[Cite as *State v. H.H.*, 2011-Ohio-6660.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1126 (C.P.C. No. 09CR-4891)
H.H.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Bruce T. Davis Co., LPA, and *Bruce T. Davis*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, H.H. ("appellant"), appeals his conviction on charges of rape, sexual battery, and gross sexual imposition, and the sentence imposed on those convictions. For the reasons that follow, we affirm in part and reverse in part.

{¶2} On August 6, 2009, appellant and his 17-year-old granddaughter, prosecuting witness ("P.W."), traveled from Indiana to Columbus, Ohio, to attend a drag-racing event. After arriving in Columbus, appellant and P.W. checked into a hotel, then went to a grocery store, had dinner, and returned to the hotel. Before going to bed, P.W. drank an alcoholic beverage that appellant had purchased at the grocery store and took a

quarter dose of medication for bipolar disorder. P.W. later testified that the bipolar medication "knocks [her] out" and causes her to sleep soundly. (Tr. 68.) P.W. went to sleep on a couch in the hotel room. Appellant and P.W. had agreed that appellant would sleep on the bed and P.W. would sleep on the couch.

{¶3} Shortly after falling asleep, P.W. awoke to find that she was lying on the bed, and that appellant was penetrating her vagina with his penis. Her pants and underwear had been removed. P.W. tried to pull away from appellant, but he pulled her back toward him and told her to "just wait." (Tr. 70.) P.W. asked appellant to stop, but again he told her to wait. While assaulting P.W., appellant touched various parts of her body with his hands. When the assault ended, appellant went to the bathroom and then returned to the bed. P.W. remained on the bed and waited for appellant to fall asleep, then dressed, took appellant's cell phone, and went outside the hotel room. P.W. called her boyfriend, who contacted P.W.'s mother, H.G. H.G. then contacted Columbus police. Officer Christopher Lieb, who was working special duty at the hotel where appellant and P.W. were staying, responded to the incident. P.W. was transported to a hospital, where she was examined by a sexual assault nurse examiner and interviewed by police detectives.

{¶4} Appellant was indicted on charges of forcible rape, rape of an individual whose ability to resist or consent was substantially impaired due to a mental or physical condition, two counts of sexual battery, and gross sexual imposition. A jury convicted appellant on all five counts as charged in the indictment. The trial court sentenced appellant to ten years of imprisonment on each of the rape convictions and 18 months of imprisonment on the gross sexual imposition conviction. The trial court found that the

sexual battery convictions merged with the rape convictions for purposes of sentencing. Appellant's sentences were imposed consecutively, for a total of 21 and 1/2 years in prison.

{¶5} Appellant appeals his conviction and sentence, assigning the following errors for this court's review:

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING APPELLANT TO MULTIPLE SENTENCES FOR FORCIBLE RAPE (2907.02(A)(1)(a)) AND RAPE WITH A VICTIM OF DIMINISHED CAPACITY (2907.02(A)(1)(c)) AND TO MULTIPLE SENTENCES FOR FORCIBLE RAPE (2907.02(A)(1)(a)) AND GROSS SEXUAL IMPOSITION (2907.05), WHERE THESE SENTENCES WERE REQUIRED TO BE MERGED PURSUANT TO OHIO REV. CODE 2941.25(A).
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> SECOND ASSIGNMENT OF ERROR: APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S ADMISSION OF INADMISSIBLE EVIDENCE AND HIS FAILURE TO PROPERLY INVESTIGATE THE CASE, BOTH OF WHICH PREJUDICED APPELLANT'S TRIAL.

{¶6} In his first assignment of error, appellant asserts that the trial court erred by failing to merge his convictions for forcible rape and rape of a victim whose ability to resist or consent was substantially impaired due to a mental or physical condition.[1] Appellant also argues that the trial court erred by failing to merge his gross sexual imposition

[1] Throughout his brief, appellant asserts that he was convicted of forcible rape in violation of R.C. 2907.02(A)(1)(a), which prohibits sexual conduct when the offender "substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception." However, as the state observes in its brief, the jury verdict indicated that appellant was found guilty of rape as charged in count one of the indictment. (Appellee's brief at 2.) Under count one of the indictment, appellant was charged with having purposely compelled P.W. to submit to intercourse by force or threat of force. This language reflects a violation of R.C. 2907.02(A)(2), which prohibits "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Accordingly, we will analyze appellant's forcible rape conviction based on R.C. 2907.02(A)(2).

conviction with the forcible rape conviction. The state claims that the trial court did not err because these convictions were not subject to merger.

{¶7} Merger is based on " 'the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' " *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶11, quoting *State v. Botta* (1971), 27 Ohio St.2d 196, 201. The doctrine of merger is codified in Ohio law as R.C. 2941.25. Id. at ¶12. Under that law, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). By contrast, "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

{¶8} The Supreme Court of Ohio recently ruled on the test for determining whether two crimes are allied offenses of similar import, and thus subject to merger, in the *Johnson* case. There was no majority opinion in *Johnson*, but the plurality opinion and concurring justices emphasized the importance of considering the defendant's conduct. *State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶5. "Under the holding [of the plurality opinion] in *Johnson*, '[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit

one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.' " *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶62, quoting *Johnson* at ¶48.

{¶9} If the offenses can be committed by the same conduct, then we must " 'determine whether the offenses *were* committed by the same conduct, i.e., "a single act, committed with a single state of mind." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.' " (Emphasis sic.) Id. at ¶63, quoting *Johnson* at ¶49-50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Johnson* at ¶51. Appellant argues that the trial court was required to merge his two rape convictions for the purposes of sentencing because he committed both crimes through the same act, with the same state of mind. Accordingly, we begin by considering whether appellant committed both crimes by the same act.

{¶10} Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(c), which provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age." Under the law, "sexual conduct"

includes "vaginal intercourse between a male and female * * * and, without the privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). Courts have found that sleep is a "physical condition" that may substantially impair a person's ability to resist or consent to sexual conduct. See *State v. Graves*, 8th Dist. No. 88845, 2007-Ohio-5430, ¶22; *State v. Wright*, 9th Dist. No. 03CA0057-M, 2004-Ohio-603, ¶6. Therefore, appellant committed rape in violation of R.C. 2907.02(A)(1)(c) when he had intercourse with P.W. while she was sleeping.

{¶11} Appellant was also convicted of forcible rape, in violation of R.C. 2907.02(A)(2), which provides that "[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." Force is generally defined as "any violence, compulsion, or constraint physically exerted by any means upon a person or thing." R.C. 2901.01(A)(1). The Supreme Court of Ohio has stated that "[t]he force and violence necessary to commit the crime of rape depends on the age, size and strength of the parties and their relation to each other." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph one of the syllabus.

{¶12} In this case, P.W. testified that she went to sleep on the couch, wearing a t-shirt, underwear, and pants. She awoke to find herself on the bed, with her underwear and pants removed. Thus, the jury could reasonably infer that appellant carried his sleeping granddaughter from the couch to the bed and removed her clothing. Under these circumstances, moving P.W.'s body and removing her clothes while she slept would constitute force under R.C. 2907.02(A)(2). See *State v. Johnson*, 2d Dist. No.

2009-CA-38, 2010-Ohio-2920, ¶18-19; *State v. Clark*, 8th Dist. No. 90148, 2008-Ohio-3358, ¶17; *State v. Burton*, 4th Dist. No. 05CA3, 2007-Ohio-1660, ¶38. By having intercourse with P.W. after moving her body and removing her clothes while she slept, appellant committed forcible rape.

{¶13} Appellant committed the crimes of forcible rape and rape of a person whose ability to resist or consent was substantially impaired due to a mental or physical condition by moving P.W. from the couch where she was sleeping to the bed, removing her clothes, and having intercourse with her while she slept. This was all part of one continuous course of action. At trial and on appeal, the state argued that the forcible rape occurred once P.W. awoke and began to resist and that, therefore, appellant committed the crimes by separate acts. However, under the facts presented in this case, we reject this argument. It is true that appellant applied additional force to P.W. after she awoke by pulling her back toward him and holding her in place as she attempted to move away from him. However, appellant had already used force on P.W. when he moved her body and removed her clothing. The evidence suggests that, after moving P.W. to the bed and removing her clothing, appellant committed a single, uninterrupted act of sexual intercourse beginning when P.W. was asleep and continuing after she awoke. Appellant did not stop when P.W. awoke, or engage in multiple acts or different types of intercourse once she was awake. Therefore, we conclude that, under these circumstances, the application of additional force to restrain and hold P.W. while the intercourse continued did not constitute a separate act for purposes of determining whether the convictions should merge for sentencing.

{¶14} The evidence presented at trial also suggests that appellant committed this course of action with a single state of mind. P.W. testified that when she woke up and began to pull away from appellant, he pulled her back and told her to wait. This demonstrates intent to complete the act that he began while she was asleep. There was no testimony that appellant hesitated or stopped having intercourse with P.W. when she woke. The state argues that appellant's initial intent was to have intercourse with P.W. without being discovered and that his state of mind changed after she woke up. However, the evidence suggests that appellant's intent throughout was to have nonconsensual intercourse with his granddaughter. The fact that he continued assaulting P.W. after she awoke does not demonstrate a changed state of mind from when the assault began. Because both crimes of rape were committed through the same course of action and with a single state of mind, the convictions should merge for the purposes of sentencing.

{¶15} Appellant also asserted that the trial court should have merged his conviction for gross sexual imposition with the forcible rape conviction. However, in his reply brief, appellant concedes that the trial court did not err in failing to merge these sentences on the authority of this court's decision in *State v. Lefthandbull* (Mar. 6, 2001), 10th Dist. No. 00AP-584. (Reply brief, 1, fn.1.) Because appellant concedes that there was no error in failing to merge these convictions, we overrule this portion of the first assignment of error.

{¶16} Accordingly, appellant's first assignment of error is sustained in part to the extent that his convictions for forcible rape and rape of a person whose ability to resist or consent was substantially impaired due to a mental or physical condition should have

merged for sentencing, and it is overruled in part as to the merger of the gross sexual imposition conviction with the forcible rape conviction.

{¶17} In his second assignment of error, appellant argues that his convictions should be reversed because his trial counsel provided ineffective assistance. Appellant claims that his trial counsel provided ineffective assistance by introducing evidence that he previously sexually abused H.G., who is appellant's daughter and P.W.'s mother. Appellant also argues that his trial counsel was ineffective in failing to investigate a potential defense based on the physical evidence in the case.

{¶18} The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶12, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. "Second, the defendant must show that the deficient performance prejudiced the defense." Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 466 U.S. at 686, 104 S.Ct. at 2064.

{¶19} Appellant first argues that his trial counsel was ineffective because he introduced evidence that appellant had previously sexually abused H.G. Appellant asserts that this information would have been inadmissible if the state had sought to

introduce it and that it was so prejudicial that the jury could have convicted him based on the assertion of past abuse alone. The state argues that this was a matter of trial strategy and does not form a basis for reversing appellant's convictions.

{¶20} In determining whether counsel was deficient, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶13, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. "Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel." *State v. Hester*, 10th Dist. No. 02AP-401, 2002-Ohio-6966, ¶10 (internal citations omitted). However, ineffective assistance may be found where an attorney adopts a tactic that, under prevailing standards, a competent attorney would not reasonably adopt. *State v. Rutledge* (June 1, 1993), 10th Dist. No. 92AP-1401. Additionally, "evidence of other crimes which come before the jury due to defense counsel's neglect, ignorance or disregard of defendant's rights, and which bears no reasonable relationship to a legitimate trial strategy, will be sufficient to render the assistance of counsel ineffective." *Hester* at ¶10.

{¶21} In *Rutledge*, Rutledge and a co-defendant, Gordon, were charged with aggravated robbery. The evidence presented at trial established that police officers witnessed two men committing the robbery from a distance and pursued the two suspects. At one point, the suspects split up, and the police officers followed Gordon, ultimately apprehending him. Shortly thereafter, one of the officers arrested Rutledge in a nearby restaurant. Because the officers lost sight of the second robber during the pursuit, the identity of the second robber was a principal issue at trial. Rutledge's trial counsel called his parole officer as a character witness to testify that he was a "good parolee."

However, his counsel also elicited testimony from the parole officer that Rutledge had previously been convicted of aggravated robbery. On appeal, this court found that Rutledge's trial counsel provided ineffective assistance by introducing this evidence regarding his prior conviction. The court concluded that because identification was the key issue in the trial, the character evidence provided by the parole officer had little value because it did not directly address that issue. Additionally, the court noted that the prosecution might have been unable to independently introduce evidence of Rutledge's prior conviction if his counsel had not called the parole officer to testify. Because "[t]he dangers inherent in introducing the prior conviction evidence * * * so outweighed any minimal benefit that no reasonable attorney would adopt such a tactic," Rutledge's trial counsel provided ineffective assistance. *Rutledge*.

{¶22} By contrast, in *Hester*, this court found that calling a defendant's parole officer to testify was not ineffective assistance, even though it led to introduction of prior conviction evidence. Hester was charged with robbery, theft, and receiving stolen property based on allegations that, while working as a nurse's assistant, she had taken a diamond ring from a patient. *Hester* at ¶1-3. When questioned by police, Hester asserted that she found the ring in a hallway of the hospital and admitted that she had pawned it. Id. at ¶12. At the time of the alleged theft, Hester was on parole, having been previously convicted of 15 counts of burglary. Id. at ¶9. Hester's counsel called her parole officer as a witness at trial to testify that she was a cooperative parolee. On cross-examination, the prosecutor was then able to elicit testimony from the parole officer regarding Hester's prior burglary convictions. In her appeal, Hester argued that her counsel was ineffective by allowing testimony regarding those prior convictions. Id. This

court rejected that claim, concluding that Hester's counsel had adopted a strategy of establishing Hester's good and honest character so that the jury would believe her claim that she found the ring and had not stolen it. Id. at ¶13. Although calling Hester's parole officer to bolster her character "opened the door" and allowed the prosecution to introduce evidence of prior crimes, we could not find that attempting to establish Hester's credibility was not a legitimate trial strategy. Id. at ¶14. The court distinguished *Rutledge* because, in Hester's case, the character evidence was directly related to her defense. Id.

{¶23} In the present case, the state's case relied primarily on P.W.'s testimony and forensic evidence. The state also called P.W.'s mother, H.G., to corroborate parts of P.W.'s testimony. On cross-examination, appellant's counsel elicited testimony from P.W. that, prior to the trip to Columbus, H.G. told P.W. that appellant had sexually assaulted her in the past. P.W. also testified that she told detectives that the trip to Columbus was a "test." (Tr. 117; 121.) When appellant's trial counsel began to question P.W. about this topic, the state objected, and the court conducted a sidebar conference with the attorneys. Appellant's counsel explained that he wanted to introduce this evidence to establish a motive for P.W. to fabricate a story that appellant raped her.

{¶24} Further, it appears appellant's trial counsel also may have solicited this testimony from P.W. in an attempt to discredit H.G. P.W. testified that H.G. told her about the past abuse just a short time before the trip. By contrast, H.G. testified that she did not remember when she told P.W. about the abuse but indicated that it was some time prior to this incident when she and her daughters were living in a different state from appellant. In closing argument, appellant's trial counsel highlighted P.W.'s testimony that the trip was a "test" and the discrepancy between P.W.'s testimony and H.G.'s testimony about

when P.W. learned of the abuse. He also argued that no mother would allow her child to go on a multi-day trip with someone who had previously sexually assaulted her.

{¶25} Thus, it is clear that appellant's trial counsel elicited the testimony regarding appellant's prior assault on H.G. as part of a planned trial strategy. Establishing that P.W. had a motive to lie and discrediting the testimony from P.W. and H.G. were tactics directly related to establishing that appellant did not commit the charged crimes. Thus, this case is more analogous to our decision in *Hester* than *Rutledge*. Although introducing evidence of prior convictions or bad acts may be a questionable strategy in hindsight, this court generally "refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable." *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶138, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. There was some risk in introducing this evidence because it suggested that appellant previously committed a similar crime, but we cannot conclude that relying on it in an attempt to discredit the testimony of P.W. and H.G. "[bore] no reasonable relationship to a legitimate trial strategy." *Hester* at ¶10.

{¶26} Even if we were to conclude that trial counsel's performance was deficient, appellant has failed to demonstrate that he suffered prejudice as a result. "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." *Bradley*, at paragraph three of syllabus. " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " Id. at 142, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶27} In this case, there was substantial evidence tending to establish appellant's guilt beyond any testimony regarding his alleged past acts. P.W. provided direct testimony regarding the sexual assault, including the fact that she awoke while appellant was assaulting her. As we have previously noted, "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶42. However, in this case, there was additional physical and circumstantial evidence corroborating P.W.'s story. Dr. Raman Tejwani ("Dr. Tejwani"), a forensic scientist with the Columbus Police Crime Lab, testified that P.W.'s DNA was identified on penile swabs taken from appellant. Stacey Wood ("Wood"), the sexual assault nurse examiner who examined P.W., testified that P.W. suffered genital injuries consistent with forcible intercourse. Additionally, H.G. testified that, after learning of the assault, she called appellant's cell phone, and he immediately stated "she could have said no." (Tr. 137.) The jury could have construed this as an admission that appellant had intercourse with P.W. In light of this evidence, appellant has failed to show a reasonable probability that, if his trial counsel had not elicited testimony regarding the prior assault on H.G., the outcome of the trial would have been different.

{¶28} Appellant also claims that his trial counsel provided ineffective assistance by failing to investigate a possible defense based on the physical evidence in the case. Specifically, appellant claims that his trial counsel failed to investigate whether he had undergone a vasectomy. Dr. Tejwani testified that she identified semen on the vaginal swab taken from P.W., but that there was no sperm present. Dr. Tejwani stated that one possible explanation for a lack of sperm in a semen sample could be that the source of the sample had undergone a vasectomy. Appellant argues that his trial counsel should

have investigated whether appellant had undergone a vasectomy and that, if he had not, this would have tended to disprove that he raped P.W.

{¶29} The details of the steps appellant's trial counsel took in investigating the case are not part of the record on appeal. There is no evidence as to whether trial counsel did or did not investigate whether appellant had undergone a vasectomy. Thus, we cannot determine on direct appeal whether trial counsel was ineffective on this basis because the claim relies on matters outside the record on appeal. *State v. Hamilton*, 10th Dist. No. 10AP-543, 2011-Ohio-3305, ¶29. See also *State v. Douthat*, 10th Dist. No. 09AP-870, 2010-Ohio-2225, ¶19 ("Where a claim of ineffective assistance of counsel is dependent upon facts outside the record, the appropriate remedy is for the defendant to file a petition for post-conviction relief.").

{¶30} Although appellant's trial counsel may have engaged in a questionable tactic by introducing evidence that appellant previously molested H.G., we cannot conclude that this was an unreasonable trial strategy under the circumstances. Further, appellant has failed to establish that, absent the introduction of this evidence, the result of the trial would have been different. Appellant's claim that his trial counsel was ineffective for failing to investigate a potential defense is not properly before us because it relies on evidence outside the record on appeal. Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶31} For the foregoing reasons, appellant's first assignment of error is sustained in part and overruled in part, and his second assignment of error is overruled. The judgment of Franklin County Court of Common Pleas is affirmed in part and reversed in

part, and this matter is remanded to that court for resentencing consistent with this decision.

Judgment affirmed in part and reversed in part; case remanded for resentencing.

KLATT and SADLER, JJ., concur.

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