

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

State of Ohio

Court of Appeals No. L-11-1159

Appellee

Trial Court No. CR0201003020

v.

Bradley W. Roberts

DECISION AND JUDGMENT

Appellant

Decided: March 22, 2013

* * * * *

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

Mollie B. Hojnicky, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which convicted appellant of the 1993 kidnapping and rape of a ten-year-old girl in Sylvania Township, Ohio. In 2011, a DNA match of appellant with the 1993 rape kit led to an indictment in a previously unsolved 1993 kidnapping and rape of a minor. This

transpired after appellant had been required to submit DNA to the state in connection to an unrelated felony conviction from a more recent case. Appellant's mandated DNA sample submitted in that case was later determined by a forensic expert for the state to match the perpetrator's DNA from the unsolved 1993 case.

{¶ 2} Appellant was subsequently indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, one count of kidnapping, in violation of R.C. 2905.01(A)(4), a felony of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree. Following a jury trial, appellant was found guilty on all counts and sentenced to a mandatory life term of incarceration. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 3} At arraignment, appellant was found to be indigent. Counsel was appointed and entered pleas of not guilty on all counts. On March 23, 2011, the trial court ruled on three motions: a motion to dismiss on statute of limitations claims, a motion to dismiss alleging that the mandatory prison sentence would constitute cruel and unusual punishment, and a motion to suppress. The motions were denied. Lastly, the trial court heard arguments on a motion to dismiss for pre-indictment delay. It was later denied.

{¶ 4} On May 9, 2011, the case proceeded to jury trial. The jury found appellant guilty on all counts. The matter was continued for sentencing. On June 10, 2011, appellant was sentenced to a mandatory life sentence for rape, a term of incarceration of 10 to 25 years for kidnapping, and sentenced to a term of incarceration of 4 to 10 years

for gross sexual imposition. For sentencing purposes, the rape and kidnapping charges were merged and the gross sexual imposition portion of the sentence was ordered to be served consecutively to the rape sentence.

Appellant, Bradley Roberts sets forth the following seven assignments of error:

FIRST ASSIGNMENT OF ERROR: THE EVIDENCE AT APPELLANT'S TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

SECOND ASSIGNMENT OF ERROR: APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISMISS FOR THE STATUTE OF LIMITATIONS.

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISMISS FOR PRE-INDICTMENT DELAY.

FIFTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT ALLOWED THE JURY TO TAKE NOTES AND ASK QUESTIONS.

SIXTH ASSIGNMENT OF ERROR: APPELLANT WAS
DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS
GUARANTEED BY THE UNITED STATES AND OHIO
CONSTITUTIONS.

SEVENTH ASSIGNMENT OF ERROR: THE MANDATORY
TERM OF LIFE IMPRISONMENT CONSTITUTES CRUEL AND
UNUSUAL PUNISHMENT AS PROHIBITED BY THE UNITED
STATES AND OHIO CONSTITUTIONS.

{¶ 5} The following undisputed facts are relevant to this appeal. On July 9, 1993, a ten-year-old girl was riding her bike near her home through a wooded area located between Arbor Hills Junior High School and Hillview Elementary School in Sylvania Township. She encountered an unknown male. The assailant grabbed the victim by her hair, forced her to the ground, tore off her panties, covered her face and raped her. The victim told her assailant that he was hurting her and pleaded with him to stop. He did not. After the rape, the assailant verbally threatened the victim regarding telling people what had occurred. Nevertheless, the victim did report her attack and it was investigated. The victim provided a detailed statement to an investigating officer from the Sylvania Township Police Department describing what had occurred and describing the perpetrator. Although several parties, including appellant, were questioned in the course of the initial investigation, no charges were able to be filed and the matter remained unsolved.

{¶ 6} On May 25, 2001, appellant was sentenced to a term of imprisonment for an unrelated felony case which statutorily required that he submit DNA to the state for placement in a state DNA database. On March 15, 2010, the Sylvania Township Police Department sent the victim's 1993 rape kit to the Ohio Bureau of Criminal Investigation in hopes of a breakthrough in the unsolved 1993 case. This follow up investigation and testing resulted in a hit on appellant's DNA. It was a match to the DNA recovered from the perpetrator in the 1993 rape.

{¶ 7} On November 10, 2010, based upon the DNA match, appellant was indicted by a grand jury on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, one count of kidnapping, in violation of R.C. 2905.01(A)(4), a felony of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree.

{¶ 8} On May 9, 2011, the matter proceeded to a jury trial. Appellant was found guilty on all counts. This appeal ensued.

{¶ 9} The appellant asserts in his first assignment of error that the evidence at trial was insufficient to support his conviction. The applicable standard of review is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.3d 492 (1991),

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable

doubt. The relevant inquiry 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.

The underlying inquiry we must resolve is whether a rational trier-of-fact could have found that the crime was established beyond a reasonable doubt. *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511.

{¶ 10} In support of this assignment, appellant relies upon the victim's description of her attacker. Appellant claims that the description by the victim at trial did not conform to the initial description from the victim. At trial, the victim described her assailant as taller than her, thin, having long greasy hair, slanty looking eyes, and a high pitched voice. She further described the man as wearing a long sleeve red and white shirt with black jean shorts and white socks. Additionally, Officer Cowell testified that the description of the suspect that he received following the incident was that of a white male in his early twenties, brown hair, having a thin build, approximately 5'9" tall, wearing a white and red shirt and black shorts. Finally, appellant's ex-wife testified that at the time of the incident, appellant's physical characteristics would have been consistent with that description.

{¶ 11} The record reflects collaboration amongst all three witnesses that the man who raped the victim and the appellant possess the same physical traits. The additional details of long greasy hair, slanty eyes and a high pitched voice were first set forth by the

victim at trial. While it may be suggested that these additional details are somehow incongruous with the victim's initial description, the record reflects that the victim was simply amplifying her prior description. The additional traits described at trial elaborated upon, but did not contradict, the victim's initial description.

{¶ 12} Appellant also maintains without supporting evidence that because his ex-wife testified that she and appellant resided in Perrysburg, Ohio, at the time of the incident, this should be construed so as to rule out any possibility that he committed this crime. However, the record reflects numerous addresses in close proximity to the location of the crime where the appellant frequently visited. In fact, appellant's parents resided in close proximity to the location of the incident.

{¶ 13} Last, appellant contends that the DNA tests were "insufficient to establish beyond a reasonable doubt that the [a]ppellant was the person who committed the crimes against [the victim]." At trial, the state produced Casey Agosti, a forensic scientist qualified as an expert in DNA analysis. Agosti unequivocally testified that the DNA found in the rape kit was a match to appellant's DNA. Agosti definitively determined that the likelihood of someone other than appellant matching that same DNA profile is one in 1billion, 197 million. Given the certitude of the DNA match, it was clearly reasonable for the jury to find that the DNA found in the victim's rape kit was appellant's DNA.

{¶ 14} We have also carefully considered the independent evaluation of the state's DNA test results conducted by Dr. Greg Hampikian on behalf of appellant. Despite

appellant's contentions to the contrary, we are not persuaded that had this been introduced at trial, it would have swayed a reasonable juror to conclude appellant was not the DNA contributor from the rape kit. On the contrary, Hampikian's opinion letter referencing his interpretation of the DNA tests performed by the state is framed with speculative conditions and conjecture. The conclusory opinion letter simply was not exculpatory. As such, maintaining that the introduction of the equivocal Hampikian opinion letter would have altered the outcome of the case is likewise conclusory and not persuasive. Given the facts and circumstances of this case, we find appellant's first assignment of error not well-taken.

{¶ 15} Appellant asserts in his second assignment of error that his convictions were against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The court then makes a determination as to whether in resolving conflicts in the evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* Under the manifest weight standard, the appellate court sits as a "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *Id.*

{¶ 16} On the same basis as set forth in detail in our response to the first assignment of error, we likewise conclude that the factfinder did not lose its way or cause

a manifest miscarriage of justice. The convictions were supported by the weight of the evidence, including a statistically definitive DNA match of the rape kit to appellant, expert testimony, and multiple witnesses. The second assignment of error is not well-taken.

{¶ 17} Appellant's third assignment of error contends that the trial court erred in its denial of a motion to dismiss due to the alleged expiration of the statute of limitations. The statute of limitations in effect at the time of the crime would have expired on July 9, 1999, prior to the indictment. However, on March 9, 1999, four months before the original statute of limitations would have expired, the legislature passed an amended version of R.C. 2901.13. Significantly, it extended the statute of limitations for the prosecution of felonies including rape, kidnapping, and gross sexual imposition to a period of 20 years after the offense is committed. This amendment took effect prior to the original statute running in this case. As such, it extended the applicable statute of limitations for this case to 2013, twenty years after the incident. The 2011 prosecution was timely. It took place two years prior to the expiration of the relevant statute of limitations.

{¶ 18} In conformity with the foregoing, this court has held that if the original statute of limitations had not run one day prior to the amendment, March 8, 1999, then the amendment would apply and extend the statute of limitations to 20 years from the date of the offense. *State v. Barker*, 6th Dist. No. L-01-1290, 2003-Ohio-5417. Here, the statute of limitations had not yet expired on the effective date of the amendment,

March 8, 1999. Thus, the statute of limitations did not expire until July 9, 2013, and appellant's trial was timely in 2011. Accordingly, the motion to dismiss was properly denied. We find appellant's third assignment of error not well-taken.

{¶ 19} Appellant's fourth assignment of error contends that the trial court erred when it denied his motion to dismiss for pre-indictment delay. The standard of review for pre-indictment delay is governed by this court's holding in *State v. Zimbeck*, 195 Ohio App.3d 729, 2011-Ohio-2171 (6th Dist.). In *Zimbeck*, we held that for a defendant to prove actual prejudice, he "must show, by concrete proof, the exculpatory value of any alleged missing evidence." *Id.* The court elaborated that a showing could not be speculative. Also, prejudice should not be presumed due to a lengthy delay. *Id.* The court further held that it, "must balance the claimed prejudice against the remaining evidence in the case, including any newly discovered evidence, to determine whether the missing evidence would have minimized or eliminated the impact of the state's evidence."

{¶ 20} The record clearly reflects that the trial court addressed the pre-indictment motion in this case under the *Zimbeck* standard. It determined that the record was devoid of anything that would rise to the level of actual prejudice. In support of this finding, the trial court noted there was no indication of the existence of exculpatory evidence. Further, there was no indication that the prosecution was delayed to gain a tactical advantage. We find that the record reflects the trial court properly denied the motion in

conformity with *Zimbeck*. Wherefore, the fourth assignment of error is found not well-taken.

{¶ 21} Appellant's fifth assignment error argues that the trial court erred when it allowed the jury to take notes and ask questions. However, the trial court was well within its discretion to allow jurors to take notes under *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996) (court ultimately concluded that failure to object to the actions of the trial court allowing note taking constitutes a waiver of any error involved), and ask questions under *State v. Fisher*, 99 Ohio St.3d 127, 134-36, 2003-Ohio-2761, 789 N.E.2d 222.

{¶ 22} Appellant unilaterally states that the jury appeared distracted by taking notes, but concedes no timely objection was made. Notably, the record is devoid of any objection in connection to claimed jury distraction. More importantly, as noted above, the Ohio Supreme Court has permitted both note-taking and jury questions. Clearly, the trial court did not act improperly. Appellant's fifth assignment of error is not well-taken.

{¶ 23} Appellant's sixth assignment of error claims that he was denied effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-pronged test. First, appellant must show that the counsel's representation

fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v.*

Washington (1984), 466 U.S. 668. See, also, *State v. Plassman*, 6th Dist.

No. F-07-036, 2008-Ohio-3842. This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v.*

Hamblin (1988), 37 Ohio St.3d 153. *State v. Newman*, 6th Dist. No.

OT-07-051, 2008-Ohio-5139, ¶ 27.

{¶ 24} We have extensively reviewed the record from below, scrutinizing it within the framework of the two-prong test required to establish ineffective assistance of counsel. We are unable to find any indicia of ineffective assistance of counsel.

Appellant unsuccessfully maintains that a failure to cross-examine certain witnesses or the failure to introduce cumulative evidence constitutes ineffective assistance of counsel.

Appellant again claims that trial counsel's decision to not call Hampikian constitutes an outcome altering event. We do not concur. As noted earlier, Hampikian's ambivalent interpretation of the test results performed by the state was conditional and inconclusive.

{¶ 25} There is no evidence that but for the claimed missteps of counsel the outcome would have been different. Appellant's sixth assignment of error is not well-taken.

{¶ 26} Appellant's seventh assignment of error contends that the mandatory term of life imprisonment constitutes constitutionally prohibited cruel and unusual

punishment. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that, “[t]rial courts 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.” (Emphasis added.) *Id.* at paragraph seven of the syllabus.

{¶ 27} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4, the Ohio Supreme Court determined that, in light of *Foster*, when reviewing a felony sentence, appellate courts must employ a “two-step” approach. In so doing, the appellate court first

must 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. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard. *Id.*

In the case at hand, appellant was sentenced under R.C. 2971.03(A)(2). It carries a mandatory sentence of life imprisonment. The disputed sentence is clearly not contrary to the law.

{¶ 28} Moreover, the record reflects that the trial court gave careful consideration to the facts of Roberts’ current offense, particularly the victim’s age, and his criminal history, in accordance with R.C. 2929.12. Further, the court clearly believed the maximum sentence was necessary to protect the public and adequately punish the

offender so as not to demean the seriousness of his conduct and its impact upon the victim as provided in R.C. 2929.11. There is nothing arbitrary, unreasonable or unconscionable in the court's application or balancing of the relevant statutory considerations. Thus, the trial court's imposition of the maximum sentence did not constitute an abuse of discretion. Appellant's seventh assignment of error is not well-taken.

{¶ 29} On consideration whereof, we find that substantial justice has been done. The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

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