

[Cite as *State v. Boynton*, 2010-Ohio-3506.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93463

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE BOYNTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498233

BEFORE: Rocco, P.J., Blackmon, J., and Dyke, J.

RELEASED AND JOURNALIZED: July 29, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Andre Boynton appeals from his conviction after a jury found him guilty of gross sexual imposition.

{¶ 2} Boynton presents six assignments of error. He claims: 1) his trial counsel provided ineffective assistance; 2) the trial court imposed an excessive sentence because it was influenced by its own improper decision to allow into evidence irrelevant and prejudicial photographs; 3) his conviction is not supported by sufficient evidence; 4) his conviction is against the manifest weight of the evidence; 5) he was denied his right to a speedy trial; and 6) cumulative error compels the reversal of his conviction.

{¶ 3} After a review of the record, this court cannot find any of Boynton's claims to have merit. Consequently, his conviction is affirmed.

{¶ 4} Boynton's conviction results from an incident that occurred on the afternoon of April 30, 2007. The victim, J,¹ who was fourteen years old, provided the following account of the incident.

{¶ 5} Upon her release from school, she began to walk home, and she heard someone calling to her from a car that was proceeding in the same direction. The person, whom she later identified as Boynton, asked if she would let him take some pictures of her. She refused to respond.

{¶ 6} Boynton then made a U-turn so that the passenger side of his car was next to her. He exited, ran around the car, grabbed her around the waist and, despite her protests, physically put her in the rear passenger seat. He then returned to the driver's seat and proceeded. J's efforts to either roll down the window or open the door proved unsuccessful, so she made note of where Boynton eventually took her, i.e., a house located on East 83rd Street near Quincy Avenue.

{¶ 7} Boynton opened up the rear passenger door and pulled J into the house by her wrist. As she entered, she saw two young women sitting in the

¹It is this court's policy to protect the privacy of victims of sexual assault.

living room. They simply watched as Boynton took J upstairs, into a bedroom, and shut the door.

{¶ 8} Boynton showed a digital camera to J. Placing some photographs of naked women on the display screen, he once again asked J if she would pose for him; he told her he would pay her.

{¶ 9} Although J responded negatively, Boynton began trying to remove J's shirt. Boynton touched her breast when he got J's shirt to her chest area. J resisted, pushing his hands away. They wrestled until J managed to put Boynton off balance and fled the room.

{¶ 10} J ran downstairs and outside, intending to go home on foot. After she had traveled a short distance, however, Boynton drove his car up to her and told her she did not have to walk home. J noticed that the two young women she saw earlier were inside the car. When J hesitated, Boynton got out and escorted her into his car. He then drove her to a place near her original location, where he allowed her to exit before he drove away. J immediately proceeded to a neighbor's house to use a telephone to call her mother.

{¶ 11} J's mother was on her way home from work; at trial, she described J's demeanor during the call as "hysterical." After hearing J's story, her mother told J to go to Hattie Dunn's apartment; Dunn occasionally acted as a child care provider to the family.

{¶ 12} Dunn testified she had just arrived home when J appeared at her door. J was “crying.” When Dunn questioned J about what happened to her, J said that a man “forced [her] into the car,” drove her “someplace on Quincy,” indicated he wanted “pictures,” and “took her blouse off and fondled her * * *.” Dunn called the police.

{¶ 13} By the time the police arrived, J’s mother was at Dunn’s apartment. Since J indicated she could find the house where she had been taken, the officers put J and her mother into their cruiser and drove to the area, where J pointed out the house located at 2457 East 83rd Street. The officers’ efforts to contact someone inside proved fruitless.

{¶ 14} However, when the officers returned J and her mother to their apartment complex, a witness provided some information to the officers about the car that dropped J off. The officers included that information in their report, then turned the matter over to the detective bureau.

{¶ 15} Det. Robert Ford was assigned to the case. Based upon the information he obtained, he assembled a photographic array and presented it to J. J chose Boynton’s photo; J identified Boynton as the man who took her to the house on East 83rd Street. The record reflects Boynton was arrested on May 17, 2007.

{¶ 16} Ford executed a search warrant for the house on East 83rd Street on May 24, 2007. He found several items of mail addressed to Boynton, a digital

camera similar to the one J described, and numerous photographs of naked women.

{¶ 17} Boynton was indicted in this case on July 10, 2007. He was charged with two counts: 1) kidnapping, with a notice of prior conviction, a sexual motivation specification, and a repeat violent offender specification; and, 2) gross sexual imposition. Boynton pleaded not guilty to the charges and was assigned counsel to represent him.

{¶ 18} On July 27, 2007, defense counsel filed motions for discovery from the state. The record reflects defense counsel thereafter also requested several continuances of the matter for purposes of obtaining additional discovery.

{¶ 19} On August 29, 2007, the state provided “DNA and medical reports” to the defense, and the trial court ordered the state to “notify court and counsel by 9/24/07 which [of Boynton’s] case[s] it intends to try first.” Thus, although trial in this case originally was set for October 15, 2007, it was “rescheduled for 10/29/2007 * * * at the request of the defendant.”

{¶ 20} On October 29, 2007, however, trial was rescheduled for January 14, 2008 due to ongoing discovery and to resolve pending motions. On November 30, 2007, the defense informed the trial court that it would receive the results of an independent DNA analysis “next week”; trial remained set for January 14, 2008.

{¶ 21} On January 14, 2008, the trial court issued a journal entry noting that trial was “rescheduled for 1/28/2008 * * * at the request of defendant”; trial in this case was to follow the completion of trial in another of Boynton’s cases.

{¶ 22} On January 28, 2008, however, another journal entry issued, indicating that due to ongoing plea negotiations, trial was rescheduled at defendant’s request for March 17, 2008.

{¶ 23} On March 17, 2008, defendant once again requested trial to be rescheduled, this time for April 28, 2008. The record reflects the state requested a two-day continuance from that date, until April 30, because the prosecutor was engaged in another courtroom.

{¶ 24} On April 30, 2008, both parties requested a continuance because they were “engaged in trial in various courtrooms and unavailable.” The trial court set a “final pretrial” for May 20, 2008 “to set a new trial date.” On May 20, 2008, “at the request of the defendant,” trial was set for June 9, 2008.

{¶ 25} On June 9, 2008, the trial court issued a journal entry that noted that trial was “rescheduled for June 23, 2008 * * * at the request of defendant” because Boynton’s attorney was engaged in another trial. On June 23, 2008, the defense requested yet another continuance to July 7, 2008.

{¶ 26} The court’s docket reflects “trial did not proceed,” however, because defense counsel was engaged in defending Boynton at trial in two other cases.

On August 21, 2008, the trial court acceded to “defendant’s request” for trial to commence on October 20, 2008.

{¶ 27} On October 20, 2008, defendant requested a continuance until December 8, 2008. On November 24, 2008, Boynton’s new defense counsel filed a notice of appearance in the case, along with motions for discovery.

{¶ 28} On December 8, 2008, trial was set for February 9, 2009 “at the request of defendant.” The state filed motions for discovery on December 10, 2008.

{¶ 29} On January 16, 2009, new defense counsel requested a referral for his client to the court’s psychiatric clinic for “competency/sanity evaluations.” The court granted his request. The evaluations were completed by February 9, 2009, at which time the defense stipulated to the clinic’s findings and asked that trial be set for April 6, 2009. The court granted the request, but admonished defense counsel to reply to the state’s discovery requests.

{¶ 30} On March 12, 2009, acting pro se, Boynton filed a motion to disqualify the trial judge. The motion was sent to the Ohio Supreme Court for a decision. In the meantime, on April 6, 2009, acting pro se, Boynton filed in the trial court a motion to dismiss his case “for lack of speedy trial.”

{¶ 31} On April 7, 2009, upon the supreme court’s denial of Boynton’s motion to disqualify, the trial court called the case for trial. Boynton’s motion to dismiss the case was denied. At the conclusion of the state’s case-in-chief,

however, the trial court dismissed a portion of the language of the indictment on count one. Boynton then presented the testimony of his friend, Anika George.

{¶ 32} George stated that although Boynton was attempting to set up a “modeling” business, he did not take the photographs the police discovered during the search of her home. She admitted that Boynton had a key to her home and could have used it while she was at work.

{¶ 33} After evaluating the evidence, the jury found Boynton not guilty of kidnapping, but guilty of gross sexual imposition. The trial court imposed a prison sentence of eighteen months.²

{¶ 34} Boynton appeals from his conviction and the sentence imposed with the following assignments of error; they are set forth verbatim.

{¶ 35} “I. That the defendant was deprived of his constitutional rights under the Ohio and United States Constitution for effective assistance of counsel as the actions of his trial counsel so departs from the standard applicable as to deprive the defendant-appellant of his right to effective assistance of counsel.

{¶ 36} “II. A. The trial court abused its discretion when it admitted State’s exhibits 8, 9, and 10.

²The trial court gave Boynton “jail credit” for “355 days.”

{¶ 37} **B. Trial court abused its discretion when it sentenced the defendant to the maximum term of incarceration by law.**

{¶ 38} **“III. Defendant-appellant asserts that his conviction is against the sufficiency of the evidence.**

{¶ 39} **“IV. Defendant-appellant asserts that his jury verdict is against the manifest weight of the evidence.**

{¶ 40} **“V. Defendant-appellant contends that the trial court denied his statutory and constitutional rights to a speedy trial.**

{¶ 41} **“VI. ‘The cumulative error committed in this present case denied defendant-appellant his right to a fair trial.’”**

{¶ 42} Boynton first argues that his trial attorney rendered constitutionally ineffective assistance in failing to respond in a timely manner to the state’s discovery requests. Boynton contends counsel’s neglect prevented him from fully cross-examining J because the trial court excluded the evidence on that basis.³ This court finds Boynton’s argument disingenuous. The record completely belies his contention.

{¶ 43} During his cross-examination of J, defense counsel informed the trial court of his intent on cross-examination to introduce a recent tape-recording that

³In addressing this assignment of error, this court notes that appellate counsel did not comply with App.R. 16(A)(7), since his argument does not contain correct citations to the “parts of the record” on which he relies.

his investigator made while speaking with her. The trial court indicated displeasure with its late disclosure, but did not reject counsel's request to consider it. Instead, the trial court listened to the recording. The court then stated:

{¶ 44} “* * * I have now listened to the tape * * *.

{¶ 45} “* * * [W]e don't know what episode [your investigator was] talking about. Okay? There were other things being discussed. You don't have [J] squarely being asked: When you were abducted off of Martin Luther King [Boulevard], was there anyone [else] in the car?”

{¶ 46} Based upon its analysis of the questions, the trial court concluded no inconsistency existed between J's direct testimony and her tape-recorded description. Crim.R. 16(B)(1)(g). It was on this ground that the trial court limited Boynton's cross-examination of J, not defense counsel's performance.

{¶ 47} Defense counsel's diligence in this case succeeded in securing his client's acquittal on the very serious charge of kidnapping. Thus, Boynton cannot demonstrate counsel provided ineffective assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Under these circumstances, Boynton's argument has no basis, and his first assignment of error is overruled.

{¶ 48} In his next assignment of error, Boynton apparently asserts that the trial court improperly allowed into evidence numerous photographs of naked women that Det. Ford found in the East 83rd Street house, and that these

photographs, in turn, in addition to his pro se motions, led the trial court to impose the maximum sentence.

{¶ 49} This court declines to address Boynton's assertion regarding the admission of the photographs into evidence because he presents no authority to support it as required by App.R. 16(A)(7). App.R. 12(A)(2).

{¶ 50} With respect to Boynton's claim that the trial court's decision to impose the maximum sentence somehow was "vindictive," the record fails to demonstrate the trial court's decision was based upon anything but appropriate sentencing considerations. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶ 51} Consequently, Boynton's second assignment of error also is overruled.

{¶ 52} Boynton argues in his third and fourth assignments of error that the state failed to present sufficient evidence to sustain his conviction and that his conviction is not supported by the manifest weight of the evidence. In essence, he contends that J's story was unbelievable.

{¶ 53} In reviewing for sufficiency, it is this court's duty to determine whether the state met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. A sufficiency challenge raises a question of law; thus, this court does not determine whether the state's evidence is to be believed, but instead determines whether the evidence supports

a conviction against the defendant. *Id.* 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 54} With respect to a challenge to the manifest weight of the evidence, the question to be answered is whether the record contains substantial evidence upon which a jury reasonably could conclude that all the elements of the crime have been proved beyond a reasonable doubt. *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229. To answer that question, this court examines the entire record to determine whether 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.* This court remains mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the jury to assess. *State v. Tenance*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386.

{¶ 55} J testified that Boynton showed her photographs of naked women on his digital camera, asked her to pose for him, and, despite her refusal and her efforts to prevent his action, began to take her shirt off, touching her on her breast as he did so. From this evidence, any rational juror could have found the state

proved all the elements of the crime of gross sexual imposition. *State v. Rosario*, Cuyahoga App. No. 89770, 2008-Ohio-3804.

{¶ 56} Moreover, since J's story was corroborated by the testimony of her mother, Dunn, and other evidence in the record, the jury acted within its prerogative to find it credible. George's testimony did not serve to undermine J's version of the incident. *State v. Welch*, Cuyahoga App. No. 93035, 2010-Ohio-1206.

{¶ 57} Since Boynton's conviction, therefore, was supported by sufficient evidence and by the manifest weight of the evidence, his third and fourth assignments of error also are overruled.

{¶ 58} Boynton claims in his fifth assignment of error that the trial court violated his right to a speedy trial. He insinuates that the simple fact that the trial itself took place nearly two years after his arrest is enough to prove his claim; he fails to provide this court with any specific calculations to support his argument.

{¶ 59} As this court demonstrated in its recitation of the entire factual background of this case, it was not the trial court that extended the proceedings, but, rather, Boynton himself. Boynton extended the time of his trial when he participated in lengthy discovery and in ongoing plea negotiations, made many requests to reschedule the trial date, replaced his trial attorney, sought referral to the psychiatric clinic, and then filed a motion to remove the judge. R.C. 2945.72(H); *State v. Banks* (Mar. 24, 1988), Franklin App. Nos. 87AP-842-844.

Moreover, the record reflects Boynton had been indicted in several other cases during the time this case was pending, further complicating the trial court's efforts to move the proceedings to a conclusion.

{¶ 60} Since the record reflects Boynton was responsible for the length of time it took to bring this case to trial, his fifth assignment of error also is overruled.

{¶ 61} Boynton lastly asserts that "cumulative error" compels reversal of his conviction. Because this court, in resolving Boynton's previous assignments of error, found no error occurred, his sixth assignment of error also fails.

{¶ 62} Boynton's conviction and sentence are affirmed.

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.

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANN DYKE, J., CONCUR

