

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1120

Appellee

Trial Court No. CR0200803757

v.

Alberto Acosta

DECISION AND JUDGMENT

Appellant

Decided: October 22, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, Alberto Acosta, appeals his conviction and sentence in the above-captioned case. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On December 2, 2008, Acosta was arraigned on a single count of sexual battery, in violation of R.C. 2907.03(A)(2) and (B), a felony of the third degree. The case proceeded to a jury trial, beginning on March 16, 2009, and ending on March 19, 2009.

{¶ 3} At trial, evidence of the following was adduced. On October 22, 2008, Acosta and his wife had invited several friends to their home to watch a University of Michigan football game. Among those friends were the victim in this case and her husband.

{¶ 4} The testimony is undisputed that Acosta, his wife, the victim, and her husband were all drinking alcohol while they were watching the game. Also undisputed is that, as the night progressed, the victim appeared to become increasingly intoxicated and, eventually, she became sick and began vomiting in Acosta's bathroom.

{¶ 5} According to testimony by Acosta, upon learning from his wife that the victim had become sick in the bathroom, he told both his wife and the victim's husband that he wanted to go "mess with" the victim, to "make fun of her." He stated that when he entered the bathroom, he found the victim in a very drunken condition. She was near the toilet bowl, with her legs underneath her, leaning against the wall. Acosta stated that he pulled the victim's hair back as she vomited into the toilet, then caressed her face and began kissing her. After kissing her, Acosta left the bathroom and reported to his wife and the victim's husband that the victim had gotten sick.

{¶ 6} Acosta later returned to the bathroom, stood the victim up, placed his arm around her, and, with considerable difficulty, attempted to guide her down the stairs

toward his bedroom. Once on the stairs, the victim tripped and fell. Acosta lifted her up off the floor and placed her on his bed.

{¶ 7} Acosta testified that after he put the victim on his bed, she stated that she was once again going to be sick, so he provided her with a receptacle to vomit in. After she vomited, Acosta left the victim, and, once again, rejoined his wife and the victim's husband. At this point, the victim's husband decided to leave Acosta's house and go pick up Acosta's daughter, who had been babysitting at his house. Acosta instructed the victim's husband to call him after he had picked up his daughter.

{¶ 8} Once the victim's husband left, Acosta testified that he returned to his bedroom and sat on the bed, next to where the victim was lying. The victim told him that she was dizzy and that she thought she would be sick again, so he helped her sit up, then, once more, provided her with some sort of receptacle to throw up in. After she was done throwing up, Acosta turned her face toward him and kissed her.

{¶ 9} He stated that he placed his hands "all over her breasts," slid his hand under her blouse to undo her bra, then unbuckled her belt, unbuckled her pants, and fondled her vaginal area. According to the victim, Acosta inserted his fingers into her vagina. Acosta disputes this assertion, maintaining that he placed his hand only "on top of her vagina." Toledo Police Detective Scott Smith testified that although Acosta was adamant in his report to police that he never penetrated the victim with his finger, he also stated that he knew that the victim had climaxed, because his hand was wet.

{¶ 10} At some point during Acosta's encounter with the victim, his phone rang. He ignored the phone at first, but when he finally answered, he discovered that it was the victim's husband who was calling to say that he was on his way. Acosta testified that he told the victim to put herself together, to put her bra back on and "so on."

{¶ 11} When the victim's husband came in the house, the victim called for him to come downstairs. According to the victim's husband, when he entered the bedroom, he found the victim lying on the bed, with her back towards him. He rolled her over and saw that her bra was sticking up through her v-neck collar, her belt was unbuckled, and her pants were unbuttoned. At that point, she stated to him, "I think Alberto [Acosta] tried to have sex with me, I want to go home." The victim's husband helped the victim adjust her clothing, helped her get up the stairs, and then took her home. The next day, Acosta's wife called to check on the victim to see if she was okay.

{¶ 12} The jury, after hearing all of the above-stated evidence, returned a verdict of guilty as to the charged offense.

{¶ 13} Sentencing took place on April 14, 2009. The trial court, after considering Acosta's criminal record, various oral statements, the victim impact statement, and the presentence report, and after balancing the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, sentenced Acosta to a term of three years in prison, with three years of postrelease control. In addition, Acosta was notified that he would have to register on the sex offender registry as a Tier III sex offender.

{¶ 14} Acosta timely appealed his conviction and sentence, raising the following assignments of error:

{¶ 15} "I. THE CONVICTION NOT SUFFICIENTLY SUPPORTED BY CREDIBLE EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 16} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A SENTENCE THAT WAS NOT THE SHORTEST AUTHORIZED.

{¶ 17} "III. TRIAL COUNSEL WAS INEFFECTIVE WHICH PREJUDICED DEFENDANT/APPELLANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE U.S. AND OHIO CONSTITUTIONS."

{¶ 18} In his first assignment of error, Acosta argues that his conviction was not supported by sufficient evidence and, further, was against the weight of the evidence.

{¶ 19} In reviewing a sufficiency of the evidence claim, "the relevant inquiry for an appellate court is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt". *State v. Mills* (Sept. 30, 2010), 6th Dist. No. WM-09-014, ¶ 37, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 20} In the instant case, the essential elements of the crime to be proven beyond a reasonable doubt are that the defendant did: (1) engage in sexual conduct; (2) with

another, not the spouse of the offender; (3) when the offender knew that the other person's ability to appraise the nature of or control the other person's own conduct was substantially impaired. See R.C. 2907.03(A)(2).

{¶ 21} "Sexual conduct" is defined as vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without 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; penetration, however slight, is sufficient to complete vaginal or anal intercourse. R.C. 2907.01(A).

{¶ 22} "Substantial impairment" is not defined in the Ohio Revised Code, and, thus, must be given the meaning generally understood in the common usage. *State v. Zeh* (1987), 31 Ohio St.3d 99, 103; *State v. Rogers*, 5th Dist. No. 07 CA 106, 2008-Ohio-6630, ¶ 31. The Supreme Court of Ohio in *Zeh*, supra, provides additional guidance where it states that "substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct." *Id.* at 103-104. We further note that substantial impairment "can be shown to exist by the testimony of people who have interacted with the victim, and by allowing the trier of fact to do its own assessment of the person's ability to appraise or control his or her conduct." *State v. Brady*, 8th Dist. No. 87854, 2007-Ohio-1453, ¶ 78.

{¶ 23} According to Acosta, the evidence was insufficient to establish either the element of sexual conduct or the element of substantial impairment. We disagree, and find that the record provides ample support to establish all of the elements of the crime beyond a reasonable doubt. Specifically, the victim clearly testified that Acosta touched her vagina and inserted his fingers inside of her. Thus, the element of sexual conduct was sufficiently established. With respect to the element of substantial impairment, there was abundant evidence that the victim was intoxicated to the point of having reduced ability either to appraise the nature of her conduct or to control her conduct. Accordingly, we find that a reasonable fact-finder could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶ 24} The "weight of the evidence" involves the jury's resolution of conflicting testimony. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and ""* * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 25} Here, it was for the jury to determine whether they believed that Acosta penetrated the victim with his fingers and whether they believed that the victim had a diminished ability either to appraise the nature of her conduct or to control her conduct

during her encounter with Acosta. Upon our review of the record, we cannot say that the jury clearly lost its way or created such a manifest miscarriage of justice that Acosta's conviction should be reversed. Accordingly, Acosta's first assignment of error is found not well-taken.

{¶ 26} In his second assignment of error, Acosta argues that the trial court abused its discretion by imposing a sentence that was not the shortest authorized. In a plurality opinion, the Supreme Court of Ohio set forth a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶ 4. "If this first step is satisfied, the second step requires that the trial court's decision be reviewed under an abuse-of-discretion standard." *Id.*

{¶ 27} In *Kalish*, the Supreme Court held that that the defendant's sentence was not contrary to law, where: (1) the trial court expressly stated that it had considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12; (2) the trial court properly applied postrelease control; and (3) the trial court imposed a sentence that was within the permissible range. *Id.* at ¶ 18. The court further held that there was no abuse of discretion, inasmuch as: (1) the trial court had given careful and substantial deliberation to the relevant statutory considerations; and (2) there was nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable. *Id.* at ¶ 20.

{¶ 28} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio relevantly held that "[t]rial courts [now] have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." 109 Ohio St.3d 1, at paragraph seven of the syllabus.

{¶ 29} In the first step of our analysis, we review whether Acosta's sentence is contrary to law. He was convicted of a third degree felony. Pursuant to R.C. 2929.14(A)(2), the prison term for a third degree felony, such as sexual battery in violation of R.C. 2907.03(A)(2) and (B), shall be one, two, three, four, or five years. As Acosta's sentence of a three year term is within applicable statutory parameters, we find that it is in conformity with the applicable rules and sentencing statutes.

{¶ 30} In addition, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in R.C. 2929.11 and 2929.12, and, further, properly advised Acosta regarding postrelease control. Thus, the sentence is not clearly and convincingly contrary to law.

{¶ 31} Having determined that the first step of the *Kalish* test was satisfied, we move to the second step, pursuant to which we must review the sentence under an abuse of discretion standard. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An appellate court applying an

abuse of discretion standard may not substitute its judgment for that of the trial court.

See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 32} In imposing its sentence, the trial court expressly declined to impose the maximum sentence, because of the large amount of alcohol that was consumed by both Acosta and the victim on the night of the offense. On the other hand, the trial court expressed concern because Acosta had clearly taken advantage of the fact that the victim had had too much to drink.

{¶ 33} In addition to balancing the R.C. 2929.11 and 2929.12 factors, the trial court considered the totality of Acosta's criminal record, various oral statements by Acosta and the victim, the victim impact statement, and the presentence report.

{¶ 34} Upon our review of the record, we find no evidence that the judge acted arbitrarily, unreasonably, or unconscionably in crafting Acosta's sentence. For all of the foregoing reasons, Acosta's second assignment of error is found not well-taken.

{¶ 35} Acosta argues in his third, and final, assignment of error that he was denied effective assistance of counsel, and his right to a fair trial was prejudiced, as a result of defense counsel's failure to request a mistrial following Acosta's voluntary statement at trial that he was raped as a child.

{¶ 36} In order to show ineffective assistance of counsel, a defendant must demonstrate (1) that defense counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's deficient representation was prejudicial to

defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694. Trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 146, citations omitted. Even "debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45.

{¶ 37} In the instant case, the following exchange took place between Acosta and his counsel:

{¶ 38} Defense Counsel: "If you had felt that [the victim] was not responsive to you or incoherent or out of it, as she said, would you have done anything to her?"

{¶ 39} Acosta: "No, and this is where I'm going to go against you, Larry. I was raped -- I was raped when I was 14 years old."

{¶ 40} Following the exchange, the prosecutor objected to the statement and asked for a mistrial. Discussion between the judge and counsel for both sides took place outside of the jury's hearing. Thereafter, the judge questioned each juror, individually, to determine whether Acosta's statement would have any impact on his or her ability to be fair and impartial. After determining that the statement would have no negative impact on the jury, the judge gave a curative instruction and advised the jury to disregard Acosta's statement.

{¶ 41} The decision of whether or not to grant a mistrial rests in the sound discretion of the trial court. See *State v. Glover* (1988), 35 Ohio St.3d 18, 19. "In a

criminal proceeding, the trial court should not order a mistrial merely because of some intervening error or irregularity unless the substantial rights of the accused are adversely affected." *State v. Thompson*, 4th Dist. No. 08CA3032, 2009-Ohio-1115, at ¶ 8, citing *State v. Nichols* (1993), 85 Ohio App.3d 65, 69. This determination is also within the sound discretion of the trial court. *Id.*

{¶ 42} Here, the trial court did not abuse its discretion in denying the state's request for a mistrial. Acosta's nonresponsive answer to defense counsel's question was properly determined, following jury voir dire and the issuance of a curative instruction, not to have adversely affected Acosta's substantial rights.

{¶ 43} We likewise find that defense counsel's tactical decision not to request a mistrial was neither deficient nor prejudicial to Acosta's case. First, the prosecutor had already requested a mistrial. There is simply no evidence to show that the trial court would have granted the request but for defense counsel's failure to join in it. And, further, as indicated above, the trial court's determination to deny the request was entirely proper in this case. Thus, Acosta's third assignment of error is properly denied.

{¶ 44} For the foregoing reasons, the judgment from which this appeal is taken is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
