

[Cite as *State v. Roig*, 2015-Ohio-3884.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102423

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GERALD R. ROIG

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585071-A

BEFORE: S. Gallagher, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 24, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Gerald R. Roig appeals the jury verdict finding him guilty of two counts of rape and a single count of gross sexual imposition, and the ensuing eight-year term of imprisonment comprised of the imposition of concurrent sentences on all counts. For the following reasons, we affirm.

{¶2} On August 16, 2012, Roig took his then 14-year-old niece (“the victim”) to a movie along with Roig’s adult daughter and her boyfriend. After the movie, the victim returned to Roig’s home for the evening. The victim testified that Roig provided her with alcohol as they played a card game, after which the victim was unable to walk straight. After the card game, the victim and Roig sat on the couch to watch a movie. Roig proceeded to give the victim an uninvited back massage, which led to the victim becoming shirtless. Roig fondled the victim before carrying her to the bedroom, the act underlying the gross sexual imposition conviction. Roig then raped the victim and forced her to perform oral sex, the separate acts constituting the rape convictions.

{¶3} Two weeks after, the victim reported the sexual assault to her grandmother, who in turn notified the victim’s mother. Neither adult took any action, except to call a “family meeting” at which time Roig was confronted and allegedly intimated the assault took place. The adult family members took no further action. The victim’s mother, after the fact, claimed that she

attempted to notify authorities earlier, but the victim refused. Roig contends the family did not believe the victim.

{¶4} The victim attempted suicide twice in the following year and ultimately was required to see a therapist. The therapist was told about the sexual assault and notified the authorities as required by Ohio law. Roig maintains that the victim suffered bullying at school and had other stressors leading to the suicide attempts, claiming, or at least implying, the sexual assault allegations were fabricated.

{¶5} During trial, the lead detective related the steps taken during the investigation, and in a narrative response, indicated that the department “reached out to” Roig, but failed to receive any statement. Defense counsel did not object to the unsolicited statement. Instead, during the cross-examination of the detective, in attempting to demonstrate the inadequacy of the investigation, defense counsel broached the subject of Roig’s pre-arrest silence as the reason Roig had not provided the police with the witnesses allegedly present in his home on the night of the assault. The victim maintained that she and Roig were alone on the evening of the incident. On behalf of the defense, those witnesses testified to being present on the night of the incident, but that nothing abnormal occurred. The jury found Roig guilty.

{¶6} Roig timely appealed his conviction. In two assignments of error, Roig now claims his trial counsel was ineffective: (1) in failing to object to the

detective's statement about Roig's pre-arrest silence and for affirmatively broaching the same topic during a cross-examination, and (2) in allowing the prosecutor to comment about the victim having to relive the assault through trial. Roig also claims that each error was plain even if his trial counsel provided effective representation. We find no merit to either argument.

{¶7} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905. The defendant has the burden of proving his counsel rendered ineffective assistance. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 223.

{¶8} We, therefore, must first determine whether the performance of Roig's trial counsel was deficient in the handling of Roig's pre-arrest silence. "A defendant's decision to exercise his right to remain silent during police interrogation is generally inadmissible at trial either for purposes of impeachment or as substantive evidence of guilt." *State v. Alghaben*, 8th

Dist. Cuyahoga No. 86044, 2005-Ohio-6490, ¶ 37, citing *State v. Perez*, 3d Dist. Defiance No. 4-03-49, 2004-Ohio-4007; *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335. The rule is not absolute. The “introduction of evidence regarding a defendant’s decision to remain silent does not constitute reversible error if, based on the whole record, the evidence was harmless beyond any reasonable doubt.” *Id.*, citing *State v. Zimmerman*, 18 Ohio St.3d 43, 45, 479 N.E.2d 862 (1985). Further, “[t]he United States Supreme Court has held that the Fifth Amendment does not prohibit references to a defendant’s invocation of the right against self-incrimination when the references are made in ‘fair response’ to the defense’s claims.” *State v. Ferguson*, 10th Dist. Franklin No. 07AP-999, 2008-Ohio-6677, ¶ 51, quoting *United States v. Robinson*, 485 U.S. 25, 32-34, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988).

{¶9} “In evaluating a claim of ineffective assistance of counsel, a court must be mindful that there are countless ways for an attorney to provide effective assistance in a given case and it must give great deference to counsel’s performance.” *State v. Burt*, 8th Dist. Cuyahoga No. 99097, 2013-Ohio-3525, ¶ 17, citing *Strickland*. Generally, appellate courts have found that trial tactics and strategies do not constitute a denial of effective assistance of counsel. *Id.*, citing *State v. Gooden*, 8th Dist. Cuyahoga No. 88174, 2007-Ohio-2371, ¶ 38; *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

{¶10} In this case, we cannot find trial counsel's performance was deficient for broaching the topic of Roig's pre-arrest silence. Roig cites several cases in which Ohio black letter law is clearly in favor of finding error for the state to prove guilt from a defendant's pre-arrest silence. All such cases, however, are inapplicable to situations in which the defendant's trial counsel seeks a tactical advantage from delving into the defendant's pre-arrest silence. It was not the state that sought the introduction to prove guilt, but rather the defense to demonstrate innocence. If the state is permitted to solicit evidence regarding a defendant's pre-arrest silence in response to the defense's claims, then we cannot find error with the defense disclosing the pre-arrest silence in his own defense. *Ferguson*. Roig's citations are simply inapplicable. *See, e.g., Leach* (the state's use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment of the U.S. Constitution).

{¶11} In this case, the defense claimed the police failed to conduct a full investigation and failed to interview the witnesses present in Roig's home on the night the assault allegedly took place to determine whether a crime had been committed. Roig maintained that the police investigation simply relied on the victim's statements. In providing an explanation for the delay in providing potentially exculpatory witnesses, defense counsel sought testimony that Roig invoked his constitutional right to remain silent and, as a result, the witnesses were not contacted by the police during the investigation. We

cannot find the trial counsel's performance was deficient. The proof of guilt boiled down to the victim's credibility. Demonstrating why the investigation was deficient was one of only a few defenses available when the defense was that the incident never even occurred. There was no DNA or any other physical evidence given the length of time between the assault and the reporting. In light of the fact that defense counsel's trial tactics included divulging Roig's pre-arrest silence to provide an explanation for why the police never interviewed witnesses, we cannot deem the inadvertent and unsolicited disclosure by the detective to be anything other than harmless error.¹

{¶12} Roig also claims his trial counsel was ineffective in failing to object to the prosecutor's comment, in closing, to the effect that the victim had to suffer through the trial, improperly implying that Roig's invocation of the right to a trial caused further harm to the victim. We agree that if the prosecutor intended to impugn the defendant's choice to go to trial, such a comment would be inappropriate. In the context of the closing and the entire case, however, we cannot say the prosecutor intended such an inference. The comment was made in the context of addressing the defendant's criticism over the victim's delay in the reporting of the incident. Although the statement may have been

¹Roig also argues his counsel was ineffective for asking the detective to confirm that the victim's suicide attempt was caused by the alleged sexual assault. As the defendant conceded, the state already introduced similar evidence. At best, any error would be harmless. Crim.R. 52(B).

ill-conceived, it was open to interpretation and was not made simply to draw a negative inference from Roig's decision to proceed to trial. We cannot say counsel's performance was deficient. Roig's first assignment of error is overruled.

{¶13} In his second assignment of error, Roig argues in the alternative that the above-cited errors are plain ones because the state's proof of guilt boiled down to the statements from the victim — the classic “he-said/she-said” type of prosecution. The victim's credibility was the crux of the state's case.

{¶14} Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Plain error exists only if ‘but for the error, the outcome of the trial clearly would have been otherwise,’ and is applied ‘under exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶15} In this case, we cannot find plain error simply because in the defendant's mind, the case was a “close call.” In order to avail himself of Crim.R. 52(B), Roig must demonstrate that an error occurred. In this case, he has not demonstrated any error. The detective's narrative statement was isolated and unsolicited. At best, the defense could have sought a curative instruction; however, the prosecutor never commented on Roig's pre-arrest

silence and the defense at trial proffered the pre-arrest silence as an explanation for the lack of an investigation into witnesses allegedly present on the night of the incident. It defies logic to require the defense to object to a statement later intended to be admitted. The prosecutor's reference to the secondary victimization caused by the trial did not rise to the level of plain error. Although arguably inappropriate, in the context of the case, we cannot say that the isolated statement was so egregious as to affect the outcome of the trial. The jury believed the victim and her family's version of events over the defense's theories. His second assignment of error is overruled, and Roig's conviction 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 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.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and

PATRICIA ANN BLACKMON, J., CONCUR