

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

State of Ohio

Court of Appeals No. L-10-1101

Appellee

Trial Court No. CR0200902293

v.

Michael W. Jaros

**DECISION AND JUDGMENT**

Appellant

Decided: September 30, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

John Thebes, for appellant.

\* \* \* \* \*

OSOWIK, P.J.

{¶1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which found appellant, Michael Jaros, guilty of one count of aggravated burglary, in violation of R.C. 2911.11(A)(2), a felony of the first degree, one count of kidnapping,

in violation of R.C. 2905.01(A)(4) and (C), a felony of the first degree, and one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree.

{¶2} Appellant was ordered to serve three consecutive nine-year terms of imprisonment at the Ohio Department of Rehabilitation and Corrections, constituting a total term of incarceration of 27 years. A timely notice of appeal was filed. For the following reasons, the judgment of the trial court is affirmed.

{¶3} From that judgment, appellant sets forth the following three assignments of error:

{¶4} "1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING APPELLANT'S OUT OF COURT STATEMENTS OVER OBJECTION.

{¶5} "2. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT DECLARING A MISTRIAL FOR REFERENCES ABOUT APPELLANT'S CUSTODIAL STATUS.

{¶6} "3. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} The following undisputed facts are relevant to this appeal. On June 17, 2009, the victim and her four-year-old son arrived at her home. The victim took her son upstairs to get ready for bed. Her husband, Michael Jaros, previously had a restraining order imposed upon him on behalf of the victim. Appellant broke into the victim's residence where he waited for her to return. After the victim and her son entered the

son's bedroom, appellant entered into the bedroom and physically restrained the victim. The victim was restrained at knifepoint. Appellant demanded numerous sexual acts from the victim. The victim cooperated.

{¶8} After forcibly restraining the victim and taking sexual liberties with her for several hours, appellant stole her vehicle and fled the scene. A short time later, the victim discovered that appellant had left her cell phone on the front porch and she called the police. After the Toledo Police arrived and investigated the crime scene, they instructed the victim to go to a hospital in order for a rape kit to be performed.

{¶9} Subsequent to these events, appellant persisted in calling and sending text messages to the victim from appellant's own mobile phone. In fact, both the Oregon Police Department and F.B.I. agents traced multiple calls originating in Georgia, Tennessee, Kentucky, and Ohio placed from appellant to the victim. On June 21, 2009, the content of these messages were reviewed by the investigating police officers on the victim's cell phone.

{¶10} The messages were saved and emailed to the Oregon Police Department. The messages were printed out, verified, and maintained in a secured evidence area. Ultimately, appellant was apprehended in Vandalia, Ohio. Despite being in custody at the Montgomery County jail, appellant again persisted in contacting the victim. Appellant mailed correspondence to the victim expressing remorse for the actions against her which initiated this case.

{¶11} The grand jury indicted appellant on two counts of rape, one count of aggravated burglary, one count of aggravated robbery, and one count of kidnapping. The matter proceeded to a jury trial.

{¶12} On March 25, 2010, the jury found appellant guilty of aggravated burglary, in violation of R.C. 2911.11(A)(2), kidnapping, in violation of R.C. 2905.01(A)(4) and (C), and aggravated robbery, in violation of R.C. 2911.01(A)(1). All three convictions were felonies of the first degree. Appellant, the victim's estranged husband, was found not guilty of the two counts of rape. Appellant was sentenced to a total term of incarceration of 27 years.

{¶13} In the first assignment of error, appellant contends the trial court abused its discretion by permitting out of court statements as evidence. Specifically, appellant maintains that the text messages and letters were inadmissible and were not authenticated. We do not concur.

{¶14} In order for a document to be admitted into evidence, it must satisfy the requirements of authentication. *State v. Smith* (1989), 63 Ohio App.3d 71, 74. Admissibility requires authentication in accordance with Evid.R. 901 or 902. Given that the messages came from appellant's undisputed email address, there is an initial presumption that he sent the messages. *State v. McCaleb*, 2d Dist. No. 05CA155, 2006-Ohio-4652, ¶ 16. In conjunction with this presumption, there must be additional supporting evidence connecting appellant to those messages. *Id.*

{¶15} Specifically, Evid.R. 901(A) establishes that, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This threshold standard does not require conclusive proof of authenticity. Rather, the required basis is sufficient foundational evidence for the trier of fact to conclude that the evidence is what its proponent claims it to be. *State v. Easter* (1991), 75 Ohio App.3d 22, 25. See *State v. Wilkins* (1980), 64 Ohio St.2d 382.

{¶16} In conjunction with this, Evid.R. 901(B)(1) and (4) provide illustrations including,

{¶17} "(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

{¶18} "\* \* \*

{¶19} "(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

{¶20} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. It is well-established that when examining admissibility issues, such as the disputed messages before us, a reviewing court may not reverse the trial court absent an abuse of discretion. *Easter*, supra, at 26. An abuse of discretion connotes 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.

{¶21} In applying these pertinent legal standards to the facts of this case, we find that the text messages and letters were properly identified and authenticated at trial. Pursuant to Evid.R. 901(B)(1), the victim identified the text messages on her cell phone sent from appellant's email address. The victim testified at trial that as appellant's wife she was familiar with his email account because she had received messages from appellant's email address on many previous occasions. Likewise, the victim identified and authenticated at trial in the same manner the handwritten letter sent to her by appellant, her husband, whose handwriting style she was well acquainted with prior to these events.

{¶22} Coupled with these facts, the investigating officer personally viewed and observed the messages during the course of the investigation. The messages were emailed to the police department, were printed, maintained, and stored in a secured evidence area. These facts and findings amply satisfy the requirements for admissibility under Evid.R. 901(A) and (B)(1) and (4). Appellant's first assignment of error is not well-taken.

{¶23} In the second assignment of error, appellant contends the trial court erred when it did not declare a mistrial. In support, appellant asserts that allowing two references to appellant's prior custodial status constituted an abuse of discretion.

{¶24} The granting of a mistrial is necessary only in the extreme scenario where a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. A mistrial should not be granted in a criminal case unless substantial rights of either the defendant or the prosecution are prejudicially affected. *Tingue v. State* (1914), 90 Ohio St. 368, 372. As such, any error which does not affect substantial rights shall be disregarded. *State v. Maurer* (1984), 15 Ohio St.3d 239.

{¶25} If it appears that a verdict for the party represented by such offending counsel is clearly justified by the evidence, the verdict may be allowed to stand. *Maurer*, supra, at 269. To determine whether references to appellant's prior custodial status denied him a fair trial, the totality of the trial must be considered. *State v. Schmidt* (1979), 65 Ohio App.2d 239, 244; *United States v. Jorn* (1971), 400 U.S. 470, 91 S.Ct. 547.

{¶26} As the Ohio Supreme Court declared in *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, the mere reference to appellant's prior conviction does not unfairly prejudice appellant to require a mistrial. When there is ample evidence establishing guilt, there is no likelihood of prejudice from reference to a prior conviction. *Trimble*, supra, at ¶ 175. Further, any prejudice resulting from these statements could be alleviated by a court's cautionary instructions. *State v. Smith* (1984), 14 Ohio St.3d 13, 23. Absent these instructions, appellant waives all but plain error. *State v. Grant* (1993), 67 Ohio St.3d 465, 472.

{¶27} As the record clearly reflects, appellant's substantial rights were not prejudicially affected in any way. Curative instructions were discussed and initially requested by appellant. As reflected in the record, appellant carefully considered the instructions, reviewed and considered this tactic with his counsel, and voluntarily declined it. As the record explicitly highlights, appellant elected to forego curative instructions. As such, we find no plain error.

{¶28} Appellant also contends the second reference to his prior custodial status during closing arguments constituted grounds for a mistrial. As the Supreme Court of Ohio has already established, "the test for prosecutorial misconduct during closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights." *Smith*, supra, at 14; *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 198.

{¶29} In evaluating remarks in closing arguments, "[p]rosecutors are entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence." *Were*, supra, at ¶ 205, quoting *State v. Smith* (1997), 80 Ohio St.3d 89; *State v. Woodard* (1966), 6 Ohio St.2d 14, 26. However, a prosecutor has a "duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶30} In determining the overall degree of prejudice in a prosecutor's closing argument, an appellate court may consider the jury instruction and the strength of the



evidence against appellant. *Dorr*, supra, at 121. If it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found appellant guilty, then his conviction will not be reversed. *Smith*, supra, at 13.

{¶31} In the present case, the record does not demonstrate that the jury would not have found appellant guilty had there been no alleged misconduct on the part of the prosecution. On the contrary, the record shows ample objective, compelling evidence of guilt. A number of witnesses were presented to the jury, the victim gave extensive, persuasive testimony, and the prosecution did not go beyond the evidence presented to the jury. Appellant's argument lacks merit. Appellant's second assignment of error is found not well-taken.

{¶32} In the third assignment of error, appellant contends the convictions were against the manifest weight of the evidence. As it is well-established, the fact finder is best suited to view the witnesses, observe their demeanor, and utilize these first-hand observations in weighing the credibility of the evidence and testimony. *Bd. of Trustees of Springfield Twp. v. Anderson*, 6th Dist. No. L-06-1014, 2007-Ohio-1530. Judgments of fact supported by some competent, credible evidence will not be reversed by a reviewing court unless they are clearly against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶33} As concluded above, the record encompasses abundant, credible evidence in support of appellant's conviction. Appellant's third assignment of error is found not well-taken.

{¶34} Wherefore, we find that substantial justice has been done in this matter. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs 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.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

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JUDGE

<p>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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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