[Cite as *State v. Alghaben*, 2005-Ohio-6490.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 86044

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
GEHAD ALGHABEN	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	December 8, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-449873
	:	
JUDGMENT	:	AFFIRMED.
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee

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SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant Gehad Alghaben appeals his conviction after a bench trial in the Cuyahoga County Court of Common Pleas. Finding no merit to the appeal, we affirm.

{¶ 2} Alghaben was charged with rape, gross sexual imposition, and kidnapping with a sexual motivation specification, arising out of an incident that occurred in February 2004. Alghaben pled not guilty, waived a jury, and was tried to the bench.

{¶ 3} At trial the testimony revealed that Alghaben was a taxi driver driving a Westlake Cab Company van. Alghaben dropped off a fare at Bounce, a nightclub in Cleveland, and picked up the victim, who requested a ride to her home in Cleveland. The victim testified that during the drive they engaged in small talk and the driver told her that his name was "Jay." Then the victim testified that Alghaben "started asking me like sexually-oriented questions like do I like oral and anal sex. He asked me if I was a homosexual, since I was leaving a gay nightclub, asked me if it was, in fact, a gay nightclub." The victim responded that she was not a homosexual and that she was there for a friend's birthday. She testified that she did not respond to the sexual questions and that she felt very uncomfortable.

{¶ 4} The victim testified that Alghaben asked for her phone number and she gave him her cell phone number. The victim explained that every time she takes a cab she has been asked for her phone number, so she thought nothing of it. She stated that

she pointed out her house and Alghaben passed it and stopped a few houses down the street. She asked what she owed and handed Alghaben a $20 bill. Alghaben pushed her hand away and said "you don't owe me anything, I'm going to make you mine tonight." The victim testified that she was very scared and tried to get out of the van, but Alghaben grabbed her by the back of her pants and pulled her back onto the seat.

{¶ 5} Alghaben started kissing the victim on the right side of her neck. She testified that she was yelling at him and pushing him off of her and trying to get away. When she made it to the door again, Alghaben yanked her back onto the seat, undid her pants, put his hand in her pants, and digitally penetrated her. The victim said she was scared and started screaming. She stated that Alghaben said "Why are you screaming? You know this feels good." He then removed his hand and tried to unbuckle his pants; meanwhile, the victim kicked him between the legs and was able to get out of the van. Alghaben yelled, "You're nothing but a filthy whore," and something to the effect of "remember the name 'Jay.'" She ran home, into her house, and up to her bedroom.

{¶ 6} The victim testified that she called a friend and her friend advised her to tell her parents. The victim then woke her mother to tell her what happened, and the police were called. While the victim was being interviewed by the police, Alghaben tried to call the victim on her cell phone. Alghaben called back three more times, and finally the victim's dad answered the phone.

Alghaben identified himself as "Jay," and the victim's mother got on the phone and pretended to be the victim. The victim's family again called police and reported his cell phone number.

{¶ 7} Alghaben testified on his behalf and stated that he picked up the victim and took her home. He testified that the victim told him that she had been drinking and dancing and having fun. He testified that during their conversation the victim told him that she was bisexual and had just broken up with her girlfriend. He further testified that she was touching herself, playing with herself, and telling him how she liked it. Alghaben stated that she pointed out her house and he did not really see where she pointed but pulled over and put on his hazard lights. He told her the fare was $5, and then asked for her phone number and whether he could call her later. She paid him, gave him her number, and asked what his name was. He told her it was "Jay," and he explained to the court that he uses the name "Jay" because people mispronounce his name, Gehad, and make fun of it, too. He testified that he called her a few times that evening but she never answered. He stated that he left her a message but neither called the other after that. Alghaben denied touching the victim, and he also denied talking to her parents.

{¶ 8} The trial court found Alghaben not guilty of rape, but found him guilty of gross sexual imposition and kidnapping with the sexual motivation specification. Alghaben was classified as a sexually oriented offender and sentenced to two years in prison.

{¶ 9} Alghaben appeals, advancing four assignments of error for our review. Alghaben's first assignment of error states:

{¶ 10} "Appellant Alghaben's conviction is against the sufficiency of the evidence."

{¶ 11} When an appellate court reviews a record upon a sufficiency challenge, "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." *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 12} Alghaben was convicted of gross sexual imposition and kidnapping with a sexual motivation specification.

{¶ 13} R.C. 2907.05 states: "Gross sexual imposition. (A) No person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies: (1) The offender purposely compels the other person * * * to submit by force or threat of force."

{¶ 14} R.C. 2905.01 states: "Kidnapping. (A) No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes * * * (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will." The

court further found that Alghaben committed the kidnapping with a sexual motivation. See R.C. 2941.147.

{¶ 15} Alghaben argues that the victim's testimony was not credible and therefore the evidence was insufficient to support a conviction for either charge.

{¶ 16} It is well established that the weight to be given the evidence and credibility of the witnesses are primarily for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80. Thus, in reviewing the legal sufficiency of evidence to support a jury verdict, it is the minds of the jurors rather than a reviewing court which must be convinced. Id., citing *State v. Petro* (1947), 148 Ohio St. 473, 501-502; *State v. DeHass* (1967), 10 Ohio St.2d 230. In other words, does the record contain evidence from which the judge would be justified in concluding that Alghaben was guilty beyond a reasonable doubt?

{¶ 17} At trial, the victim testified that Alghaben grabbed her and forcefully stopped her from leaving the van two times. He was kissing her neck and put his hand down her pants. Furthermore, Alghaben made several comments that indicated his intent. Therefore, we are of the opinion that there was evidence before the court which, if believed, was sufficient to convince the court of Alghaben's guilt beyond reasonable doubt.

{¶ 18} Alghaben's first assignment of error is overruled.

{¶ 19} Alghaben's second assignment of error states:

{¶ 20} "Appellant Alghaben's conviction is against the manifest weight of the evidence."

{¶ 21} Under this assignment of error, Alghaben again argues that the victim's testimony is not credible and is vague, uncertain, and conflicting.

{¶ 22} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." *Leonard*, 104 Ohio St.3d at 68 (internal quotes and citations omitted).

{¶ 23} In making this determination, however, an appellate court must defer to the fact finder's conclusions regarding the witnesses' credibility as the fact finder is in a better position to observe the witnesses' demeanor. *State v. Ross* (Oct. 12, 2000), Cuyahoga App. No. 77126, citing *State v. DeHass* (1969), 10 Ohio St.2d 230. Moreover, the decision to reverse a judgment as against the manifest weight of the evidence is to be exercised with extreme caution and only in the exceptional case where it is evident that

the evidence manifestly weighs against conviction. Id., citing *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442 and 64443.

{¶ 24} Here, we cannot say that the evidence manifestly weighs against conviction; therefore, Alghaben's second assignment of error is overruled.

{¶ 25} Alghaben's third assignment of error states:

{¶ 26} "Appellant was deprived the effective assistance of trial counsel."

{¶ 27} Alghaben argues that his counsel was ineffective because he failed to object when the state was asking leading questions and failed to object to the last-minute witness for the state. Alghaben also claims that he was prejudiced when his attorney elicited testimony regarding the meaning of his first name Gehad, meaning "holy war," in light of 9-11.

{¶ 28} A claim of ineffective assistance of counsel requires proof that counsel's "performance has fallen below an objective standard of reasonable representation" and, in addition, prejudice arises from that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus; see, also, *State v. Lytle* (1976), 48 Ohio St.2d 391. The establishment of prejudice requires proof "that there exists a reasonable probability that were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley,* supra, paragraph three of the syllabus. The burden is on defendant to prove ineffectiveness of counsel. *State v. Gray*, Cuyahoga App. No. 83097, 2004-Ohio-1454,

citing *State v. Smith* (1985), 17 Ohio St.3d 98. Trial counsel is strongly presumed to have rendered adequate assistance. Id. Moreover, this court will not second-guess what could be considered to be a matter of trial strategy. Id.

{¶ 29} First, we note that this was a bench trial, and in a criminal case, a presumption exists that the trial court considers only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624. Second, failure to object to error, alone, is not sufficient to sustain a claim of ineffective assistance. *State v. Fears* (1999), 86 Ohio St.3d 329. Third, Evid.R. 611(C) does not prohibit the use of leading questions and gives the trial court broad discretion to allow its use. See *City of Parma v. Koumonduros*, Cuyahoga App. No. 85315, 2005-Ohio-3713. Finally, the Supreme Court of Ohio has recognized that declining to interrupt the prosecutor's argument with objections, or failing to object to certain evidence, is not deficient performance, especially in a bench trial. See *State v. Keene*, 81 Ohio St.3d 646, 668, 1998-Ohio-342.

{¶ 30} Clearly, some witnesses testify better than others; in other words, some will describe what happened with very little prompting by the prosecutor, while others will require a little more effort. In this case, defense counsel did object, at times, to the state's use of leading questions, and the court sustained the objections. Further, the trial court can distinguish between

what a witness actually testifies to and what the state tries to get the witness to say even when defense counsel failed to object. Alghaben has not established and the transcript does not reveal that he was prejudiced by the leading questions.

{¶ 31} With regard to the last-minute witness called by the state, we fail to see how Alghaben was prejudiced; clearly defense counsel did not object because he had several last-minute witnesses himself.

{¶ 32} As for defense counsel's inquiring what Alghaben's first name means, we find this to be part and parcel to defense counsel's strategy. It appears defense counsel was trying to give the court an alternative explanation as to why Alghaben gave the victim a different name, since the state was arguing that Alghaben lied to the victim about his name primarily to hide his identity. Therefore, we find that Alghaben was not prejudiced by defense counsel's inquiry.

{¶ 33} The record before us does not indicate that the trial court considered any evidence other than what was relevant, material, and competent; consequently, Alghaben's third assignment of error is overruled.

{¶ 34} Alghaben's fourth assignment of error states:

{¶ 35} "The trial court committed reversible error by allowing into evidence Appellant Alghaben's decision to remain silent during a police interrogation thus depriving him of the protections afforded by the Fifth Amendment to the United States Constitution."

{¶ 36} Under this assignment of error Alghaben argues that the trial court improperly allowed the state to elicit information from the detective regarding Alghaben's Fifth Amendment right to remain silent. In addition, Alghaben complains that it was improper and ineffective assistance of counsel for the state and defense counsel to stipulate that Alghaben met with the detective with counsel present, was advised of his rights, and exercised his right to remain silent. Last, Alghaben contends that he was prejudiced by the state's comments during closing arguments regarding his silence.

{¶ 37} "A defendant's decision to exercise his right to remain silent during police interrogation is generally inadmissable at trial either for purposes of impeachment or as substantive evidence of guilt." *State v. Perez*, Defiance App. No. 4-03-49, 2004-Ohio-4007, citing *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147. Furthermore, its introduction violates the Due Process Clause of both the state and federal constitutions. Id. Nevertheless, the introduction of evidence regarding a defendant's decision to remain silent does not constitute reversible error if, based on the whole record, the evidence was harmless beyond any reasonable doubt. *State v. Zimmerman* (1985), 18 Ohio St.3d 43, 45.

{¶ 38} In this case, the following colloquy took place:

> **"Q. Okay. So Detective, now, you've taken photographs of the cab, you've got a victim statement, you've got a suspect, now, and you've learned that he was driving that cab, Cab No. 120, which Mr. Headley brought to you. What did you do with that information?**

"A. Even before I got the information, the pictures from the cab, I had made contact with the defendant."

"Q. Okay. All right. And you made contact with him?

"A. Yes.

"Q. Did you talk to him?

"A. Yes.

"Q. Personally, you called – you talked to him on the {¶ 39} phone?

"A. Yes. I did.

"Q. All right. And what did you say to him?

"A. I advised him of the complaint, and I was – wanted to give him an opportunity to give his side.

"Q. Okay. What did he say when you advised him on the phone of the complaint?

"Defense Counsel: Objection.

"The Court: That objection is sustained.

"Q. Okay. After you - - did you make - - arrange a meeting with him?

"A. Yes.

"Q. Okay. What date did you arrange that meeting with him?

"A. I want to say around about the 27th, 28th of February?

"Q. Okay. I'm not going anywhere near that after that. Let me just ask you this, Detective. After you arranged the meeting, and after you reviewed all of the information, what did you do?

"A. I prepared a package that was sent to the grand jury.

"Prosecutor: Okay. Very good. One second, your honor?

"The Court: Hmm-hmm.

"Defense Counsel: Your honor?

"The Court: The record will reflect, and Counsel, you can jump in any time if I've made a misstatement, both counsel have stipulated to the fact that the defendant made himself available to this witness with counsel, physically, and came down to the station to meet with this particular witness.

"At that time the witness - - or excuse me, the defendant was advised of his rights, he did have counsel present, and at the time, he refused to make a statement. I did state that correctly? Add anything you would like.

"Defense Counsel: He refused to make a statement, but we said he was exercising his right to remain silent.

"The Court: Very good. He was exercising his constitutional right to remain silent.

"The Prosecutor: Thank you, Judge.

"Defense Counsel: Thank you.

"The Prosecutor: Thanks.

"The Court: Hmm-hmm.

"Q. Detective, with that, all that information then, what did you do? You presented a package?

"A. Yes."

{¶ 40} As seen above, the trial court properly sustained defense counsel's objection when the state presumably attempted to get into Alghaben's pre-arrest, pre-*Miranda* silence. See *Leach*, supra. The questions and answers that followed can be categorized as "course of investigation" testimony. See *Leach*, 102 Ohio St.3d at 141.

{¶ 41} Next, regarding the stipulation, we must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at of the time of counsel's conduct. *Strickland v. Washington* (1984), 466 U.S. 668, 690. Again, we will not second-guess what can be considered sound trial strategy. Furthermore, in a trial to the bench, the judge is presumed to consider only relevant and competent evidence.

{¶ 42} Finally, Alghaben argues that the prosecutor's statements during closing arguments prejudiced him "to the point of no return." Specifically at issue was when the prosecutor stated the following: "Mr. Drucker makes this big thing that he has nothing to hide, but the question, when the police came to ask him * * * about [the alleged crime] he didn't want to tell them about how drunk she was, or how she was flashing herself, or how coming onto him, or that he liked her, he thought she was cool, so he put her number in the phone. He didn't say one word about that to the police when they came and asked him about it. Why is that, Judge? Because he didn't know what they had on him at that time. That's something you can consider. Yeah, you have to live with that evidence."

{¶ 43} The rule that the state cannot comment regarding a defendant's exercise of his right to remain silent enforces "the underlying policies of the Fifth Amendment, which is to avoid having the *jury* assume that a defendant's silence equates with guilt." *Leach*, 102 Ohio St.3d at 138 (emphasis added). Although

the prosecutor's statements are improper and unnecessary, we cannot say that the trial court considered anything but what was relevant, material, and competent. Further, upon the whole record, we find any error in the introduction of such evidence was harmless beyond any reasonable doubt. Therefore, Alghaben's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., AND

JAMES J. SWEENEY, J., CONCUR.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).