[Cite as *State v. Robinson*, 2010-Ohio-5776.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94293

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMUEL ROBINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520748

BEFORE: Kilbane, P.J., Jones, J., and Cooney, J.

RELEASED AND JOURNALIZED: November 24, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Defendant-appellant, Samuel Robinson ("Robinson"), appeals his convictions and sentence. Finding no merit to the appeal, we affirm.

{¶ 2} In March 2009, Robinson was charged with one count of aggravated burglary (Count 1), three counts of rape (Counts 2-4), three counts of kidnapping (Counts 5-7), and one count of child endangering (Count 8).[1] The matter proceeded to a jury trial in October 2009.

[1]The offenses were committed in 1994.

{¶ 3} Prior to trial, the court held a hearing on Robinson's motion to suppress the identification made with the photo array. The trial court denied the motion, finding that Robinson did not meet his initial burden of establishing that the procedure was unduly suggestive. At the close of the State's case, the trial court dismissed two of the kidnapping charges (Counts 6 and 7).[2] The jury found Robinson guilty of the remaining counts.

{¶ 4} The trial court sentenced Robinson to 7 to 25 years in prison for aggravated burglary and 9 to 25 years in prison on each rape count, with the rape counts to be served consecutively to each other and consecutively to the aggravated burglary count.[3] The court also sentenced him to six months for child endangering, to be served concurrently to the aggravated burglary and rape counts. The court classified Robinson as a Tier III sex offender.

{¶ 5} The following evidence was adduced at trial.

{¶ 6} In the early morning hours of November 2, 1994, the victim ("W.V."),[4] awoke to a knock at the door of her home on West 30th Street in Cleveland. She heard someone manipulating the lock on her door, so she looked out the window and observed Robinson outside. She then ran to the

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[2]Because the trial court dismissed Counts 6 and 7 (kidnapping) pursuant to Crim.R. 29, it then referred to Count 8 (child endangering) as Count 6.

[3]The court merged the kidnapping count with the rape counts as allied offenses of similar import.

[4]Victims of sexual violence are referred to herein by initials in accordance with

back room and picked up her year-and-a-half old daughter when Robinson broke into her home. He told her that he needed a change of clothes because he stole a car and he was running from the police. W.V. went to find him some clothes when he entered the room wearing nothing but gloves. She asked him, "What are you doing?" Robinson told her, "You know what I'm here for." He then advised that he was recently released from prison. W.V. was six-months pregnant at the time and asked him why he would do this to her. Robinson replied, "I'm going to do it anyway. It's not the first time that I done it."

{¶ 7} Robinson then performed oral sex on W.V., while her daughter was next to her on the bed. He next vaginally raped W.V. while she laid on her back. After this act, he conversed with her about prison and her boyfriend's and roommate's whereabouts. Robinson then vaginally raped W.V. again. He had her stand up with her leg propped on the bed. Her daughter was crying so Robinson told her to hold the baby and turn her back so he could vaginally rape her from behind.

{¶ 8} Robinson then got dressed and left. He came back a minute later and asked W.V. for a screwdriver and left again. She then put on a robe, grabbed her daughter, and ran to her friend's house. Her friend called an ambulance and W.V. was taken to the hospital, where a rape kit was

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this court's established policy regarding nondisclosure of their identities.

completed. The Cleveland police met with her at the hospital and took a basic police report.

{¶ 9} Cleveland Police Detective Christina Cottom ("Detective Cottom") of the Sex Crimes and Child Abuse Unit testified that she was assigned to this case when the Ohio Bureau of Criminal Identification and Investigation ("BCI") notified her that Robinson's DNA was linked to the November 1994 rape of W.V. The BCI had a "hit" on Robinson's DNA because of a sample obtained in an unrelated March 2008 rape case. Cottom located W.V. and confirmed that she wanted to proceed with the case. W.V. met with Cottom and gave her a statement. Cottom also showed W.V. a photo array from which she identified Robinson. Cottom included a picture of Robinson in the array because the DNA analysis of the rape kit sample identified Robinson as the perpetrator.

{¶ 10} Robinson now appeals, raising four assignments of error for review.

Motion to Suppress

{¶ 11} In the first assignment of error, Robinson argues that the court erred when it failed to suppress the pretrial photo identification by W.V.

{¶ 12} In reviewing a trial court's ruling on a motion to suppress, the reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions for the trier of fact.

State v. DePew (1988), 38 Ohio St.3d 275, 277, 528 N.E.2d 542; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. The reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. Id.; see, also, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 13} Robinson first argues that the photo array shown to W.V. was unduly suggestive because the individuals in the photo array have differences in their skin complexion. W.V. stated that her attacker had a dark complexion, and Robinson asserts that two of the individuals in the photo array were light skinned, African-American males. Second, he argues that he "stood out like a beacon" because none of the other individuals in the array had an upturned nose as W.V. described to the police. Third, he complains that the first four photographs depict individuals with layered clothing and the last two photographs depict individuals in shirts.[5]

[5]Robinson also complains that the photo array was unduly suggestive because W.V. stated that her attacker had a tattoo on his right shoulder and she was not shown photographs of tattooed individuals. He claims that he does not have a tattoo on his right shoulder. This argument is unpersuasive as the photo array is of facial recognition not tattoo recognition.

{¶ 14} We note that courts apply a two-prong test in determining the admissibility of challenged identification testimony. First, the defendant bears the burden of demonstrating that the identification procedure was unnecessarily suggestive. If this burden is met, the court must then consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *State v. Page*, Cuyahoga App. No. 84341, 2005-Ohio-1493, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140. "Stated differently, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325, 697 N.E.2d 1072. See, also, *State v. Morrison*, Cuyahoga App. No. 86967, 2006-Ohio-3352.

{¶ 15} In *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court set forth the following factors to consider regarding potential misidentification:

> **"the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation * * *."**

{¶ 16} The court must review these factors under the totality of the circumstances. Id. Furthermore, "although the identification procedure may have contained notable flaws, this factor does not, per se, preclude the admissibility of the identification." *Page*, citing *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, 489 N.E.2d 1057; *State v. Moody* (1978) 55 Ohio St.2d 64, 67, 377 N.E.2d 1008.

{¶ 17} Here, Robinson failed to establish that the identification procedure was unreasonably suggestive. W.V. viewed the photo array in December 2008, which was 14 years after the offense. In her initial statement to the police, she described Robinson with some specificity. She stated that he had dark skin, a crew cut, an upturned nose, and wore a hooded sweatshirt. At the suppression hearing, Detective Cottom testified that when she assembled the photo array, she used a picture of Robinson that was as close to the date of the crime that she could find. She then used pictures of individuals who have similar features to Robinson, which included his nose, skin complexion, and clothing. When she handed W.V. the photo array, W.V. immediately said "[t]hat's him." She circled Robinson's picture and wrote her name underneath the photo. Because all six photos are of African-American men with facial hair, short hair, and similar build, and the upturned nose could be depicted in any of the photos, we find that the photo

array is not unnecessarily suggestive. Therefore, the trial court's denial of Robinson's motion to suppress was proper.

{¶ 18} Accordingly, the first assignment of error is overruled.

Statute of Limitations

{¶ 19} In the second assignment of error, Robinson argues that the court erred when it failed to dismiss the indictment because the six-year statute of limitations had expired.

{¶ 20} In the instant case, Robinson moved to dismiss the indictment, arguing that under R.C. 2901.13, the State had six years from the date of the offense (November 1994) to commence the prosecution of his case. The trial court denied this motion.

{¶ 21} On the date the offenses were committed, November 2,1994, the statute of limitations for a felony was six years under R.C. 2901.13(A)(1). However, effective March 9, 1999, the General Assembly amended R.C. 2901.13 to provide that for certain felony offenses, including rape, aggravated burglary, and aggravated robbery, the prosecution shall be barred unless it is commenced within 20 years after the offense is committed. The legislative history to this amendment states that:

> **"Section 2901.13 of the Revised Code, as amended by this act, applies to an offense committed on and after the effective date of this act and applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section**

2901.13 of the Revised Code as it existed on the day prior to the effective date of this act."

{¶ 22} Thus, if the statute of limitations had not expired by March 8, 1999, an offender is subject to prosecution under the amended version of R.C. 2901.13. See *State v. Herron*, Cuyahoga App. No. 91362, 2009-Ohio-2128, ¶5 (where this court found that "the General Assembly retroactively extended the limitations period in March 1999 to all cases in which the six-year limitations period had not yet expired. The courts have uniformly upheld the constitutionality of this retroactive extension of the limitations period.") See, also, *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, 802 N.E.2d 1127, ¶5.

{¶ 23} Here, Robinson was subject to prosecution because less than six years elapsed from the time of the offenses (November 1994) and the amendment of R.C. 2901.13 (March 1999).

{¶ 24} Accordingly, the second assignment of error is overruled.

Merger

{¶ 25} In the third assignment of error, Robinson argues that the trial court erred when it failed to merge the two vaginal rape counts (Counts 3 and 4). He relies on *State v. Elyel* (Mar. 21, 1984), Hamilton App. No. C-830403,

and *State v. Jones* (Aug. 4, 1995), Montgomery App. No. 14649, arguing that the two acts of vaginal rape should have been merged.

{¶ 26} However, *Jones* was overruled by the Ohio Supreme Court in *State v. Jones* (1997), 78 Ohio St.3d 12, 676 N.E.2d 80 ("*Jones II*"). In *Jones II*, the court found that "significant intervening acts" (loss of erection and withdrawal from vagina) supported a determination that precluded the merger of the two vaginal rape acts. Id. at 14.

{¶ 27} In *Elyel*, the court concluded "that the principal, or most persuasive, inquiry as to whether one act or multiple punishable acts of rape are involved, is the * * * 'nature of the act and risk of harm to the victim.'"

{¶ 28} Here, there were two distinct and separate acts of rape. The first act occurred when W.V. was lying down; the second act occurred later when she was standing up with one leg on the bed and holding her screaming baby, with Robinson penetrating her from behind. Therefore, we agree with the trial court's decision finding that Counts 3 and 4 were separate acts.

{¶ 29} Accordingly, the third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 30} In the fourth assignment of error, Robinson argues that he was denied effective assistance of trial counsel. He claims that defense counsel erred when he failed to present any evidence. In order to substantiate a claim for ineffective assistance of counsel, Robinson must demonstrate "(a)

deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable'). *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶30.

{¶ 31} In the instant case, almost 15 years passed since the date of the crime and the time of trial. Additionally, the DNA evidence identified Robinson as the perpetrator.[6] Other than Robinson's blanket assertion that defense counsel failed to present any evidence, Robinson offers nothing to rebut the presumption that counsel's actions were the product of a sound trial strategy. See *State v. Williams*, Cuyahoga App. Nos. 92009 and 92010, 2009-Ohio-5553, ¶47. He fails to assert which witnesses he wanted to testify or what other evidence he wished to present. There are numerous ways to provide effective assistance of counsel, and debatable trial tactics and strategies do not constitute a denial of that assistance. *State v. Wright*, Cuyahoga App. No. 92344, 2009-Ohio-5229, ¶45, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. Therefore, we decline to find that Robinson's trial counsel rendered ineffective assistance of counsel.

[6]The DNA results revealed that there is a 1 in 49 quintillion, 380 quadrillion chance that the DNA sample does not belong to Robinson.

{¶ 32} Accordingly, the fourth assignment of error is overruled.

{¶ 33} Judgment is 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 convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR