[Cite as *In re H.F.*, 2010-Ohio-5253.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94840

IN RE: H.F.
A Minor Child

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-09115883

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

RELEASED AND JOURNALIZED: October 28, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, H.F. ("appellant"),[1] a seventeen-year-old male at the time of the August 26, 2009 offense, appeals from the trial court's decision. The February 17, 2010 decision found appellant delinquent of acts, if which committed by an adult, would constitute kidnapping, attempted rape, gross sexual imposition, and theft. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the trial court.

STATEMENT OF THE CASE

[1] The parties in this case are referred to herein by their initials or title in accordance with this court's established policy regarding non-disclosure of identities in juvenile and sexual assault cases.

{¶ 2} On August 27, 2009, appellant was charged with one count of kidnapping, a felony of the first degree if committed by an adult, and a violation of R.C. 2905.01(A)(4); one count of attempted rape, a felony of the second degree if committed by an adult, and a violation of R.C. 2907.02(A)(2) and R.C. 2923.02; two counts of gross sexual imposition, a felony of the fourth degree if committed by an adult, and a violation of R.C. 2907.05 (A)(1); and one count of theft, a misdemeanor of the first degree if committed by an adult, and a violation of R.C. 2913.02(A)(1).

{¶ 3} On December 16, 2009, the day of trial, appellant admitted to the five- count complaint as charged, and was subsequently committed to the Ohio Department of Youth Services for one year. Appellant filed his notice of appeal with this court on March 16, 2010.

STATEMENT OF THE FACTS

{¶ 4} On August 26, 2009, appellant called A.B. and asked to come over to her house. Appellant arrived with a movie and a T.V. dinner. While watching the movie, appellant fell asleep. A.B. woke appellant and asked him several times to leave, but he refused each time. She then called her cousin and told her that appellant refused to leave. Appellant heard A.B. talking on the phone and became upset. He took the phone from her, dragged her into the living room, and while calling her derogatory names began choking her almost to the point of unconsciousness.

{¶ 5} Appellant then pulled A.B. onto his lap and began to make movements with her on his lap. Appellant then took her into the bedroom, placed her on the bed face down, removed her pants, and unsuccessfully tried to rape her anally. All the while, A.B. was attempting to fight off appellant and told him to stop and to leave. Appellant rolled A.B. over and asked her to stimulate him manually. Frightened, A.B. complied. Appellant soon became frustrated with A.B. and pushed her on the bed and starting to choke her again.

{¶ 6} Appellant then crawled on top of A.B., placed his knees on her shoulders to restrict her movement, and put his penis and testicles in her face. Appellant pulled down A.B.'s shirt, fondled her breasts and then ejaculated on her face and clothes. Appellant ordered A.B. to stand up, continuing to choke her, and told her to clean him up. A.B. made her way to the kitchen area and attempted to run out the front door. Appellant, still undressed, came out of the door and pulled A.B. by her hair, covered her mouth, and dragged her back into the kitchen.

{¶ 7} In the kitchen, appellant told A.B. to take off her shirt that was covered with semen, and he put it in his back pocket. Appellant then stole approximately sixty dollars from A.B.'s purse.[2] Appellant then told A.B. to get down on her knees and pray with him. After this, appellant smacked A.B. several more times and continued to call her derogatory names. Finally, appellant stole A.B.'s home phone, put it in his bag, and left.

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[2]There is conflicting information in the record listing the money stolen as $40 or

ASSIGNMENTS OF ERROR

{¶ 8} Appellant assigns two assignments of error on appeal:

{¶ 9} "[1.] The trial court erred in not merging the kidnapping, attempted rape, and gross sexual imposition conviction at sentencing.

{¶ 10} "[2.] Appellant was denied the effective assistance of counsel for failure to investigate and file a motion to suppress his statement where there was reasonable probability that the successful motion would have affected the outcome."

LEGAL ANALYSIS

{¶ 11} Appellant argues in his first assignment of error that the lower court erred in not merging the kidnapping, attempted rape, and gross sexual imposition conviction at sentencing. Specifically appellant argues that the trial court violated R.C. 2941.25, which prohibits multiple convictions for allied offenses of similar import. However, contrary to appellant's argument, R.C. 2941.25 is inapplicable to juvenile delinquency cases.

