[Cite as *State v. Redon*, 2009-Ohio-5966.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92611

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH REDON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511565

BEFORE: Celebrezze, J., Dyke, P.J., and Jones, J.

RELEASED: November 12, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Kenneth Redon, appeals his convictions for kidnapping in violation of R.C. 2905.01 and domestic violence in violation of R.C. 2919.25. After a thorough review of the record, and for the following reasons, we affirm.

{¶ 2} Appellant arrived home in the early morning hours of May 12, 2008 after spending time visiting his daughter at his daughter's mother's house. At approximately 2:30 in the morning, appellant woke his wife, Shawnta Redon, by trying to kiss her. After Mrs. Redon rebuffed appellant's advances, an argument ensued involving the location of the television remote control. In the course of this argument, Mrs. Redon was trying to locate her cell phone using the house telephone line. Appellant snatched the phone from Mrs. Redon and hit her several times, with blows landing on her face and arms.

{¶ 3} At trial, Mrs. Redon testified that she was hit at least once in the face and several times on her arms as she raised them to protect her head. Photographs taken by the Bedford police department were introduced at trial, which showed injuries to Mrs. Redon's arm. She further testified that the argument calmed down, and she and appellant sat on the couch for a few minutes. Then Mrs. Redon went upstairs to the bathroom to survey the damage done by appellant. The court, while questioning Mrs. Redon about

inconsistences in her prior statement to the Bedford police the next day, elicited testimony that she was in the bathroom for a few hours, during which time appellant was standing at the door preventing her from leaving. Appellant's car was also blocking Mrs. Redon's car, further preventing her from leaving the premises. Appellant finally left the home to deliver newspapers. Mrs. Redon then called her mother and packed a bag, planning to stay at her mother's house. Upon finding her car blocked in, she called appellant, who arrived an hour later to move his car. Mrs. Redon was also unable to locate her keys, which were conveniently found by appellant upon arriving at the home to move his car. Mrs. Redon left the home and reported the incident to the Bedford police later that day.

{¶ 4} On June 5, 2008, appellant was indicted on one count of domestic violence and one count of kidnapping. A bench trial was conducted on November 12, 2008, which concluded with the court finding appellant guilty of kidnapping, a first degree felony, and domestic violence, a first degree misdemeanor. Appellant was sentenced to time served for the domestic violence conviction and a suspended five-year term of imprisonment with three years of community control and six months of special intensive domestic violence community control for kidnapping.

Law and Analysis

{¶ 5} On appeal appellant takes issue with the trial court's questioning of witnesses, the use of prior statements in questioning and as substantive evidence, the effectiveness of appellant's counsel, and the manifest weight of the evidence.[1]

Judicial Questioning of the Witness

{¶ 6} In appellant's second assignment of error, he argues that the court improperly questioned Mrs. Redon. This argument is based, in part, on the court's use of Mrs. Redon's prior statement, as argued in assigned errors IV and V. These three assignments of error are substantially interrelated; therefore, for the sake of judicial economy, we will address them together.

{¶ 7} Judges are governed by the Ohio Code of Judicial Conduct. Rule Two requires that a judge "shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Rule 2.3(A). This rule further states that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice." Rule 2.3(B). See, also, *State v. Mascarella* (1995), Tuscarawas App. No. 94 AP 100075. Rule 2.2 provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Id. See, also, Canon 2.

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[1] A full recitation of appellant's assigned errors can be found in the appendix.

{¶ 8} "Under Evid.R. 611, the court has discretion to control the flow of the trial. This control includes asking questions of the participants and the witnesses in a search for truth. Evid.R. 614. Since a trial court's powers pursuant to Evid.R. 611 and 614 are within its discretion, a court reviewing a trial court's interrogation of witnesses and comments must determine whether the trial court abused that discretion. *State v. Davis* (1992), 79 Ohio App.3d 450, 454, 607 N.E.2d 543." *State v. Prokos* (1993), 91 Ohio App.3d 39, 44, 631 N.E.2d 684.

{¶ 9} To constitute an abuse of discretion, the court's actions must be more than legal error; they must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 10} "A trial judge has a duty to see that truth is developed and therefore should not hesitate to pose a proper, pertinent, and even-handed question when justice so requires. *Akron-Canton Waste Oil, Inc. v.*

Safety-Kleen Oil Serv., Inc. (1992), 81 Ohio App.3d 591, 610, 611 N.E.2d 955. A trial judge is presumed to act in a fair and impartial manner. *In re Disqualification of Kilpatrick* (1989), 47 Ohio St.3d 605, 606, 546 N.E.2d 929. To overcome this presumption, an appellant must make a showing of bias, prejudice, or that the trial judge prodded the witness to elicit partisan testimony. *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 98, 454 N.E.2d 541." *Klasa v. Rogers*, Cuyahoga App. No. 83374, 2004-Ohio-4490, ¶32.

{¶ 11} "A judge abuses his discretion when he plays the part of an advocate, but the rule is not so restrictive that [a] judge is not permitted to participate in a search for the truth." *State v. Kight* (Sept. 9, 1992), Jackson App. No. 682. A trial court "may interrogate witnesses, in an impartial manner, whether called by itself or by a party." Evid.R. 614(B). "This rule exists because the trial court has an 'obligation to control proceedings, to clarify ambiguities, and to take steps to insure substantial justice.'" *State v. Stadmire,* Cuyahoga App. No. 81188, 2003-Ohio-873, ¶26, quoting *State v. Kay* (1967), 12 Ohio App.2d 38, 49, 230 N.E.2d 652.

{¶ 12} Appellant claims that the court abused its discretion when it engaged Mrs. Redon in a long series of questions regarding her prior written statement to the Bedford police department. Appellant cites to *State v. Prokos,* supra, in support of this proposition. However, the *Prokos* case involves a jury trial with extensive questioning by the court. In *Prokos*, the Fourth District specifically addressed the impact such questioning could have

on a *jury*. That court found that "[i]n a trial before a jury, the court's participation must be limited, lest the court, consciously or unconsciously, indicates its opinion on the credibility of a witness. Where a jury might infer the court's opinion of a witness through the persistence, tenor, range, or intensity of its questions, the interrogation is prejudicially erroneous." Id. at 44, citing *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 256 N.E.2d 613, paragraphs three and four of the syllabus.

{¶ 13} In the case at bar, a bench trial was conducted where "a trial judge is ordinarily accorded greater flexibility" in the questioning of witnesses. *Lorenc v. Sciborowski* (Mar. 16, 1995), Cuyahoga App. No. 66945. See, also, *State v. Armstrong* (Aug. 6, 1993), Montgomery App. No. 13498. This is because "when there is no jury, there is no one to be prejudicially influenced by the judge's demeanor." *State v. Stadmire*, supra, at ¶28.

{¶ 14} Appellant makes much of the number of questions posed to Mrs. Redon by the trial court. While 89 questions is a substantial number, the majority were to clear up contradictions and ambiguities between Mrs. Redon's testimony in court and her prior statement to the police. Appellant's trial counsel introduced those inconsistencies on cross-examination. The court was simply trying to arrive at the truth when confronted with differing versions of events and a recalcitrant witness. As the trial court noted, victims of domestic violence are often reticent to testify at trial against their abuser. The court took great pains to go over Mrs. Redon's prior statement

and ask her the same questions that were posed by police officers. The court determined that the testimony of Mrs. Redon was consistent with her prior statement, even if Mrs. Redon was hesitant to tell the full extent of the events when first questioned by the prosecution.

{¶ 15} In an effort to prove prejudice, appellant points to testimony drawn out by the court that was not adduced on direct examination by the prosecution. This should be expected because the testimony that was drawn out was in regard to the prior statement, which the prosecution was forbidden to use on direct examination. A party cannot attack the credibility of its own witness absent a showing of surprise and damage to its case. *State v. Duffy* (1938), 134 Ohio St. 16, 15 N.E.2d 535. Here, there was no adverse testimony by Mrs. Redon that would amount to surprise. However, on cross-examination, appellant used the prior inconsistent statement to attack Mrs. Redon's veracity. This opened the door for the court to question Mrs. Redon about her prior statement and to try to determine why there were differences in her prior statement and her court room testimony and which of those was the truth. The court was "directing [her] attention to a former conversation or declaration as to cause [her] promptly to correct [her] testimony or explain the apparent inconsistency. For this purpose such examination may afford valuable aid in judicial investigation; and, if it be competent at all for that purpose, the reason for admitting it would seem to require, that the examination should be allowed to extend so far as to permit

the former statements to be repeated to the witness, and inquiry to be made of [her] concerning them; for the repetition of the statement itself, referring to the circumstances of its utterance, would be the most likely means of awakening the recollection of the witness, enabling [her] to recall the facts, satisfy [her] of [her] mistake, and induce a correction or explanation; or, if the witness be a perverse or false one, such examination may serve to probe [her] conscience, and move [her] to relent and speak the truth." *Hurley v. State* (1889), 46 Ohio St. 320, 323, 21 N.E. 645.

{¶ 16} The court did not abuse its discretion when it tried to clear up ambiguities introduced by appellant in the cross-examination of Mrs. Redon. The court did not overstep its bounds and become "an advocate" for the prosecution.

{¶ 17} Appellant also alleges that the court improperly based its decision on the prior written statement as substantive evidence. This is contrary to the record. The court used the statement to elicit testimony in order to determine if Mrs. Redon's stories were consistent, or, if not, why they were not consistent. The court used Mrs. Redon's prior statement to confirm her testimony at trial. The trial court stated that Mrs. Redon confirmed her written statement "virtually word for word when the Court questioned her." The judge went on to find Mrs. Redon credible and appellant not credible. The court used Mrs. Redon's statement to confirm her veracity, which is an appropriate use.

{¶ 18} Finally, appellant failed to object to the court's use of the statement, which means this court is limited to examining the trial court's actions for plain error. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225, 229. Error is not plain error unless the outcome of the trial "clearly would have been otherwise, but for the error." *State v. Thomas*, Cuyahoga App. No. 78570, 2002-Ohio-4026, ¶16. "The standard for plain error is whether substantial rights of the accused are so adversely affected as to undermine the fairness of the guilt determining process." Id.

{¶ 19} As we have concluded above, the use of Mrs. Redon's statement to clear up inconsistences in testimony was proper; therefore, appellant cannot demonstrate error by the court. Appellant's second, fourth, and fifth assignments of error are without merit.

Ineffective Assistance of Counsel

{¶ 20} In appellant's first and third assignments of error, he argues that trial counsel was deficient by failing to object to the court's use of Mrs. Redon's prior statement to the Bedford police and by introducing the statement on cross-examination, thereby allowing questioning that produced evidence to substantiate the charge of kidnapping.

{¶ 21} 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 appellant's trial or legal proceeding would have been different had defense

counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 102 S.Ct. 2211, 72 L.Ed.2d 652; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 22} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 23} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *.

{¶ 24} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel,

even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison,* 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland,* supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland,* supra, at 694. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley*, supra, at 142.

{¶ 25} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at 143.

{¶ 26} In the case at bar, the testimony of Mrs. Redon was the gravamen of the prosecution's complaint. As such, appellant's trial counsel used her prior written statement to impeach her credibility. This is a valid trial tactic. Appellant would have this court find that such actions amounted to ineffective assistance of counsel and goes on to state that trial counsel should have just conceded the misdemeanor domestic violence charge. "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*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. This method of impeachment is a well recognized and valid trial strategy that does not amount to a violation of trial counsel's official duties.

{¶ 27} Appellant also claims that trial counsel should have objected to the court using the prior written statement to refresh Mrs. Redon's memory because Mrs. Redon had not lacked a present recollection of the events contained within the writing. However, trial counsel introduced conflicts between Mrs. Redon's present testimony and the recollections recorded in the written statement. The court was then free to question the witness regarding those conflicts and to have Mrs. Redon read the statement to determine what was accurate, as explained above. Objecting to the use of the written statement would not have changed the outcome of the trial, and appellant's ineffective assistance of counsel claim must fail.

Manifest Weight of the Evidence

{¶ 28} The court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the

credibility of the 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. * * * See *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42[.]" *Martin*, supra, at 175. Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Martin*, supra.

{¶ 29} In determining whether a judgment of conviction is against the manifest weight of the evidence, this court in *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442 and 64443, adopted the guidelines set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10, syllabus. These factors, which this court noted are in no way exhaustive, include: "(1) Knowledge that even a reviewing court is not required to accept the incredible as true; (2) Whether evidence is uncontradicted; (3) Whether a witness was impeached; (4) Attention to what was not proved; (5)The certainty of the evidence; (6) The reliability of the evidence; (7) The extent to which a witness may have a personal interest to advance or defend their testimony; and (8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary."

{¶ 30} A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169.

{¶ 31} Here, appellant's conviction was substantiated by the testimony of Mrs. Redon, the victim, and photographic evidence, which corroborated her testimony. Mrs. Redon did not have a personal interest in seeing appellant convicted because she was still married to him and, according to the record, actively engaged in trying to conceive a child with him. It was uncontradicted that appellant stood outside the bathroom doorway for a good deal of time while Mrs. Redon was in the bathroom. The trial court did not commit a manifest miscarriage of justice. The court, as trier of fact, could reasonably conclude from substantial evidence that the state proved appellant committed the crimes for which he was found guilty. Appellant's convictions are not against the manifest weight of the evidence. Appellant's final assignment of error is without merit.

{¶ 32} Having found the trial court's actions proper and that the trial court did not lose its way in convicting appellant based on the testimony of Mrs. Redon, we affirm the decision of the trial court.

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.

FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, J., CONCURS, and
ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY

APPENDIX

Appellant's six assignments of error:

I. "Due to shortcomings in trial counsel's performance, appellant received ineffective assistance of counsel."

II. "The trial court's interrogation of the state's witness was improper."

III. "Counsel was ineffective in failing to object to the trial court's questioning of the witness."

IV. "The trial court inappropriately used the written statement."

V. "The trial court improperly used the testimony achieved from the impeachment for the truth of the matters in the written statement."

VI. "Appelant's conviction is against the manifest weight of the evidence."