

[Cite as *Valentine*, 2011-Ohio-184.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94355

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEWIS VALENTINE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518519

BEFORE: Kilbane, A.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 20, 2011
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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Lewis Valentine (“Valentine”), appeals his convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In December 2008, Valentine was charged in an eight-count indictment. Counts 1 through 3 charged him with rape, Count 4 charged him with felonious assault, Counts 5 through 7 charged him with kidnapping, and Count 8 charged him with having a weapon while under disability.¹ The matter proceeded to a jury trial, at which the following evidence was adduced.

{¶ 3} In December 2008, the victim, S.C.,² was walking around the Richmond Mall during her break, when Valentine approached her and complimented her appearance. Valentine then visited S.C. before she left work for the day, and they exchanged phone numbers. Valentine called her later that evening when she was on her way to the grocery store. S.C. told him that she would call him back when she finished shopping. On her way back home, Valentine called her again asking her to come over so they could get to know each

¹Counts 1 through 3 carried one- and three-year firearm specifications, notice of prior conviction, and a repeat violent offender specification. Counts 4 through 7 carried a sexual motivation specification, one- and three-year firearm specifications, notice of prior conviction, and a repeat violent offender specification.

²The victim is referred to herein by her initials in accordance with this court’s established policy regarding nondisclosure of identities in cases involving sexual violence.

other. Initially S.C. declined, but then she decided to go because of the problems in her marriage. She arrived at Valentine's house around midnight.

{¶ 4} S.C. testified that it was not her intention to have a romantic encounter with Valentine. She stated that she just wanted to talk to a man because she was going through so much at home and she wanted to know what she was doing wrong. They conversed, listened to music, and drank alcohol. At one point, Valentine approached her and removed the jewelry from around her neck. He then cleaned the jewelry, put it back on her neck, and started massaging her shoulders. S.C. was shocked by the unsolicited contact. She expressed that she wanted to go home, but Valentine ignored her. He walked her to the living room, where he pushed her on the floor and vaginally raped her.

{¶ 5} Afterwards, Valentine pushed S.C. into the shower where he washed her hair. He then had her clean up broken glass that was on the table and floor before she went to find her clothes. As she put her clothes on, he pushed her down on the floor again where he vaginally and orally raped her. She pled with him to let her go home. Valentine had a sawed-off shotgun at his side and said, "[y]ou're not going nowhere, bitch."

{¶ 6} S.C. eventually left Valentine's home and tried calling the police, but could not complete the call. She then called her sister, who told her to call the police again. When she managed to contact police, a Richmond Heights police

officer accompanied her to the hospital. The DNA evidence presented at trial from her rape kit revealed profiles consistent with her and Valentine.

{¶ 7} After the State rested its case, defense counsel moved for acquittal under Crim.R. 29. The court granted the motion with respect to Count 4 (felonious assault) and Counts 6 and 7 (kidnapping), and the three-year firearm specification on Counts 1 and 2 (rape). The State dismissed all the repeat violent offender specifications on Counts 1-7.

{¶ 8} During closing argument, defense counsel argued that S.C. consented to having sex with Valentine. Defense counsel described how she chose to go to Valentine's house late at night, rather than returning home to put her groceries away. He also noted that she voluntarily drank a large quantity of alcohol and that there was no evidence of a 911 call. The defense implied that the lack of a 911 tape proves that she consented to sex. The defense also stated that she may have had "buyer's remorse" because of her situation at home. In response, the prosecutor stated several times that, "there is no evidence of consent," without directly commenting on the fact that Valentine did not testify.

{¶ 9} While the jury was deliberating, defense counsel moved for a mistrial, arguing that the prosecutor improperly commented on Valentine's prior convictions during closing argument and Valentine's constitutional right to remain silent. The trial court overruled the motion, finding that the prosecutor's comments did not justify a mistrial.

{¶ 10} The jury found Valentine guilty of Count 2 (rape), with the notice of prior conviction specification and the one-year firearm specification attached, and Count 3 (rape), with the notice of prior conviction specification and the one- and three-year firearm specifications attached. The jury also found him guilty of Count 5 (kidnapping) with a sexual motivation specification, one- and three-year firearm specifications, and notice of prior conviction specification attached, and Count 8 (having a weapon while under disability).

{¶ 11} The trial court sentenced Valentine to an aggregate of 13 years in prison: nine years each on Counts 2 and 3, to be served concurrently to each other, but consecutive to the one year on Count 8, and consecutive to the three years for the firearm specifications.³ The court merged Count 5 with Counts 2 and 3 as allied offenses of similar import.

Prosecutorial Misconduct

{¶ 12} Valentine now appeals, raising one assignment of error, in which he states:

{¶ 13} “[Valentine] was denied a fair trial due to prosecutorial misconduct by the assistant prosecutor commenting on [Valentine’s] failure to testify.”

{¶ 14} Valentine argues that the prosecutor’s statements during closing argument deprived him of a fair trial. Valentine claims that the prosecutor

³The court ran the one-year and three-year firearm specifications concurrent with each other, but consecutive to the other counts, for a total of three years.

improperly commented on his right not to testify and his probation termination, which inferred prior criminal convictions.

