[Cite as *State v. Harrison*, 2010-Ohio-2778.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93132

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LORENZO HARRISON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513945

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

RELEASED: June 17, 2010

JOURNALIZED:
ATTORNEY FOR APPELLANT

David L. Doughten
4403 St. Clair Avenue
Cleveland, OH 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Jennifer A. Driscoll
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Lorenzo Harrison, appeals his rape and kidnapping convictions, rendered after a jury trial. We reverse in part and remand for further proceedings.

I. Procedural History

{¶ 2} In August 2008, Harrison was indicted on ten counts of rape, each with a furthermore clause that he purposely compelled the victim to submit by force or threat of force, a furthermore clause that the victim was under ten years of age, a notice of prior conviction, and a repeat violent offender specification. Harrison was also indicted on ten counts of kidnapping, each with a sexual motivation specification, notice of prior conviction, and repeat violent offender specification.

{¶ 3} Two of the rapes (Counts 1 and 2) and kidnappings (Counts 3 and 4) were alleged to have occurred between August 1, 2005 and January 15, 2006. Four of the rapes (Counts 5-8) and kidnappings (Counts 9-12) were alleged to have occurred between February 1, 2006 and August 1, 2006. The remaining rapes (Counts 13-16) and kidnappings (Counts 17-20) were alleged to have occurred between August 2, 2006 and June 1, 2007. The sole alleged victim was R.A.

{¶ 4} A bill of particulars delineated that the charges set forth in Counts 1-4 occurred at a Columbia Avenue, Cleveland home; the charges set

forth in Counts 5-12 occurred at an East 106th Street, Cleveland apartment; and the remaining charges set forth in Counts 13-20 occurred at a Woodside Avenue, Cleveland apartment.

{¶ 5} After a psychiatric evaluation was performed on Harrison, the case was placed on the common pleas court's mental health court docket.

{¶ 6} The repeat violent offender specifications and notices of prior conviction were bifurcated from the underlying charges and tried to the court.[1] On the day of trial, Harrison made an oral motion to excuse his assistant public defender, but the court summarily denied his request. Counts 13-20 were dismissed at the close of the state's case pursuant to the defense's Crim.R. 29 motion. The defense did not present any evidence.

{¶ 7} The jury found Harrison guilty of the following: Count 1, rape, and Count 3, kidnapping (at the Columbia Avenue address); Count 5, rape, Count 8, rape, Count 9, kidnapping, and Count 12, kidnapping (at the East 106th address). Harrison was also found guilty of the notices and specifications attendant to Counts 1, 3, 5, 8, 9, and 12. He was acquitted of the remaining charges.

{¶ 8} The trial court sentenced him to a life term for the rape counts, to be served concurrently to ten-year sentences for the kidnapping convictions.

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[1]Harrison stipulated to the underlying offense that gave rise to the notices of prior conviction.

II. Trial Testimony

{¶ 9} The victim, R.A., testified that she and her mother lived in Cleveland with Harrison at three different residences; she had previously lived with her Aunt Evelyn in Detroit. She stated that Harrison anally raped her on seven different occasions during the time she lived with him. R.A. testified that the incidents occurred while her mother was at work and R.A. was at home with Harrison. After the last time that Harrison raped R.A., he told her that what he had done was wrong and he was going to stop.

{¶ 10} R.A. testified that she once told her mother about the rapes, but her mother did not do anything. Her mother admitted that R.A. had told her about Harrison's conduct and that she did not do anything because she loved Harrison, did not want to see him get in trouble, and did not believe R.A. She continued to leave R.A. alone with Harrison after R.A.'s disclosure.

{¶ 11} The trial testimony also revealed that R.A.'s mother and Harrison had a tumultuous relationship that involved drinking and physical violence. R.A.'s mother eventually tired of the relationship, and she and R.A. moved to their hometown of Detroit. Shortly after the move, R.A. told her Aunt Evelyn of the rapes; Evelyn immediately contacted the Cleveland police.

{¶ 12} A medical exam was conducted on R.A. two months after the last rape; no evidence of sexual conduct was noted.

III. Law and Analysis

A. The Jury Panel

{¶ 13} In his first assignment of error, Harrison contends that the trial court erred by failing to remove biased jurors for cause. Harrison's second assignment of error, wherein he claims ineffective assistance of counsel, is based, in part, on defense counsel's performance during voir dire.

{¶ 14} Several jurors are the subject of Harrison's challenges. One of the jurors, Juror No.12, was dismissed by the court.[2] Harrison argues that although the court dismissed Juror No. 12, "counsel may have used the only peremptory challenge that he exercised against that same juror." A review of the transcript and jury forms, however, indicate that the court dismissed the original Juror No. 12, another person (a police officer) from the jury panel became the substituted Juror No. 12, and defense counsel exercised a peremptory on that substituted person. Thus, Harrison's claim of ineffective assistance of counsel based on his attorney exercising a peremptory on the same juror that the court had already dismissed is without merit.

{¶ 15} R.C. 2945.25 sets forth a safeguard to help ensure that a criminal defendant is afforded a fair and impartial jury. The decision to disqualify a juror for cause for one of the enumerated reasons in R.C. 2945.25 is left to the sound

[2]Juror No. 2 was also dismissed by the court because she said that she would have "difficulty keeping [her] emotions out of this" based on sexual abuse she suffered as a child.

discretion of the trial court. *State v. Smith*, 80 Ohio St.3d 89, 105, 1997-Ohio-355, 684 N.E.2d 668. An abuse of that discretion must have occurred before this court may reverse a conviction. Id.

{¶ 16} Criminal defendants would only be prejudiced when a trial court refused to dismiss a prospective juror for cause if it forced defendants to exhaust their peremptory challenges. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶86-87. Here, Harrison's counsel only used one peremptory challenge — for Juror No. 12, as just discussed — which use is raised in his ineffective assistance of counsel claim.

{¶ 17} As discussed below, we find that it was demonstrated that the jurors Harrison now complains of would be fair and impartial and, therefore, the trial court did not abuse its discretion by not dismissing them for cause and defense counsel was not ineffective for not using peremptory challenges to dismiss them.

1. Juror No. 1

{¶ 18} Juror No. 1 stated that his younger brother claims that they (the juror and the brother) were sexually abused as children by an uncle (deceased at the time of trial). He stated that he has no recollection of any abuse and was not sure he believes his brother, because he has no proof. He stated that his brother's allegation is not something that he dwells on and he only brought it up in response to the specific question posed to the panel about anyone or their family member being a victim of sexual abuse. When asked

if his brother's allegation would interfere with his ability to be a fair and impartial juror, he responded, "[n]o, no, not at all."

2. Juror No. 7

{¶ 19} Juror No. 7 was a pediatric nurse who treated children for a broad range of ailments, but focused in large part on respiratory and renal conditions. She stated that if it came to her attention that a child was suffering from emotional or psychological trauma, the child would be referred for psychiatric help. Juror No. 7 stated that nothing about her work would prevent her from being a fair and impartial juror.

{¶ 20} Juror No. 7 also shared that her cousin's daughter was allegedly a victim of sexual abuse. The cousin told Juror No. 7 of the allegation, and the juror described her role as "just listening"; the juror stated that other than her cousin telling her of the allegation, she was not involved in the situation. When asked if her family situation would affect her judgment in this case, Juror No. 7 responded, "[i]t's two totally separate issues. Even like my work, I see kids that are victims of abuse but I can't make a judgment. I can just treat them. That is why they are there, to get treated."

3. Juror No. 8

{¶ 21} Juror No. 8 revealed that about four or five years ago, he learned that approximately 20 years ago his then 14-year-old daughter was raped by

a peer. He indicated that his daughter has "made such great progress[,]" and was "putting her life back together pretty well." The juror stated that he would not hold what happened to his daughter against the defendant; he would put that situation aside, and be fair and impartial in this case.

4. Juror No. 10

{¶ 22} Juror No. 10 stated that several years ago her cousin's children were alleged to have been abused. The juror stated that she did not "know the facts in their cases[,]" she had no involvement with the prosecution of the case (if there was one), and she could completely set that case aside from this case.

{¶ 23} On this record, it was demonstrated that the above jurors would be fair and impartial in this case. Moreover, we are not persuaded by Harrison's contention that "due to the inordinate number of prospective jurors with a history of suffering from similar charges as facing [him], counsel should have requested a dismissal of the entire venire and requested a new panel." By Harrison's own admission, much of the questioning of the jurors who indicated some personal experience with sexual abuse allegations was done in camera. There simply is no evidence that the entire panel was tainted.

{¶ 24} In light of the above, the first assignment of error is overruled and the second assignment of error is overruled as it relates to the jury.

B. Ineffective Assistance of Counsel

{¶ 25} For the remainder of his second assignment of error, Harrison contends that his counsel was ineffective because he would not let him testify at trial. The defendant bears the burden of proof in demonstrating ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 477 N.E.2d 1128. In matters regarding trial strategy, we will generally defer to defense counsel's judgment. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965.

{¶ 26} Harrison relies on his statement to the court at sentencing that his counsel would not let him testify. That statement is not sufficient to demonstrate ineffective assistance of counsel. Moreover, the record demonstrates that it was the defense's strategy to not have Harrison testify.[3] That strategy was reasonable in light of Harrison's prior convictions. Accordingly, on this record, we find that counsel was not ineffective, and overrule the second assignment of error.

C. Weight of the Evidence

{¶ 27} Harrison's third assignment of error challenges the weight of the evidence. In reviewing a claim challenging the manifest weight of the

[3]The repeat violent offender specifications and notices of prior convictions were tried to the court.

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 citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 28} Harrison contends that the weight of the evidence does not support the convictions because the only evidence against him were allegations made by the victim, whose mother did not believe her. As the investigating detective testified, however, sexual assaults are often "secretive crimes," with no one besides the perpetrator and victim being aware of the crime.

{¶ 29} In this case, R.A. moved three times in the course of two years, each time going to a different school. She testified that there was no one at school she felt she could trust to confide in. When she eventually did confide in her mother, her mother did nothing.

{¶ 30} The mother's judgment was called into question by her own sister, Evelyn. Specifically, Evelyn testified that she had custody of R.A. for

the first four years of her life because her sister "was not ready to be a mother." Evelyn also testified about the conditions under which R.A. lived when she was with her mother and Harrison, which included fighting and drinking by both of them. On this record, it is not so incredible that the only witness to the crimes was R.A.

{¶ 31} We are not persuaded by Harrison's suggestion that R.A. told her mother of the crimes after Harrison had punished her, supplying R.A. with "the motivation to put Harrison out of her and her mother's life." The crimes did not truly come to light until after R.A. and her mother had moved to Detroit, after the mother's relationship with Harrison had ended. Thus, appellant's suggestion that R.A. made the crimes up to end her mother's relationship with Harrison is not supported by the record.

{¶ 32} Further, the fact that there were no physical injuries does not support Harrison's contention that the convictions are against the manifest weight of the evidence. It is not uncommon for there to be a lack of physical evidence of anal penetration, especially when, as here, the exam was conducted two months after the last rape. See *State v. Boerio*, Lucas App. No. L-08-1182, 2009-Ohio-5181, ¶19.

{¶ 33} On this record, the manifest weight of the evidence supports the convictions and the third assignment of error is overruled.

D. Request for New Counsel

{¶ 34} For his fourth assigned error, Harrison contends that the trial court erred by denying his request to dismiss his counsel without investigation into the grounds for the request.

{¶ 35} Just prior to voir dire, Harrison asked for replacement counsel, to which the court responded, "[t]hat request is denied." Trial then commenced.

{¶ 36} At sentencing, Harrison raised the issue of his request for replacement counsel and stated that he felt as if he had been "railroaded" by the court and counsel. Defense counsel stated, "I don't want to get into a discussion with Mr. Harrison about the issues he raised. We do have a — I just don't want to do that on the record." The assistant prosecutor responded, "Your Honor, if I may for the record just point out that at no point during the four days of trial did the defendant state he was not being properly represented, he never brought anything forward to the Court, so I would just like to state that for the record."

{¶ 37} In *State v. Deal* (1969), 17 Ohio St.2d 17, 244 N.E.2d 742, the Ohio Supreme Court stated the following at its syllabus: "Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial

judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable."[4]

{¶ 38} In *State v. Prater* (1990), 71 Ohio App.3d 78, 83, 593 N.E.2d 44, the Tenth Appellate District found a judge's concerns about the timeliness of a motion for new counsel unpersuasive in ruling that the judge should have inquired about the defendant's complaint. The Ohio Supreme Court cited *Prater* with approval in *State v. Keith* (1997), 79 Ohio St.3d 514, 524, 684 N.E.2d 47. In *State v. Beranek* (Dec. 14, 2000), Cuyahoga App. No. 76260, this court noted that, "[i]n both *Deal* and *Prater*, the case was remanded to the judge for the limited purpose of inquiring into the defendant's allegations, with instructions to re-enter the judgment of conviction if the allegations were unfounded. *Deal*, 17 Ohio St.2d at 20, 244 N.E.2d at 743-44; *Prater*, 71 Ohio App.3d at 85-86, 593 N.E.2d at 48."

{¶ 39} This court explained the purpose of the limited remand: "[t]he purpose of the inquiry and investigation are to allow a defendant the opportunity to place his allegations on the record, and to show sufficient investigation into their merit to allow appellate review. Thus the complaining

[4] In *Deal*, the defendant sought to remove his attorney after the state had presented and rested its case.

defendant is allowed the opportunity to place allegations and evidence of at least some issues of ineffective assistance of counsel on the record for review on direct appeal, rather than having those issues postponed for postconviction relief petitions, because they rely on evidence outside the record." This court noted that if the defendant's allegations are specific enough to justify further investigation, the court must investigate, but no further investigation is required for vague or general reasons for wanting to discharge counsel. This court also stated, quoting *Prater*, that the investigation may be "'brief and minimal.'"

{¶ 40} This court held that the judge on remand should attempt to determine those issues for which the defendant sought to discharge his attorney initially, and acknowledged that "in the aftermath of trial," a defendant "might assert numerous errors of his trial counsel," but cautioned that "it is unlikely that he would foresee each error prior to trial."

{¶ 41} In this case, the trial court summarily dismissed Harrison's request for replacement counsel without permitting him to explain his reasons for the request. The state argues that Harrison was very proactive during the proceedings (i.e., by filing pro se motions) and never expressed his displeasure with counsel throughout the four-day trial. But this court held in *Beranek* that a defendant should not be penalized for "failing to press the

issue before the judge when [the judge] made it clear that she would not consider [the defendant's] complaints and did not inquire into their nature."

{¶ 42} Accordingly, on the authority of *Beranek*, *Deal*, *Prater*, and *Keith*, supra, the fourth assignment of error is sustained, and the case is remanded to the trial court for the limited purpose of inquiring into Harrison's allegations, with instructions to re-enter the judgment of conviction if the allegations are unfounded.

E. Right to Testify

{¶ 43} Lastly, Harrison contends that his waiver of his right to testify was not knowingly, intelligently, or voluntarily given because the court did not question him about his decision not to testify.

{¶ 44} Harrison's argument, however, has been rejected by the Ohio Supreme Court, which has held as follows: "[g]enerally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused. See, e.g., *Rock v. Arkansas* (1987), 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37; *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993; *Brown v. Artuz* (C.A.2, 1997), 124 F.3d 73, 77. But in Ohio, courts of appeals have held that a trial judge is not required to conduct an inquiry with the defendant about the decision whether to testify. See, e.g., *State v. Oliver* (1995), 101 Ohio App.3d 587, 656 N.E.2d 348. In fact, most courts have ruled that neither the United States

Constitution nor applicable rules require the trial judge to ask the defendant about the decision not to testify. See, e.g., *Artuz*, 124 F.3d at 78; *State v. Walen* (Minn.1997), 563 N.W.2d 742; *State v. Gulbrandson* (1995), 184 Ariz. 46, 64, 906 P.2d 579, 597; *Phillips v. State* (1989), 105 Nev. 631, 632-633, 782 P.2d 381, 382; *Aragon v. State* (1988), 114 Idaho 758, 762-763, 760 P.2d 1174, 1178-1179; *Commonwealth v. Hennessey* (1987), 23 Mass.App.Ct. 384, 387-390, 502 N.E.2d 943, 945-948. We agree and hold that a trial court is not required to conduct an inquiry with the defendant concerning the decision whether to testify in his defense." *State v. Bey*, 85 Ohio St.3d 487, 499, 1999-Ohio-283, 709 N.E.2d 484.

{¶ 45} In light of the above, Harrison's fifth assignment of error is overruled.

IV. Conclusion

{¶ 46} The case is reversed in part and remanded to the trial court for the limited purpose of inquiring into Harrison's request for new counsel, with instructions to re-enter the judgment of conviction if the court concludes that the allegations are unfounded. If the trial court finds that Harrison's allegations are unfounded, the convictions are affirmed, any bail pending appeal is terminated, and the trial court shall execute upon the sentence. Any further appeal will be limited to a review of the court's finding in reference to the removal of counsel.

It is ordered that appellee and appellant equally divide the 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.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR