

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ANGELO V. MILINI, JR.	:	Case No. 2009CA00040
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2008CR0149

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 28, 2009

APPEARANCES:

For Plaintiff-Appellee

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Farmer, P.J.

{¶1} On February 19, and May 19, 2008, the Stark County Grand Jury indicted appellant, Angelo Milini, Jr., on one count of rape with a repeat violent offender specification in violation of R.C. 2907.02(A)(2) and R.C. 2941.149, one count of burglary in violation of R.C. 2911.12(A)(1), one count of kidnapping in violation of R.C. 2905.01(A)(2) and/or (A)(4), one count of disruption of public services in violation of R.C. 2909.04(A)(1), and one count of domestic violence in violation of R.C. 2919.25(A). Said charges arose from an incident involving appellant's estranged wife, Tanisha Baker-Milini.

{¶2} A jury trial commenced on July 15, 2008. The jury found appellant guilty as charged. By judgment entries filed February 6, and February 12, 2009, the trial court sentenced appellant to an aggregate term of eighteen years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR DISMISSAL IN ACCORD WITH CRIM.R. 29, AS THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE APPELLANT."

II

{¶5} "THE JURY'S VERDICT AGAINST THE APPELLANT OF GUILTY ON THE CHARGES OF RAPE, KIDNAPPING, REPEAT VIOLENT OFFENDER, DOMESTIC VIOLENCE, BURGLARY, AND DISRUPTION OF PUBLIC SERVICES

WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE OVERTURNED."

III

{¶6} "TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING EVIDENCE THAT THE ALLEGED VICTIM HAD FALSIFIED REPORTS ABOUT DOMESTIC VIOLENCE AGAINST THE APPELLANT."

IV

{¶7} "APPELLANT WAS DEPRIVED A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTIONS, DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL RESULTING FROM COUNSEL'S STIPULATION TO THE ADMISSION OF APPELLANT'S PRIOR CONVICTIONS FOR DOMESTIC VIOLENCE AND COUNSEL'S FAILURE TO CALL WITNESSES AND ALLOW THE APPELLANT TO TESTIFY."

I, II

{¶8} Appellant claims the trial court erred in not granting his Crim.R. 29 motion for acquittal, and the jury's verdict was against the manifest weight of the evidence. We disagree.

{¶9} We will address these assignments together because the motion for acquittal was made at the conclusion of all the evidence and was made without any specificity. We conclude the issue raised would have been as set forth in the assignments of error i.e., the credibility of the complaining witness, Tanisha Baker-Milini.

{¶10} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶11} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶12} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶13} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶14} On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶15} Appellant was convicted of rape in violation of R.C. 2907.02(A)(2), burglary in violation of R.C. 2911.12(A)(1), kidnapping in violation of R.C. 2905.01(A)(2), disruption of public services in violation of R.C. 2909.04(A)(1), and domestic violence in violation of R.C. 2919.25(A). The elements of each offense are as follows:

{¶16} "[Rape] No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

{¶17} "[Burglary] No person, by force, stealth, or deception, shall do any of the following: (1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense.

{¶18} "[Kidnapping] No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: (2) To facilitate the commission of any felony or flight thereafter.

{¶19} "[Disruption of Public Services] No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following: (1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service***.

{¶20} "[Domestic Violence] No person shall knowingly cause or attempt to cause physical harm to a family or household member."

BURGLARY

{¶21} Ms. Baker-Milini testified that on the afternoon of the attack, she locked the door to her apartment and went to the mailbox to pick up her mail. Vol. I T. at 140. On the way back, as she unlocked the door, appellant grabbed her around the neck from behind and pushed her into her apartment. Id.

RAPE & KIDNAPPING

{¶22} Ms. Baker-Milini was forced by appellant to enter her apartment. Id. Appellant began choking her and hitting her. Id. Appellant knocked Ms. Baker-Milini down in the kitchen and dragged her into the bedroom. Id. at 146. Appellant called her a bitch because she talked to the police about him. Id. He pushed her down on the bed, squeezed her neck, and beat her in the "bowels" causing her to urinate on the floor. Id. at 147. Appellant took off her clothes and forced her to have vaginal intercourse. Id. at 148. After the incident, appellant "washed off" and permitted Ms. Baker-Milini to "wash off" also. Id. at 149. He then made her return to the bedroom and choked her again, making her feel as if she was going to blackout. Id. at 150-151. The entire incident lasted between eleven to twelve hours. Id. at 140. Ms. Baker-Milini testified she was too sore and too afraid to attempt an escape. Id. at 154.

{¶23} Canton Police Officer Brock Heald testified after responding to the 911 call, he observed the apartment in disarray. Id. at 271. He noticed Ms. Baker-Milini acted as if she was in shock, "like she was like disconnected from what had happened." Id. at 267. There was a red mark/cut on her throat that looked like a thumbnail. Id. at 268. He did not observe any torn clothing. Id. at 276.

{¶24} Karen Rowlands, the sexual assault nurse examiner at Aultman Hospital, also noticed Ms. Baker-Milini's "flat affect" which she testified was common with sexual assault victims. Id. at 228-229. Ms. Rowlands noted swelling in Ms. Baker-Milini's neck caused by trauma. Id. at 236; State's Exhibit 7. There were no facial contusions. Id.

DISRUPTION OF PUBLIC SERVICES

{¶25} Ms. Baker-Milini testified that before appellant left her apartment on the morning after the attack, he destroyed the cords to the telephones in the kitchen and bedroom. Id. at 151-153. Officer Heald testified he observed the damaged telephone lines when he responded to the 911 call. Id. at 282.

DOMESTIC VIOLENCE

{¶26} Ms. Baker-Milini testified she and appellant were married, but estranged. Id. at 132, 133-134. Appellant stipulated to a prior conviction for domestic violence. Ms. Baker-Milini's testimony on the domestic violence count was the same testimony given for the rape and kidnapping counts.

{¶27} Appellant argues this convictions rest on the credibility of Ms. Baker-Milini and her testimony is not credible. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260.

{¶28} Because rape and kidnapping are generally done while no witnesses are present, single testimony can be credible. From the evidence presented, we find

testimony that supported Ms. Baker-Milini's testimony i.e., the observations of the police officer and nurse concerning her demeanor and injuries, the DNA results from the analysis of the towel as being appellant's (Vol. II T. at 14), and the police officer's testimony about the condition of the apartment. This testimony lends credence to Ms. Baker-Milini's testimony. Further, although not required, there was proof of a motive for the attack. Appellant called Ms. Baker-Milini from the hospital where he was a patient and yelled at her for telling the police where he was. Vol. I T. at 138. Appellant was so angry, he went AWOL from the hospital. Id. at 251-252.

{¶29} We find the corroborating testimony lent credibility to Ms. Baker-Milini's testimony, and the evidence was sufficient to establish appellant's guilt.

{¶30} Upon review, we find no manifest miscarriage of justice.

{¶31} Assignments of Error I and II are denied.

III

{¶32} Appellant claims the trial court erred in not permitting Ms. Baker-Milini's prior conviction for falsification regarding domestic violence in the record. We disagree.

{¶33} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶34} No where in the record is there a motion to admit the falsification charge judgment entry. There was the following colloquy between defense counsel and Ms. Baker-Milini concerning the prior falsification charge:

{¶35} "Q. Mrs. Milini, I understand that you've been charged with - - previously with a falsification crime; is that correct?

{¶36} "A. Yes, I was.

{¶37} "Q. In 2005?

{¶38} "A. Yes, I was.

{¶39} "Q. And you pled guilty to that crime?

{¶40} "A. I pled no contest.

{¶41} "Q. Pled no contest here in Canton Municipal Court - -

{¶42} "A. Yes.

{¶43} "Q. - - is that not correct?

{¶44} "A. Yes.

{¶45} "Q. Because you falsified a police report?

{¶46} "A. No, I was threatened and I was begged by Angelo - -

{¶47} "Q. That's not the question.

{¶48} "The Court: Let me just stop you for a minute, would you. Be careful what you ask.

{¶49} "By: Mr. Urban:

{¶50} "Q. Did you or did you not make false statements that led to a charge in 2005?

{¶51} "A. No, I didn't make false statements.

{¶52} "Q. So the State got it wrong?

{¶53} "A. No. Actually when I went before the Grand Jury, I changed my story."

{¶54} Except for the cautionary remark, we find no exclusion of Ms. Baker Milini's criminal record for falsification.

{¶55} Evid.R. 609(F) sets forth the method of proof for prior convictions as follows:

{¶56} "When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers."

{¶57} We find sufficient evidence in the record to establish the prior conviction for falsification on cross-examination of Ms. Baker-Milini. Therefore, no further extrinsic evidence was admissible. We find the trial court did not limit or hinder the issue of her prior record as it related to her credibility and truthfulness.

{¶58} Assignment of Error III is denied.

IV

{¶59} Appellant claims he was denied effective assistance of trial counsel. We disagree.

{¶60} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶61} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of

reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶62} "3. 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."

{¶63} Appellant argues his trial counsel should not have stipulated to his prior domestic violence conviction, failed to call any witnesses, and did not permit him to testify.

{¶64} Appellant stipulated on the record as to his prior conviction and agreed it was appropriate for his trial counsel to so stipulate. Vol. II T. at 3-5. Under the doctrine of "invited error," it is well-settled that "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Supreme Court of Ohio has stated:

{¶65} " 'The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an

error and then procure a reversal of the judgment for an error for which he was actively responsible.' " *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91.

{¶66} The failure to have appellant testify or to present other witnesses clearly falls within the realm of trial strategy. This court must accord deference to defense counsel's strategic choices made during trial and "requires us to eliminate the distorting effect of hindsight." *State v. Post* (1987), 32 Ohio St.3d 380, 388.

{¶67} Upon review, we find no demonstration of any deficiency by defense counsel or any demonstration of prejudice to appellant.

{¶68} Assignment of Error IV is denied.

{¶69} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

JUDGES

