[Cite as *State v. Kiley*, 2011-Ohio-1156.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. THOMAS E. KILEY Appellant	C.A. No. 10CA009757 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CR075579

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Thomas Kiley met his wife, Y.P. through a Florida escort service. After a brief courtship, the couple married and Y.P. moved to Ohio. Because of her employment history, Mr. Kiley was suspicious of Y.P.'s communications, monitoring her telephone and online activities. When he found a racy photograph of Y.P. with a previous boyfriend, Mr. Kiley became angry and assaulted her. He also threw her telephone in a lake. After settling down, Mr. Kiley planned a vacation for the two of them for the following day to try to work out their issues. They missed their flight, however, and returned home. When they got home, Mr. Kiley began rifling through Y.P.'s possessions, looking for evidence that she had been unfaithful to him. He also demanded her car keys. When Y.P. refused to give him her spare keys, Mr. Kiley told her that, if she did not give them to him, he would have anal sex with her. When Y.P. still refused, Mr. Kiley followed through on his threat. He pinned Y.P. down on their bed, ripped off her pants, and

attempted to have anal sex with her. Despite using lubricant and wrapping a cord around Y.P.'s ankles to restrain her legs, he was unable to accomplish his goal. Later, while Mr. Kiley slept, Y.P. slipped out of his hold and ran barefoot through the snow to the house next door, where she dialed 911. Soon after Y.P. left, Mr. Kiley realized that she was gone and pursued her. When he saw that she was on the phone, however, he returned home, grabbed a few things, and drove away in his van. The Grand Jury indicted Mr. Kiley for kidnapping, rape, and tampering with evidence. A jury convicted him of kidnapping and rape, and the trial court sentenced him to five years in prison. Mr. Kiley has appealed, arguing that his lawyer was ineffective, that the trial court denied him his constitutional right to be present at all stages of the trial, that the prosecutor's improper remarks during voir dire and closing argument denied him the right to a fair trial, that his convictions are against the manifest weight of the evidence, and that the court incorrectly dismissed his post-conviction relief petition. We affirm Mr. Kiley's convictions because his trial lawyer was not ineffective, the court did not deprive him of his right to be present at trial, the prosecutor's remarks were not prejudicial, and his convictions are not against the manifest weight of the evidence. His petition for post-conviction relief was premature, and we remand to the trial court for it to now consider that petition.

INEFFECTIVE ASSISTANCE

{¶2} Mr. Kiley's first assignment of error is that his trial lawyer was ineffective in violation of his constitutional rights. He has argued that his lawyer failed to object to a number of the prosecutor's leading and hearsay-eliciting questions, and that the cumulative effect of the errors deprived him of a fair trial.

{¶3} To establish that his lawyer was ineffective, Mr. Kiley "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable

representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus (1989)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

{¶4} Regarding the prosecutor's use of leading questions, in *State v. Jackson*, 92 Ohio St. 3d 436, 449 (2001), the Ohio Supreme Court held that, because "it is within the trial court's discretion to allow leading questions[,] . . . the failure to object to any leading questions [does not] constitute[ ] ineffective assistance of counsel." Accordingly, Mr. Kiley's lawyer was not ineffective for not objecting to the prosecutor's leading questions. *State v. Fisher*, 9th Dist. No. 24116, 2009-Ohio-332, at ¶25.

{¶5} Regarding the prosecutor's hearsay-eliciting questions, Mr. Kiley has argued that his lawyer should have objected to questions the prosecutor asked a sheriff's deputy about what he learned during the course of his investigation. The prosecutor asked: "Deputy, did you learn during the course of your investigation that there was a struggle between [Mr. Kiley] and [Y.P.]?" The deputy responded "[y]es, sir." The prosecutor then asked: "Did you learn in the course of your investigation that the Defendant hit and choked [Y.P.]?" The deputy responded "[a]bsolutely. That is what she advised." The prosecutor later asked the deputy if he had learned through the course of his investigation that Mr. Kiley had raped Y.P. The deputy answered "[y]es."

{¶6} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R.

801(C). Under Rule 802 of the Ohio Rules of Evidence, "[h]earsay is not admissible except as otherwise provided by . . . these rules . . . ."

{¶7} The deputy's answers to the struggle and rape questions were not hearsay because "[h]e related no statement made to him and . . . did not state how he learned" that Mr. Kiley and Y.P. had struggled or that Mr. Kiley raped Y.P. *State v. Neal*, 2d Dist. Nos. 2000-CA-16, 2000-CA-18, 2002-Ohio-6786, at ¶51. Although the deputy said that he learned that Mr. Kiley had hit and choked Y.P. because that is what Y.P. told him, Y.P., herself, testified that Mr. Kiley "locked his hands around my throat. He was choking me and banging my head at the wall." Accordingly, Mr. Kiley has not demonstrated that he was prejudiced by his lawyer's failure to object to the question.

{¶8} Mr. Kiley has also argued that his lawyer failed to object after a deputy improperly gave his personal opinion that Y.P. "is a very naïve girl." See Evid. R. 701. Mr. Kiley, however, has taken the deputy's answer out of context. The deputy was merely recounting what he had told Mr. Kiley when he was at their house the day before the rape. Mr. Kiley's lawyer also cross-examined the deputy extensively about his opinion, using it to support his theory of the case. According to Mr. Kiley's lawyer, Y.P. was an expert at manipulating men to get what she wanted. He argued that "she knows that people have a tendency to believe her" and pointed out that, in only a short time, the deputy "got hooked in just like everybody else." We, therefore, conclude that, even if the deputy's answer was improper opinion evidence, Mr. Kiley's lawyer had a tactical reason for not objecting to it. See *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶227 (noting that debatable trial tactics do not constitute ineffective assistance).

{¶9} Mr. Kiley has further argued that his lawyer was ineffective for not objecting to the fact that the trial court answered the jury's deliberation questions in his absence. He has argued that his lawyer should have requested a short recess to find him or at least offered an explanation about his whereabouts. He has also argued that his lawyer should have requested a curative instruction regarding his absence.

{¶10} The Ohio Supreme Court has held that a lawyer may waive a defendant's presence during a jury question, which is what Mr. Kiley's lawyer did. *State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, at ¶148. Mr. Kiley has not demonstrated that he was prejudiced by the waiver. Regarding a curative instruction, the trial court specifically asked Mr. Kiley's lawyer whether he "would like for me to instruct them not to take anything from [Mr. Kiley] not being present?" After a conversation off the record, the trial court did not give such an instruction. We infer that the court did not give an instruction about Mr. Kiley's absence because it was a tactical decision by his lawyer. It would be reasonable for the lawyer not to want to draw attention to the fact that Mr. Kiley was absent. Accordingly, we conclude that Mr. Kiley has not established that his lawyer's performance was deficient or that he suffered any prejudice because of it. Mr. Kiley's first assignment of error is overruled.

PRESENT DURING TRIAL

{¶11} Mr. Kiley's second assignment of error is that the trial court incorrectly denied him the right to be present during all stages of his trial. He has argued that the court incorrectly answered a question that the jury asked during its deliberations without him being present in the courtroom.

{¶12} "An accused has a fundamental right to be present at all critical stages of his criminal trial." *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶100. "However, 'the

presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only*.'" *Id*. (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 17 (1964)). "The question is whether his presence has a 'reasonably substantial' relationship to 'the fullness of his opportunity to defend against the charge.'" *Id*. (quoting *Snyder*, 291 U.S. at 105-06).

{¶13} "[T]he oral delivery of jury instructions in open court is a critical stage of trial[.]" *State v. Campbell*, 90 Ohio St. 3d 320, 346 (2000). If the jury returns to the courtroom to ask a question about those instructions, however, a defense lawyer may waive his client's presence. *State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, at ¶148. Moreover, Mr. Kiley has "failed to allege how he was prejudiced by his absence . . . or how his presence had a reasonably substantial relation to his opportunity to fully defend against the charges." *State v. Nguyen*, 9th Dist. No. 22883, 2006-Ohio-5065, at ¶9. Mr. Kiley has not demonstrated that there was any testimony or other evidence presented in his absence. See *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶103 (concluding that defendant's absence from part of proceeding was not prejudicial). Mr. Kiley's second assignment of error is overruled.

PROSECUTORIAL MISCONDUCT

{¶14} Mr. Kiley's third assignment of error is that the trial court made improper remarks during voir dire and closing argument that deprived him of his right to a fair trial. He has argued that the prosecutor misstated the definition of reasonable doubt, incorrectly telling the jury that it could find him guilty if it was "firmly convinced of the evidence" or "firmly convinced of the charges" without any reference to their truth.

{¶15} Because Mr. Kiley did not object to the prosecutor's reasonable doubt descriptions, he is limited to arguing plain error. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23. Rule 52(B) of the Ohio Rules Criminal Procedure permits appellate courts to take notice of plain errors, but such notice is to be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1978). In order to prevail on a claim of plain error, the defendant must show that, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Murphy*, 91 Ohio St. 3d 516, 532 (2001) (quoting *State v. Campbell*, 69 Ohio St. 3d 38, 41 (1994)); see *State v. Johnson*, 46 Ohio St. 3d 96, 102 (1989) ("In examining the comment made by the prosecutor, the issue is whether but for the prosecutor's misconduct the verdict would have been otherwise.").

{¶16} Even assuming the prosecutor misstated the definition of reasonable doubt, the trial court told the jury that it had to apply the law as it was instructed by the court. The trial court defined reasonable doubt for the jury, and Mr. Kiley has not argued that the definition it gave was incorrect. We, therefore, conclude that Mr. Kiley has failed to establish that, but for the prosecutor's allegedly improper statements, he would not have been convicted. See *State v. Johnson*, 46 Ohio St. 3d 96, 102 (1989); *State v. Boots*, 2d Dist. No. 2001 CA 1542, 2001 WL 1388495 at *2 (Nov. 9, 2001) (concluding defendant was not prejudiced by prosecutor's incorrect definition of reasonable doubt because "[t]he trial court made clear to the jurors that they were required to apply the law as set forth by the court, and the trial court properly defined reasonable doubt and proof beyond a reasonable doubt for the jurors in open court and in its written instructions to the jury."). Mr. Kiley's third assignment of error is overruled.

MANIFEST WEIGHT

{¶17} Mr. Kiley's fourth assignment of error is that his convictions are against the manifest weight of the evidence. If a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must 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[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶18} The jury found Mr. Kiley guilty of rape and kidnapping. Under Section 2907.02(A)(2) of the Ohio Revised Code, "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Under Section 2905.01(A)(4), "[n]o person, by force, . . . shall . . . restrain the liberty of . . . [an]other person . . . [t]o engage in sexual activity . . . with the victim against the victim's will[.]"

{¶19} Y.P. testified that, after Mr. Kiley and she returned home from the airport, he started "raging," going around the house pulling things out of drawers and going through her clothes and suitcase. Mr. Kiley went through her purse and found her car keys, then asked her for her spare keys. When Y.P. said she did not know where they were, Mr. Kiley pulled her out of bed and told her to start looking for them. After Mr. Kiley shoved her around the house for a while, Y.P. told him that she had given the keys to a neighbor. Mr. Kiley then told her that, if she did not find the keys within ten minutes, he would have anal sex with her.

{¶20} Y.P. testified that, after counting down to zero, Mr. Kiley pushed her into the bedroom and threw her on the bed. She testified that he got on top of her and yanked her pants

and underwear off all at once. He pinned her with his knees and arms and attempted to have anal sex with her. When he was unable to penetrate her, he dragged her off the bed and into the bathroom, where he retrieved a bottle of lubricant. He then tossed her back on the bed. According to Y.P, Mr. Kiley grabbed an alarm clock from the nightstand, pulled it out of the wall, and wrapped its cord around her ankles to try to keep her from struggling. He began trying to penetrate her again, but was unable to get all the way in, so he pulled out and masturbated till he ejaculated on her back. Y.P. got up to go to the bathroom, noticing some blood in the toilet when she was finished. Mr. Kiley watched Y.P. while she used the bathroom, then made her return to the bed where he lay next to her with his arms and legs wrapped around her.

{¶21} According to Y.P., when deputies arrived, they took her back to her house to interview her. While they were there, she noticed that the fitted sheet that had been on their mattress was no longer there. She testified that, after questioning her, a deputy took her to the Nord Center for a sexual assault examination. The nurse who examined Y.P. testified that Y.P. had a couple of marks on her neck and back, but that she did not observe any other injuries, including to her vagina or anus. The nurse testified that the absence of injuries was not unusual in anal rapes, especially since a lubricant had been used. The nurse took swabs of Y.P.'s vagina, anus, chest, hips, and back, which all tested positive for sperm or seminal fluid.

{¶22} Deputy Edward Gawlik testified that, while he was pulling into Y.P.'s development with his cruiser's emergency lights activated, he saw Mr. Kiley leaving the development in a van. He turned around and briefly attempted to look for Mr. Kiley's vehicle, then continued to the neighbor's residence. Deputy Stanley Qualls, who was in a different cruiser behind Deputy Gawlik's, testified that he also turned around and attempted to stop Mr.

Kiley. He said that he followed Mr. Kiley all the way to the county line, but was unable to overtake him.

{¶23} Detective Michael Lopez testified that he also responded to Y.P.'s 911 call. Inside the master bedroom of her house, he saw a bottle of KY jelly, an alarm clock on the floor with its cord in loops, women's pants and underwear that looked like they had been pulled off all at once, and a mattress that was missing a sheet. He testified that he spoke to Mr. Kiley the next day about what had happened. Mr. Kiley told him that his marriage to Y.P. was fine until he discovered that she was a prostitute and had been communicating with about 20 other men. He, therefore, installed software on their laptop that would secretly record her activity on the computer. Mr. Kiley also told him that he had tossed Y.P.'s phone in a nearby lake. Mr. Kiley further told him that, after they got home from the airport, Y.P. got angry when he started going through her things and hit him in the head with the alarm clock.

{¶24} Detective Lopez testified that, when he told Mr. Kiley that Y.P. had mentioned sexual conduct, Mr. Kiley told him that they had had consensual vaginal intercourse after coming home from the airport. Mr. Kiley denied that they had anal intercourse, but after being told that a rape kit had been done, he said that he had inserted his thumb in Y.P.'s rectum because she requested it. When the detective asked Mr. Kiley about the missing sheet, "[t]here was a long pause[,] [t]hen he said, "[w]ell, they got KY spilled on them, and we had to take them off." When the detective asked Mr. Kiley about Y.P.'s injuries, Mr. Kiley told him that, the previous night, Y.P. had tried to hit him, so he put his arm out and she fell backwards. He said that he then picked her up off the floor. Finally, Detective Lopez testified that Mr. Kiley told him that he did not know why he left after Y.P. dialed 911.

{¶25} Mr. Kiley has argued that Y.P.'s testimony is contradicted by the physical evidence. He has noted that she testified that, when they were fighting the day before the rape, he tore down a curtain that hung in the doorway to their bedroom, broke a mirror, threw her into a closet door (which caused it to break), choked her with his hands, and banged her head into a wall. The sheriff's department, however, found no evidence of a broken curtain, mirror, or closet door, and the sexual assault nurse did not notice any injury to Y.P.'s head. He has also noted that, although Y.P. said there was blood when she went to the bathroom after the attack, the nurse did not find any injury to or bleeding from her vagina or anus. He has further noted that, although Y.P. told the sexual assault nurse that Mr. Kiley had wrapped her ankles with the cord from a lamp, the sheriff's department did not find a lamp in the bedroom. Y.P. also told the 911 dispatcher that she was calling because of domestic violence, failing to mention rape until the deputies were interviewing her.

{¶26} Mr. Kiley has argued that Y.P. was not credible. He has pointed out that she admitted lying to a Florida domestic relations court about how the two of them met. She admitted to engaging in prostitution and underreporting her income on her tax returns. She also admitted trying to take one of her children out of the country, even though she was prohibited from doing so by a court order.

{¶27} Mr. Kiley has further argued that the fact that the swabs the sexual assault nurse took tested positive for sperm or seminal fluid was inconsequential because Y.P. admitted having consensual sex with him the night before the alleged rape. He has noted that the nurse testified that those substances can be present up to 72 hours after a sexual encounter. She also testified that those substances can be transferred from one area of the body to another. According to Mr.

Kiley, the fact that sperm was found on her anal swab, therefore, does not mean that they had anal sex.

{¶28} Just because the deputies did not observe any evidence of the previous day's fight does not mean that it did not happen, especially considering that Y.P. and Mr. Kiley would have had an opportunity to clean up afterwards. Nor does the lack of bruises on Y.P.'s body establish that she was not assaulted. In addition, the jury may have reasonably concluded that, just because Y.P. was a prostitute and lied to a court in an attempt to regain custody of her child, it did not mean she was lying about Mr. Kiley's violent conduct. Furthermore, considering that the State submitted a photograph of an alarm clock cord wrapped in two circles on the floor of the bedroom, the jury could have reasonably found that the fact that Y.P. told the nurse it was a lamp cord was only a minor inconsistency. See *State v. Ortiz*, 185 Ohio App. 3d 733, 2010-Ohio-38, at ¶23. In determining Y.P.'s credibility, the jury could also have taken into account that the manner in which the deputies found Y.P.'s pants and underwear was consistent with them having been pulled off all at once. The jury was further entitled to consider the fact that Mr. Kiley drove away after his wife called 911, passing multiple cruisers that had their emergency lights activated as he exited the development. See *State v. Hand*, 107 Ohio St. 3d 378, 2006-Ohio-18, at ¶167 ("flight . . . [is] evidence of consciousness of guilt, and thus of guilt itself.") (quoting *State v. Eaton*, 19 Ohio St. 2d 145, 160 (1969), vacated in part on other grounds, 408 U.S. 935 (1972)).

{¶29} We have reviewed the record and conclude that the jury did not lose its way when it found that Mr. Kiley kidnapped and raped Y.P. in violation of Sections 2905.01(A)(4) and 2907.02(A)(2) of the Ohio Revised Code. Mr. Kiley's fourth assignment of error is overruled.

POST-CONVICTION RELIEF

{¶30} Mr. Kiley's fifth assignment of error is that the trial court incorrectly dismissed his petition for post-conviction relief. The court concluded that, because its original sentencing entry was void, at the time Mr. Kiley filed his petition there was no conviction from which he could petition under Section 2953.21 of the Ohio Revised Code.

{¶31} Under Section 2953.21(A)(1)(a), "[a]ny person who has been convicted of a criminal offense . . . and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable . . . may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief." Under Section 2953.21(A)(2), Mr. Kiley had to file his petition for post-conviction relief "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction . . . ."

{¶32} The trial court sentenced Mr. Kiley on January 14, 2009. Mr. Kiley appealed, but this Court determined that it did not have jurisdiction over the appeal because the trial court had not properly imposed post-release control. See *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, at syllabus; *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14. It vacated Mr. Kiley's sentence and remanded the matter to the trial court for a new sentencing hearing. A month later, Mr. Kiley petitioned for post-conviction relief.

{¶33} The Ohio Supreme Court has recently reconsidered its decisions regarding post-release control, holding that, if a trial court has not properly imposed post-release control, only that part of the sentence is void. *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238, at ¶26. Because our decision to vacate Mr. Kiley's sentence was correct at the time it was made and

neither party appealed it, we would generally consider it to be the law of the case. *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984) ("[T]he doctrine of 'law of the case' . . . provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."). The Ohio Supreme Court has cautioned, however, that "[t]he doctrine [of law of the case] is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Id*. It has specifically identified an intervening Ohio Supreme Court decision as a situation in which it may not be appropriate to apply the doctrine. *Id*. at 5.

{¶34} In retrospect, this Court should not have vacated Mr. Kiley's sentence. We, therefore, sustain Mr. Kiley's assignment of error and remand this matter for consideration of his petition for post-conviction relief.

CONCLUSION

{¶35} Mr. Kiley's trial lawyer was not ineffective, the court did not deprive him of his right to be present during trial, the prosecutor's remarks during voir dire and closing argument were not prejudicial, and Mr. Kiley's convictions are not against the manifest weight of the evidence. The judgment of the Lorain County Common Pleas Court is affirmed, and this matter is remanded for consideration of Mr. Kiley's petition for post-conviction relief.

Judgment affirmed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MICHAEL J. DUFF, Attorney at Law, for Appellant.

DANIEL WIGHTMAN, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.