[Cite as *State v. Lenard*, 2018-Ohio-2070.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 105342 and 105343

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD MARCUS LENARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-602274-A and CR-15-602350-A

BEFORE: S. Gallagher, P.J., Blackmon, J., and Celebrezze, J.

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SEAN C. GALLAGHER, P.J.:

{¶1} Richard Lenard appeals his convictions in Cuyahoga C.P. Nos. CR-15-602274-A and CR-15-602350-A. We affirm.

{¶2} The victim and Lenard had a tumultuous and, at times, a violent relationship. In October 2016, the two fought over social media postings that led to physical altercation in which the victim was injured. After being punched, the victim ran into the kitchen of the residence where both were living and grabbed a knife to defend herself. Lenard disarmed the victim. He then dragged her into the living room where he forced her to strip and lie on the floor.

Lenard then beat her with his belt. After the beating, Lenard took a knife and threatened to cut the victim's hair in the attempt to end the altercation (according to Lenard) or to terrorize the victim into further psychological submission (according to the state).

{¶3} More than a month later, the couple fought again. This time the altercation was more violent, and the victim ended up in the hospital, although at trial they both claimed to have mutually fought with fists and heavy objects used as weapons. Lenard testified that the victim threw a jar of pennies and a dresser at him, so Lenard began punching the victim in the face. At one point during the altercation, the victim was bleeding enough that blood spattered on the wall and the carpet. Lenard put rubber gloves on before punching the victim further.

{¶4} The fight ended with both allegedly falling down a flight of stairs, as an explanation for the victim's serious injuries. Lenard had sprained his wrist and ankle, and claimed to have scars on his forehead from the victim's conduct. The next day, the victim was walking on the street and a passerby called the police because of the victim's appearance. Her injuries from the second altercation were far more serious than the first. After being admitted to the hospital, the victim was diagnosed with a concussion, bleeding in her brain, and multiple bruises over her body.

{¶5} Lenard was separately indicted for the two altercations, but the cases were consolidated for trial. At trial the victim minimized the extent of Lenard's conduct but corroborated portions of her statement made to the police following the events. Her original statements implicated Lenard as the aggressor and confirmed the belt-beating and hair-cutting incidents. In addition, the medical records included statements made by the victim as to how her injuries occurred. Those statements also painted Lenard as an abuser. Lenard claims to have been acting in self-defense at all relevant times.

{¶6} The state introduced correspondence between the victim and Lenard, some of which was prohibited by a no-contact order, in which the victim professed her love and devotion to Lenard and her willingness to do anything for him. Lenard also told the victim to not identify him at trial or not show up.

{¶7} When all was said and done, Lenard was convicted of felonious assault under R.C. 2903.11(A)(1) and kidnapping under R.C. 2905.01(A)(3) for the second altercation. The trial court imposed seven-year, concurrent sentences on both counts to be served consecutive to another unrelated case in which Lenard was sentenced to 16 months in prison. Lenard was also convicted of kidnapping under R.C. 2905.01(A)(3) and a separate kidnapping under R.C. 2905.01(B)(2) for the first altercation. The trial court imposed 6-year, concurrent terms on both counts to be served consecutive to the aforementioned cases. The resulting aggregate sentenced totaled 14 years, 4 months.

{¶8} Lenard appealed, claiming that the trial court erred: (1) when it imposed court costs in the final entry of conviction without providing Lenard the opportunity to object at the sentencing hearing, in violation of *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278; (2) by failing to merge the two kidnapping charges from the first altercation; and (3) in permitting the state to admit evidence from a detective not based on his personal experience or expert knowledge.

{¶9} There is no error with respect to the failure to impose court costs at the sentencing based on *Joseph*. In *State v. Beasley*, Slip Opinion No. 2018-Ohio-493, ¶ 265, the Ohio Supreme Court held that "after *Joseph* was decided and before [the defendant] was sentenced, the General Assembly amended R.C. 2947.23 by adding subdivision (C)," which provides that "[t]he court retains jurisdiction to waive, suspend, or modify the payment of the costs of

prosecution * * * at the time of sentencing *or at any time thereafter*." (Emphasis sic.) *Beasley* concluded that *Joseph* no longer controlled and the defendant could file a motion to waive the payment of costs at any time such that there is no reversible error in failing to impose costs at the sentencing hearing. *Id.* As it relates to Lenard, although the trial court imposed costs in the sentencing entry without providing Lenard the opportunity to seek waiver of the payment, under *Beasley*, any such error is harmless.

{¶10} There also is no error with respect to the trial court's conclusion that the two kidnapping offenses in CR-15-602350-A are separate offenses for the purposes of R.C. 2941.25. Lenard's sole argument on this issue is that the state "argued that both counts included the time that Mr. Lenard held the victim down in order to 'beat' her." According to Lenard, the state was using the same conduct to justify two convictions — he claims that "the state unequivocally used the evidence of the beating with the belt to obtain convictions" on both kidnapping counts.

{¶11} The record does not support Lenard's argument. The two kidnapping convictions were based on separate conduct, cutting the victim's hair in order to terrorize her under R.C. 2905.01(A)(3) (restraining another's liberty in order to terrorize the victim) after having separately restrained the victim to physically beat her, including with a belt, under R.C. 2905.01(B)(2) (restraining another person's liberty causing or creating a substantial risk of serious physical harm).

{¶12} Under R.C. 2941.25(B), a defendant may be convicted of all the offenses "*if any one of the following is true*: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." (Emphasis added.) *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 1. Lenard's acts, although within hours of each

other, were separate — the beating that took place was not necessary to or a part of the terror Lenard sought to instill by threatening and then cutting the victim's hair with a knife. *See, e.g., State v. Carter*, 8th Dist. Cuyahoga No. 101810, 2015-Ohio-1834, ¶ 36 (shooting was an additional act above and beyond that which was needed to commit robbery). The crimes were committed with separate acts and were not based on the one act of beating the victim with a belt after she was forced to strip and lie prostrate on the floor. Lenard does not address the separate conduct prong of *Ruff*. *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 21; App.R. 16(A)(7).

{¶13} Finally, there is no reversible error with respect to the detective's testimony admitted under Evid.R. 701. At trial, Lenard objected to five statements relating to the detective's opinion regarding the victim's reluctance to implicate Lenard as the aggressor and abuser. Importantly, Lenard did not object to the introduction of letters in which Lenard discussed ways to get himself acquitted at trial or to get the charges dropped by having the victim recant, fail to appear for trial, or not identify Lenard at trial.

{¶14} The detective testified as a fact-witness based on his investigation of the criminal conduct. Under Evid.R. 701, a fact-witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Lenard claims that the detective's testimony "was not admissible as lay opinion because it was not based on his first-hand perceptions." According to Lenard, the detective did not have enough experience in handling domestic abuse cases to explain the victim's reluctance to implicate Lenard, and as a result, his testimony was not based on his personal experience and should have been excluded.

{¶15} We need not address the argument presented. Pursuant to Crim.R. 52(A), any error, defect, irregularity, or variance that does not affect a substantial right shall be disregarded. Lenard concedes that the jury was as "capable of considering the victim's written and oral statements of love and affection toward Mr. Lenard as" the detective. In other words, according to Lenard, the introduction of the letters in which the victim professed her devotion to Lenard and willingness to do anything for him demonstrated why she was reluctant to testify against Lenard at trial. At best, the detective's testimony was duplicative of the conclusions the jury itself could draw. Even if the trial court had precluded the detective from providing his opinion as to why the victim became reluctant to continue cooperating after initially reporting the crime, the state had other evidence demonstrating the same.

{¶16} Further, and as Lenard notes, the state's closing focused on the correspondence between the victim and Lenard that had been exchanged before trial as a reason to discount the victim's in-court version of the altercations as compared to the version she provided in the initial statement made to the police after the altercations. In fact, the state made no mention of the detective's testimony and made no attempt to highlight the challenged statements. The statements made by the detective discussing the course of his investigation were isolated, limited to five discrete questions asked during the course of his testimony explaining the investigation in general.

{¶17} Thus, whether the detective's testimony was admitted in error is irrelevant; it cannot be concluded that the five challenged statements affected the outcome of trial in light of the other evidence presented that the state actually relied on to demonstrate the victim's motivation to change her story.

{¶18} Lenard's convictions are affirmed.

It is ordered that appellee recover from 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 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
PATRICIA ANN BLACKMON, J., DISSENTS IN PART WITH SEPARATE OPINION

PATRICIA ANN BLACKMON, J., DISSENTING IN PART:

{¶19} I respectfully dissent in part from the majority's opinion that Lenard's two kidnapping convictions do not merge for the purpose of sentencing. I would find that these two convictions are allied offenses and remand this case for resentencing under *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381.

{¶20} Lenard argues that the court erred by failing to merge one of his kidnapping convictions in violation of R.C. 2905.01(A)(3) with his kidnapping conviction in violation of R.C. 2905.01(B)(2). Both convictions arose from conduct that occurred on October 7, 2015. Lenard argues that both kidnappings stemmed from "the entire encounter" and arose from "the same course of conduct."

{¶21} Evidence in the record shows that Lenard forcefully cut K.H.'s hair. This conduct is associated with the conviction for violating R.C. 2905.01(A)(3), which states, in part, that "[n]o person, by force * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o terrorize, or to inflict serious physical harm on the victim or another * * *."

{¶22} There is also evidence that Lenard led K.H. to the living room, held her down, and beat her with a belt. This conduct is associated with the conviction for violating R.C. 2905.01(B)(2), which states, in part, that "[n]o person, by force * * * shall knowingly * * * under circumstances that create a substantial risk of serious physical harm to the victim * * * [r]estrain another of the other person's liberty."

{¶23} At trial, K.H. testified about the fight between her and Lenard in October 2015. Her testimony on direct examination was vague, using generalizations such as pushing, grabbing, bruising, and altercation. Upon motion by the state, the court declared K.H. a hostile witness under Evid.R. 607, and the state was permitted to cross-examine her using the statement she gave to the police the day after the incident to refresh her memory.

{¶24} The state read into the record K.H.'s police report from October 8, 2015: "I kicked him off me, I ran to the kitchen and he grabbed me by the neck. So I grabbed a butcher knife and began to swing it. He then threw me to the ground and dragged me into the living room, began punching, choking and spitting on me. He made me take off my clothes and made [me] lay on my stomach while he hit me with the belt, punched me, stomped me and then cut my hair with a knife." K.H. agreed that this was the statement she made to the police.

{¶25} Accordingly, the kidnapping under R.C. 2905.01(A)(3) and (B)(2) are offenses of similar import. I would remand for resentencing.