

[Cite as *State v. Boynton*, 2010-Ohio-4670.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93784

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-511811

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

RELEASED AND JOURNALIZED: September 30, 2010

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Andre Boynton, appeals from his convictions for rape with sexually violent predator and repeat violent sexual offender specifications, kidnapping, intimidation, and failure to comply. In seven assignments of error, Boynton complains about his sentence, the performance of trial counsel, the evidence, and juror misconduct. We find no error and affirm.

{¶ 2} Boynton first argues that the court abused its discretion by holding a sexually violent predator/repeat violent offender specification hearing when he was not “an offender as the legislature intended * * *.” He maintains that he had not been previously convicted of a sexually violent offense as a predicate for the specifications.

{¶ 3} The state correctly notes that Boynton’s argument is premised on a superseded version of R.C. 2971.03(A). Former R.C. 2971.03(A) stated that a sexually violent predator specification enhances the sentence of a defendant “who is convicted of or pleads guilty to a sexually violent offense and who also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment * * *.” In *State v. Smith*, 104 Ohio St.3d 106, 107, 2004-Ohio-6238, 818 N.E.2d 283, the syllabus states: “R.C. 2971.01(H)(1) requires that only a conviction that existed prior to the indictment of the underlying offense can be used to support the specification.”

{¶ 4} The General Assembly amended R.C. 2971.03 in light of the *Smith* decision “to clarify that the Sexually Violent Predator Sentencing Law does not require that an offender have a prior conviction of a sexually violent offense in order to be sentenced under that Law[.]” See 2004 Ohio Laws File 163 (Am.Sub.H.B. 473); *State v. Wagers*, 12th Dist. No. CA2009-06-018, 2010-Ohio-2311, at ¶30.

{¶ 5} The current version of R.C. 2971.03(A) states that the court “shall impose a sentence upon a person who is convicted of or pleads guilty to a violent sex offense and who also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense * * *.” This version of the statute thus allows an offender to be classified and sentenced as a sexually violent predator based on the conviction of the underlying offense contained in the indictment. *Id.* at ¶31, citing *State v. Hardges*, Summit App. No. 24175, 2008-Ohio-5567.

{¶ 6} Boynton’s indictment contained a sexually violent predator/repeat violent offender specification in language used by the former version of R.C. 2971.03 — it cited to a former conviction as a basis for the specification. The court recognized this error and stated that the language detailing the former conviction was “superfluous” and “just doesn’t matter.” By rejecting the wording of the indictment, the court effected a permissible amendment under Crim.R. 7(D) because the specification was imperfect and the deletion of extraneous language relating to a prior conviction did not change the name or identity of the crime charged. Under the current version of R.C. 2971.03, Boynton could be found guilty of the specification without reference to any prior conviction, so deletion of language relating to an alleged prior offense had no prejudicial effect.

II

{¶ 7} The second assignment of error complains that the court abused its discretion by sentencing Boynton to the maximum term of incarceration allowed by law. He argues that the length of sentence was the product of vindictiveness motivated by a post-trial, presentence affidavit of prejudice seeking removal of the trial judge.

{¶ 8} Prior to trial, Boynton waived his right to a jury on the repeat violent offender and sexually violent predator specifications. The court bifurcated trial on the specifications and stayed the matter pending resolution of the counts submitted to the jury. The court also decided to wait for the resolution of unrelated trials Boynton had in other criminal cases before conducting trial on the specifications. After the jury had returned its guilty verdicts, but before the court conducted a trial on the specifications, Boynton filed his pro se affidavit of prejudice seeking removal of the trial judge. The motion argued that the trial judge acted prejudicially when responding to alleged juror misconduct (that misconduct is the subject of Boynton's third assignment of error); by failing to allow the jury to consider a lesser included offense; and by refusing to dismiss the specifications as argued in the first assignment of error. Boynton also appeared to claim that the trial judge, who lived near him, had found him guilty in order to "police" the neighborhood to "ensure that Defendant will never see freedom on the

streets again.” The chief justice of the Ohio Supreme Court denied the affidavit of prejudice. The chief justice likewise denied Boynton’s request to reconsider his decision not to remove the trial judge.

{¶ 9} To the extent that Boynton argues that the court failed to state reasons to justify the length of the sentences imposed, we reject that argument. “The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus. We analyze prison terms only to ensure compliance with the sentencing statutes and, if compliant, whether the sentence is an abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶4.

{¶ 10} The jury found Boynton guilty of committing rape in violation of R.C. 2907.02(A)(2). The court separately found Boynton guilty of the repeat violent offender and sexually violent predator specifications. Pursuant to R.C. 2971.03(A)(3)(d)(ii), the court was obligated to sentence Boynton to an “indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment.” The court sentenced Boynton to a term of ten years to life on the rape count, the minimum term available with the specifications, and ordered that it be served

consecutive to a five-year sentence in count 5. The sentences on the remaining counts were ordered to be served concurrently for a net sentence of 15 years to life in prison. These sentences were plainly within the permissible range allowed by law.

{¶ 11} We likewise find that Boynton offers no basis from which we could conclude that vindictiveness caused by the filing of an affidavit of prejudice caused the court to abuse its discretion in ordering sentence. Boynton's criminal history justified the length of his sentence wholly apart from any allegations of vindictiveness. During sentencing, the court detailed Boynton's criminal history, noting that he was convicted of a sexually-oriented offense in 1994. Three months after his release from prison in 1995, he committed an aggravated robbery and was sentenced to a term of ten to 25 years in prison. He was released from prison in April 2005 and began committing more sexually-oriented offenses in December 2006. This criminal history justified the length of the sentence imposed in this case — a sentence that did not approach the maximum allowed by law.

{¶ 12} We conclude that Boynton's sentence was not the product of vindictiveness resulting from the filing of an affidavit of prejudice, but from Boynton's lengthy history of criminal conduct and the need to protect the public from future crimes. There being no evidence to suggest that the

affidavit of prejudice had any impact on the court's sentencing decision, we find that the court did not abuse its discretion when imposing sentence.

III

{¶ 13} Boynton next argues that the court abused its discretion by refusing to grant a mistrial on grounds of juror misconduct when, during jury deliberations, the court learned that a juror had read the Revised Code and felt "that it does not match the instructions given to the jury."

{¶ 14} Allegations of juror misconduct raise constitutional concerns under the Sixth Amendment's guarantee of an "impartial jury." See Section 10, Article I, Ohio Constitution (establishing the right to "a speedy public trial by an impartial jury"). But a new trial on grounds of juror misconduct will only be granted if the misconduct materially affected the substantial rights of the defendant. *State v. Lewis* (1993), 67 Ohio St.3d 200, 207, 616 N.E.2d 921. This requires the defendant to show prejudice resulting from the misconduct. *State v. Kehn* (1977), 50 Ohio St.2d 11, 19, 361 N.E.2d 1330.

We defer to the court's discretion in investigating and dealing with claims of alleged misconduct because the trial judge is in the best position to determine the nature and extent of any alleged misconduct. *State v. Huertas* (1990), 51 Ohio St.3d 22, 29, 553 N.E.2d 1058.

{¶ 15} During jury deliberations, the foreperson sent the court a note stating:

{¶ 16} “One of the jurors has read the Ohio Revised Code and feels it does not match the instructions given to the jury. Please advise us on how to proceed. Is it possible to get a copy of the Ohio Revised Code definition of rape?”

{¶ 17} The court informed the parties and proposed to bring the jury back into the courtroom and have them cease deliberations. It would then ask the foreperson to identify the juror in question, identify the issue that juror had with the instruction, and finally ask the foreperson to detail the extent of the conversation on the matter. When later clarifying the record, the court allowed defense counsel to make the following statement about the court’s proposed procedure: “And I specifically stated that without waiving any of my client’s rights with regard to requesting a mistrial, I wasn’t going to object to the court’s procedure.”

{¶ 18} The foreperson identified the juror and said that he told the jury that the wording of the instruction was apparently “different” from that of the statute and that he wanted to have the “real” definition. The other jurors believed that they should base their decision on the definitions provided by the court’s jury instructions, so the juror in question “felt like if that was your instruction, that was fine, but without that direct instruction he wanted the legal wording.” The court then brought in the jury and told it that it and counsel had reviewed the instructions and were convinced that the jury had

been correctly instructed on the applicable law. The court also reminded the jurors that they had taken an oath to follow the legal instructions provided by the court. The court then adjourned to chambers and individually questioned each juror as to whether they could follow the legal instructions provided by the court. The juror in question told the court that he could lay aside any question about the accuracy of the jury instructions and assured the court that he would follow those instructions. The other jurors responded in a like manner. At the conclusion of the individual voir dire, Boynton asked the court to declare a mistrial. The court denied the motion.

{¶ 19} The court's actions in response to the juror's question for clarification of the jury instructions convinces us that it did not abuse its discretion by denying the motion for a mistrial. We presume that a jury will follow the instructions of the trial court, *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶93, and all of the jurors specifically reaffirmed their intention to follow the court's instructions during their individual voir dire. Nothing in the record suggests that they did otherwise.

{¶ 20} We also note the absence of any objection from Boynton on the procedure employed by the court. In off-the-record conversations later memorialized on the record, defense counsel said he was "acquiescing in the Court's procedure and not waiving any objection to it." It is unclear how Boynton could hope to do so — tacit or implied assent to the court's procedure

for investigating juror misconduct would necessarily rule out any later objection to that procedure. But even if counsel could acquiesce to the procedure and still reserve the right to object, Boynton offered no plausible grounds for the mistrial. He could only say that the juror's independent research "permeated" and "tainted" the jury. Against this objection was the unanimous affirmation by the jurors of their oath to follow the court's instructions. Boynton offers nothing from which we could find that the jurors disregarded the court's instructions. There is no evidence of prejudice.

IV

{¶ 21} The fourth assignment of error raises two issues of ineffective assistance of counsel: counsel's failure to respond timely to the state's motion for discovery and counsel's failure to ensure Boynton's competency for trial.

A

{¶ 22} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant'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. This analysis requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense

counsel's essential duties to his client[.]” *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Second, we determine whether “the defense was prejudiced by counsel’s ineffectiveness.” *Bradley*, 42 Ohio St.3d at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at paragraph three of the syllabus.

B

{¶ 23} Boynton first argues that defense counsel was ineffective by failing to respond to the state’s request for discovery, thus barring him from submitting the results of independent DNA testing.

{¶ 24} The record in this case does not show that the state demanded discovery, so counsel could not have failed to respond to any demand for discovery.

{¶ 25} In any event, defense counsel stated on the record that “[w]e did have an independent test of the DNA. We will not be presenting any evidence with regard to that.” Counsel’s refusal to use the results of independent DNA testing suggests that those results would not have been helpful to the defense. That was a strategic decision that an appellate court

is not in a position to second-guess because debatable trial tactics will not form a basis for proving ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, at ¶45.

C

{¶ 26} The next argument is that counsel should have requested a competency evaluation to determine Boynton's fitness to stand trial. Boynton claims "it is a fact" that he suffers from bipolar disorder and therefore could not assist defense counsel with trial preparations.

{¶ 27} Competency to stand trial is determined by whether the defendant "has 'sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding' and a 'rational as well as a factual understanding of the proceeding against him.'" *Godinez v. Moran* (1993), 509 U.S. 397, 391, 113 S.Ct. 2680, quoting *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788.

{¶ 28} There is nothing in the record of this case to suggest that Boynton lacked sufficient ability to consult with counsel and understand the nature of the proceedings against him. The record shows several pro se filings by Boynton that indicated his awareness of the proceedings, including a motion to dismiss the rape specifications and a motion to dismiss the indictment on speedy trial grounds. The content of those pro se motions leaves no doubt

that Boynton had a rational and factual understanding of the proceedings against him.

{¶ 29} It also bears noting that in CR-498434, the court referred Boynton for a competency evaluation. The results of that testing, admitted just three months before the trial in this case, showed that Boynton had “no psychological or psychiatric diagnoses” and was competent to stand trial. Boynton gives no reason for trial counsel to conclude that the results of that testing were no longer valid when the trial at issue in this case commenced.

V

{¶ 30} The fifth assignment of error complains that there was insufficient evidence to support a conviction for kidnapping because it was highly improbable that the incident happened in the manner testified to by the victim.

{¶ 31} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 32} The state charged kidnapping under R.C. 2905.01(A)(2). That section states that no person, by force, threat, or deception, shall remove

another from the place where the other person is found for the purpose of facilitating the commission of any felony.

{¶ 33} The 13-year-old victim testified that she had been walking to a friend's house when a silver car carrying Boynton and a woman pulled up beside her. The woman exited the car and asked the victim for directions to a shopping plaza. After giving directions, the woman pushed and then struck the victim and called for Boynton. Boynton and the female forced the victim into the backseat of the car, with one holding her hands while the other held her feet. Thinking she was the victim of a prank, the victim said that she did not call out or otherwise physically resist her captors. When she realized it was not a prank, she testified that she could not escape from the car because the car's child-locks had been engaged. Boynton and the woman drove to a house and entered, leaving the victim in the car. She did not try to escape, fearing that she would be caught and they would "do something bad to me." They returned about five minutes later and drove to a second house. The woman opened the door for the victim and all three entered the house. Boynton took the victim upstairs while the woman remained on the first floor. He led her into a room and told her to disrobe. Frightened, she did as instructed. Boynton then had sexual intercourse with her. When finished, Boynton took photographs of the victim. They then dressed and

joined the woman. The three left in the car and the victim was eventually dropped off.

{¶ 34} Viewed in a light most favorable to the state, we find the requisite elements of kidnapping were established. The victim testified that she was pushed, struck, and forced into Boynton's car and driven to a house where she was raped. A rational trier of fact could have found this was sufficient evidence to show that the victim had been forcibly removed from a place for the purpose of facilitating a felony.

VI

{¶ 35} For his sixth assignment of error, Boynton complains that the jury verdict for kidnapping was against the manifest weight of the evidence. He argues that the victim consented to being with him, as evidenced by her failure to flee despite having many opportunities to do so.

{¶ 36} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009. The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence.

This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to “believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 37} The jury did not lose its way by finding Boynton guilty of kidnapping. The victim had been forcibly placed in the car and said that she did not cry out or otherwise try to escape because she feared the consequences of a failed escape attempt. The jury could have found this to be a plausible explanation given her age (13-years-old at the time of the offense) and relative lack of experience. Certainly, the very sudden nature of her abduction could be expected to have paralyzed the victim’s ability to respond. Perhaps other victims might have reacted differently to this kind of forcible abduction. But the jury was in the best position to view the victim and assess her credibility, apparently believing her version of events. We see no basis for challenging that conclusion.

VII

{¶ 38} Finally, Boynton argues in his seventh assignment of error that he is entitled to a new trial on the basis of cumulative error. Having found

no error in the first instance, we summarily overrule this assignment. *State v. Marcinick*, 8th Dist. No. 89736, 2008-Ohio-3553, at ¶157.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR