[Cite as *State v. Lopez*, 2011-Ohio-182.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94312

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GERALD LOPEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522528

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

RELEASED AND JOURNALIZED: January 20, 2011

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Gerard Lopez, appeals from a judgment convicting him of two counts of rape and three counts of gross sexual imposition. He raises six assignments of error for our review:

{¶ 2} "[1.] The trial court abused its discretion by finding the complaining witness competent to stand trial.

{¶ 3} "[2.] The preparation and performance of appellant's trial counsel was defective and prejudiced appellant in such a way as to violate the appellant's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

{¶ 4} "[3.] The trial court erred to the prejudice of the appellant when it denied defense counsel's motion in limine with regard to alleged prior bad acts.

{¶ 5} "[4.] The trial court erred to the prejudice of the appellant when it overruled his motion to dismiss pursuant to Crim.R. 29 where the state had failed to prove the required elements of rape and/or gross sexual imposition.

{¶ 6} "[5.] The judgments of conviction are against the manifest weight of the evidence ***.

{¶ 7} "[6.] The trial court erred to the prejudice of the appellant when it denied appellant's motion for new trial."

{¶ 8} Finding no merit to his appeal, we affirm.

Procedural History

{¶ 9} The grand jury indicted Lopez on ten counts: Counts 1 and 2, rape, in violation of R.C. 2907.02(A)(2); Counts 3 and 4, rape, in violation of R.C. 2907.02(A)(1)(c); Counts 5 and 6, gross sexual imposition, in violation of R.C. 2907.05(A)(1); Counts 7 and 8, gross sexual imposition, in violation of R.C.

2907.05(A)(5); Counts 9 and 10, kidnapping, in violation of R.C. 2905.01(A)(4), with sexual motivation specifications attached.[1] He pleaded not guilty to the charges.

{¶ 10} After many pretrials and discovery, Lopez waived his right to a jury trial. On the day the bench trial was scheduled to begin, Lopez orally moved for a competency hearing to determine if the victim, A.M., was competent to testify. After a hearing on the matter, the court determined that she was.

{¶ 11} At the conclusion of the bench trial, the trial court found Lopez guilty of Counts 3, 4, 5, 6, and 7, but not guilty of Counts 1, 2, 8, 9, and 10.

{a} [1]R.C. 2907.02(A)(2) states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{b} R.C. 2907.02(A)(1)(c) provides: "No person shall engage in sexual conduct with another who is not the spouse of the offender *** when ***[t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition ***, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition ***."

{c} R.C. 2907.05(A)(1) provides: "No person shall have sexual contact with another, not the spouse of the offender *** when *** [t]he offender purposely compels the other person *** to submit by force or threat of force."

{d} R.C. 2907.05(A)(5) provides: "No person shall have sexual contact with another, not the spouse of the offender *** when *** [t]he ability of the other person to resist or consent *** is substantially impaired because of a mental or physical condition ***, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person *** is substantially impaired because of a mental or physical condition ***."

{e} R.C. 2905.01(A)(4) provides: "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person *** [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

{¶ 12} Sometime after the verdict, but prior to the sentencing hearing, Lopez retained new counsel. The day before the sentencing hearing, Lopez's new counsel moved to continue his sentencing so that Lopez could move for a new trial. The court denied the continuance. The following day, Lopez moved for a new trial, attaching two affidavits. The trial court then held a hearing on the motion, and subsequently denied it.

{¶ 13} The trial court sentenced Lopez to a total of eight years in prison: seven years on Counts 3 and 4, to run concurrent to each other, and one year for Counts 5, 6, and 7, to also run concurrent to each other, but consecutive to Counts 3 and 4. Five years of postrelease control was also part of his sentence.

Bench Trial

{¶ 14} The state presented Borys Ostrowskyj, a support administrator of the Cuyahoga County Board of Developmental Disabilities, to testify to A.M.'s capabilities. But during his testimony, Lopez stipulated to A.M.'s "diagnosis [of] mental retardation."

{¶ 15} A.M. testified that she was 32 years old and lived with her parents. She graduated from high school when she was 21 years old. She had worked at the Cuyahoga County Treasurer's Office for 11 years. Her father also worked for the county, and she and her father took the bus to work together every day.

{¶ 16} A.M. testified that on March 11, 2009, she went to work with her father, as usual. At some point after lunch, she went to the storage room in the basement of the building to get paper and envelopes. She said that she obtained a key from her supervisor's office.

{¶ 17} When she walked in the storage room, "Jerry" was sitting on a chair reading a newspaper. "Jerry" told A.M. that he wanted to show her something. He "grabbed" her left hand and led her to the first aisle in the room. He told her to pull her pants down, but she told him "no, I don't want to." He told her to do it anyway, and then he kissed her on her lips and put his tongue in her mouth.

{¶ 18} After Lopez kissed her, A.M. said that he touched her "virgina." She then identified "virgina" as the "private part" where "pee" comes from. A.M. testified that "Jerry" made her get on her hands and knees and he touched her "vagina again" with his penis. She was not wearing her pants or her underwear at this point because "Jerry" had taken them off.

{¶ 19} A.M. further testified that "Jerry" also touched her "butt" with his penis, and went "halfway inside." She said that it hurt and agreed that she felt "wetness" come "out of his private part." He then put his penis "inside" her vagina again and it hurt. He went "in and out" two times. She agreed again that something "came out of his private part, his penis." She did not

want him to do it and she told him to stop. A.M. also stated that "Jerry" touched her vagina with his index finger, and that he put it "in and out" two times.

{¶ 20} A.M. further testified that after she and "Jerry" had stood up and she had put her clothes back on, he kissed her again. He also put his hand inside her shirt and touched her "boobs one time." She stated that she did not want him to kiss her and she told him not to. "Jerry" told her "to keep it a secret and don't tell no one." She heard someone come in the room before she left, but could not remember who it was.

{¶ 21} Kristy Neff testified that on March 11, she went to the storage room; the door was locked and the lights were on. She walked directly to a file cabinet to retrieve what she needed and she heard a noise in one of the aisles. She turned around and saw Lopez coming out of an aisle. She said that Lopez was "adjusting his shirt with his pants undone." She explained that his pants "were unbuttoned and unzipped." Lopez told her that he was "adjusting his pants," and she laughed. She said that she thought that Lopez had been masturbating. But a few seconds later, Neff saw A.M. walk out of the same aisle, walking behind Lopez. A.M. appeared fine and she was dressed. A.M. left the room without saying anything to Neff or to Lopez. Neff was upset

when she left the storage room, so she went to talk to Robin Thomas, Chief Deputy Treasurer, about what she saw.

{¶ 22} Donnette Lewis testified that sometime after lunch, she saw A.M. standing near the elevators in the basement of the building. She stated that she said hello to A.M., as she always does, but that A.M. did not respond to her. Lewis thought that was odd because A.M. would always smile and talk to her. Lewis then heard a man, whom she did not know, yell A.M.'s name. She saw the man grab A.M., hold onto her arms, and talk to her. A.M. just looked at the ground while the man spoke to her. She identified Lopez as the man she saw talking to A.M.

{¶ 23} Loretta Parks testified that she worked in the same office as Lopez, in an adjacent cubicle. On the day of the incident, she said that Lopez came back from lunch about 15 or 20 minutes early. She thought that was odd because he usually took the entire hour. Parks then saw Lopez pacing around the office and she wondered why. Parks stated that Lopez did not appear to be limping.

{¶ 24} Christopher Falsone also testified that he worked in the same office as Lopez. He stated that he saw Lopez pacing that day too. Falsone asked Lopez why, and Lopez told him that he hurt his foot playing racquetball.

{¶ 25} Marie Ruebensaal testified that she was A.M.'s supervisor for nine years. Ruebensaal was the one who escorted A.M. to Robin Thomas's office after Neff reported the incident to Thomas. And although A.M. had always come to Ruebensaal with problems previously, she did not do so on this day.

{¶ 26} Thomas testified that after Neff reported the incident to her, she contacted Bruce Nimrick, human resources administrator, and had A.M. brought to her office. Thomas, in the presence of Nimrick, questioned A.M. about what, if anything, had happened in the storage room. A.M. appeared to be very nervous. After talking to A.M., Thomas and Nimrick informed the county treasurer about the incident and a decision was made to call the police.

{¶ 27} Dr. Deborah Kimball testified that she examined A.M. approximately seven hours after the alleged rape. She explained that she conducted a rape-kit analysis on A.M., which included collecting her clothes. Dr. Kimball then read from her report:

{¶ 28} "[A.M.] recounts the following: At 2 p.m. today she entered a storage room 40 at work to get a paper and envelope. A coworker, Jerry, he was in the room. He told [A.M.] to take off her pants. She said no. He then unzipped her pants and took off her pants and panties. He told her to get on her hands and knees and she did. He then stood behind her and unzipped his pants. He

inserted his penis into her vagina for a few seconds. Unknown whether there was an ejaculation. He then inserted his fingers into her vagina.

{¶ 29} "They stood up and he kissed her on the lips. She went to leave the room. He told [A.M.] to keep what had happened a secret. When [A.M.] left the room, another coworker, Kristy, saw the two leaving the room. This coworker encouraged [A.M.] to inform their boss about what had happened.

{¶ 30} "[A.M.] denies any previous sexual intercourse. ***"

{¶ 31} Dr. Kimball read further from her report that A.M. denied any "anal penetration," and did not know whether ejaculation occurred.

{¶ 32} Dr. Kimball explained that A.M. had "two linear lacerations," that were not actively bleeding at the time of the examination. She explained that the lacerations were no more than two weeks old because they had not yet "started to heal," and said they could have been caused by any object. She further stated that "[i]n general, lacerations in the vagina are at times with force." She did not find semen or "dried stains" on A.M., but said that did not mean that there was no sexual activity.

{¶ 33} On cross-examination, Dr. Kimball agreed that the lacerations could have been caused by masturbation.

{¶ 34} Detective Christina Cottom testified that she went to the treasurer's office at around 3:00 p.m. on that same day. She interviewed A.M. about what

had happened, first in Robin Thomas's office and then in the storage room. She escorted A.M. and her father to the hospital. Approximately one week later, Detective Cottom obtained a written statement from A.M.

{¶ 35} Detective Cottom testified that she sent A.M.'s clothing and other evidence from the rape-kit analysis to the Bureau of Criminal Identification ("BCI"), as well as "buccal swabs" from Lopez. But none of the items collected and tested from A.M. matched Lopez's DNA.

{¶ 36} Laura Lenz testified that five or six years ago, she walked to the back of a room in the treasurer's office and saw Lopez "behind A.M. with his arms around her kissing her on the sides of her neck." Lenz yelled, "What the hell is going on here?" Lenz immediately went to her supervisor, who at that time was Marie Ruebensaal, and the department supervisor, Lynn Lewis, and told them together about what she had witnessed.

{¶ 37} At the close of the state's case, Lopez moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶ 38} Lopez presented two witnesses on his behalf, himself and his wife. Irene Lopez testified that because of medication that her husband was taking, he had been impotent for several years. On cross-examination, Irene stated that her husband told his doctor, Dr. D'Silva, that "he couldn't perform" when it first happened, two to three years ago, around 2008.

{¶ 39} Lopez's testimony regarding his "erectile dysfunction" mirrored that of his wife's. But he agreed on cross-examination that the first time anything about this issue appeared in his medical records was in April 2009, after the indictment, not in 2008.

{¶ 40} Regarding March 11, 2009, Lopez testified that A.M. came into the storage room while he was trying to relax and stretch his bunion. Lopez began to walk around the room because his foot hurt and when he did, A.M. followed him, and talked to him. Lopez said he saw a box sticking out too far on one of the shelves, so he pushed it back. After he did that, he had to adjust his pants because they were loose on him. Lopez explained that while he was readjusting his pants, Neff walked in and asked him what he was doing. Lopez denied that his zipper was down or his button undone.

{¶ 41} Lopez further explained that later, when he saw A.M. by the elevator, he called her name. She did not hear him, so he grabbed her arm to ask her if the "OPEX machines needed to be emptied."

{¶ 42} As for pacing near his desk after he came back from work, Lopez attributed that to his bunion. He said that he was trying to "align that bunion."

{¶ 43} Lopez further denied that the incident Laura Lenz testified to, him kissing A.M. five or six years ago, ever happened. On cross-examination, he claimed that Lenz "came on to" him, and he turned her down. That is why Lenz testified that she saw him kissing A.M.

{¶ 44} We will address Lopez's six assignments of error in the order he raises them, except for his ineffective assistance of counsel arguments, which we will address last.

Witness Competency

{¶ 45} The first issue Lopez raises is that the trial court erred when it found A.M. to be competent and permitted her to testify.

{¶ 46} A trial court's determination of a witness's competence to testify will not be reversed on appeal unless the court has abused its discretion. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43, 644 N.E.2d 331. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256-257, 1996-Ohio-159, 662 N.E.2d 1.

{¶ 47} In *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768, the court explained: "A trial judge, being in the best position to view and hear a witness and being in the best position to determine the witness' understanding of the

events in question and his understanding of the nature of an oath, is to be given wide discretion in determining that witness' competence to testify." Id. at syllabus.

{¶ 48} Evid.R. 601(A) provides that "[t]hose 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." The term "unsound mind" is defined in R.C. 1.02(C), and "includes all forms of mental retardation or derangement."

{¶ 49} "A witness of unsound mind is not automatically incompetent to testify. [*Bradley*] at 140 ***. Even persons of unsound mind are competent to testify if they are able to correctly state matters that have come within their perception with respect to the issues involved, and they are able to appreciate and understand the nature and obligation of the oath to be truthful. Id. at 140-41, ***, quoting *State v. Wildman* (1945), 145 Ohio St. 379, ***." *In re J.M.*, 2d Dist. No. 22836, 2009-Ohio-3950, ¶24.

{¶ 50} At the competency hearing, A.M. answered questions correctly about herself, her home, her family, her education, transportation to and from work, and current and past employment. She understood that Sponge Bob was not real, that he is a cartoon, and understood that Big Bird was "pretend." She further testified to knowing that a lie "is a bad thing" and that truth is "a good thing," and that someone who lies gets punished. And she correctly identified several examples of lies and truths.

{¶ 51} We therefore cannot say that the trial court abused its discretion in finding A.M. competent to testify.

{¶ 52} Lopez further argues that the trial court erred because it did not properly conduct the competency hearing, did not identify the grounds for finding A.M. competent to testify, and did not journalize its decision finding A.M. to be competent. We find no merit to these arguments. Neither the evidentiary rules nor any statute describe how the trial court should hold the competency hearing, or mandate that it make specific findings or journalize the competency decision. Lopez's first assignment of error is overruled.

Other-Acts Evidence

{¶ 53} In his third assignment of error, Lopez argues that the trial court erred when it denied his motion in limine regarding Laura Lenz's testimony as to his alleged prior bad acts. He further maintains that this evidence was extremely prejudicial and warrants reversal.

{¶ 54} The standard of review regarding the admissibility of any such evidence is abuse of discretion. *State v. Sanford*, 8th Dist. No. 84478, 2005-Ohio-1009, ¶10, citing *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167.

{¶ 55} With regard to the admissibility of "other acts" evidence, it is well established that evidence tending to prove that the accused has committed other acts independent of the crime for which he is on trial is inadmissible to show that

the defendant acted in conformity with his bad character. *State v. Gumm* (1995), 73 Ohio St.3d 413, 426, 653 N.E.2d 253. But Evid.R. 404(B) does provide that other acts evidence may be admissible when it is offered for some other purpose, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 56} Like all evidence, however, other acts evidence is still subject to the limitations provided in Evid.R. 402 and 403; therefore, the proffered evidence must be relevant and its probative value must outweigh its potential for unfair prejudice. *State v. Gaines*, 8th Dist. No. 82301, 2003-Ohio-6855, ¶16. Further, the prior act must not be too remote and must be closely related in time and nature to the offense charged. *State v. Burson* (1974), 38 Ohio St.2d 157, 159, 311 N.E.2d 526. If the act is too distant in time or too removed in method or type, it has no probative value. *State v. Henderson* (1991), 76 Ohio App.3d 290, 294, 601 N.E.2d 596.

{¶ 57} Even if we were to find that this evidence should not have been admissible, it would not warrant reversal, as Lopez argues. Lopez waived his right to a jury trial. This court has held that in cases involving a bench trial, trial judges are presumed to know the law and apply it properly. Thus, contrary to Lopez's assertion, we are confident that the trial court considered this evidence for its proper purpose, i.e., to prove intent, plan, motive, and

opportunity, and not simply for the proposition that Lopez acted in conformity with a prior bad act. See *State v. Murray*, 8th Dist. No. 91268, 2009-Ohio-2580, ¶25, citing *State v. Craig*, 4th Dist. No. 01 CA8, 2002-Ohio-1433, ¶13 (concern that other acts evidence will be improperly considered by trier of fact does not exist in a bench trial).

{¶ 58} With that being said, we cannot say the trial court abused its discretion in admitting the evidence. The prior act here involved Lopez taking sexual advantage of a developmentally disabled woman, seizing the opportunity to do so when no one was around them. The incident in the storage room in March 2009 involved the same opportunity and plan, i.e., to take advantage of this same woman. Thus, we find the other acts evidence in this case was probative in proving opportunity and plan; it did not come in to prove character.

{¶ 59} Lopez's third assignment of error is overruled.

Sufficiency of the Evidence

{¶ 60} The test an appellate court must apply in reviewing a challenge based on a denial of a Crim.R. 29 motion is the same as a challenge based on sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), 8th Dist. No. 65356. 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, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 61} Lopez argues that the state failed to present sufficient evidence to convict him of rape and gross sexual imposition. He first contends that the evidence was not sufficient because the state failed to present any physical evidence. He argues that A.M. testified that he ejaculated twice, but his DNA was not found on any of the samples submitted to BCI. And he further argues that the two lacerations found could have been up to two weeks old and could have been caused by masturbation. We find his arguments to be unpersuasive.

{¶ 62} While no physical evidence tied Lopez to the crime, such evidence is not required in order to sustain a conviction. *Jenks*, supra, paragraph one of the syllabus. The state presented sufficient direct evidence, through A.M.'s testimony, and substantial circumstantial evidence through its many other witnesses to establish that Lopez committed rape and gross sexual imposition against A.M. And although Dr. Kimball testified that the lacerations could have been up to two weeks old, she did not state that they were two weeks old.

Indeed, "up to two weeks" means the injuries could have been two hours old. Viewing this evidence in a light most favorable to the state, we find it was sufficient to convict Lopez beyond a reasonable doubt.

{¶ 63} Next, Lopez argues that the state could not have presented sufficient evidence that A.M.'s "ability to resist or consent was substantially impaired because of a mental condition," as required under rape, R.C. 2907.02(A)(1)(c) and gross sexual imposition, R.C. 2907.05(A)(5), because the trial court found her competent to testify. We also find this argument to be without merit.

{¶ 64} A person of "unsound mind," which includes "all forms of mental retardation," can still be found competent to testify, as we previously discussed. But that does not mean that the person's "ability to resist" is not substantially impaired because of a mental condition. A.M.'s sister testified that A.M. could not live alone, drive a car, do her own banking, or shop for herself. She further testified that A.M. had a "job coach" to assist her with her employment and had never had a boyfriend. Thus, viewed in a light most favorable to the state, the evidence was sufficient to establish that A.M. was unable to resist because of her mental condition for purposes of proving rape and gross sexual imposition.

{¶ 65} Lopez's fourth assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 66} In his fifth assignment of error, Lopez claims his convictions were against the manifest weight of the evidence.

{¶ 67} In reviewing a claim challenging the manifest weight of the evidence, "[t]he 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 ¶81.

{¶ 68} Lopez argues that the trier of fact — the trial judge in this case — lost his way when he found him guilty of five of the ten charges. Lopez therefore maintains that his convictions for rape and gross sexual imposition were against the manifest weight of the evidence. We disagree.

{¶ 69} Lopez focuses his argument mainly on the fact that A.M. gave testimony at trial that was inconsistent with what she told the doctor who had examined her immediately following the alleged rape, and from what she told police following the incident. Lopez further argues that A.M.'s testimony

regarding whether Lopez ejaculated during the incident was also inconsistent with her previous statements — where she had stated, according to Lopez, that "nothing ever came out of his private part." He also argues, as he did in his previous assignment of error, that because there was no physical evidence to corroborate A.M.'s testimony, his convictions should not stand.

{¶ 70} It is well settled that "inconsistencies in the testimony of witnesses do not render a conviction against the manifest weight of the evidence. A [fact finder] may 'take note of the inconsistencies and resolve or discount them accordingly. It is equally well settled the issue of credibility is primarily a matter for the trier of fact to determine since the trier of fact is in the best position to judge the credibility of witnesses and the weight to be given the evidence." *State v. Wooten*, 5th Dist. No. 2008CA00103, 2009-Ohio-1863, ¶95.

{¶ 71} Here, the trial court — as trier of fact — heard all of the testimony, including A.M.'s inconsistent statements, defense counsel's effective cross-examination of A.M., the doctor, and the detective. Based on all of the testimony, we cannot conclude that the trial court lost its way in finding Lopez guilty of five of the ten counts, especially when the trial court found him not guilty of the other five counts. It is apparent that the trial court carefully considered all of the evidence and rendered his verdict.

{¶ 72} Lopez's fifth assignment of error is overruled.

Motion for New Trial

{¶ 73} In his sixth assignment of error, Lopez argues that the trial court erred when it denied his motion for a new trial.

{¶ 74} A ruling on a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 64 N.E.2d 54, paragraph one of the syllabus; *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus.

{¶ 75} Lopez argues that the trial court erred by not granting his motion for new trial because there was an "irregularity in the proceedings," such that he was prevented from having a fair trial. Specifically, he maintains that he should have been granted a new trial because his trial counsel failed to subpoena two witnesses, Colleen Patton and Michael Whitaker.

{¶ 76} Crim.R. 33(A)(1) provides that "[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: *** [i]rregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial[.]"

{¶ 77} Moreover, "[t]he decision to grant a motion for new trial is an extraordinary measure which should be used only when the evidence presented weighs heavily against the conviction. It is clear from the language of Crim.R. 33 that a new trial is not to be granted unless it affirmatively appears from the record

that a defendant was prejudiced by one of the grounds stated in the rule, or was thereby prevented from having a fair trial. See Crim.R. 33(E)." (Citations omitted.) *State v. Samatar,* 152 Ohio App.3d 311, 2003-Ohio-1639, 787 N.E.2d 691, ¶35.

{¶ 78} Lopez attached two affidavits to his new trial motion, that of Patton and Whitaker. Whitaker averred that he spoke to Lopez minutes before the incident allegedly occurred and a few days after Lopez was arrested. He opined that Lopez did not sound crazy or frustrated when he talked to him minutes before the incident.

{¶ 79} Patton stated that she knew A.M. to be flirtatious with men, but said that Lopez was not flirtatious with women. She further indicated that in her opinion, "the charges against Mr. Lopez are not true and that from [her] experience, the alleged victim acts like she is more mentally challenged than she really is."

{¶ 80} At the hearing on the motion for new trial, the prosecutor stated on the record that Lopez's previous trial counsel had in fact considered calling Patton and Whitaker as witnesses, but then strategically decided not to. The prosecutor stated that Patton had gone to the prosecutor's office and "made several disparaging remarks about the victim in the case and about the case in general." When Lopez's counsel informed the prosecutor that he was going to call Patton as a witness, the prosecutor told him what Patton "did just moments ago." Based on

that information, Lopez's trial counsel decided not to call Patton as a witness. As for Whitaker, the prosecutor argued at the hearing that Whitaker was not there when it happened, and had only talked to Lopez on the telephone prior to the incident.

{¶ 81} Again, the trial court presided over the trial and was the fact finder. In denying the motion, the trial court stated, "[t]here were no irregularities, I was the fact finder, I found that the testimony and the evidence was compelling."

{¶ 82} After reviewing the record, the motion, and the affidavits, we agree with the trial court's ruling and thus, cannot say that it abused its discretion in denying Lopez's motion for new trial.

{¶ 83} Lopez's sixth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 84} In his second assignment of error, which we have saved for last, Lopez raises eleven instances of ineffective assistance of counsel.

{¶ 85} In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, the Supreme Court of the United States set forth the two-pronged test for ineffective assistance of counsel. It requires that the defendant show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687.

The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." Id.

{¶ 86} Lopez argues that his trial counsel was ineffective for not filing a written motion for a competency hearing and for not adequately questioning A.M. at the competency hearing. Prior to trial, Lopez's trial counsel orally moved for a competency hearing. There is nothing that requires the motion be filed in writing. Lopez further argues that his trial counsel failed to adequately question A.M. during the competency hearing. Specifically, he claims that his trial counsel should have used A.M.'s personnel file to question her, and if he had, the trial court would have likely found her incompetent. We disagree. It was undisputed that A.M. was "mentally retarded." Her personnel file would have only spoken to that issue (IQ test scores were "in the 50s and 60s," that she "had the communicative skills of a five year old," that she had to travel to work with her father, that she was "mentally retarded," and that her father "had power of attorney over her"), not whether she was competent to testify, i.e., be able to "correctly state matters" and be "able to appreciate and understand the nature and obligation of the oath to be truthful."

{¶ 87} Lopez argues that his trial counsel was ineffective for failing to use A.M.'s written statement to impeach her and cross-examine her regarding "glaring difference in her testimony compared to her written statement" and "statements to medical personnel." The scope of cross-examination falls within the realm of trial

strategy and therefore, debatable trial tactics do not establish ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 811 N.E.2d 48, 2004-Ohio-3430, ¶45; *State v. Campbell*, 90 Ohio St.3d 320, 339, 2000-Ohio-183, 738 N.E.2d 1178. Trial counsel did ask A.M. if she remembered what she had told the detective, but A.M. could not remember. Rather than try to impeach a developmentally disabled witness, trial counsel made a tactical decision to do it in other ways. The record shows that Lopez's trial counsel raised A.M.'s inconsistent statements throughout the trial, namely, when cross-examining the doctor and the detective, and further, trial counsel heavily argued the same during closing arguments to the judge. Thus, we find defense counsel's decision to only ask a few questions of a developmentally disabled witness was a tactical decision and not deficient.

{¶ 88} and 4. Lopez argues that trial counsel was ineffective for failing to question Detective Cottom as to why police did not collect semen and bodily fluid samples in the storage room, and for failing to ask Detective Cottom why the police did not collect his clothes for analysis. But Lopez's trial counsel did ask Detective Cottom, several times, "there is no evidence, forensic evidence pointing to my client, is there?" Detective Cottom testified that there was no DNA evidence or other physical evidence tying Lopez to the crime. Thus, Lopez's trial counsel was not ineffective in how he handled Detective Cottom's cross-examination.

{¶ 89} Lopez argues that his trial counsel was ineffective for failing to call the BCI forensic scientist to testify. Lopez maintains that the analyst would have "confirmed that nowhere in the BCI report was there any mention of a foreign hair, contrary to the testimony of Detective Cottom." But our reading of the BCI report clearly shows that "an apparent foreign human hair" was found during "pubic hair combing," and thus, Detective Cottom was truthful in her testimony. Thus, it is not clear what Lopez is trying to assert here.

{¶ 90} Lopez contends that his trial counsel was ineffective for failing to read the BCI report closely, to discover that Detective Cottom was wrong when she testified that a foreign hair was discovered. As we just stated, the BCI report does indicate that "an apparent foreign human hair" was found during "pubic hair combing." Thus, again, we are not sure what Lopez is asserting here.

{¶ 91} Lopez contends that his trial counsel was ineffective for failing to hire a private investigator. But Lopez does not assert how a private investigator would have helped his case, or more importantly, how he was harmed by his trial counsel's alleged failure to do so.

{¶ 92} Lopez contends that his trial counsel was ineffective for failing to interview witnesses, especially the state's witnesses. After a thorough review of the record in this case, we find that Lopez's trial counsel was thoroughly prepared to try the case. He not only effectively cross-examined all of the state's witnesses, he also strongly argued the case during closing arguments.

{¶ 93} Lopez contends that his trial counsel was ineffective for failing to call additional defense witnesses, specifically Colleen Patton and Michael Whitaker. But as we previously discussed, Lopez's trial counsel made a tactical decision not to do so. The decision to call or not call witnesses is generally a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of the effective assistance of counsel. *State v. Utz*, 3d Dist. No. 3-03-38, 2004-Ohio-2357, ¶12, citing *State v. Williams* (1991), 74 Ohio App.3d 686, 694, 600 N.E.2d 298.

{¶ 94} Lopez contends that his trial counsel was ineffective for failing to file a motion to compel regarding evidence received late from the state. It is not clear what Lopez is asserting here. Reviewing the transcript pages Lopez cites regarding this alleged deficient performance, it appears that the prosecutors were objecting to Lopez submitting a letter from his doctor because Lopez had just given the letter to prosecutors on the day of trial. The trial court denied the state's request and allowed Lopez's doctor to testify. Thus, again, it is not clear what Lopez is arguing here.

{¶ 95} Finally, Lopez asserts that the "cumulative effect of all of trial counsel's errors" constitutes ineffective assistance of counsel. But since we found Lopez's trial counsel was not deficient in any of the instances, there is no cumulative error.

{¶ 96} Lopez's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

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MARY J. BOYLE, JUDGE

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