[Cite as *State v. Moore*, 2011-Ohio-449.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94277

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENDELL MOORE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514098

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

RELEASED AND JOURNALIZED: February 3, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Kendell Moore ("defendant") appeals his convictions for rape, gross sexual imposition, and kidnapping and his accompanying ten year prison sentence. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

{¶ 2} In June of 2008, Cleveland police officer Joseph Kean ("Kean") hired defendant, whom he knew, to work on the roof of a rental property on Kipling Avenue in Cleveland that Kean owned. At the time, P.T. and her fiancé rented the second floor of the house from Kean. On June 10, 2008, defendant went to the house and he and P.T. engaged

in a sexually suggestive conversation in the second floor kitchen. Defendant and P.T. then had sexual intercourse, which, according to P.T. was rape and according to defendant was consensual.

{¶ 3} On August 8, 2008, defendant was indicted for rape in violation of R.C. 2907.02(A)(2), gross sexual imposition in violation of R.C. 2907.05(A)(1), and kidnapping in violation of R.C. 2905.01(A)(4) with a sexual motivation specification. On September 1, 2009, a jury found defendant guilty of all three charges. The court merged the rape and kidnapping convictions and sentenced defendant to nine years in prison for these offenses, in addition to one year in prison for the gross sexual imposition, to run consecutively, for an aggregate sentence of ten years in prison.

{¶ 4} Defendant appeals and raises six assignments of error for our review.

{¶ 5} "I. The misconduct of the prosecution deprived defendant of the right to a fair trial and effective assistance of counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Ohio Constitution."

{¶ 6} "II. Due to shortcomings in trial counsel's performance, appellant received ineffective assistance of counsel."

{¶ 7} Specifically, defendant argues that his counsel was ineffective in three ways: First, counsel failed to object when the prosecutor cross-examined defendant about why he retained an attorney and waited approximately one month to make a statement to the police

regarding P.T.'s allegations against him. Second, counsel failed to investigate P.T.'s cell phone records to see if she called defendant. Defendant argues that this evidence would weigh against P.T.'s credibility and her testimony that the sex was not consensual. Third, counsel did not object to the admission into evidence of the police report, the statement P.T. gave to the police, and the statement defendant gave to police. Defendant argues that these documents were inadmissible hearsay that prejudiced him because they took the focus away from the jury's determination of the witnesses' credibility.

{¶ 8} "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, 538 N.E.2d 373.

{¶ 9} In *Jenkins v. Anderson* (1980), 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86, paragraph one of the syllabus, the United States Supreme Court held that "[w]hile the Fifth

Amendment prevents the prosecution from commenting on the silence of a defendant who asserts the right to remain silent during his criminal trial, it is not violated when a defendant who testifies in his own defense is impeached with his prior silence." A defendant's pre-arrest silence may be admissible when he "has been silent for a significant amount of time prior to the arrest, and the period of silence thus appeared inconsistent with a later claim of innocence or alibi." *State v. Slagter* (Oct. 26, 2000), Cuyahoga App. No. 76459.

{¶ 10} In the instant case, Kean called defendant on the same day of the alleged rape — June 10, 2008 — to inform him of P.T.'s accusations. Cleveland Police Detective James Butler asked defendant to come to the police station to make a statement on June 11, 2008. Defendant voluntarily gave a statement to the police on July 8, 2008, approximately one month later. At trial, defendant testified, and the following colloquy took place during cross-examination:

"Q: Now, why did it take you so long to come in and give a statement to the police?

"A: Because I [chose] to obtain an attorney to come in with me.

"Q: All right. When did that happen?

"A: When did I choose an attorney?

"Q: Yes.

"A: The very same day I got a phone call.

"* * *

"Q: All right. Now, so you went and got a lawyer. Why?

"A: Why not? I was accused of rape.

"* * *

"Q: Okay. And you gave your statement on July 8th; is that right?

"A: Yes, sir.

"Q: Okay. Why so long?

"A: My attorney was out of town on business."

{¶ 11} The prosecutor asked defendant if he explained to Kean what happened when Kean first made defendant aware of P.T.'s accusations. Defendant answered that he denied raping P.T., but he offered no further explanation to Kean. Defendant was asked why he later made a statement to Det. Butler. Defendant testified as follows: "Because I was in fact on Kipling but it was not rape, it was consensual sex. Why should I not make a statement?" Defendant explained that he gave his attorney Det. Butler's number and, after his attorney arrived back in town, arrangements were made for defendant to make a statement to the police.

{¶ 12} Defense counsel did not object to this line of questioning.

{¶ 13} Defendant consistently denied raping P.T., from the day of the incident when he received a phone call from Kean, to a month after the incident when he voluntarily gave a statement to the police, to his testimony at trial. The state's questioning defendant about his pre-arrest silence and his right to counsel was not used for impeachment purposes because

there is nothing inconsistent about defendant's silence and his claim of innocence.

{¶ 14} An accused person has no duty to speak to the police. In fact, quite the opposite, an accused has the unequivocal right to remain silent, and the United States Supreme Court has held that it is implicit in our jurisprudence that "silence will carry no penalty." *Doyle v. Ohio* (1976), 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.E.2d 91. In *State v. Leach*, the Ohio Supreme Court explained that a "suspect might remain silent for innocent reasons: fear of police, threats from another person not to speak with police, embarrassment about a relationship or course of conduct that is not necessarily criminal, or the belief that explaining his or her conduct is futile." *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶34.

{¶ 15} Defense counsel also failed to object to the admission into evidence of the police report, the statement P.T. gave to the police, and the statement defendant gave to police. Defendant argues that these documents were inadmissible hearsay that prejudiced him because they took the focus away from the jury's determination of the witnesses' credibility. The police officer who wrote the report, P.T., and defendant all testified at trial, and it is their testimony upon which the jury should base its credibility determinations.

{¶ 16} "'Hearsay' is 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." Evid.R. 801(C). Generally, hearsay is inadmissible pursuant to Evid.R. 802, subject to the exceptions

in Evid.R. 803. Police reports that "'recite an officer's observations * * * made as part of an investigation of criminal activities' * * * are inadmissible hearsay and should not [be] submitted to the jury." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶111 (quoting in part *State v. Ward* (1984), 15 Ohio St.3d 355, 358, 15 OBR 477, 474 N.E.2d 300).

{¶ 17} In the instant case, the prosecutor asked the court to admit into evidence the police report concerning this case, P.T.'s written statement to police, and defendant's written statement to police:

"PROSECUTOR: Normally, I would not, at least in the old days, Judge, admit these but, in this era of open discovery in which we are basically having witnesses testify and then reading their statements and reports, I can tell you from 26 years of experience that the first – if we don't admit them, the first thing the jury is going to ask for is those police reports and statements because they were read in court.

That's my reason for asking that * * * they be admitted because they were used by witnesses in court.

"* * *

"THE COURT: Well, generally, gentlemen — you have no objection [defense

counsel]?

"COUNSEL: No.

"COUNSEL: No.

"THE COURT: Generally, I would not admit those statements because the best evidence is the fact that they were read in court. I agree with you, [prosecutor], because everybody used them and there is no objection and this is the nature of this particular case and the evidence that's been presented, I think that I would allow the exhibits to go back to the jury since both the State of Ohio and defense used these exhibits quite extensively during the course of this case."

{¶ 18} All three of these exhibits are clearly hearsay and inadmissible under Evid.R. 803(8). On appeal, defendant argues that during deliberations there was an obvious danger that the jury would focus on the police report and written statements, rather than on the witnesses' testimony at trial, which prejudiced him.

{¶ 19} The state, on the other hand, argues that because counsel failed to object to the admission of these documents, defendant cannot take advantage of any resulting error on appeal. We reject this argument because we are reviewing this issue for ineffective assistance of counsel based on the failure to object. The state further argues that the written

"statements were cumulative of other evidence at trial," and thus any error in admitting them was harmless. See *State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, 910 N.E.2d 14. The state does not argue that these exhibits are admissible as an exception to the rule against hearsay.

{¶ 20} Under the first prong of *Strickland*, supra, defense counsel was deficient in not objecting to the state's using defendant's pre-arrest silence as substantive evidence of guilt and not objecting to inadmissible hearsay evidence. We now turn to whether the result of defendant's trial would have been different had the jury not heard this tainted evidence.

{¶ 21} In looking at the entire record, evidence of defendant's guilt was not overwhelming. There was no physical evidence and no eyewitness. This case turned on whether the jury believed P.T.'s testimony or defendant's testimony. Neither party was impeached on any material inconsistencies, and both parties' testimony was plausible. Because this case was a close call, we find that defense counsel's flawed performance materially prejudiced defendant. It is impossible to say that the jury would have convicted defendant had the state not implied he was guilty because he waited for his attorney to be present before he spoke with the police. This prejudicial implication, and the hearsay statements that were improperly admitted into evidence, resulted from counsel's failure to object. Accordingly, we hold that counsel was ineffective under both prongs of *Strickland* and sustain defendant's first and second assignments of error. Defendant's remaining

arguments are moot pursuant to App.R. 12(A)(1)(c).

{¶ 22} Appellant's convictions are reversed, and this case is remanded for a new trial.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY