[Cite as *State v. Meek*, 2009-Ohio-3448.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DAVID MEEK Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 08CA139 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08CR323
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 9, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRIAN T. WATLZ 20 South Second Street Fourth Floor Newark, OH 43055	THOMAS S. GORDON 8026 Woodstream Drive, NW Canal Winchester, OH 43110

Farmer, J.

{¶1} On May 23, 2008, the Licking County Grand Jury indicted appellant, David Meek, on one count of felony domestic violence in violation of R.C. 2919.25, one count of rape in violation of R.C. 2907.02, and one count of sexual battery in violation of R.C. 2907.03. Said charges arose from incidents involving appellant and his girlfriend, Lindsey Hanby-Dysart.

{¶2} A jury trial commenced on October 15, 2008. The jury found appellant guilty of the domestic violence count, but not guilty of the rape and sexual battery counts. By judgment entry filed October 17, 2008, the trial court sentenced appellant to five years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "APPELLANT WAS DENIED A FAIR TRIAL, AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION."

I

{¶5} Appellant claims he was denied a fair trial because the prosecutor made unproven assertions in opening statements, his trial counsel was ineffective, and the prosecutor erroneously used leading questions. We disagree.

OPENING STATEMENTS

{¶6} In its preliminary instructions, the trial court explained the nature of opening statements and closing arguments as follows:

{¶7} "***Generally the trial will proceed with the attorneys making their opening statements outlining to you what they expect the evidence will show, then the parties will have an opportunity to present such evidence as they desire to present, after which the attorneys will have the opportunity to make their closing statements where they can comment on what they believe the evidence has demonstrated, after which the Court would instruct you on the rules of law that apply to the case at which time you'd retire for your deliberations." T. at 114-115.

{¶8} In its closing charge to the jury, the trial court once again explained the nature of opening statements and closing arguments, "Evidence does not include the indictment, the opening statements of counsel, and the closing arguments of counsel. Opening statements and closing arguments are designed only to assist you and are not to be considered as evidence.***" T. at 406-407.

{¶9} Appellant argues the following statement by the prosecutor during opening statement was not substantiated by the evidence:

{¶10} "You're going to hear that when the Defendant was interviewed by police, that he was asked if there was any assaultive behavior. You're going to hear that he told the police, no, no, we just had rough sex. You're going to hear from the officer that he wasn't asked about sex, wasn't told that that was an allegation, but yet came up with that out of his own guilty conscience." T. at 116.

{¶11} Detective Scott Keene of the Licking County Sheriff's Office testified he never mentioned any allegations of rape or sexual assault to appellant during his interview. T. at 136. After the detective asked appellant if there had been any

assaultive behavior, appellant stated, "the only really time it got rough was during some rough sex and he had pulled her hair and that was at her request." T. at 137.

{¶12} Appellant also complains of the following comment made by the prosecutor during opening statement:

{¶13} "You're going to hear from Ms. Hanby, Lindsey, about how she was controlled; about how she told who she could associate with; how she was told she had to give the money that she got to him; how she was told when and where to move and what to do and who to do it with; and that the Defendant in this case ran the house because he was the one with the power and the control and that he enforced this through physical means." T. at 116-117.

{¶14} Ms. Hanby-Dysart testified appellant did not let her see her family; would not let her talk to her family or talk to her mother; forced her to move around; and controlled all the money, even her own money. T. at 172-173, 175. When they moved four times in six months, it was appellant who made all the decisions, and he would not let her use his cell phone to call her family on New Year's Eve. T. at 174, 179-180.

{¶15} Appellant also complains of the following additional comment made by the prosecutor during opening statement:

{¶16} "You're going to hear about how domestic violence victims think. You're going to hear that Lindsey had to be convinced by her sister to report this to the police. That she didn't want to do it. She was scared. She thought she was in love with him and she didn't know what to do." T. at 118.

{¶17} Ms. Hanby-Dysart testified she was scared of appellant, and "he's done a lot of bad things to me." T. at 187. The following morning after the incident, appellant

told Ms. Hanby-Dysart he would take her down to the Newark Police Department and "tell them what I did to you." T. at 188. Appellant drove her all around, but did not go to the police department. T. at 189-190. Thereafter, Ms. Hanby-Dysart tried to disable appellant's vehicle "so I can go next door and call my mom or my sister and have them come get me so they could bring the cops with them." T. at 191. Appellant caught her trying to pull the wires in his vehicle. Id. Ms. Hanby-Dysart then ran over to the neighbors to use the telephone "to call my mom or my sister and have them come and get me." T. at 192. Her sister, Kelly Lowendick, arrived and picked her up. Id. During this time, appellant texted her and she texted him back because "I wanted to know if things would get better and why he did what he did to me" and because she was still in love with him. T. at 193. Ms. Lowendick wanted her sister to call the police, but she didn't because "I was too tired and I was stressed and I didn't get a very good sleep and I was scared." T. at 196, 283. Ms. Hanby-Dysart did not want to call the police, but Ms. Lowendick finally convinced her to report the incident, so Ms. Hanby-Dysart called Kelly Miller, appellant's "PO." T. at 196, 289-290. Ms. Lowendick testified she read a degrading text message sent by appellant to Ms. Hanby-Dysart. T. at 285.

{¶18} We have reviewed all of the complained of comments made by the prosecutor during opening statement vis-à-vis the evidence presented. We find the statements are not inaccurate interpretations of the evidence, and did not prejudice appellant's right to a fair trial. Further, the trial court's cautionary instructions at the beginning of the trial and at the conclusion of the evidence were sufficient to ensure that the jury only relied on the evidence presented and not on the prosecutor's conclusory statements.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

{¶19} Appellant argues his trial counsel erred in bringing up the issue of his probation officer, and erred in failing to object to the testimony concerning his text messages to Ms. Hanby-Dysart. We disagree.

{¶20} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶21} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶22} "3. 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."

{¶23} On direct examination, Detective Keene testified his first contact with Ms. Hanby-Dysart occurred at the office of Kelly Miller. T. at 128. Ms. Hanby-Dysart testified she reported the incident to Kelly Miller, appellant's "PO." T. at 196. During the cross-examination of Detective Keene, the following exchange occurred between defense counsel and Detective Keene:

{¶24} "Q. Kelly Miller's office, is that like probation or something?

{¶25} "A. He's the chief adult parole officer I believe.

{¶26} "Q. Parole. Okay. And you had contact with her in that office.

{¶27} "A. Yes.

{¶28} "Q. And you were in uniform.

{¶29} "A. Yes.

{¶30} "Q. And who was present with you?

{¶31} "A. Deputy Ford was present at that time.

{¶32} "Q. So, two deputies. Anybody else?

{¶33} "A. Not that I remember other than Kelly Miller was there shortly and then left." T. at 141.

{¶34} This exchange was the sole reference to Kelly Miller's occupation by defense counsel, and the issue was placed in evidence via Ms. Hanby-Dysart's testimony. T. at 196. Furthermore, a stipulation was read to the jury informing the jury that appellant had been convicted of domestic violence on two previous occasions. T. at 325-326. The fact that appellant had a parole officer could not have been a surprise to the jury. We find the cited questioning by defense counsel was not deficient and was basically irrelevant. It had no impact on the outcome of the trial.

{¶35} As for the text messages, appellant argues the testimony was hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Under Evid.R. 801(D)(2), a statement is not hearsay if it is an admission by a party-opponent:

{¶36} "The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of

which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy."

{¶37} We agree with appellant that a foundation for the text messages was not made. However, we disagree that the sole purpose of introducing the text messages was to establish some sort of admission by appellant i.e., "[y]ou told on me." T. at 197. We view the text messages in the context of Ms. Hanby-Dysart explaining why she was hesitant to call the police after the incident and her overall fear of appellant.

{¶38} Although it is arguable that the complained of testimony should have been objected to by defense counsel, we nonetheless find the text message testimony did not affect the outcome of trial. Ms. Hanby-Dysart testified at length on the assault and rape. Both Detective Keene and Ms. Lowendick observed the evidence of physical abuse on Ms. Hanby-Dysart, as did the jury via State's Exhibits 2A-2D.

PROSECUTORIAL MISCONDUCT

{¶39} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, certiorari denied (1990), 112 L.Ed.2d 596. In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168.

{¶40} Appellant complains of leading questions by the prosecutor. From our review of the record, some of the leading questions were merely fundamental and did not create any prejudice. There were some on re-direct which by the very nature of re-direct have to be limited questions as to those issues brought up on cross-examination. There were some questions directly leading in nature that were objected to by defense counsel, and the trial court sustained the objections. We find any of the questions that were leading on direct did not elicit such subjective answers as to be prejudicial and meet the second prong of the *Lott* test.

{¶41} Upon review, we find the appellant was not denied a fair trial.

{¶42} The sole assignment of error is denied.

{¶43} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

s/Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

SGF/jp 0603

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID MEEK	:	
Defendant-Appellant	:	CASE NO. 08CA139

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

Sheila G. Farmer

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES