[Cite as *State v. Harris*, 2011-Ohio-194.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94388

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY L. HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522676

BEFORE: Rocco, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 20, 2011

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Anthony L. Harris appeals from his convictions and sentences after a jury found him guilty of two counts of rape and one count of kidnapping with a sexual motivation specification.

{¶ 2} Harris presents four assignments of error. He argues: 1) the trial court wrongly allowed the sexual assault nurse examiner (the "SANE") to narrate the victim's description to her of what occurred during the incident; 2) during closing argument, the prosecutor improperly commented on his refusal to testify; 3) his convictions are against the manifest weight of the evidence; and, 4) the trial court should have provided "factual findings" when it imposed a consecutive sentence.

{¶ 3} Following a review of the record, this court cannot find reversible error in the admission of the SANE's testimony. Moreover, in context, the prosecutor's comments in closing argument failed to rise to the level of impropriety. Harris's convictions find support in the manifest weight of the evidence. Finally, based upon the Ohio Supreme Court's decision in *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, a trial court need not render findings concerning its decision to impose a consecutive sentence for more than one conviction. Harris's convictions and sentences, therefore, are affirmed.

{¶ 4} The victim, SM,[1] provided the following description at trial of the incident that led to Harris's convictions in this case. She was 19 years old at the time, and met Harris by chance in early December 2008, as she entered a

[1]This court's policy is to protect the privacy of victims of sexual offenses; therefore, the victim and her cousin will be referred to by initials.

convenience store just as he was leaving it. Harris, who was 24 years old, asked her age and for her telephone number. SM obliged.

{¶ 5} Harris called her occasionally during the next few days, and SM chatted with him. Just after midnight on December 8, 2008, she awoke to notice he had just called her, so she returned the call. Harris invited SM to his home to visit with him and his family.

{¶ 6} Although SM was dressed in pajamas, she agreed and provided directions in order that Harris and his uncle could pick her up. She lived with her cousin, AP, so SM told her where she was going before she left. SM thought that, in view of the time, she might "sleep over," but she intended to return at daybreak.

{¶ 7} When SM arrived at Harris's house with Harris and his uncle, they proceeded to the basement, where she met his aunt, his cousin, and his cousin's girlfriend. "They [were] playing cards, drinking, smoking, and everybody just talking and listening to music."[2] SM joined them in smoking marijuana cigars.

{¶ 8} After "about two more hours," Harris's relatives left the house. SM felt tired and sleepy, so she intended to fall asleep on the couch, but Harris talked her into going upstairs to his room, where she could sleep on a bed. Once there, she simply "lay [sic] down on the bed" without uncovering it, unconcerned that Harris joined her.

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[2]Quotes indicate trial testimony.

{¶ 9} SM awoke at around daybreak because she was "feeling [Harris] go in [her] pants, * * * and he put his fingers in" her vagina; she pushed herself away from his touch. Harris then turned her, slapped her face, "pin[ned her] to the bed" with his body, "struggle[d her] pants off," and, in spite of her efforts to resist, "penetrated" her vagina with his penis.

{¶ 10} "After he was done, [SM] jumped up and grabbed [her] pants, and was putting them on," when Harris told her he "want[ed] some more." Harris pulled SM back onto the bed. When she wrestled against him, he slapped her a second time, turned her over on her stomach, and raped her again.

{¶ 11} When Harris finished, "he dragged SM to the bathroom and tried to make [her] get in the shower." SM distracted Harris, however, by asking him for something to restore order to her hairstyle. Eventually, Harris told her she could leave.

{¶ 12} SM made her way back to her cousin's home, where she sat on the floor until AP awoke. SM's cousin testified she woke because she heard SM in tears, speaking to someone on her telephone; SM identified the other person as Harris. When SM disclosed what had happened over at Harris's house, her family members called the police. The responding officers drove SM to the hospital, where she was examined by the SANE.

{¶ 13} The SANE obtained SM's description of the incident, took photos of her, and performed a "rape kit." Subsequent DNA analysis of the fluids obtained during the examination indicated Harris was the "contributor" of the semen collected from SM.

{¶ 14} Harris subsequently was indicted on four counts, charged with one count of kidnapping with a sexual motivation specification, and three counts of rape. His case proceeded to a jury trial.

{¶ 15} After hearing the state's evidence, the jury found Harris guilty of kidnapping with a sexual motivation specification, and guilty of two counts of rape; the jury acquitted Harris of the other count. The trial court notified Harris of his registration duties as a classified "Tier III" sexual offender, then sentenced Harris to four years on each rape conviction, "merging" the kidnapping count into them, for a total of eight years.

{¶ 16} Harris appeals, presenting the following assignments of error.

{¶ 17} "I. The trial court erred in permitting hearsay testimony from the SANE nurse [sic]."

{¶ 18} "II. The appellant was denied a fair trial, because the prosecutor's remarks during closing argument amounted to a comment on appellant's decision not to testify.

{¶ 19} "III. The verdict was against the manifest weight of the evidence.

{¶ 20} "IV. The trial court erred when it imposed consecutive prison terms on Counts 3 and 4 without making the factual findings required by R.C. 2929.14(4)(E) [sic]."

{¶ 21} Harris argues in his first assignment of error that the trial court improperly allowed the SANE, over his objection, to read the "narrative history as described by patient" SM, since the testimony was inadmissible hearsay pursuant to Evid.R. 802.[3] As authority for his argument, Harris cites this court's opinion in *State v. Reid*, Cuyahoga App. No. 83206, 2004-Ohio-2018. His argument is unpersuasive for three reasons.

{¶ 22} First, Evid.R. 803(4) provides that statements "made for the purpose of medical diagnosis or treatment and describing medical history, or past and present symptoms, * * * or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment," are "not excluded by the hearsay rule." A review of SM's testimony demonstrates she already had spoken with the responding police officers. SM subsequently provided the information Harris challenges primarily in order to obtain *medical*

[3]Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

treatment after the incident. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶112-113.

{¶ 23} Moreover, in addressing whether such testimony offends the Confrontation Clause, the Ohio Supreme Court stated as follows at paragraphs one and two of the syllabus in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834:

{¶ 24} "1. For Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' (*Crawford v. Washington* (2004), 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, followed.)

{¶ 25} "2. In determining whether a statement is testimonial for Confrontation Clause purposes, courts should *focus on the expectation of the declarant at the time of making the statement*; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations." (Emphasis added.)

{¶ 26} Applying the foregoing test to the testimony that Harris challenges demonstrates that SM's expectation in speaking with the SANE was primarily focused on obtaining treatment for the trauma she had just experienced. *State v. Vanderhorst*, Cuyahoga App. No. 93040, 2010-Ohio-1856. SM testified that the SANE asked her "if [Harris] had ejaculated in [her] or anywhere else on [her], you

know, [she] was answering them [sic] type of questions * * *." Thereafter, SM underwent a physical examination.

{¶ 27} Third, SM testified at Harris's trial, and described the incident in her own words. This court stated in pertinent part as follows in *Reid*, at ¶33:

{¶ 28} "* * * [T]he 'assault history' which the nurse read into evidence was also duplicative of other non-hearsay evidence presented by other witnesses. Reid fails to show how the 'assault history' affected the outcome of the trial."

{¶ 29} For the foregoing reasons, this court declines to find the trial court acted improperly in allowing the SANE to testify about SM's description of the incident.

{¶ 30} Harris's first assignment of error, accordingly, is overruled.

{¶ 31} Harris argues in his second assignment of error that the prosecutor engaged in improper argument during his closing remarks to the jury; he contends some of the prosecutor's remarks were made in derogation of his right to remain silent.

{¶ 32} Generally, the conduct of a prosecuting attorney during a trial cannot be made a ground of error unless the conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. *State v. Papp* (1978), 64 Ohio App.2d 203, 412 N.E.2d 401, cited with approval, *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768. Moreover, it has been held that a trial court must

afford a prosecutor some latitude and freedom of expression during argument. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189.

{¶ 33} Therefore, a defendant shall be entitled to a new trial only when a prosecutor makes improper remarks *and* those remarks substantially prejudice the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. The appellate court determines whether, absent the prosecutor's improper statements, a jury would have found the defendant guilty. *Maurer*, supra. A review of the record in this case reveals the remarks of which Harris complains, in context, were not improper.

{¶ 34} During his closing argument, the prosecutor indicated the specific elements the state was required to prove beyond a reasonable doubt, and described how he thought SM's testimony supplied that evidence. The prosecutor stated in pertinent part as follows:

{¶ 35} "Recall [SM's] testimony. [She testified Harris told her:] You can't be in my bed looking like this. I'm going to rape you.

{¶ 36} "He made a specific statement. He did express his state of mind *in her testimony*. That's undisputed. It's uncontroverted. You do have that testimony from her. * * *.

{¶ 37} " * * * I said on opening statement that you were going to hear a description of a set of bad decisions. * * * [A]gree to go to a house party with the intent of staying there, wearing pajama bottoms.

{¶ 38} "But it's also uncontroverted that she laid out in the phone call with Mr. Harris that this was not going to be a hookup, and that's uncontroverted. It's undisputed. She laid down a condition * * * ."

{¶ 39} " * * * You may not like her decision making. * * *

{¶ 40} "It's easy to Monday morning quarterback and second-guess and say, Well, * * * I wouldn't have done this, or I wouldn't have made the decisions that [SM] made. * * * She comes from a different background. She's leading her life how she described she was leading it. That's not the issue.

{¶ 41} "The issue is: When she was there under cross-examination, at the moment she was crying, did you stop and tell yourself, I don't believe this?

{¶ 42} "* * * Did you think she was acting? That's for you to determine.

{¶ 43} "Your reaction to how she testified, what she described, is a touchstone based on your life experience of how you evaluate people. That's what you're here to do.

{¶ 44} "We have evidence of sex. We have evidence of identity. We have a date, a time, a place, a who, a where, a how, a what.

{¶ 45} "The only issue is: Was there consent?

{¶ 46} "There's no evidence of consent."

{¶ 47} The foregoing demonstrates that the prosecutor was referring only to SM's testimony. Since the trial court had instructed the jury more than once that Harris was entitled to the presumption of innocence, and since the prosecutor reminded the jury that it was the state's burden to prove Harris's guilt beyond a reasonable doubt, the jury could not reasonably have understood from these particular remarks that the prosecutor was commenting on Harris's decision not to testify in this case. *State v. Rogers* (July 20, 2000), Cuyahoga App. No. 76355.

{¶ 48} The remarks, therefore, were not improper. Harris's second assignment of error also is overruled.

{¶ 49} In his third assignment of error, Harris argues his convictions for kidnapping and rape are against the manifest weight of the evidence.

{¶ 50} A challenge to the manifest weight of the evidence questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When a defendant asserts that a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the 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. Id. at 387.

{¶ 51} Although Harris asserts that SM's testimony "strained credulity" in many respects, this court disagrees. SM provided a coherent and consistent account of her experience, and her testimony found corroboration in that of her cousin. Moreover, the record reflects SM had some emotional difficulty during her recounting of the incident, as would be natural for a rape victim. The jury, therefore, acted within its prerogative to believe her testimony. *State v. Moseley*, Cuyahoga App. No. 92110, 2010-Ohio-3498, ¶26-29.

{¶ 52} Harris argues in his fourth assignment of error that the trial court was required to make findings pursuant to R.C. 2929.14(E)(4) before imposing consecutive terms for his convictions. He claims the court's failure to do so mandates reversal of his sentence.[4]

{¶ 53} As authority for his argument, Harris cites *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, and asserts that the United States Supreme Court's decision has abrogated *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He thus contends that the statutory findings

[4]In addressing this assignment of error, it must be noted that Harris failed in the trial court to either raise this issue or request findings. *State v. Banna*, Cuyahoga App. No. 93871, 2010-Ohio-4887, ¶16.

required by R.C. 2929.14(E)(4) were revived by implication, because the Ohio legislature never repealed the statutory provisions that were excised by *Foster*.

{¶ 54} The Ohio Supreme Court recently has specifically rejected the argument Harris raises in *State v. Hodge*, Slip Opinion No. 2010-Ohio-6320, paragraph two of the syllabus. Since the trial court possessed the authority and the discretion to determine, without making specific findings, that Harris's prison sentences should be served consecutively, Harris's fourth assignment of error also is overruled. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328.

{¶ 55} Harris's convictions and sentences are 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 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.

KENNETH A. ROCCO, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., CONCURS
MELODY J. STEWART, J., CONCURS IN
JUDGMENT ONLY