{¶ 12} R.C. 2941.25 governs multiple counts and provides the following:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may

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$60.

contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 13} This court has previously held that the statute requiring the merger of allied offenses of similar import, R.C. 2941.25(A), does not apply to juvenile delinquency proceedings. The allied offenses statute is inapplicable because delinquency cases do not charge juveniles with crimes, but with acts which, if committed by an adult, would constitute a crime and thereby establish the juvenile delinquent. *In re J.H.*, Cuyahoga App. No. 85753, 2005-Ohio-5694 at ¶17, citing *In re: Skeens*, infra.

{¶ 14} Several other Ohio appellate courts have also held that R.C. 2941.25(A), which provides that an adult offender indicted on two or more allied offenses of similar import may be convicted of only one of the offenses, does not apply to juvenile delinquency matters. *In re: Bowers*, Ashtabula App. No. 2002-A-0010, 2002-Ohio-6913, citing *In re: Skeens* (Feb. 25, 1982), Franklin App. Nos. 81 AP-882 and 81 AP-883; *In re: Durham* (Sept. 17, 1998), Franklin App. Nos. 97 APF12-1653 and 97 APF12-1654; *In re: Lugo* (June 14, 1991), Wood App. No. WD-90-38.

{¶ 15} Consequently, R.C. 2941.25 does not apply to this case.

{¶ 16} Appellant's first assignment of error is overruled.

{¶ 17} Appellant argues in his second assignment of error that he was denied effective assistance of counsel for failure of his counsel to investigate and file a motion to suppress his statement where there was a reasonable probability that the successful motion would have affected the outcome.

{¶ 18} To establish the grounds for an ineffective assistance of counsel claim, appellant must show that (1) the lawyer's performance was deficient, and (2) the lawyer's deficient performance resulted in prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. The Ohio Supreme Court adopted a similar standard in *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623, by stating:

> "When 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 * * * there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness."

{¶ 19} The prejudice arm of both *Strickland* and *Lytle* is a "but for" standard - i.e., but for the lawyer's deficient performance, the outcome of the trial would have been different. *State v. Crickon* (1988), 43 Ohio App.3d 171, 175, 540 N.E.2d 287. The court must look to the totality of the circumstances, and not isolated instances of an allegedly deficient performance. *State v. Malone* (Dec. 13, 1989), Montgomery App. No. 10564. "Ineffective assistance does not exist merely because counsel failed 'to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it.'" Id., quoting *Smith v. Murray* (1986), 477 U.S. 527, 535, 106 S.Ct. 2661, 91 L.Ed.2d 434. Therefore, under this standard, appellant must show that his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from that deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538

N.E.2d 373, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

{¶ 20} Here, appellant argues that his confession was due to police coercion or duress used by appellant's uncle, a Bedford police officer. Review of the record however does not support appellant's contention. The record is devoid of any evidence of duress or coercion by the police. A report from the interview conducted by the Bedford Heights Police Department indicates that appellant was read his Miranda rights, had his mother contacted, and was not interviewed until his mother arrived at the police station and was present with him.

{¶ 21} Appellant was advised of the charges against him, acknowledged that he understood the charges and then proceeded to give a full confession to the police. Moreover, after confessing to the police, appellant told the trial court judge at the December 16, 2009 hearing that he understood that his admission was knowingly and intelligently given and freely and voluntarily made.[3]

{¶ 22} Furthermore, the trial judge informed appellant that his admission was a complete admission of guilt. The trial judge also spent a significant amount of time making sure appellant understood exactly what was occurring with regard to his admission.[4]

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[3]See, December 16, 2009 Hearing, tr. 9.

[4]Id., tr. 4-10.

{¶ 23} Accordingly, we find no error on the part of defense counsel concerning her decision not to file or pursue a motion to suppress appellant's statement or confession.

{¶ 24} Appellant further argues trial counsel was ineffective in failing to investigate a rape kit that was conducted on the victim. However, as previously stated, we find appellant's confession and admissions to be proper. Looking at the totality of the circumstances, it is unlikely defense counsel's late notice regarding this kit would have produced any different outcome in this case.

{¶ 25} Accordingly, we find appellant's ineffective assistance of counsel arguments to be without merit.

{¶ 26} Appellant's second assignment of error is overruled.

Judgment 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 delinquency adjudication is affirmed. 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., and
FRANK D. CELEBREZZE, JR., J., CONCUR