[Cite as *State v. Lenard*, 2018-Ohio-4847.]

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:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-602274-A
Application for Reopening
Motion No. 520301

RELEASE DATE: December 5, 2018

FOR APPELLANT

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SEAN C. GALLAGHER, P.J.:

{¶1} Richard Lenard has filed a timely application for reopening pursuant to App.R. 26(B). Lenard is attempting to reopen the appellate judgment, rendered in *State v. Lenard*, 8th Dist. Cuyahoga Nos. 105342 and 105343, 2018-Ohio-2070, that affirmed his convictions for the offenses of felonious assault and kidnapping. We decline to reopen Lenard's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Lenard is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting

for a defendant to second-guess his or her attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶4} Lenard has raised seven proposed assignments of error in support of his application for reopening.

I. Victim executes "no prosecution form"

{¶5} Lenard's first proposed assignment of error is that:

> The alleged victim K.H. testified she signed a "no prosecution form" in both cases. It was plain and reversible error for the state to prosecute appellant. The trial court erred when it denied appellant's Rule 29 motion to acquit.

{¶6} Lenard, through his first assignment of error, argues that appellate counsel was ineffective for failing to argue that the victim's execution of a "no prosecution form" prevented his prosecution. Lenard argues that the trial court should have granted a Crim.R. 29 motion for acquittal based upon the victim's "no prosecution form."

{¶7} R.C. 2931.03 provides that:

> The court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.
>
> *A judge of a court of common pleas does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness* and over the objection of the prosecuting attorney or other chief legal officer who is responsible for the prosecution of the case. (Emphasis added.)

{¶8} In addition, this court in *State v. Hollins*, 8th Dist. Cuyahoga No. 103864, 2016-Ohio-5521, held that:

> Although [*State v. Busch*, 76 Ohio St.3d 613, 615, 669 N.E.2d 1125 (1996)] held that a trial judge could sua sponte dismiss a criminal case if the complaining witness did not wish to proceed, even if the prosecutor objected to the dismissal, that aspect of the *Busch* decision was legislatively superseded by statute in 1998 when R.C. 2931.03 was amended to add the following language: "A judge of a court of common pleas does not have the authority to dismiss a criminal complaint charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney or other chief legal officer who is responsible for the prosecution of the case." Accordingly, a case may no longer be dismissed solely at the request of the complaining witness. *State v. Sanders*, 7th Dist. Columbiana No. 12 CO 35, 2013-Ohio-5220,
> ¶ 15, 3 N.E.3d 749.

State v. Hollins, *supra*, at ¶ 19.

{¶9} Thus, the trial court was not required to grant a Crim.R. 29 motion to dismiss, based upon the desire of the victim not to prosecute, and we find no error associated with Lenard's first proposed assignment of error.

II. Testimony regarding mitigating factors

{¶10} Lenard's second proposed assignment of error is that:

> It was ineffective assistance of counsel for McDonnell to fail to subpoena Lenard's mental health doctors to testify concerning his PTSD issues. Lenard has been on the mental health case load since 1994.

{¶11} Lenard, through his second proposed assignment of error, argues testimony with regard to his mental condition should have been presented during trial in order to present mitigating factors to the trial court. Specifically, Lenard argues that:

> The issue of Lenard's PTSD condition is mitigating factor in this case that must be heard. Lenard was diagnosed with PTSD, anxiety, depression and issues of anger. Lenard was on the mental health case load even while in the Cuyahoga County jail as early as April 2016. He was given the psych medication celexa and effexor and remeron to help with his disorders. Lenard's trial was

> October 24, 2017, more than year later. Lenard notified counsel of his condition. Dr. Koblentz and Dr. Oney were available as witnesses to testify to Lenard's mental health disorder. It was ineffective for counsel to fail to call these doctors, or any doctor for that matter as defense witness when mitigating circumstances exist. Lenard attempted to put on record the PTSD issue but was silenced by his counsel. * * *
>
> Post Traumatic Stress Disorder is condition that Lenard suffers from. He had substantial right to call medically educated and medically trained professional mental health doctors to testify concerning this condition, once Lenard was denied that right, his due process rights were violated.

{¶12} The record before this court does not indicate the type of testimony that would have been adduced at trial by his mental health doctors. It is well settled that matters outside the record do not provide a basis for reopening. *State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52 (2000); *State v. Hicks*, 8th Dist. Cuyahoga No. 83981, 2005-Ohio-1842. Allegations of ineffectiveness based on facts not appearing in the trial record must be reviewed through post-conviction remedies and cannot be raised through an App.R. 26(B) application for reopening. *State v. Coleman*, 85 Ohio St.3d 129, 1999-Ohio-258, 707 N.E.2d 476; *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 1999 Ohio App. LEXIS 5458 (Nov. 18, 1999), *reopening disallowed*, 2005-Ohio-5463. To the extent that Lenard relies on issues that are outside the record, the second proposed assignment of error does not provide a basis for reopening.

III. Admission of applicant's letter at trial

{¶13} Lenard's third proposed assignment of error is that:

> Detective Wells testimony rested primarily on the introduction of letter's (correspondence) between Lenard and K.H. where the state claimed it influenced her trial testimony. It was plain and reversible error for the state to lead the court and the jury to believe this when each and every letter submitted into evidence (states exhibits 35, 37, 39 & 41) was intercepted by "jail investigators" by a no contact order.

{¶14} Lenard, through his third proposed assignment of error, argues that the trial court erred by admitting into evidence state's exhibits Nos. 35, 37, 39, and 41; letters that he wrote while incarcerated. Specifically, Lenard argues that the exhibits were referenced by a police detective at trial that resulted in prejudice to his defense.

{¶15} During the course of trial, Lenard authenticated exhibits 35, 37, 39, and 41 and also admitted that the exhibits were in his handwriting. Tr. 546 and 582. The letters were also authenticated by the police detective. Tr. 575 - 580. Lenard has failed to present any argument as to why the exhibits were inadmissible during the course of trial. It must also be noted that the issues of the admissibility of Lenard's letters and the usage of the letters by the police detective during his testimony were previously addressed on direct appeal and found to be without merit.

> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

State v. Lenard, supra, ¶ 13 - 17.

{¶16} The doctrine of res judicata prevents further examination of the issue of the admissibility of exhibit Nos. 35, 37, 39, and 41. *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803. Lenard has failed to establish that he was prejudiced through his third proposed assignment of error.

IV. Jury charge on lesser included offense to kidnapping

{¶17} Lenard's fourth proposed assignment of error is that:

> The trial court erred and committed plain error when it failed to give the lesser included offense of unlawful restraint as it relates to count 2, 7 and 8.

{¶18} Lenard, through his fourth proposed assignment of error, argues that the trial court erred by failing to instruct the jury on the lesser included offense of unlawful restraint with

regard to the charged offenses of kidnapping. The failure to request an instruction on a lesser included offense is typically a matter of trial tactics rather than ineffective assistance of counsel. *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996- Ohio-71, 658 N.E.2d 764. In addition, this court on review will not second-guess the strategic decisions made by counsel at trial. *State v. Marsh*, 7th Dist. Mahoning No. 12 MA 40, 2013-Ohio-2949.

{¶19} Finally, even though an offense may be statutorily defined as a lesser included offense of another offense, a lesser included offense charge is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207; *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988). Herein, the evidence adduced at trial clearly prevented acquittal on the charged offenses of kidnapping. A jury charge on the lesser included offense of unlawful restraint was not required. Lenard has failed to establish any prejudice through his fourth proposed assignment of error.

V. Sufficiency of the evidence

{¶20} Lenard's fifth proposed assignment of error is that:

> The trial court erred when it denied appellant's motion for acquittal for kidnapping because the state failed to prove culpable mental state (mens rea) i.e. purpose.

{¶21} Lenard, through his fifth proposed assignment of error, argues that his convictions for the offenses of kidnapping are not supported by sufficient evidence because the state failed to prove that he acted purposely.

{¶22} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is sufficient to support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. When reviewing a claim of insufficiency, the evidence

presented at trial is examined by this court in a light most favorable to the state and then we are required to determine whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the charged offense. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991); *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio2126, 767 N.E.2d 216. We are not permitted to overturn the conviction unless it is determined that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Jenks, supra*. Finally, we do not evaluate witness credibility when reviewing a sufficiency of the evidence claim. *Yarbrough, supra*.

{¶23} Herein, we find that sufficient evidence was adduced at trial to convict Lenard of two counts of kidnapping in violation of R.C. 2905.01(A)(3) and one count of kidnapping in violation of R.C. 2905.01(B)(2). The offense of kidnapping, pursuant to R.C. 2905.01(A)(3), required the state to prove that Lenard acted with purpose to terrorize or to inflict serious physical harm on the victim. The offense of kidnapping, pursuant to R.C. 2905.019(B)(2), required the state to prove that Lenard acted with purpose to restrain the victim of her liberty.

{¶24} The evidence introduced at trial clearly demonstrated that:

1) Lenard threw the victim to the ground and dragged her into the living room; 2) Lenard punched, choked, and spit on the victim; 3) Lenard made the victim remove her clothing and lay on her stomach; 4) Lenard repeatedly hit the victim with a belt; 5) Lenard cut the victim's hair; 6) Lenard restrained the victim on the floor; 7) Lenard punched the victim; 8) Lenard broke the victim's cell-phone; 8) Lenard grabbed the victim by her arm and pushed her down the stairs; 9) Lenard caused injury to the victim's lip; 10) the victim suffered a concussion because of Lenard's actions; 11) the victim suffered bruising on her legs because of Lenard's actions; 12) the victim's

eye was swollen because of Lenard's actions; 13) the victims arm was bruised and swollen because of Lenard's actions; and 14) Lenard cut the victim's hair a second time.

{¶25} Pursuant to R.C. 2901.22, a person acts purposely

> "when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."

The record before this court clearly demonstrates that Lenard purposely terrorized and inflicted severe physical harm on the victim. Lenard also restrained the victim of her liberty. Therefore, Lenard's convictions for the offenses of kidnapping were supported by sufficient evidence and the fifth proposed assignment of error is not well taken.

VI. Failure to authenticate records/authorization to release victim's medical records

{¶26} Having a common basis in law and fact, Lenard's sixth and seventh proposed assignments of error shall be simultaneously considered by this court.

{¶27} Lenard's sixth proposed assignment of error is that:

> Appellant suffered ineffective assistance of counsel and it was plain and reversible error for counsel to stipulate to the authenticity of the records (states exhibits 31 and 32) without appellant's consent or knowledge outside his presence and after appellant was excused for the day by the court.

{¶28} Lenard's seventh proposed assignment of error is that:

> Counsel was ineffective for failing to require the state to authenticate the medical records pursuant to the rules of evidence. The medical records were not endorsed and a custodian of records did not testify. The record is devoid of the victim's authorization to release medical records.

{¶29} Lenard, through his sixth and seventh proposed assignments of error, argues that he was prejudiced by trial counsel's decision to stipulate to the authenticity of the victim's medical

records. In addition, Lenard argues that he was not present during the admission of the victim's records and that the victim did not authorize the release of her medical records.

{¶30} As previously stated, the two-prong *Strickland* analysis must be applied upon consideration of an App.R. 26(B) application for reopening: 1) the applicant must prove that his appellate counsel was deficient for failing to raise on appeal the issue he now presents; and 2) had appellate counsel presented the issue that was not considered on direct appeal, there was a reasonable probability that the outcome of the appeal would have been different. This court must also indulge in a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance and that debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980).

{¶31} In the matter sub judice, trial counsel's stipulations to the authenticity of the victim's medical records were debatable trial tactics that this court will not second-guess. Also, Lenard has failed to demonstrate the prejudice that resulted from trial counsel's stipulation to the authenticity of the victim's medical records.

{¶32} In addition, the transcript of proceedings clearly provides that Lenard was indeed present in the courtroom during the admission into evidence of the victim's medical records. *See* tr. 497-498. Finally, Lenard's mere assertion that the victim did not authorize the release of her medical records is not sufficient to maintain an application for reopening. Lenard does not identify either the portions of the record which provide the bases for his claim nor the legal authority supporting his conclusion. *State v. Johnson*, 8th Dist. Cuyahoga No. 61015, 2000 Ohio App. LEXIS 6085 (Dec. 13, 2000). *See also Morgan v. Eads*, 104 Ohio St.3d 142,

2004-Ohio-6110, 818 N.E.2d 1157. Thus, we find that Lenard's sixth and seventh proposed assignments of error are not well taken.

{¶33} Application denied.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR