

[Cite as *State v. Mondie*, 2009-Ohio-3070.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91668

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

STANLEY MONDIE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503836

BEFORE: Gallagher, P.J., Rocco, J., and Blackmon, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Stanley Mondie, appeals the judgment of conviction and sentence entered by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} On November 26, 2007, Mondie was indicted on two counts of rape in violation of R.C. 2907(A)(1)(b) and one count of kidnapping in violation of R.C. 2905.01(A)(2)/(A)(4). Both rape counts contained a furthermore clause, alleging that Mondie purposely compelled the victim to submit by force or threat of force, and a sexually violent predator specification. The kidnapping count contained a sexual motivation specification and a sexually violent predator specification. All counts alleged that the victim was under the age of 13 at the time of the offense. Mondie entered a plea of not guilty to the charges.

{¶ 3} On December 3, 2007, and again on March 27, 2008, Mondie, in open court, signed a waiver of speedy trial and consented to the case being continued. Trial was ultimately set for May 12, 2008. On the date of trial, Mondie executed a written waiver of jury trial. The matter then proceeded to a bench trial.

{¶ 4} The victim was a 12-year-old fifth grader. She testified to an incident that occurred on September 5, 2007, at the beginning of the school year. She and a friend (hereafter “K.S.”) were walking home from school when they noticed a boy walking in the opposite direction on the other side of the street. The victim yelled

“hey sexy” to the boy across the street. Upon a dare from K.S., the victim asked the boy for his number.

{¶ 5} The boy told the girls to come over to where he was standing. The victim stated that the boy identified himself as “Lil-D,” that he was wearing black jeans and a white T-shirt, and that his hair was braided.

{¶ 6} Lil-D and the girls began talking, and he asked the girls to go to his house. They walked for about 15 to 20 minutes and arrived at a house with a red and white “for sale” sign out front. Lil-D took the girls to an unattached garage out back, and they entered through a side door.

{¶ 7} The victim testified that once they were in the garage, Lil-D pulled down her pants, pulled down his pants, bent her forward, and put his “private part” in her behind, but not all the way inside. She later clarified that he was pushing against the outside of her behind and did not go inside of her. Lil-D then had the victim perform oral sex on him. She stated that this was not something that she wanted to do, and she told K.S. she wanted to go home. Once the girls left the garage, they did not know where to go and they stopped a woman to ask for directions to their elementary school. On their way home, the girls spotted K.S.’s sister, who was out looking for the girls.

{¶ 8} When she got home, the victim was scared and did not tell her mother what happened. K.S. reported the incident at school the next day, and the victim’s mother was notified. The victim went to the hospital, where she told a nurse what happened. The victim later made a statement to the police and identified the

perpetrator in a photo lineup. She also identified the perpetrator as the defendant at trial.

{¶ 9} K.S. was a 10-year-old fourth grader. Prior to testifying, the court asked K.S. a series of questions and determined she was competent to testify. K.S. testified that she and the victim encountered a boy on the way home from school, that she dared the victim to get his phone number, that he took them to a “rent house” that had a sign out front, that the house was red and white with a detached garage, that he took them into the garage, and that he sexually assaulted the victim.

K.S. saw the boy pull down the victim’s pants, make her bend over, and “put his penis in her butt.” He then made the victim perform oral sex. K.S. testified that after she stated a second time that they had to go home, the boy stopped what he was doing and they left. She indicated that the boy was wearing black jeans and a red shirt, and that he had tight braids. K.S. did not tell her mother what happened because she was scared of getting in trouble. The next day, she told a counselor at school what had happened.

{¶ 10} K.S. was able to recall how to get back to the rent house and showed her mother where the incident occurred. She stated that the boy’s name was Lil-D, and she identified him in a photo lineup. However, she did not recognize Lil-D as being in the courtroom at the time of trial.

{¶ 11} The victim’s mother and K.S.’s mother each testified to a day at the beginning of the school year when their daughters did not get home at their regular time. Neither learned of the incident until the school contacted them the next day.

{¶ 12} Renee Hotz, a sexual assault nurse examiner at University Hospital, testified that she assessed the victim's physical and mental condition at the hospital on September 6, 2007. Hotz took swab samples from the victim, noted a laceration on the lower portion of the victim's genital area, and found the victim was painful to the touch. Hotz testified that the location of the injury and tenderness were common in cases of sexual assault from behind.

{¶ 13} Detective David Bartee of the Cleveland Heights Police Department testified that he investigated the case. He testified that the description given by the girls of the suspect was a black male, 18 to 20 years old, thin, about 5'10," with braided hair and a thin beard. Det. Bartee went to the crime scene and discovered a single-family home that was white with red trim and had a detached garage with an unlocked door. He indicated that there was a "for rent" sign out front and that the house was vacant. The house was a couple of blocks from the girls' elementary school.

{¶ 14} Detective Bartee discovered that the Mondie family was the last to reside in the home, and he determined that Stanley Mondie matched the age and description of the offender. Det. Bartee placed a picture of Mondie in a photo lineup with like individuals and separately showed the lineup to the victim and the witness. Both identified Mondie as the offender.

{¶ 15} Mondie was arrested on September 12, 2007, and he signed a waiver of his *Miranda* rights. Thereafter, Mondie admitted that he saw the girls and spoke with them; however, Mondie denied any further contact with the girls and refused to say

anything further. The detective stated that when he saw Mondie, Mondie had braids that were starting to come out.

{¶ 16} Following the state's case, defense counsel moved for a directed verdict, which motion was denied by the trial court. The defense then called two alibi witnesses.

{¶ 17} Mondie's girlfriend, Nola Porter, testified that Mondie was with her all day on the date of the incident and that Mondie was babysitting for his sister that day. Porter stated that Mondie had his hair in a ponytail with no braids, and he was wearing "stone-wash" blue jeans and a white T-shirt. She admitted that Mondie has worn his hair in braids before. Diane Mondie, Mondie's mother, also testified that Mondie was babysitting that day, although she left for work at 1:00 p.m. She stated Mondie's hair was standing on top and had not been combed.

{¶ 18} At the conclusion of trial, the court found Mondie guilty of attempted rape with the furthermore specification under Count 1, guilty of rape with the furthermore specification under Count 2, and guilty of kidnapping with the sexual motivation specification under Count 3. The court found that Mondie was not guilty of the sexually violent predator specification under each count. The court classified Mondie as a tier III offender and sentenced him to a total sentence of 25 years to life in prison.

{¶ 19} Mondie filed this appeal, raising three assignments of error for our review. His first assignment of error provides as follows: "Appellant was denied his constitutional right to the effective assistance of counsel at trial."

{¶ 20} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 1995-Ohio-104. Further, "trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance." *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 1998-Ohio-343, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10.

{¶ 21} Mondie argues that his trial counsel failed to sufficiently challenge the testimony and evidence relating to the identification of the defendant as the perpetrator and failed to sufficiently develop this defense in the case. Mondie points to inconsistencies in the record as to what the perpetrator was wearing and K.S.'s failure to make an in-court identification. Mondie also states that there were inconsistencies as to his hair style and that a booking photo was not offered into evidence at trial. Mondie further argues that trial counsel failed to sufficiently cross-examine the witnesses on other inconsistencies in their testimony.

{¶ 22} Our review of the record reflects that the testimony of the witnesses in this matter was largely consistent, with relatively few inconsistencies. Defense counsel conducted a thorough cross-examination of each witness.

{¶ 23} Both the victim and K.S. provided similar accounts of their encounter with the perpetrator and detailed accounts of the incident. They provided similar physical descriptions of the perpetrator, and they separately identified Mondie from a photo lineup. Their descriptions included that the perpetrator had braided hair. Det. Bartee indicated that when he arrested Mondie a few days following the incident, Mondie had braids that were starting to come out. K.S. was able to recall the home where the incident occurred, and Det. Bartee found that the Mondie family was the last to reside in the home. Mondie admitted to Det. Bartee that he saw and spoke to the girls on the day of the incident.

{¶ 24} The overwhelming evidence pointed to Mondie as the perpetrator of the crime, and we do not find that the performance of defense counsel was seriously flawed and deficient, or that the result of the trial would have been different had defense counsel performed otherwise.

{¶ 25} Mondie also argues that trial counsel was ineffective by failing to file a motion to suppress the photo lineup and out-of-court identification, as well as the oral statements made by Mondie at the time of his arrest. “Failing to file a motion to suppress does not constitute ineffective assistance of counsel per se. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant

must prove that there was a basis to suppress the evidence in question.” (Internal citations omitted.) *State v. Brown*, 115 Ohio St.3d 55, 68-69, 2007-Ohio-4837.

{¶ 26} Mondie argues that the photograph used in the lineup was taken from the Bureau of Motor Vehicles’ database and therefore was not an adequate reflection of his characteristics at the time of the offense. The record reflects that the driver’s license photo used in the photo lineup depicted Mondie with braids in his hair. This was consistent with the descriptions provided by the victim and the witness, as well as his appearance at the time of arrest as described by Det. Barte. Furthermore, there is nothing in the record to suggest that the photo lineup was impermissibly suggestive. Likewise, there is nothing in the record to support Mondie’s contention that the post-*Miranda* statements made by him pertaining to his encounter with the girls were subject to suppression. Because Mondie has not shown a valid basis to suppress the evidence in question, we find no merit to his argument.

{¶ 27} Finally, Mondie contends trial counsel should have challenged the competence of the 10-year-old witness, K.S., prior to trial or requested a lengthy voir dire of K.S. He also states that the competence of the 12-year-old victim should have been challenged. Evid.R. 601(A) provides as follows: “Every person is competent to be a witness except: * * * Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” In this

case, neither K.S. nor the victim was under the age of ten. Thus, they were both presumed competent to testify.

{¶ 28} The trial court recognized that K.S. was almost eleven. Even so, the trial court conducted a thorough evaluation of K.S. and determined that she was competent to testify. The court asked her a series of questions concerning her ability to recall information and concerning her understanding of the difference between telling the truth and telling a lie. Further, both K.S. and the victim were able to understand the questions asked on direct and cross-examination and provide clear responses. Insofar as Mondie points to minor inconsistencies in their testimony, any inconsistencies in the testimony of the victim and K.S. were credibility issues for resolution by the trial judge, who found the victim and K.S. credible. We find that Mondie has failed to substantiate a claim of ineffective assistance of counsel, and we overrule his first assignment of error.

{¶ 29} Mondie's second assignment of error provides as follows: "Appellant's convictions are against the manifest weight and sufficiency of the evidence."

{¶ 30} 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.

{¶ 31} 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.” (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at 68.

{¶ 32} Mondie was convicted of attempted rape, rape, and kidnapping. R.C. 2907.02(A)(1)(b) defines rape as “No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.” R.C. 2923.02(A) defines attempt as “No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.” R.C. 2905.01(A)(2) defines kidnapping, with respect to a victim under the age of thirteen, as removing another by any means from the place where the other person is found or restraining the liberty of the other person “for the purpose of facilitating the commission of any felony.”

{¶ 33} In this case, the victim testified that Mondie brought the girls to a house that was 15 to 20 minutes away from their school and took them into a garage out back. The victim stated that once in the garage, Mondie pulled down his pants,

pulled down her pants, bent her down, and put his “private part” in her behind, but not all the way inside. She described the actions as a pushing feeling on the outside of her behind rather than inside. She stated that he then made her perform oral sex on him. She did not want to engage in these acts. Her description of what occurred was corroborated by the testimony of K.S. Also, the sexual assault nurse examiner noted a laceration and tenderness, which were consistent with a sexual assault from behind. Both K.S. and the victim identified Mondie in a photo lineup, and the house at which the incident occurred was linked to Mondie. Additionally, although Mondie called two alibi witnesses, the testimony of Det. Bartee established that Mondie placed himself with the victim and K.S. on the date of the incident.

{¶ 34} Mondie challenges the victim’s description of the assault and argues that there were discrepancies in her statements. He argues that there was a lack of physical evidence of the crime to support the conviction. He also points to inconsistencies in the testimony of the witnesses. These were all matters that the trier of fact could take note of and resolve or discount them accordingly. However, upon the record, they did not render the convictions against the sufficiency or manifest weight of the evidence.

{¶ 35} Viewing the evidence in a light most favorable to the state, we find that sufficient evidence was presented upon which any rational trier of fact could find beyond a reasonable doubt that Mondie committed the offenses upon which he was convicted. Furthermore, after examining the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we

cannot say that the court clearly lost its way and created a manifest miscarriage of justice. Accordingly, Mondie's second assignment of error is overruled.

{¶ 36} Mondie's third assignment of error provides as follows: "Appellant did not make a knowing, voluntary or intelligent waiver of his constitutional right to a trial by jury."

{¶ 37} "A jury waiver must be voluntary, knowing, and intelligent. Crim.R. 23. * * * [I]f the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made. Moreover, a written waiver is presumptively voluntary, knowing, and intelligent." (Internal citations omitted.) *State v. Fitzpatrick*, 102 Ohio St.3d 321, 325-326, 2004-Ohio-3167.

{¶ 38} In this case, Mondie, after consulting with his attorney, executed a written jury waiver in open court. The trial court informed Mondie of his right to a jury trial and made sure that he understood the consequences of waiving that right. Mondie, who previously waived his right to a speedy trial, stated a belief that the word waiver meant "temporarily." The trial court informed him that in this instance, he would be "giving up" his jury trial, and Mondie stated he understood. The trial court discussed at length the distinction between a jury trial and a bench trial and, upon clear representations made by Mondie, determined Mondie's waiver had been knowingly, intelligently, and voluntarily made.

{¶ 39} Mondie has failed to show upon the record that his jury waiver was not freely and intelligently made. Accordingly, his third 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 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
PATRICIA ANN BLACKMON, J., CONCUR