[Cite as *State v. Haynes*, 2011-Ohio-5743.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-273
	:	O P I N I O N
- vs -		11/7/2011
	:	
COURTNEY HAYNES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-06-0924

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RINGLAND, J.

{¶1} Defendant-appellant, Courtney Haynes, appeals from his conviction in the Butler County Court of Common Pleas for one count of aggravated burglary and one count of rape. For the reasons outlined below, we affirm appellant's conviction, but reverse the sentence and remand for the limited purpose of resentencing.

{¶2} On the evening of May 20, 2010, L.P., a single mother living with her four-year-old daughter in a Butler County apartment complex, awoke to find her bedroom lights on and

a "very large" silhouette standing in the doorway. Dazed at first, L.P. laid in bed and watched as the large silhouette turned off the overhead lights, exited the room, and closed the door. Wanting to investigate the matter further, and feeling the need to check on her daughter, L.P. wrapped herself in a blanket, exited her bedroom, and walked into the hallway.

{¶3} Upon exiting her bedroom and noticing her daughter's bedroom door was closed, L.P. turned down the hallway when she was confronted by what she described as a "very large man, African American, close cropped hair wearing a dark t-shirt and very large, just large" who asked her if she was "Angela" and "if this was apartment number 304." After telling the man that he was in the wrong apartment and demanding for him to leave, the man began to walk towards the open back patio door when he suddenly turned around, threw L.P. to the floor, and raped her. After the attack was complete, during which time L.P. struggled mightily, the man fled from the apartment through the back patio door and L.P. called the police.

{¶4} Once the police arrived, and after she was able to compose herself, L.P. informed the police that she "was very, very sure" her attacker was "the man [she] was having problems with previously," which included, among other things, several confrontations regarding loud noise coming from his nearby apartment. Approximately 30 minutes later, after a police K-9 unit traced a recent scent from L.P.'s back patio door to the front of appellant's apartment building, L.P. positively identified appellant, an African American male standing approximately six feet two inches tall and weighing 280 pounds, as the man who attacked her. Thereafter, appellant, who had a fresh scratch on his arm, was arrested and charged with one count of aggravated burglary and one count of rape, both first-degree felonies.

{¶5} On September 2, 2010, following a three-day jury trial, appellant was found guilty of both offenses. On October 18, 2010, the trial court held a sentencing hearing during

which it classified appellant as a tier three sex offender, imposed fines of $700, and ordered him to serve a total of nine years in prison.

{¶6} Appellant now appeals from his conviction and sentence, raising three assignments of error for review.

{¶7} Assignment of Error No. 1:

{¶8} "THE DISTRICT [sic] COURT ERRED IN PERMITTING THE INTRODUCTION OF SUBSTANTIVE EVIDENCE THROUGH IMPEACHMENT."

{¶9} In his first assignment of error, appellant initially argues that the trial court erred by permitting the state to introduce a prior inconsistent statement of its own witness, Rhonda Schmidt, appellant's girlfriend, "as substantive evidence of [his] guilt." However, while he did object to the introduction of the prior inconsistent statement under Evid.R. 607(A) by claiming the state was "not surprised by this," appellant never argued that the state was offering Schmidt's prior inconsistent statement as substantive evidence of his guilt. It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal. *State v. Abney*, Warren App. No. CA2004-02-018, 2005-Ohio-146, ¶17, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 122; *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. Therefore, because appellant did not specifically raise this issue with the trial court, this matter is waived and we need not consider it for the first time on appeal. Accordingly, appellant's first argument is overruled.

{¶10} Appellant also argues under his first assignment of error that the trial court erred by failing to provide the jury with a limiting instruction "on how they could use" Schmidt's prior inconsistent statement. Stated differently, appellant argues the trial court erred by not instructing the jury that Schmidt's prior inconsistent statement could be used only for impeachment purposes. Appellant, however, did not request the trial court to provide the jury with such an instruction, and therefore, he has waived this error on appeal. See

State v. Colvin (Mar. 13, 1995), Butler App. No. CA94-04-092, at 12 (finding defendant waived any error in trial court's failure to provide jury with limiting instruction regarding witnesses' prior inconsistent statement by failing to request such an instruction); see, also, *State v. Bauer* (Dec. 16, 1982), Cuyahoga App. No. 44637, 1982 WL 2620, at *4. Accordingly, appellant's second argument is overruled.

{¶11} That said, while appellant did not allege plain error, we nonetheless find that even if appellant had not waived these issues on appeal, neither of the alleged errors would constitute plain error. As this court has stated previously, "[n]otice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶7, citing *State v. Long* (1978), 53 Ohio St.2d 91, 95. An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. A finding of harmless error, however, is appropriate where there is "overwhelming evidence of guilt" or "some other indicia that the error did not contribute to the conviction." *State v. Sims*, Butler App. No. CA2007-11-300, 2009-Ohio-550, ¶34, quoting *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5.

{¶12} Here, the state presented overwhelming evidence of appellant's guilt including, among other things, uncontroverted evidence that appellant sent L.P. an anonymous internet message containing a link to a lewd pornographic video showcasing a large African-American male engaged in sexual acts with a woman vaguely resembling the victim, that L.P. had specifically identified appellant as her attacker shortly after the rape and again at trial, and that appellant, who had a fresh scratch on his arm, left his apartment around the time of the attack only to hurriedly return and wash his hands, change his clothes, and leave with what appeared to be a trash bag containing clothing. The state also provided evidence indicating a K-9 unit tracked a recent scent from L.P.'s back patio door to the front of appellant's nearby

apartment building. In turn, even if appellant had properly preserved these issues for appeal, because the state provided overwhelming evidence of his guilt, any error the trial court may have made by allegedly allowing the state to introduce Schmidt's prior inconsistent statement as substantive evidence of appellant's guilt or by failing to provide the jury with a proper limiting instruction, was, at best, harmless. Appellant's first assignment of error, therefore, is overruled.

{¶13} Assignment of Error No. 2:

{¶14} "APPELLANT HAYNES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE TO FILE A MOTION TO SUPPRESS AND REQUEST A LIMITING INSTRUCTION."

{¶15} In his second assignment of error, appellant argues that he received ineffective assistance of trial counsel. In support of this claim, appellant raises two issues for review. For ease of discussion, we will address each issue separately.

{¶16} To prevail on his ineffective assistance of counsel claim, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *State v. Jones*, 193 Ohio App.3d 400, 2011-Ohio-1717, ¶35; *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. In order to demonstrate prejudice, appellant must establish, but for counsel's errors, a reasonable probability exists that the result of his trial would have been different. *State v. Ritchie*, Butler App. No. CA2008-12-304, 2009-Ohio-5280, ¶21, citing *Strickland* at 694. The failure to make an adequate showing on either prong is fatal to appellant's ineffective assistance of counsel claim. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶77, citing *Strickland* at 697.

{¶17} Initially, appellant argues that he received ineffective assistance of trial counsel "when his trial counsel failed to move to suppress the improper and overly suggestive

identification of him" made by L.P. shortly after the attack. This argument lacks merit.

{¶18} It is well-established that the "[f]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶208, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. Rather, the failure to file a motion to suppress amounts to ineffective assistance of counsel "only when the record demonstrates that the motion would have been successful if made." *State v. Bullock*, Clermont App. No. CA2005-04-031, 2006-Ohio-598, ¶19, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433. In turn, even when some evidence in the record supports a motion to suppress, we presume trial counsel was effective if "the defense counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act." *State v. Lamb*, Butler App. Nos. CA2002-07-171, CA2002-08-192, 2003-Ohio-3870, ¶45, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 174.

{¶19} When a witness confronts a suspect before trial, such as the case here, due process requires a court to suppress the witness' identification of the suspect where (1) the confrontation was unnecessarily suggestive of the suspect's guilt, and (2) the identification was unreliable under the totality of the circumstances. *State v. Robinson*, Fayette App. No. CA2009-02-004, 2009-Ohio-4937, ¶11; *State v. Waddy* (1992), 63 Ohio St.3d 424, 438. Generally, a confrontation is unnecessarily or unduly suggestive when the witness has been shown only one subject. *Robinson*, 2009-Ohio-4937 at ¶12, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243; *State v. Hillman*, Franklin App. Nos. 06AP-1230, 07AP-728, 2008-Ohio-2341, ¶47. However, because reliability is the linchpin in determining the admissibility of identification testimony, even if the identification procedures used were unnecessarily or unduly suggestive, there is no due process violation where the identification itself possesses sufficient aspects of reliability. *State v. McDonald*, Butler App. No. CA2009-09-240, 2010-Ohio-1521, ¶8; *State v. Grays*, Madison App. No. CA2001-02-007, at 5, 2001-

Ohio-8679; *State v. Sawyer* (May 17, 1999), Butler App. No. CA98-07-140, at 3.

{¶20} "When determining the reliability of a witness' identification, a court examines whether the identification was unreliable under the totality of the circumstances." *Lamb*, 2003-Ohio-3870 at ¶50, citing *State v. Poole* (1996), 116 Ohio App.3d 513, 522. The factors considered relevant in making this determination include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the sighting and the confrontation. *State v. Stepp*, Butler App. No. CA2007-05-117, 2008-Ohio-4305, ¶22, citing *Neil v. Biggers* (1972), 409 U.S. 188, 199, 93 S.Ct. 375; *State v. Broom* (1988), 40 Ohio St.3d 277, 284.

{¶21} In this case, although appellant was the only person presented to L.P. for her to identify, the identification itself shows significant aspects of reliability. Here, L.P. was clearly able to see her attacker as he pinned her down on the floor and raped her. Furthermore, L.P.'s initial description of her attacker as a "very large" African-American male with "close cropped hair" who she had "problems with previously," closely matches that of appellant. Moreover, when confronted with appellant a mere 30 minutes after the attack, L.P. immediately identified appellant as her attacker. In fact, when asked "how sure [she] was" when first confronting appellant, L.P. testified that she was "[o]ne hundred percent sure" that appellant was her attacker. Therefore, although the confrontation could be characterized as inherently suggestive, because L.P.'s identification of appellant as her attacker shows significant aspects of reliability, we cannot say that identification procedure created a substantial likelihood of misidentification such that appellant's motion to suppress would have been granted. See, e.g., *State v. Adkins*, Cuyahoga App. No. 95279, 2011-Ohio-5149, ¶49; *State v. Jennings*, Mahoning App. No. 08-MA-181, 2009-Ohio-6536, ¶17; *State v. Wilkerson*,

Franklin App. No. 01AP-1127, 2002-Ohio-5416, ¶57. Accordingly, appellant's first argument is overruled.

{¶22} Appellant also argues that he received ineffective assistance of trial counsel when his trial counsel "fail[ed] to request a limiting instruction from the court concerning the use of [Schmidt's prior inconsistent statement.]" However, similar to our findings under appellant's first assignment of error, even if we were to assume deficient performance, based on the overwhelming evidence of his guilt, appellant simply cannot show any resulting prejudice. Appellant's second argument, therefore, is overruled.

{¶23} Having found no merit to either argument advanced under this assignment of error, appellant's second assignment of error is overruled.

{¶24} Assignment of Error No. 3:

{¶25} "THE TRIAL COURT ERRED IN FAILING TO PROVIDE APPELLANT WITH HIS RIGHT TO ALLOCUTION."

{¶26} In his third assignment of error, appellant argues that the trial court erred by denying him his right to allocution by "failing to address him personally and by failing to ask if he wished to make a statement on his own behalf or present information in mitigation at sentencing." We agree.

{¶27} "The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, ¶85. Although not considered a constitutional right, "the right of allocution is firmly rooted in the common-law tradition." *State v. Copeland*, Butler App. No. CA2007-02-039, 2007-Ohio-6168, ¶6, citing *Green v. United States* (1961), 365 U.S. 301, 304, 81 S.Ct. 653; *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶100-103. This right is "both absolute and not subject to waiver due to a defendant's failure to object." *State v. Collier*, Clark App. Nos. 2006 CA 102, 2006 CA 104, 2007-Ohio-6349, ¶92.

{¶28} Pursuant to Crim.R. 32(A)(1), before imposing a sentence in a criminal trial, "the trial court shall 'address the defendant personally' and ask whether he or she wishes to make a statement on her own behalf or present any information in mitigation of punishment." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶166. In turn, the right to allocution created by Crim.R. 32(A)(1), something which courts must painstakingly adhere to in both capital and noncapital cases, "does not merely give the defendant a right to allocution; it imposes an affirmative requirement on the trial court to ask if he or she wishes to exercise that right." *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶135; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶188; *State v. Banks*, Butler App. No. CA2006-08-182, 2007-Ohio-4968, ¶15. Such "inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *State v. Brown*, 166 Ohio App.3d 252, 2006-Ohio-1796, ¶8, quoting *State v. Green*, 90 Ohio St.3d 352, 359-360, 2000-Ohio-182. Therefore, in cases in which the trial court imposes a sentence without first asking the defendant whether he or she wishes to exercise their right of allocution, "resentencing is required unless the error is invited error or harmless error." *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183, paragraph three of the syllabus.

{¶29} At appellant's October 18, 2010 sentencing hearing, the following exchange occurred:

{¶30} "[THE STATE]: State of Ohio versus [appellant], CR-2010-06-0924. [Appellant] is here for sentencing, Your Honor. The victim and her family are here and do not wish to address the court, but just let the court know that they are here.

{¶31} "THE COURT: This case went to trial in front of a jury who rendered a verdict on the 2nd of September of guilty on count one, rape, F-1 and guilty on count two, aggravated burglary, F-1. I asked that a presentence investigation report be prepared. I have that. What would you like to bring to the court's attention?

{¶32} "[APPELLANT'S TRIAL COUNSEL]: Judge, while we respect the jury's decision, we certainly believe that they were in error. That being said, [appellant] is 27 years old, and he has no history whatsoever and never had a problem or been in trouble. We have got a situation obviously where he has been convicted of very serious crimes, and the aggravated burglary and the rape, and we recognize that the rape time must be mandatory time, but we ask the court to consider allowing him to serve a minimum sentence in this case and, I believe, that [appellant] can be a productive member of society.

{¶33} "And I think that – he knows he has to go to prison but we ask the court to take into consideration his lack of history whatsoever. I think he may want to address the court as well. I know he sent you a letter.

{¶34} "THE COURT: Yes, he did.

{¶35} "[APPELLANT'S TRIAL COUNSEL]: And he would rest on that."

{¶36} Following this exchange, the trial court, without personally addressing appellant, turned its attention to the state and the previously submitted victim impact statement. Thereafter, still without personally addressing appellant to determine if he wished to make a statement on his own behalf, the trial court classified appellant as a tier three sex offender, indicated that it had considered the necessary sentencing guidelines "and any other pertinent facts that the higher court has instructed the court to consider," imposed fines of $700, and ordered appellant to serve a total of nine years in prison.

{¶37} After a thorough review of the record, it is clear that the trial court never personally addressed appellant asking if he wished to exercise his right to allocution. "The requirement of allocution is considered fulfilled when the conduct of the court clearly indicates to the defendant that he has a right to make a statement prior to the imposition of sentence." *State v. Harvey*, Allen App. No. 1-09-48, 2010-Ohio-1627, ¶15, citing *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828. Such is simply not the case here. The trial court,

therefore, clearly erred by not adhering to the allocution requirements as mandated by Crim.R. 32(A)(1) before imposing its sentence.

{¶38} Despite this, the state claims the trial court's failure to personally address appellant at his sentencing hearing "was invited error and also harmless." For ease of discussion, we will address each of the state's arguments separately.

{¶39} Initially, as it relates to its invited error claim, the state argues that the trial court's error was invited because "appellant's counsel informed the trial court that appellant 'would rest' on the letter he submitted to the court." We disagree.

{¶40} Under the invited error doctrine, which is applied when defense counsel is "actively responsible" for the trial court's alleged error, a party is not entitled to take advantage of an error which he himself invited or induced the court to make. *State v. Mansour*, Butler App. No. CA2010-08-198, 2011-Ohio-4339, ¶33; *Banks*, 2007-Ohio-4986 at ¶12. In other words, "[t]he rule of invited error prohibits a party who induces error in the trial court from taking advantage of such error on appeal." *State v. Williams*, Butler App. No. CA2006-03-067, 2007-Ohio-2699, ¶27.

{¶41} That said, nothing in the record convinces this court that the trial court was invited or induced into disregarding the clear and unambiguous requirements of allocution as mandated by Crim.R. 32(A)(1). While the state relies heavily on the fact appellant's trial counsel informed the trial court that appellant "would rest on that," it is open to conjecture as to what his trial counsel actually meant. Was appellant's trial counsel referring to appellant's entire soliloquy, or merely on his previously submitted letter? Moreover, the record is devoid as to any of appellant's actions, including any head movements or other body language, indicating appellant agreed with his trial counsel's assertion that he "would rest on that" by declining to act upon his right of allocution. Had the trial court complied with its affirmative requirement to ask if he wished to exercise this right, appellant may very well have taken

advantage of his last opportunity to plead his case and express remorse prior to his sentencing.

{¶42} As noted above, the right of allocution created by Crim.R. 32(A)(1) "does not merely give the defendant a right to allocution; it imposes an affirmative requirement on the trial court to ask if he or she wishes to exercise that right." *Myers*, 2002-Ohio-6658 at ¶135; *Fry*, 2010-Ohio-1017 at 188; *Banks* at ¶15. Therefore, because we find appellant did not invite or induce the trial court to commit this error, the state's first argument is overruled.

{¶43} Next, as it relates to its harmless error claim, the state argues that the trial court's failure to personally address appellant prior to sentencing was harmless because "appellant did provide the trial court with an unsworn statement, his letter." In support of its claim, the state relies on the Ohio Supreme Court's decision in *State v. Reynolds*, 80 Ohio St.3d 670, 1998-Ohio-171.

{¶44} In *Reynolds*, the Ohio Supreme Court found a trial court's failure to address the defendant prior to sentencing him to death was harmless where he had made an unsworn statement to the jury during the penalty phase of his capital murder trial, submitted a letter to the trial court prior to sentencing, and had his defense counsel make a statement on his behalf at the sentencing hearing. Id. at 684. In so holding, the court, after first noting that "the purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment," found the defendant "had this opportunity in the penalty phase of the case when he presented evidence and made an unsworn statement." Id.

{¶45} In this case, however, although he did submit a letter to the trial court prior to his sentencing hearing, and even though his trial counsel did make a statement on his behalf, unlike the defendant in *Reynolds*, appellant was never afforded the opportunity to "speak on

his own behalf or present any information in mitigation of punishment."[1] Id. In turn, without ever providing him with this opportunity, an opportunity which, as noted above, is much more than an "empty ritual," we have no basis to conclude the trial court's failure to personally address appellant at his sentencing hearing was harmless for "the plain wording of [Crim.R. 32(A)(1)] does not encompass anyone other than the defendant presenting information in mitigation." *Short*, 2011-Ohio-3641 at ¶85, quoting *State v. Lowe* (May 3, 2001), Cuyahoga App. No. 78021, 2001 WL 468536, *2.

{¶46} Moreover, while a written statement oftentimes carries significantly more weight than an oral recitation of the same, it is simply "unfair to judge a defendant's mitigation plea on paper when he is entitled to make that plea in person to the court that is sentencing him." *Brown*, 2006-Ohio-1796 at ¶13, citing *State v. Spradin*, Pike App. No. 04CA727, 2005-Ohio-4704, ¶10. Therefore, although a trial court's failure to personally address a defendant prior to sentencing certainly can amount to harmless error, such is not the case here. Accordingly, the state's second argument is overruled.

{¶47} In light of the foregoing, because we find the trial court's failure to address appellant personally by asking him if he wished to exercise his right to allocution as mandated by Crim.R. 32(A)(1) does not amount to either invited error or harmless error, appellant's third assignment of error is sustained. This matter, therefore, must be remanded for resentencing. See *Campbell*, 2000-Ohio-183 at paragraph three of the syllabus; *Copeland*, 2007-Ohio-6168 at ¶12. Upon remand, the trial court is instructed to resentence appellant after directly asking him "if he * * * wishes to make a statement in his * * * own behalf or present any information in mitigation of punishment." See *Campbell* at 326, 2000-

1. Although not cited by the state, we also find this case distinguishable from the Ohio Supreme Court's decision in *Myers*, a case in which the defendant "exercised the right to speak on his own behalf during the mitigation phase and subjected himself to cross-examination." Id., 2002-Ohio-6658 at ¶136.

Ohio-183, quoting Crim.R. 32(A)(1).

{¶48} Judgment reversed as to sentencing only and remanded for resentencing. In all other respects, the trial court's judgment is affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.