[Cite as *State v. Miller*, 2011-Ohio-4281.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-10-011
Appellee	Trial Court Nos. CRI-2010-0084 CRI-2010-0186
v.	
Michael C. Miller	**DECISION AND JUDGMENT**
Appellant	Decided: August 26, 2011

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

John D. Allton, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Michael C. Miller, appeals the May 19, 2010 judgment of the Huron County Court of Common Pleas which, following a jury trial convicting him of rape, kidnapping, and unlawful sexual conduct with a minor, sentenced appellant to a total of 15 years of imprisonment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} This case stems from the events of September 25, 2009, when appellant allegedly forced the minor victim, at knifepoint, to accompany him to a nearby elementary school where he performed oral sex on the victim. The two returned to the victim's home and, ultimately, the police were called and appellant was apprehended. On January 20, 2010, appellant was indicted on one count of rape, R.C. 2907.02(A)(2), and one count of kidnapping, R.C. 2905.01(A)(4), with the specification that the victim was not released unharmed, R.C. 2905.01(C). On February 17, 2010, appellant was indicted on one count of unlawful sexual conduct with a minor, R.C. 2907.02(A) and (B)(3), stemming from the same event. The cases were consolidated.

{¶ 3} On March 17, 2010, the state filed a motion in limine to exclude any evidence of the victim's prior sexual conduct, past victimization, and custody status. Appellant opposed the motion. In chambers, on the morning of trial, the parties presented oral arguments on the motion. The motion was ultimately granted as to the prior victimization but conditionally denied as to an alleged sexual abuse incident where the victim was the perpetrator. The case then proceeded to trial.

{¶ 4} A summary of the evidence presented at trial is as follows. The victim testified that on September 25, 2009, at approximately 9:00 p.m., he was sitting on his neighbor's porch playing with a cat and whittling a stick with a pocket knife. On that date, the victim was 15 years old. His bicycle was next to the stoop. According to the victim, appellant rode up on a bicycle and said his name was Chuck; he had never seen

appellant before and he appeared very drunk. Appellant then fell on top of him and the victim dropped his pocket knife.

{¶ 5} The victim stated that appellant grabbed the knife and told him to ride to the school so appellant could suck his penis. The victim testified that appellant threatened to kill him if he did not comply. The two, each riding a bicycle, rode to the school where the victim allowed appellant to perform oral sex on him for approximately five minutes; he then pulled up his pants.

{¶ 6} The victim testified that he then tried to get appellant a ride home to get him away from him. The victim first went to a neighbor's house and asked her if she would give appellant a ride home; she refused. The victim stated that he tried to give appellant directions to get him back wherever he came from; however, appellant continued to follow him. Appellant followed the victim home, he would not leave, and the victim's foster father called the police. After the police picked him up he told his foster family what happened. The victim then spoke with police officers and was taken to the hospital for a rape exam. During cross-examination, the victim stated that he was scared during the incident but did not know why he did not just ride his bicycle away from appellant.

{¶ 7} The victim's foster father, E.W., testified that on September 25, 2009, at approximately 9:00 p.m., he discovered appellant on his front porch. Appellant appeared very intoxicated and the victim wanted to help him get to State Route 61. Appellant would not leave the porch so E.W. called the police. The victim informed E.W. that appellant had taken his pocket knife; E.W. identified the knife found on appellant. After

the police left, the victim told E.W. that appellant performed oral sex on him. E.W. then called the police to return to his home.

{¶ 8} The victim's neighbor, M.B., testified that on September 25, 2009, the victim and appellant came to his door and asked his wife if appellant could have a ride. M.B. stated that appellant's bicycle was left in his yard and that appellant appeared to be very intoxicated.

{¶ 9} Norwalk Police Officers James Montana, Jared Ferris, and Melissa McNally participated in the investigation. Officer Montana testified that when he arrived at the victim's home he was very upset and began crying. Montana accompanied the victim to the school and was shown the location of the alleged incident. Montana stated that appellant was highly intoxicated.

{¶ 10} During cross-examination, Officer Montana was questioned as to why the school surveillance camera, which was motion activated at 8:40 p.m., only showed the victim at the front steps looking into the building. The camera was activated again at 9:00 p.m. but nothing was shown on the video. Montana stated that according to school officials, the camera angle does not film much past the front doors and that it is hard to discern anything when it is dark outside.

{¶ 11} Officers Jared Ferris and Melissa McNally took appellant, who was intoxicated, into custody. An open pocket knife was found in appellant's pant pocket. Officer McNally took photographs of the areas involved in the alleged incident; the photographs were admitted into evidence.

{¶ 12} Norwalk Police Detective David McDonnough investigated the incident. He arranged for the victim and appellant to have DNA samples taken and arranged to have the samples transmitted to the Bureau of Criminal Investigation ("BCI") for testing.

{¶ 13} Tammy Kilbride, sexual assault nurse examiner (SANE), testified that she collected multiple swabs from the victim as well as the shorts he was wearing as underwear. Kilbride also took a narrative history from the victim which was consistent with what he told police.

{¶ 14} BCI forensic biologist, Raymond Peoples, testified that he examined the shorts that were delivered as well as the swabs. Peoples testified that he examined the shorts for amylase, which is found in saliva. Amylase was found on the shorts as well as the penile swabs taken from the victim. Reynolds testified that he found semen on the anal swabs. Reynolds testified that he did not conduct any DNA testing on the anal swabs because prior authorization from the prosecutor was not given.

{¶ 15} Kristen Slaper, also from the BCI and a forensic biologist, testified that she conducted the DNA testing on the shorts and swabs where amylase was detected. She compared the DNA findings to the sample taken from appellant. Slaper testified that the DNA profile from the penile swabs was consistent with appellant's DNA. The shorts had a mixture from the victim and appellant.

{¶ 16} Following deliberations, the jury convicted appellant of the three counts in the indictment and further found that the victim was not released unharmed. On May 19, 2010, appellant was sentenced to nine years in prison for rape, six years in prison for

kidnapping, and three years in prison for unlawful sexual conduct with a minor. Counts 1 and 2 were ordered to be served consecutively, while Count 3 was to run concurrently with Counts 1 and 2 for a total of 15 years of imprisonment. This appeal followed.

{¶ 17} Appellant now raises three assignments of error for our review:

{¶ 18} "I. It was plain error for the trial court to improperly instruct the jury on the mitigating circumstance or affirmative defense of 'released unharmed.'

{¶ 19} "II. The conviction of the defendant was against the manifest weight of the evidence.

{¶ 20} "III. The defendant was denied the effective assistance of counsel."

{¶ 21} In appellant's first assignment of error he argues that the trial court committed plain error by improperly instructing the jury as to the kidnapping charge and the mitigating circumstance of being released unharmed. "Notice of plain error under

{¶ 22} Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus; *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 32.

{¶ 23} R.C. 2905.01, the kidnapping statute effective on the date of the offense, provided:

{¶ 24} "(A) 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:

{¶ 25} "* * *

{¶ 26} "(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;

{¶ 27} "* * *

{¶ 28} "(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree."

{¶ 29} The Supreme Court of Ohio has held that the "released in a safe place unharmed" language in the statute is not an element of the kidnapping offense; rather, it is an affirmative defense that must be proven by the defense. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 233. The indictment in this case appears to place the burden on the state to prove that the victim was not released unharmed.

{¶ 30} At the conclusion of appellant's trial, the court issued the following in regard to the kidnapping, released unharmed defense:

{¶ 31} "If you find that the State proved beyond a reasonable doubt all the essential elements of the offense of kidnapping, your verdict must be guilty. You must then separately determine whether [the victim] was released unharmed.

{¶ 32} "If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of the offense of kidnapping, then your verdict must be not guilty. You will not determine whether [the victim] was released unharmed."

{¶ 33} The oral instructions mirrored the verdict form. While deliberating, the jury asked the court to provide a clear definition of harm. After conferencing with the parties, the court instructed the jury: "Harm is defined as physical or mental damage." The jury found that the victim was not released unharmed.

{¶ 34} Ohio Jury Instructions does provide the following "released unharmed" instruction:

{¶ 35} "(A) CLAIM. The defendant claims that (insert name of victim) was released in a safe place unharmed.

{¶ 36} "(B) BURDEN. The burden of going forward with the evidence that (insert name of victim) was released in a safe place unharmed and the burden of proof of this claim are upon the defendant. The defendant must establish such claim by the greater weight of the evidence." 5 Ohio Jury Instructions (2011) 248, Section 505.01(B).

{¶ 37} Appellant contends that the error made by the court in failing to instruct the jury on the proper burden of proof was not harmless because, as evidenced by the jurors' question, they were contemplating whether the victim was released unharmed. Ohio courts have held that victims of rape are, de facto, not released unharmed and that, therefore, a safe-release defense was not warranted. See *State v. Avery* (1998), 126 Ohio

App.3d 36, 44; *State v. Royston* (Dec. 15, 1999), 9th Dist. No. 19182; *State v. Reid* (Nov. 27, 1990), 10th Dist. No. 90AP-378.

{¶ 38} Upon review, though we agree that the instruction given failed to set forth the proper burden of proof, we find that it did not rise to the level of plain error. The jury found that appellant raped the 15-year-old victim; thus, the victim was not released unharmed. Appellant's first assignment of error is not well-taken.

{¶ 39} In appellant's second assignment of error he contends that the jury's verdict was against the manifest weight of the evidence. In an appeal in a criminal case where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *Thompkins* at 387, quoting with approval, *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." Id.

{¶ 40} In this assignment of error, appellant seems to be arguing that the actions of the victim are more consistent with that of a perpetrator rather than a victim. Appellant suggests that when the two were on bicycles the victim should have just ridden away.

Appellant further suggests that because oral sex was performed on the victim, it is more likely that he forced himself on appellant. Finally, appellant points to the fact that only the victim can be seen on the school surveillance camera. Appellant claims that the victim looked into the school to ensure that there were no witnesses.

{¶ 41} Upon review, we cannot say that the jury lost its way when it found appellant guilty of the charges. The victim consistently told the same story to police and the SANE nurse. Appellant did have the pocket knife that the victim states he was threatened with and the victim did have appellant's DNA on his penis. The victim stated that he did not ride away on his bicycle because he was scared. Finally, there was testimony regarding the limited range of the school camera. Appellant's second assignment of error is not well-taken.

{¶ 42} Appellant's third and final assignment of error alleges that he received ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further,

debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶ 43} Appellant contends that counsel was ineffective in failing to pursue questioning where the victim was the perpetrator in an alleged sexual incident. Further, appellant asserts that counsel failed to aggressively cross-examine the victim.

{¶ 44} Reviewing appellant's arguments, we must agree with the state that defense counsel's questioning of the victim was a reasonable, strategic decision. The victim's history shows sexual abuse by his stepfather at a very young age. This prior victimization could certainly explain why the victim remained with appellant. It could also explain the victim's acting out sexually. Also, the jury may not have looked favorably upon appellant had his counsel badgered the young victim. Accordingly, we find that appellant did not receive constitutionally deficient counsel. The third assignment of error is not well-taken.

{¶ 45} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE