out of consciousness.

{¶ 32} The victim's testimony met all the elements of the crimes for which appellant was convicted, and other testimony corroborated her testimony. Specifically, A.V. testified that the victim was extremely intoxicated on that day, and both testified that the remains of a condom package were found in the bedroom. Although the testimony of the victim also established the elements of rape in violation of R.C. 2907.02(A)(2), the trial court did not find appellant guilty of these two counts because there was no corroborating testimony to establish forcible sexual conduct, a required element of this crime.

{¶ 33} The trial court did not "lose its way" in convicting appellant of two counts of rape. Evidence was adduced at trial that two separate sexual acts took place where appellant, who provided alcohol to the minor child, knew or had reason to know that the victim's ability to resist or consent was substantially impaired due to her intoxication. Appellant's third assignment of error is overruled.

{¶ 34} Finding no merit to any of appellant's assigned errors, this court affirms appellant's conviction.

It is ordered that appellee recover from 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.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR