

[Cite as *State v. Fitzwater*, 2011-Ohio-929.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94890

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH F. FITZWATER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528598

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: March 3, 2011

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MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Kenneth Fitzwater, appeals his convictions for abduction and attempted felonious assault. He raises the following three assignments of error for our review:

{¶ 2} “[1.] The defendant’s convictions were against the manifest weight of the evidence.

{¶ 3} “[2.] The trial court erred by not giving instructions on the lesser included offenses of unlawful restraint and assault.

{¶ 4} “[3.] Defendant was denied effective assistance of counsel by the failure of defense counsel to request instructions on lesser included offenses.”

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

Procedural History and Factual Background

{¶ 6} The grand jury indicted Fitzwater on five counts: two counts of kidnapping, in violation of R.C. 2905.01(A)(2) and (3); attempted murder, in violation of R.C. 2923.02 and 2903.02(A); felonious assault, in violation of R.C. 2903.11(A)(1); and intimidation of a crime victim or witness, in violation of R.C. 2921.04. He pleaded not guilty to the charges, and the case proceeded to a jury trial where the following facts were presented.

{¶ 7} Samantha Suhm testified that she began dating Fitzwater in December 2008, when she was 17 years old, and Fitzwater was 21 years old. She explained that their relationship was “fine” at first, but after about two months, he became physically abusive toward her.

{¶ 8} On June 21, 2009, Samantha and Fitzwater went to Fitzwater’s uncle’s house. They fished, ate dinner, and played games in the yard until it got dark. After that, they went inside and played pool in the basement. Samantha explained that at some point, Fitzwater

and his cousin began drinking hard liquor. Then, around 1:45 a.m., Fitzwater, his cousin, and Samantha snorted Xanax pills.

{¶ 9} Sometime around 3:00 a.m., Samantha and Fitzwater got into an argument. Samantha wanted to go home, so she walked down the street to a gas station to call her mother. But after Fitzwater came to the gas station looking for her, she told her mother she would just spend the night at his uncle's house.

{¶ 10} Samantha testified that as she started walking back, Fitzwater began following her. There were no sidewalks, so they were walking in the street. She said Fitzwater was yelling and screaming at her, and then he began to “smack” her in the face. She threatened to tell the “authorities,” and he started choking her. She said she could not breathe and she tried to fight him off of her, but he continued choking her. He told her that if he had to go to jail, he “might as well kill [her].”

{¶ 11} According to Samantha, Fitzwater then pushed her into a muddy ditch, and that he “ended up wrestling [her] to the ground.” Fitzwater was on top of her in the ditch, still choking her with both hands. She stated that she must have blacked out because the next thing she remembered was the police asking her questions, and Fitzwater was nowhere in sight.

{¶ 12} Samantha testified that she lied to police officers; she told them that she had been arguing with Fitzwater, but that nothing physical had happened. Her parents picked her

up at the police station around 3:30 a.m. and took her home. Later that same day, Fitzwater came to her parents' house. He stood outside "ranting and raving." The police came to their house, and he left.

{¶ 13} Samantha's mother had a birthday party for her on June 24, 2009. Samantha said she was afraid for her family to see her because "everybody would see [her] face." She testified that her face "was black," she had "bruises everywhere," her "ear was bleeding," her "nose was bleeding," and her "jaw was popping."

{¶ 14} Although Fitzwater was not at her birthday party because her mother would not allow it, Samantha did go to Fitzwater's house after the party, where she stayed for three days.

Samantha testified that Fitzwater promised that he would not hit her again. She further testified that she was afraid of him; he threatened to "pour battery acid" on her, kill her dog, "shoot [her] little sister," and "catch [her] mom with a brick."

{¶ 15} But on June 26, Samantha called her mother to pick her up. Samantha broke up with Fitzwater later that day. She said that after that, he continued to "stalk" her, driving by her house, playing loud music, and blowing airhorns. Then, on July 11, she learned she was pregnant. And on July 19, she went to the police station and reported the incident that had occurred on June 22. She said that she had not planned to report it to police, but decided to after he continued to stalk her.

{¶ 16} Tracy Suhm, Samantha’s mother, testified that when she arrived at the North Royalton police station on June 22, Samantha was crying hysterically. Tracy further explained that Samantha was covered in mud, was not wearing shoes, and her shirt was ripped.

But at that point, Tracy did not think that Samantha needed medical attention. She just thought Samantha was upset.

{¶ 17} When they arrived home, Samantha immediately took a shower. Tracy’s phone began to ring as soon as they got home. Tracy answered it; it was Fitzwater. He told her, “Bitch, if you call the police, I’m going to post bond and I’m going to be out after you [sic].”

{¶ 18} Tracy testified she could hear Samantha screaming in the shower because her nose would not stop bleeding. When she walked in, the shower was filled with blood. Samantha told her that she could not breathe out of her nose and that she kept saying her ribs were hurting her “real bad.” Tracy also noticed what looked like red “pencil marks” on Samantha’s neck. She testified that she begged Samantha to go to the hospital, but Samantha refused because she said “she would have to pay the consequences.”

{¶ 19} Fitzwater later showed up at their house; he was making a scene outside, so Tracy called the police. Tracy said that Fitzwater told her that he had just “slapped” Samantha, but that he did not do anything else to her.

{¶ 20} David Epifano testified that on June 22, 2009, he was delivering USA Today papers on his regular delivery route at approximately 3:00 a.m. He explained that he was driving eastbound on Albion Road when he saw a male and a female in the middle of his lane.

He had to swerve to miss them. He said the “female was struggling to get away from the male.” After he passed them, he looked in his rearview mirror “and she was still struggling,” so he called 911. He explained that it looked like the female was trying to get away from the male, and the male was restraining her with his right hand around her neck.

{¶ 21} On cross-examination, Epifano agreed that when he called 911, he did not say the man had the woman by the neck, nor did he say it in his statement. But he explained, “it’s not in the written statement; however, what I saw is what I saw.” He further stated that he saw “a girl being restrained *** fighting for what I thought would be her life.”

{¶ 22} Officer Steve Zahursky of the North Royalton Police Department testified that he was working the midnight shift on June 22, 2009. He responded to a dispatch call of “two people in the roadway.” He drove “up Albion Road” and saw Samantha walking; she was covered in mud, disheveled, barefoot, and “red in the facial area.” He explained that Samantha had told him that she had gotten into a verbal argument with Fitzwater and that she just wanted to go home. She explained she was muddy because she had fallen in a ditch. He drove her to where Officer Brian Hamilton had located Fitzwater. When she saw Fitzwater, she became very emotional, telling Officer Zahursky that she did not want him to

go to jail, “he didn’t do anything wrong, she loves him.” Officer Zahursky said that he asked her “numerous times if there was a physical altercation,” and she said, “no.” At one point, she said to him, “Thanks a lot, *** you saved my life.” But he did not see any injuries on her.

{¶ 23} Officer Brian Hamilton of the North Royalton Police Department testified that he was also working the midnight shift on June 22, 2009. He responded to a call for a “welfare check” of a female in the road. As he was driving to Albion Road, he saw Fitzwater at a garden center. Fitzwater told Officer Hamilton that he had been fighting with his girlfriend, but that it was not physical. Officer Hamilton said that Fitzwater was clean, wearing jeans, and was not covered in mud.

{¶ 24} Officer Renee Bragg of the Cleveland Police Department testified that on June 26, 2009, she responded to a call to Tracy Suhm’s house. She said that Samantha was crying. Officer Bragg saw marks around her neck.

{¶ 25} At the close of the state’s case, Fitzwater moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶ 26} Fitzwater’s mother, Tammy, testified on his behalf. She explained that even after the alleged incident on June 22, Samantha stayed at her house with Fitzwater for three days and was still planning to move into their garage with him. She said that on June 25, which was Samantha’s

18th birthday, Samantha brought birthday cake to their house, went swimming, and played basketball. She said that she never saw any injuries on Samantha.

{¶ 27} The jury found Fitzwater not guilty of kidnapping, but guilty of the lesser included offense of abduction, in violation of R.C. 2905.02(A)(3), on both counts. The jury further found Fitzwater not guilty of attempted murder, not guilty of intimidation, and not guilty of felonious assault, but guilty of the lesser included offense of attempted felonious assault.

{¶ 28} The state conceded prior to sentencing that the two counts of abduction merged with the attempted felonious assault, and elected to have Fitzwater sentenced on the first count of abduction. The trial court then sentenced Fitzwater to two years in prison. Three years of mandatory postrelease control was also part of his sentence.

Manifest Weight of the Evidence

{¶ 29} In his first assignment of error, Fitzwater argues that his convictions were “clearly against the manifest weight of the evidence.”

{¶ 30} 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.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 31} Fitzwater argues that his case is the exceptional case that should be remanded for a new trial because the jury lost its way and created a manifest miscarriage of justice by convicting him. He raises several arguments within this assignment of error. But essentially, most of his arguments come down to credibility. And unfortunately for Fitzwater, the jury believed Samantha and her mother over him and his mother. Although we must act as a “thirteenth juror” when considering whether the manifest weight of the evidence requires reversal, we must give great deference to the fact finder’s determination of the witnesses’ credibility. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553.

{¶ 32} Fitzwater also argues that the state failed to present any corroborating evidence to substantiate Samantha’s and her mother’s version of the events. But the state did present David Epifano and Officer Bragg, unbiased witnesses. Epifano testified that Fitzwater was holding onto

Samantha by her neck, while Samantha was struggling to get away from him, appearing as if she was fighting for her life. Officer Bragg testified that she saw marks on Samantha's neck several days after the incident.

{¶ 33} As Fitzwater suggests this court do, and as we are required to do in all challenges to the manifest weight of the evidence, we have considered the entire record, weighed the evidence and all reasonable inferences, and considered the credibility of the witnesses to determine if the jury lost its way. And after doing so, we cannot conclude that it did.

{¶ 34} Accordingly, Fitzwater's first assignment of error is overruled.

Lesser Included Offense Instruction

{¶ 35} In his second assignment of error, Fitzwater argues that although the trial court instructed the jury on the lesser included offenses of kidnapping (i.e., abduction) and felonious assault (i.e., attempted felonious assault), the trial court erred by not also instructing the jury on the lesser included offenses of unlawful restraint and assault. He did not raise this issue in the trial court, but contends that failure to do so amounted to plain error.

{¶ 36} The state concedes that unlawful restraint and assault are lesser included offenses, but maintains that the trial court did not err by not giving

a charge to the jury on unlawful restraint and assault because Fitzwater denied all liability and therefore was not entitled to the instructions.

{¶ 37} A jury instruction on a “lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶37, quoting *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. If this test is not met, the instruction on the lesser included offense is not required. *Id.*, citing *State v. Kidder* (1987), 32 Ohio St.3d 279, 282-283, 513 N.E.2d 311.

{¶ 38} It is also well established that “[a]n instruction on the lesser included offense is not warranted where the evidence presented on behalf of the defendant is such that if accepted by the jury it would constitute a complete defense to all elements of the crime charged.” *State v. McKinney*, 11th Dist No. 2007-T-0004, 2008-Ohio-3256, ¶161, citing *State v. Nolton* (1969), 19 Ohio St.2d 133, 249 N.E.2d 797, syllabus. Where the defendant completely denies any involvement in the crime, he is not entitled to an instruction on a lesser included offense. *State v. Stewart* (Nov. 19, 1998), 8th Dist. No. 73255. See, also, *State v. Keenan*, 81 Ohio St.3d 133, 139, 1998-Ohio-459, 689 N.E.2d 929 (“where a defendant presents a complete

defense to the substantive elements of the crime, *** an instruction on a lesser included offense is improper”).

{¶ 39} The foregoing authority applies to each of Fitzwater’s arguments because Fitzwater claimed throughout the trial, from opening statements to closing arguments, that he and Samantha only had a verbal argument on June 22, 2009. This was a complete defense to all charges. As a result, Fitzwater was not entitled to a jury charge on either unlawful restraint or assault.

{¶ 40} Accordingly, we find no error, let alone plain error. Fitzwater’s second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 41} In his third assignment of error, Fitzwater argues that he was deprived of his constitutional right to due process because his trial counsel was ineffective for failing to request jury instructions on the lesser included offenses of unlawful restraint and assault. We do not agree.

{¶ 42} In order to prove that trial counsel was ineffective, a defendant must demonstrate: (1) deficiency in his attorney’s representation and, (2) prejudice from the deficiency. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373. Deficiency of representation “requires

showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland* at 687. When evaluating counsel’s performance, this court must be “highly deferential[]” and “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance ***.” *Bradley* at 142, quoting *Strickland* at 689.

{¶ 43} “In the context of ineffective assistance of counsel, the Supreme Court of Ohio has stated that the “[f]ailure to request instructions on lesser included offenses is a matter of trial strategy[.]” *State v. Murphy*, 9th Dist. No. 24753, 2010-Ohio-1038, ¶8, quoting *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71, 658 N.E.2d 764. Accordingly, the failure to request that the jury be instructed on a lesser included offense, even if the instruction would be appropriate, is not considered a deficiency in representation. If the defendant claims he did not commit the offense, there is a strong presumption that counsel’s failure to request a lesser included offense instruction is a strategic decision made to avoid confusing the jury or lessening the chance of an acquittal. *Murphy* at ¶9, citing *State v. Harris* (1998), 129 Ohio App.3d 527, 533, 718 N.E.2d 488. See, also, *State v. Catlin* (1990), 56 Ohio App.3d 75, 78-79, 564 N.E.2d 750.

{¶ 44} Fitzwater was convicted of attempted felonious assault and abduction. He argues that trial counsel should have requested a jury instruction on the offense of assault and unlawful restraint. But throughout the entire trial and in closing arguments, Fitzwater advanced the theory that Samantha and her mother were fabricating the events of June 22, 2009. Presumably, trial counsel hoped to secure an acquittal and did not want to risk convictions on lesser included offenses by requesting that the jury consider them. Trial counsel's decision not to request a jury instruction on assault and unlawful restraint is consistent with Fitzwater's claim of innocence and does not amount to ineffective assistance. *Murphy* at ¶8, quoting *Griffie*, 74 Ohio St.3d at 333. Fitzwater's third 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.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR