

[Cite as *State v. Klusty*, 2015-Ohio-2843.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

GARY KLUSTY

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Craig R. Baldwin, J.

Case No. 14 CAA 07 0040

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 13-CR-I-08-0377

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 13, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Gary Klusty appeals his conviction entered by the Delaware County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was alleged to have engaged in inappropriate sexual conduct with K.W., a minor child, while visiting K.W.'s family in 1998 and again in 1999. W.W. the younger brother of K.W., testified at trial, during one incident he ran into the house after playing outside and witnessed Appellant and K.W. on the couch and observed Appellant on top of K.W. He stated Appellant followed him to his bedroom and told him he and K.W. were "wrestling."

{¶3} K.W. testified when she was around nine or ten years of age, she met Appellant during his visits with her family on their farm. She testified he commented she looked very mature for her age. She then testified as to four separate incidents during which Appellant sexually abused her in 1998, and 1999.

{¶4} On August 21, 2003, Appellant was indicted on three counts of rape, in violation of R.C. 2907.02, with force specifications; and two counts of gross sexual imposition, in violation of R.C. 2907.05. The State alleges the offenses occurred in 1998, and 1999.

{¶5} A jury trial was scheduled for May 4, 2004. Prior to trial, the State filed a motion to dismiss the indictment due to Appellant's wife's inability to travel due to a high risk pregnancy.

{¶6} On August 23, 2013, the State refiled the indictment. In Delaware County Case No. 13 CR I 08 0377, the State charged Appellant with three counts of rape, in

violation of R.C. 2907.02, with force specifications; and five counts of gross sexual imposition, in violation of R.C. 2907.05.

{¶7} Appellant filed a motion to dismiss the indictment due to prejudicial pre-indictment and post-indictment delay. The trial court held a hearing on Appellant's motion. Via Judgment Entry of December 5, 2013, the motion was denied.

{¶8} The matter proceeded to jury trial on June 3, 2014. At the conclusion of the evidence, Appellant renewed his motion to dismiss for pre-indictment delay. The trial court again denied the motion. Following the presentation of evidence, the jury returned a verdict of guilty as to each count of gross sexual imposition and as to two of the three counts of rape.

{¶9} On June 13, 2014, the trial court conducted a sentencing hearing. The trial court imposed a prison term of two years as to Count Two, a three year term as to Count Four, and a life term as to Counts Three and Five, with each term to be served concurrently and consecutive for an aggregated ten year prison term as to Counts One, Seven and Eight.

{¶10} Appellant appeals, assigning as error:

{¶11} "I. THE TRIAL COURT'S FAILURE TO DISMISS APPELLANT'S CASE DESPITE DEMONSTRABLE PREJUDICE RESULTING FROM THE STATE'S UNJUSTIFIED PRE-INDICTMENT DELAY VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶12} "II. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY AS TO THE AGE OF THE CASE PREJUDICED APPELLANT AND VIOLATED

HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶13} "III. THE TRIAL COURT'S FAILURE TO INCLUDE THE VICTIM IN ITS ORDER SEPARATING WITNESSES DURING TRIAL VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION."

I.

{¶14} In the first assignment of error, Appellant argues the trial court erred in overruling Appellant's motion to dismiss the indictment due to pre-indictment and post-indictment delay.

{¶15} The Ohio Supreme Court in *State v. Luck* 15 Ohio St.3d 150 (1984), held

Having found actual prejudice to the defendant, we turn to the second part of the test set forth in *United States v. Lovasco, supra*, which requires that there be no justifiable reason for the delay in prosecution that caused this prejudice. On this point, the state contends that it appears that there was, in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. Following this alleged "error in judgment," the Lakewood Police Department ceased its active investigation into Tietjen's death. Fifteen years later, the prosecutor sought an indictment based upon the same evidence that had been available in 1968, [footnote omitted] In fact, the deaths of witnesses and the loss of taped interviews had significantly *reduced* the available

evidence by the time that the prosecutor sought the indictment of Mrs. Luck.

This court will not assume the role of the prosecutor to determine when there is sufficient evidence to seek an indictment in every case; and we agree with the rationale of *United States v. Lovasco, supra*, 431 U.S. at 792, 97 S.Ct. at 2050, that it would be unwise to adopt a rule requiring the commencement of prosecution whenever there is “sufficient evidence to prove guilt beyond a reasonable doubt.” We believe, however, that a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see *United States v. Marion, supra*, or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable.

In the instant case, the state delayed prosecuting the defendant because of an alleged “error in judgment,” which lead to a halt in the Lakewood Police Department's active investigation of Tietjen's death. This investigation remained at a stand-still for approximately fifteen years. During that time, witnesses died, memories faded, and evidence was lost. When the state finally decided to commence its prosecution of the

defendant herein, it did so without one shred of new evidence—its case being substantially the same as it had been since 1968. For these reasons, we find that the pre-indictment delay in the instant case is unjustifiable.

{¶16} This Court held in *State v. Burden*, Stark App. No. 2012CA00074, 2013-Ohio-1628,

When a defendant asserts a pre-indictment delay violating his due process rights, prejudice may not be presumed. *United States v. Crouch*, 84 F.3d 1497, 1514–1515(5th Cir.1996). The notion that prejudice may be presumed from a lengthy delay arises in the context of the four-part balancing test used in determining whether a post-indictment or post-accusation delay has deprived a defendant of his Sixth Amendment right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101(1972). The *Barker* four-part test, and the concept of presumptive prejudice, applies only to post-indictment or post-accusation delays that implicate the Sixth Amendment right to a speedy trial, and has no application to pre-indictment delays. See, *State v. Metz*, 4th Dist. No. 96 CA 48, 1998 WL 199944(Apr. 21, 1998) (Citation omitted); *State v. Schraishuhn*, 5th Dist. No.2010–CA–00635, 2011–Ohio–3805, ¶ 31; *State v. Harrell*, 5th Dist. No. 98CAA06029, 1999 WL 3887(Dec. 29, 1998).

The Ohio Supreme Court held that a delay in the commencement of prosecution by the state would be found unjustified when it is done in an attempt to gain a tactical advantage over the defendant, or when the state

“through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.” *Luck*, 15 Ohio St.3d at 158, 472 N.E.2d 1097. The Court also held that the length of delay would normally be a key factor in this determination. *Id.*

The defendant has the burden of demonstrating prejudice. *United States v. Lawson* 780 F.2d 535, 541–542(6th Cir.1985). A lengthy delay in prosecuting the defendant, by itself, does not constitute actual prejudice. The defendant must demonstrate how the length of the delay has prejudiced his ability to have a fair trial. *United States v. Norris*, 501 F.Supp.2d 1092, 1096(S.D. Oh.2007). In *United States v. Wright*, 343 F.3d 849, 860(6th Cir.2003), the Court held that loss of memory is insufficient to establish prejudice as a matter of law.

{¶17} In *State v. Flickinger*, 4th Dist. No. 98CA09, 1999 WL 34854(Jan. 19, 1999) the court noted,

A defendant must provide concrete proof that he will suffer actual prejudice at trial as a result of the government's delay in indicting the defendant. See, e.g., *Crouch*, 84 F.3d at 1515 (stating that vague assertions of faded memories are insufficient to establish actual prejudice; the defendant must state which witness is unable to fully recount the details of the crime and how the witness' lapsed memory will prejudice the defense); *United States v. Beszborn* (C.A.5, 1994) 21 F.3d 62, 67,

certiorari denied sub nom, Westmoreland v. United States, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288 (stating that vague assertions of faded memories are insufficient to establish actual prejudice); *United States v. Stierwalt* (C.A.8, 1994), 16 F.3d 282, 285 (stating that assertions of faded memories are insufficient to establish actual prejudice when the defendant fails to specify how witness' lapsed memory will harm his defense); *United States v. Harrison* (S.D.N.Y.1991), 764 F.Supp. 29, 32 (stating that assertion of faded memories is insufficient to establish actual prejudice); *United States v. Greer* (D.Vt.1997), 956 F.Supp. 525, 528 (stating that a defendant must present concrete proof of actual prejudice and not mere speculation of actual prejudice).

{¶18} Here, Appellant argues he was prejudiced by the destruction of evidence, specifically computer evidence, and the unavailability of witnesses. The trial court correctly held any evidence on the computer would not be exculpatory as the State did not present evidence Appellant attempted to contact the victim by computer. Further, K.W. denied Appellant attempted to contact her via the Internet. Finally, The State offered four DVD's containing evidence files from the South Carolina Computer Crime Center containing the computer files recovered from Appellant's computer. Therefore, any claim of prejudice due to the lack of Appellant's computer at trial must fail. In addition, the value of any such evidence is speculative at best.

{¶19} Appellant's second claim relative to the unavailability of witnesses is unpersuasive. K.W.'s counselor's testimony and unavailability due to the counselor's passing is not demonstrably exculpatory evidence. Appellant maintains K.W. did not tell

her counselor of the alleged sexual abuse. K.W. testified at trial she did, over time, tell her counselor of the abuse. Appellant has not demonstrated how the lack of this evidence is overtly prejudicial or exculpatory. We find the potential exculpatory value of the evidence is merely speculative.

{¶20} Appellant further maintains essential law enforcement witnesses in Ohio and South Carolina are now unavailable to testify as witnesses at trial. The testimony at the hearing on Appellant's motion to dismiss demonstrates all significant law enforcement personnel involved in the investigation were present at trial. The lead officer, Detective Patrick Brandt of the Delaware Sheriff's Office, was available and testified. He conducted the majority of the investigation, interviewed witnesses and traveled to South Carolina to interview Appellant.

{¶21} Detective Eric Griffin, whom Appellant claims is unavailable, now works for the State of Ohio Pharmacy Board. The State demonstrated he is available to subpoena for trial.

{¶22} Finally, Appellant maintains K.W.'s original recorded statement is unavailable. Appellant concedes a transcript of the statement has been made available. Therefore, Appellant has failed to demonstrate actual prejudice from the unavailability of the originally recorded statement.

{¶23} Based on the above, we find Appellant has not met his burden of demonstrating prejudice due to the delay in the indictment. Accordingly, the first assignment of error is overruled.

II.

{¶24} In the second assignment of error, Appellant challenges the trial court's instruction to the jury as to the age of the case.

{¶25} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. DeMastry*, 155 Ohio App.3d 110, 2003-Ohio-5588.

{¶26} The trial court instructed the jury as follows,

First of all, there have been no previous trials in this case, and you're not to consider whether any prior proceedings occurred in this matter. Any procedural history of legal proceedings is irrelevant to your determination in this case after the time of disclosure.

{¶27} Based upon our analysis and disposition of the first assignment of error and given the procedural history herein, including the prior indictment and dismissal due to Appellant's wife's medical condition, we find the trial court did not abuse its discretion in instructing the jury as stated above and did not abuse its discretion in failing to further instruct the juror concerning the pre-indictment delay.

{¶28} The second assignment of error is overruled.

III.

{¶29} In the third assignment of error, Appellant maintains the trial court erred in allowing the victim, K.W., to remain present during all stages of the trial pursuant to R.C. 2930.09.

{¶30} R.C. 2930.09 reads,

A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding. At any stage of the case at which the victim is present, the court, at the victim's request, shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines that exclusion of the individual is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding.

{¶31} Evidence Rule 615 provides,

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

(4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

{¶32} A decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court. *State v. Maley*, First Dist No. C-120599, 2013-Ohio-3452.

{¶33} Appellant has not demonstrated K.W.'s testimony was influenced or affected by her presence in the courtroom during trial. We find the trial court did not abuse its discretion in allowing K.W. to remain in the courtroom as authorized by statute and Ohio rules of court throughout trial.

{¶34} The third assignment of error is overruled.

{¶35} Appellant's conviction in the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur