

[Cite as *State v. Boynton*, 2010-Ohio-4248.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93598

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE BOYNTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498434

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

RELEASED AND JOURNALIZED: September 9, 2010
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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Andre Boynton (“defendant”), appeals his convictions for unlawful sexual conduct with a minor conviction and his ten-year

prison sentence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In the afternoon on April 26, 2006, defendant flagged down 13-year-old M.E.¹ (“the victim”), who was walking in the Superior Avenue and E. 105th Streets area of Cleveland. Defendant asked M.E. her name and age, and she answered his questions truthfully. M.E. got into defendant’s car and the two went to defendant’s house, where they engaged in consensual sexual intercourse.

{¶ 3} Later that day, M.E. told her mother that she had sexual intercourse, and her mother took M.E. to the hospital where a rape kit was performed. The police arrived at the hospital, and M.E. told them that she had sex with a man named Leonard Welch.

{¶ 4} In November 2006, the Ohio Bureau of Criminal Identification and Investigation (“BCI”) performed DNA tests on the items in M.E.’s rape kit. Male DNA was found on M.E.’s swabs; however, it did not match Leonard Welch’s DNA.

{¶ 5} BCI determined that the DNA from M.E.’s rape kit was consistent with defendant’s DNA. The information was given to the police, who showed M.E. a line-up of photographs “to see if she could identify the suspect that had been identified by BCI.” M.E. picked defendant out of the line-up.

¹The victim is referred to herein by her initials in accordance with this Court’s established policy regarding non-disclosure of identities of juveniles.

{¶ 6} In February 2007, BCI again compared the DNA from M.E.'s swabs with defendant's DNA and found them to be consistent.

{¶ 7} Defendant was charged with two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). On June 8, 2009, a jury found defendant guilty of both counts, and the court sentenced him to five years in prison for each count, to run consecutive to one another, for an aggregate sentence of ten years in prison.

{¶ 8} Defendant appeals and raises seven assignments of error for our review. "I. Defendant-appellant asserts that the prosecutor [peremptorily] challenged three African-American prospective jurors because of their race, in violation of [his right to a fair trial]."

{¶ 9} The United States Supreme Court established "a three-step procedure for evaluating claims of racial discrimination in peremptory strikes. First, the opponent of the strike must make a prima facie showing of discrimination. Second, the proponent must give a race-neutral explanation for the challenge. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful racial discrimination." *State v. White* (1999), 85 Ohio St.3d 433, 436, 709 N.E.2d 140 (citing *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69).

{¶ 10} In the instant case, defendant raised a *Batson* objection to three jurors the State wanted to strike. The court asked the State to give a race-neutral explanation for each challenge: the State challenged juror number 11 because it

“wasn’t comfortable with his responses * * * [h]e seemed kind of guarded in his answers.” The State challenged juror number 14 because “she just doesn’t seem very intelligent. This is a day care provider who works with children, some who have disabilities, and she doesn’t even know what those disabilities stand for. ADHD, she doesn’t know what that means. That causes the State some concern.” Finally, the State challenged alternate juror number 23 because he “had difficulty answering a lot of questions. He was very surly. A lot of times we got uh-huh, yeah, and nothing more specific.”

{¶ 11} Our review of the jury voir dire supports the State’s race-neutral reasoning. Additionally, defendant points to nothing in the record indicating a discriminatory intent on behalf of the State. Although defendant argues on appeal that the State’s reasoning was a pretext for discrimination, defendant offers no specifics or explanation other than the three jurors in question are African-American. While defendant is not required to prove a pattern of discriminatory strikes to succeed on a *Batson* claim, the court may take into consideration that other African-American individuals, to whom the State did not object, sat on the jury in the instant case. See *White*.

{¶ 12} This Court gives deference to the trial court’s ruling on a *Batson* issue, which is mainly an evaluation of credibility. *State v. Murphy*, 91 Ohio St.3d 516, 530, 2001-Ohio-112, 747 N.E.2d 764. Accordingly, we hold that defendant did not meet his burden of proving racial discrimination, and his first assignment of error is overruled.

{¶ 13} In defendant's second assignment of error, he argues that he was deprived of his right to effective assistance of counsel for two reasons:

{¶ 14} "II(A). Defendant-appellant's trial counsel failed to timely respond to the State's request for discovery thereby denying the defendant-appellant the opportunity to fully argue and submit defendant's expert testimony of the independent D.N.A. results.

{¶ 15} "II(B). Defendant must be competent enough to assist attorney to prepare for his trial."

{¶ 16} "To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 143.

{¶ 17} In defendant's first claim of ineffective assistance of counsel, he alleges that the court excluded an independent expert DNA analysis that he requested because his attorney failed to timely respond to the State's discovery

request. However, our review of the record shows that the court did not permit defendant to introduce this evidence at trial because it was cumulative to the BCI report on DNA introduced by the State. The court also ruled that, in addition to being cumulative, the independent DNA report weighed heavily against defendant, as it concluded that he could not be excluded as a contributor of the DNA found on M.E.'s vaginal swab.

{¶ 18} As the timeliness of defense counsel's discovery responses was not a factor in the court's ruling regarding the independent DNA report, we cannot say that counsel was ineffective concerning this issue.

{¶ 19} Defendant's second claim of ineffective assistance of counsel raises a fundamental requirement of due process "that a criminal defendant who is legally incompetent may not be tried." *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶36. See, also, R.C. 2945.37.

{¶ 20} At defendant's request, his competency to stand trial was evaluated by a court appointed psychiatrist. The doctor's expert report concluded that defendant had no mental health issues, he understood the nature of court proceedings, and was competent to stand trial. The State and defense counsel stipulated to these findings. On appeal, defendant claims to suffer from bi-polar disorder and argues that his trial counsel should have been aware of his "mental state" and requested an independent "psychic exam."

{¶ 21} Defendant offers nothing to support his contention that his counsel was ineffective regarding this issue. In *State v. Marshall* (1984), 15 Ohio App.3d

105, 472 N.E.2d 1139, this Court held the following: “Where the trial court refers the defendant for a psychiatric evaluation pursuant to a request by defendant’s counsel, and the examining psychiatrist concludes that the defendant is fully capable of assisting in his own defense and of understanding the nature and facts of the charges against him, the psychiatrist’s testimony to that effect, given at a hearing conducted pursuant to R.C. 2945.37, is sufficient to sustain the court’s determination that the defendant is competent to stand trial.” *Id.* at paragraph one of the syllabus.

{¶ 22} Defendant failed to demonstrate that his counsel’s performance was sub-standard or that a subsequent mental evaluation would have found him incompetent to stand trial. Defendant’s second assignment of error is overruled.

{¶ 23} Defendant’s third assignment of error contains two unrelated arguments, the first of which follows:

{¶ 24} “III(A). The trial court abused its discretion when it refused to allow defendant’s expert [DNA] witness to testify.”

{¶ 25} Trial courts have broad discretion to admit or exclude evidence, and we review admissibility rulings under an abuse of discretion standard. *State v. Lyles* (1989), 42 Ohio St.3d 98, 99, 537 N.E.2d 221. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. Pursuant to Evid.R. 403(B), relevant evidence may be excluded if

the probative value is substantially outweighed by the prejudicial effect of needlessly presenting cumulative evidence.

{¶ 26} In the instant case, the State admitted into evidence the results of the BCI report comparing DNA extracted from M.E.'s rape kit with defendant's DNA. The BCI report concluded that "Andre Boynton cannot be excluded as the source of the sperm on the vaginal swabs. * * * [T]he expected frequency of occurrence of the major DNA profile identified on the sperm fraction of the vaginal swabs is 1 in 99,500,000,000,000,000,000 unrelated individuals."

{¶ 27} Defendant had the DNA from M.E.'s rape kit independently tested by DDC DNA Diagnostics Center ("DDC"). DDC's report concluded that "[t]he partial mixed DNA profile obtained from [M.E.'s vaginal swab] is consistent with the DNA profiles from [M.E.] and Andre Boynton. Therefore, [M.E.] and Andre Boynton cannot be excluded as contributors to the mixed partial DNA profile obtained from [M.E.'s vaginal swab]. The probability of selecting an unrelated individual at random from the population having a DNA profile matching the partial mixed DNA profile obtained from [M.E.'s vaginal swab] is approximately 1 in 52 individuals."

{¶ 28} The court denied defendant's request to admit the DDC report and testimony from a DDC employee who analyzed the DNA. The court's denial was based on the following reasons: the DDC report did not contradict the State's DNA evidence; the statistical conclusions are "different because they're talking about two different things"; the evidence was cumulative; and the evidence hurts, rather than helps, defendant.

{¶ 29} The court asked defense counsel “how this information is helpful to the defendant as opposed to being damaging to the defendant.” Defense counsel responded as follows: “Your honor, based on my conversations that I had with the DNA Diagnostics, along with — in the presence of my client I have nothing to offer to say that this doctor testifying would help his case.”

{¶ 30} Accordingly, we find no abuse of discretion in the trial court's decision to exclude evidence that was not only cumulative to evidence already admitted, but was harmful to the party who proffered it.

{¶ 31} In the second part of defendant's third assignment of error, he argues that:

{¶ 32} “III(B). The trial court abused its discretion when it sentenced the defendant to the maximum term of incarceration by law.”

{¶ 33} The Ohio Supreme Court set forth the standard for reviewing felony sentencing in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Kalish*, in a plurality decision, holds that appellate courts must apply a two-step approach when analyzing alleged error in a trial court's sentencing. “First, they 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 shall be reviewed under an abuse-of-discretion standard.” *Id.* at ¶4.

{¶ 34} In determining whether defendant's sentence is contrary to law, we look to R.C. 2929.14(A)(3), which states that prison terms for third degree felonies are between one and five years.

{¶ 35} The court sentenced defendant to the maximum term of five years for each count of unlawful sexual conduct with a minor, which is a third degree felony. Defendant's aggregate prison term of ten years is within the statutory range.

{¶ 36} We also find that the court properly included five years of postrelease control as part of defendant's sentence. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. Additionally, the court considered the purpose and principles found in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12 when sentencing defendant. Specifically, the court relied on a presentence investigation report that was ordered and used in another case against defendant one month before defendant was sentenced in the instant case.

{¶ 37} Accordingly, the court complied with the first prong of *Kalish*, and defendant's sentence is not "clearly and convincingly contrary to law." *Kalish*, at ¶4. We now analyze the details of the court's findings and review the decision for an abuse of discretion under the second prong of *Kalish*.

{¶ 38} The record shows that the following factors were considered at defendant's sentencing hearing: M.E. was 13 years old at the time of the offense; defendant's prior criminal record shows that "he has a pattern of behavior for picking up young girls off of the street corner, taking them to apartments or homes and engaging in sexual activity"; defendant was recently convicted by a jury of

rape in another case and was awaiting sentencing; and defendant will be classified as a Tier I sex offender in that rape case.

{¶ 39} We find that the court acted within its discretion when it sentenced defendant to the maximum term of five years in prison for each offense. Furthermore, the court did not abuse its discretion in ordering defendant to serve these sentences consecutively. See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, at ¶35 (holding that *Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so"). Defendant's third assignment of error is overruled.

{¶ 40} Defendant's fourth and fifth assignments of error will be addressed together, and they read as follows:

{¶ 41} "IV. Defendant-appellant asserts that his conviction is against the sufficiency of the evidence.

{¶ 42} "V. Defendant-appellant asserts that his jury verdict is against the manifest weight of the evidence."

{¶ 43} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶ 44} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 45} “The appellate court sits as the ‘thirteenth juror’ and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 46} Defendant was convicted of two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), which states that “[n]o person who is eighteen years of age or older shall engage in sexual conduct with another * * * when the offender knows the other person is thirteen years of age or older but less than sixteen, or the offender is reckless in that regard.” The jury also found that defendant was ten or more years older than the victim, which under R.C. 2907.04(B)(3) categorizes his convictions as third degree felonies.

{¶ 47} M.E. testified that in April 2006, she ran away from home for a week and a half and stayed at various people’s houses in her neighborhood. During this time she met defendant and told him her real name and age, which was 13. She remembers this because defendant’s response was, “Age ain’t nothing but a number.” M.E. testified that she and defendant had sexual intercourse, and defendant was not wearing a condom when he ejaculated inside her. M.E. also stated that defendant performed oral sex on her. Shortly after this incident, M.E.’s

parents found her walking on Superior Avenue. She got in the car with her parents, who asked her where she had been. M.E. showed them some of the houses and told them she had sexual intercourse with a 20-year-old male named Leonard Welch.

{¶ 48} M.E. testified that she did not tell her parents that she also had sex with defendant while she was a runaway. “[A]t that time when I got in that car my mother asked me, she said who else did you have sex with and I just told her Leonard Welch. That’s the only name I brought attention to my mother.” Asked why, M.E. replied, “Because I ain’t want to make my mother feel like [her] daughter just out there giving her body away.”

{¶ 49} M.E.’s mother testified that she took M.E. to the hospital after finding her walking the streets, because M.E. said she had been having sex while she was gone.

{¶ 50} Two police officers testified that they took M.E.’s statement after the rape kit was completed at the hospital. At the time, M.E. gave the police the name Leonard Welch. When the DNA evidence showed that the sperm from M.E.’s rape kit was defendant’s, rather than Welch’s, police prepared a photo array for M.E. that included defendant’s picture. The police told M.E. that the DNA evidence did not implicate Welch. The police did not mention defendant’s name. M.E. identified defendant as the suspect.

{¶ 51} Defendant argues that M.E. was not credible and her testimony was inconsistent because she initially identified another male as the offender, and did

not identify him until over a year after the date of the offense. Defendant also argues that the photograph line-up and DNA test results were “bogus.”

{¶ 52} After reviewing the record, we find that the evidence supports defendant’s convictions. M.E. offered a plausible explanation of why she withheld defendant’s name at first, and defendant’s DNA was found on M.E.’s vaginal swab. There was sufficient evidence to show that defendant, who was 30 years old at the time, engaged in sexual conduct with M.E., after M.E. told defendant she was 13 years old. The jury did not lose its way in convicting defendant of unlawful sexual conduct with a minor. Defendant’s fourth and fifth assignments of error are overruled.

{¶ 53} “VI. Defendant-appellant contends that the trial court denied his statutory and constitutional rights to a speedy trial.”

{¶ 54} Specifically, defendant argues that he was brought to trial “45 days over the time for which he was required to be brought to trial.”

{¶ 55} When an appellate court reviews an allegation of a speedy trial violation, it “should apply a de novo standard of review to the legal issues but afford great deference to any findings of fact made by the trial court.” *State v. Barnes*, Cuyahoga App. No. 90847, 2008-Ohio-5472, ¶17.

{¶ 56} R.C. 2945.71(C)(2) requires the State to bring a defendant accused of committing a felony to trial within 270 days after his arrest. “[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E). However, this provision does not

apply to defendant in the instant case because he was being held in jail pending trial in at least one other case when he was indicted for the instant case on July 10, 2007. Additionally, various events toll speedy trial days, including for example, defense requested continuances and requests for discovery. R.C. 2945.72(E) and (H).

{¶ 57} On April 20, 2009, the court denied defendant's motion to dismiss for lack of a speedy trial, finding that the time had not run due to defense counsel's requests for continuances.

{¶ 58} Upon our independent review of the record, we find that defendant's speedy trial rights were not violated. Defendant's speedy trial time was tolled from July 27, 2007, when he requested discovery, through November 30, 2007, when the court held a pretrial after multiple defense-requested continuances. Time was tolled again from January 14, 2008 through April 28, 2008, based on further continuances requested by defendant, who was awaiting trial in three other felony cases at the time. Defendant's speedy trial time was tolled again, starting on May 20, 2008 and lasting until his trial on June 3, 2009, because of various motions that defendant filed, including a request for a competency evaluation, a request for an independent DNA analysis, and a motion to disqualify the judge. See R.C. 2945.72(E) (stating that a defendant's speedy trial time may be extended by "[a]ny period of delay necessitated * * * or instituted by the accused"). Defendant's sixth assignment of error is overruled.

{¶ 59} “VII. The cumulative errors committed in this present case denied defendant-appellant his right to a fair trial.”

{¶ 60} Pursuant to the cumulative-error doctrine, “a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal.” *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623. The Ohio Supreme Court found in *Garner*, however, that the cumulative error doctrine did not apply because there were no “multiple instances of harmless error.” *Id.*

{¶ 61} The same reasoning is applicable to the instant case. After reviewing defendant’s arguments on appeal, we find no error. Defendant’s final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

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