{¶ 15} In the instant case, Valentine complains about the following 12 passages the prosecutor made during closing argument:

State's Closing Argument

“[STATE]: [S.C.] testified to a long, horrendous evening where there was indeed force all right. No evidence of consent. Thus far, no evidence of consent.

* * *

“[W]hen somebody talks about if * * * [S.C.] consented, I ask someone else to speak up and point to what testimony that you heard saying it was consensual. There is no evidence of consent in this case.”

State's Final Closing Argument

“[STATE]: Thanks again, ladies and gentleman, for your time and attention. I will try to be brief. Again, there is no evidence of consent. Again, the question of whether or not [S.C.] acted in a stupid manner, we will come back in a few minutes on that decision.

* * *

“Do you really think she has intentions on having random sex? Ask yourselves, especially the ladies, at 40 years old are you really looking to go to the grocery store around midnight, just to have some random sex on the floor of a living room? Does it make sense? That is all we ask because I want you to continue to be mindful if there is no evidence of consent. They decided to slip that under the door there is consent, which we heard some rhetoric about this must have been consensual.

* * *

“That is closing argument. The fact of the matter is, what I say and what counsel says is not evidence. Again, you have no evidence of consent.

*** * ***

“[W]e were told in closing argument a 40-year-old woman who has a grandchild at home is heading out to the grocery store, agrees to do this sort of daring venture and meet this guy, was brought into this house, wants to have random sex on the floor of the place? I don’t know — ask yourselves if that is what she set out to do that night. And continue to be mindful there is no evidence of consent.

*** * ***

“By the way, when [defense counsel] read the journal entries here and talked about how [the trial judge] was so easy, he didn’t tell you why probation was terminated.

*** * ***

“You will use your common sense * * * and make your own determinations[.] * * * But I suggest to you, ladies and gentlemen, if you were being assaulted like this, it is often best to comply, especially if you are drunk and maybe something more than drunk.

*** * ***

“[The police officer] came [to S.C.’s house] and took her to Hillcrest Hospital. I don’t know what that is supposed to mean. I guess that is when you have nothing, you argue — you’ve got to find something.

*** * ***

“It is agreed there was sexual conduct. Half the rape charge is decided for you. There is no dispute. There is no evidence of consent. We submit to you that makes the other half of the rape charge just as easy.

* * *

“S.C. has to sit there, go through the statement, rides down to 152nd to the police station. Now she has to point out [Valentine’s] house. According to the Defense, this is a make-believe world for her. She is framing [Valentine] now. This is the mindset. She’s continuing to do this. According to the [defense], this would have been a great night. They are suggesting out of the corner of their mouths this is consensual sex.

* * *

“You have heard the instruction already that all of the evidence comes from the witness stand and, again, what we say is not evidence. I caution you on manufacturing evidence. Manufacturing a consent defense for this Defendant. I ask you to police yourselves about that again. We are that concerned, the idea that the Defense can suggest it out of the corner of their mouths in closing arguments when it is not evidence and * * * you have to go back and determine it is consensual when there is no evidence of it. There was no dispute there was sexual activity. None. This is a given. There is no evidence of consent. So I think that you get there very easily in the reverse way.”

{¶ 16} In general, both parties are granted some latitude during closing argument. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710. It is improper, however, for a prosecutor to comment on the defendant’s failure to testify. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; *State v. Lynn* (1966), 5 Ohio St.2d 106, 214 N.E.2d 226, paragraph one of the syllabus.

{¶ 17} In order to determine whether there was a violation of Valentine's constitutional right not to testify, we must consider: "whether the language used was *manifestly* intended or was of such character that the jury would naturally and *necessarily* take it to be a comment on the failure of the accused to testify." (Emphasis in original.) *State v. Webb* (1994), 70 Ohio St.3d 325, 328, 638 N.E.2d 1023, quoting *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168.

{¶ 18} A review of the prosecutor's comments in the instant case can arguably be read as an impermissible inference of guilt regarding Valentine's decision not to testify, and we in no way condone such a tactic. See *State v. Twyford*, 94 Ohio St.3d 340, 356, 2002-Ohio-340, 763 N.E.2d 122. The prosecutor commented several times that there is "no evidence of consent." The prosecutor also commented that the defense suggested out of the corner of their mouth that the sex was consensual.

{¶ 19} Although we find these comments are arguably improper, these comments neither prejudiced Valentine nor denied him a fair trial. *Id.* The evidence of his guilt was compelling — S.C.'s testimony coupled with the DNA evidence, and the fact that the jury did not convict him on all counts. Furthermore, the trial court instructed the jury that: "[i]t is not necessary that [Valentine] take the witness stand and testify in his own defense. [Valentine] has a constitutional right not to testify. The fact that he did not testify must not be considered by you for any purpose whatsoever." We note that, "[a] jury is presumed to follow the

instructions given to it by the trial judge.” *Twyford* at 356, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082, overruled on other grounds.

{¶ 20} Accordingly, the sole assignment of error is overruled.

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, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR