[Cite as *State v. Johnson*, 2016-Ohio-2622.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102047

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585440-A

BEFORE: E.A. Gallagher, J., Jones, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 21, 2016

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant James Johnson appeals his conviction from the Cuyahoga County Court of Common Pleas. Johnson argues that his conviction was against the manifest weight of the evidence, that the trial court erred in failing to provide him with two attorneys to represent him at trial, that the prosecutor improperly commented on his post-arrest silence and that he was denied effective assistance of counsel. For the following reasons, we affirm.

Facts and Procedural Background

{¶2} In June of 2014, Johnson was charged with two counts of rape and two counts of kidnapping pertaining to Z.F. and two counts of rape and two counts of kidnapping pertaining to K.S. The rape counts contained furthermore clauses specifying that the victims were under the age of ten. The case proceeded to a jury trial and Johnson was found guilty of one count of rape and one count of kidnapping pertaining to K.S. Johnson was acquitted on all remaining counts and the trial court found him not guilty of the sexually violent predator specification attached to the rape count. The trial court merged the rape and kidnapping counts as allied offenses and the state elected to proceed to sentencing under the rape charge. The trial court imposed a prison term of 25 years to life for the rape conviction.

{¶3} For the purposes of this appeal only the facts pertaining to the charges for which Johnson was convicted will be addressed. The following pertinent facts were adduced at trial.

{¶4} K.S. was born on February 18, 2004, and was nine years old in January 2014. Johnson was best friends with K.S.'s father, A.A., and in a dating relationship with L.G., a cousin of K.S.'s mother, A.S. Due to these relationships, K.S. was familiar with Johnson and knew him as "Uncle Slug."

{¶5} On January 17, 2013, A.S. and A.A. were engaged in wedding preparations at an Embassy Suites hotel and were unable to pick up K.S. after school. A.S. called Johnson and asked him to pick up K.S. from school. A.S. testified that it was typical for her and Johnson to watch each other's children. Johnson picked up K.S. and took him back to A.S. and A.A.'s home in Euclid. When A.S. and A.A. returned home from wedding planning activities, they found Johnson alone in their home with K.S.

{¶6} On February 26, 2013, A.S. received a call from L.G. regarding allegations made against Johnson by L.G.'s daughter, Z.F. As a result of this conversation, A.S. questioned K.S. regarding Johnson's conduct with him and K.S. reported that he had been forced to perform oral sex on Johnson.

{¶7} K.S. maintained that two instances of oral sex had occurred with Johnson. One instance occurred in the front seat of Johnson's sports utility vehicle but K.S. struggled to recall when this incident occurred and what his age was at the time. Johnson was acquitted of the charges relating to this incident.

{¶8} The second incident occurred on January 17, 2013, after Johnson picked K.S. up from school. K.S. testified that Johnson took him to his home, closed the blinds, locked the door, turned off the lights and told K.S. to join him on a couch. Johnson then

removed his penis and made K.S. perform oral sex. The incident lasted for approximately ten minutes before "Uncle Drew" appeared at the home and knocked on the door. Johnson ordered K.S. to stop and go do his homework before Johnson answered the door.

{¶9} After K.S.'s parents learned of the accusations, K.S. was interviewed by Lauren McAliley, a nurse practitioner with Child Advocacy and Protection at Rainbow Babies and Children's Hospital. McAliley testified that there was no forensic evidence to be collected in K.S.'s case due to the delayed disclosure. McAliley prepared a report after meeting with K.S. wherein she detailed his account of the January 17, 2013 incident. K.S. reported to McAliley that "this happened only one time" and he was told not to tell anyone or he would be beat up.

{¶10} Johnson testified and denied ever being alone with K.S. in the home. Johnson maintained that he took K.S. to Taco Bell and remained there until they met K.S.'s parents at the house. Johnson's relationship with L.G. ended in November 2012. On March 3, 2013, L.G. appeared at Johnson's place of employment and a confrontation ensued that resulted in L.G.'s arrest and Johnson being terminated. Johnson testified that L.G. confronted him about infidelity. L.G. testified that she confronted him regarding the allegations of sexual abuse towards her daughter, Z.F.

Law and Analysis

I. Manifest Weight

{¶11} In Johnson's first assignment of error he argues that his convictions for rape and kidnapping were against the manifest weight of the evidence.

{¶12} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13.

{¶13} "When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a 'thirteenth juror' and may disagree 'with the factfinder's resolution of conflicting testimony.'" *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the "exceptional

case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin*, *supra.*

{¶14} Johnson argues that the jury clearly lost its way in this instance and cites the jury's decision to acquit him of the other rape and kidnapping charges in addition to inconsistencies in K.S.'s memory as to which of the two incidents occurred first, how old he was at the time of the incident in the motor vehicle and when he told his parents about the abuse.

{¶15} We cannot say this is the exceptional case where the evidence weighs heavily against the conviction. K.S. provided detailed testimony regarding the rape that occurred in his home on January 17, 2013. Johnson's testimony that he took K.S. to Taco Bell and was never alone with K.S. was refuted by both A.S. and A.A., who returned home to find K.S. and Johnson alone in the family home. In contrast, the evidence regarding the alleged rape of K.S. in the SUV was far weaker. K.S. struggled to recall when it occurred, it was unclear when he told his parents about the incident and he told Lauren McAliley that only one incident occured — the incident in the home.

{¶16} The credibility of the witnesses is an issue primarily for the trier of the facts, and a jury is free to believe all, some, or none of the testimony of each witness appearing at trial. *State v. Peterson*, 8th Dist. Cuyahoga Nos. 100897 and 100899, 2015-Ohio-1013, ¶ 94. In this instance, the jury clearly believed K.S.'s testimony regarding the January 17, 2013 assault and we cannot say that their judgment is against the manifest weight of the evidence.

{¶17} Johnson's first assignment of error is overruled.

II. Representation by Two Attorneys

{¶18} In his second assignment of error, Johnson argues that the trial court erred in failing to assign two attorneys to represent him on the charge of rape of a victim less than ten years of age. Johnson's argument is premised on the fact that Cuyahoga County's attorney fee schedule provides for two attorneys to be compensated in aggravated murder cases without specifications of aggravating circumstances and the penalties for the two offenses are similar.

{¶19} We are unaware of any legal authority to support appellant's contention that he is entitled to be represented by two attorneys for a rape charge nor does the assigned counsel fee schedule upon which he relies provide for such representation and the local rules of the Cuyahoga County Common Pleas Court provides for assigment of only one attorney in a case such as this.

{¶20} Johnson's second assignment of error is overruled.

III. Post-Arrest Silence

{¶21} In his third assignment of error, Johnson argues that the prosecutor engaged in prosecutorial misconduct during closing argument by referencing his post-arrest silence.

{¶22} The test for prosecutorial misconduct is whether the prosecutor's remarks or questions were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Hicks*, 194 Ohio App.3d 743, 2011-Ohio-3578, 957 N.E.2d 866,

¶ 30 (8th Dist.). A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). The focus of that inquiry is on the fairness of the trial, not on the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 496 709 N.E.2d 484 (1999). "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, *there can be no such thing as an error-free, perfect trial*, and * * * the Constitution does not guarantee such a trial." (Emphasis added.) *United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

{¶23} Our focus upon review is whether the prosecutor's comments violated appellant's substantial rights, thereby depriving appellant of a fair trial such that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *Hicks* at ¶ 30; *State v. Onunwor*, 8th Dist. Cuyahoga No. 93937, 2010-Ohio-5587, ¶ 42, citing *State v. Loza*, 71 Ohio St.3d 61, 641 N.E.2d 1082 (1994).

{¶24} We note, however, that a defendant's substantial rights cannot be prejudiced when the remaining evidence, standing alone, is so overwhelming that it constitutes defendant's guilt and the outcome of the case would have been the same regardless of evidence admitted erroneously. *Hicks* at ¶ 30, citing *State v. Williams*, 38 Ohio St.3d 346, 528 N.E.2d 910 (1988).

{¶25} As a general rule, a prosecutor is entitled to a certain degree of latitude during closing argument. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988). Moreover, as stated by this court in *State v. Bruce*, 8th Dist. Cuyahoga No. 70982, 1997 Ohio App. LEXIS 4334 (Sept. 25, 1997), closing arguments must be viewed in their entirety to determine whether the disputed remarks were prejudicial. *Id*.

{¶26} Here, Johnson argues that the prosecutor improperly commented on his post-arrest silence during closing argument. Once a criminal defendant receives the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), it is improper for the state to impeach the defendant by causing the jury to draw an impermissible inference of guilt from the defendant's post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The rationale behind this rule is that *Miranda* warnings carry the state's "implicit assurance" that an arrestee's invocation of the Fifth Amendment right to remain silent will not later be used against him. *Wainwright v. Greenfield*, 474 U.S. 284, 290-291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). Because a defendant's post-*Miranda* warning silence could be nothing more than an invocation of his right to be silent, it would be fundamentally unfair to permit a breach of that assurance by allowing impeaching questions as to why the defendant failed to give an exculpatory account to the police after receiving the warnings. *Id*. at 295; *State v. Rogers*, 32 Ohio St.3d 70, 71, 512 N.E.2d 581 (1987).

{¶27} However, the United States Supreme Court explained in *Anderson v. Charles*, 447 U.S. 404, 408-409, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980):

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id. at 408.

{¶28} Furthermore, a prosecutor may question a defendant about post-arrest silence without a *Doyle*-violation if the defendant has raised the issue on direct examination. *State v. Roby*, 3d Dist. Putnam No. 12-09-09, 2010-Ohio-1498, ¶ 19; *State v. Thompson*, 10th Dist. Franklin No. 08AP-956, 2009-Ohio-3552, ¶ 21-24 (holding 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.)

{¶29} In this instance, Johnson's attorney raised the issue of the police interrogation during his direct testimony. Johnson indicated that, after being advised of his *Miranda* rights, he did not immediately invoke his right to remain silent and continued to talk to a detective until the detective began intimidating him in an attempt to obtain a confession. At that point, Johnson demanded an attorney and the interview ended. On cross-examination, the prosecutor asked Johnson if, prior to terminating the interview, he

provided the detective with the same description of events he had provided at trial. Johnson replied, "No, he didn't want to hear that."

{¶30} The state did not raise the issue during its initial closing argument. During Johnson's closing argument, his attorney lamented that Johnson was "not there to defend himself when this investigation [was] going on." On rebuttal, the state merely refuted this claim noting that Johnson had an opportunity to speak with investigators as was his testimony.

{¶31} Under these facts, we find no violation of *Doyle*.

{¶32} Johnson's third assignment of error is overruled.

IV. Ineffective Assistance of Counsel

{¶33} In his fourth assignment of error, Johnson argues that he was denied effective assistance of counsel due to his trial court's failure to object to hearsay testimony by A.A. wherein he recounted a telephone conversation between himself, Johnson and K.S. wherein he confronted Johnson about K.S.'s allegations.

{¶34} In order to establish 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*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶35} In this instance, Johnson's trial court failed to object to hearsay statements contained within a recounted phone conversation between A.A., K.S. and Johnson. The

hearsay statements were limited to A.A.'s recounting of K.S. accusing Johnson of touching him while Johnson denied the claim.

{¶36} We cannot say that the failure by Johnson's trial counsel to object to the very limited hearsay statements in this instance affected the outcome of the trial. The main premise behind the hearsay rule is that the adverse party is not afforded the opportunity to cross-examine the declarant. *See State v. Primeau*, 8th Dist. Cuyahoga No. 97901, 2012-Ohio-5172, ¶ 69. K.S. testified at trial and provided a far more detailed account of the rape than the generic allegation referenced in A.A.'s testimony. A.A.'s testimony regarding the phone conversation was merely cumulative to the admissible testimony of K.S. and harmless beyond a reasonable doubt. *State v. Simmons*, 8th Dist. Cuyahoga No. 98613, 2013-Ohio-1789, ¶ 28, citing *State v. Greer*, 8th Dist. Cuyahoga No. 91983, 2009-Ohio-4228, ¶ 59.

{¶37} Johnson's fourth assignment of error is overruled.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant the 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.

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EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and
MARY J. BOYLE, J., CONCUR