[Cite as *State v. Vigil*, 2016-Ohio-7485.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103940

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER M. VIGIL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-596356-A

BEFORE: S. Gallagher, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 27, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Christopher M. Vigil appeals his conviction and sentence in this case. Upon our review, we affirm in part, reverse in part, and remand the matter to the trial court to vacate the conviction and sentence for domestic violence.

{¶2} Appellant was charged under a five-count indictment with two counts of rape, two counts of kidnapping, each with a sexual-motivation specification, and one count of domestic violence. The case proceeded to a jury trial.

{¶3} At trial, the victim testified that she and appellant met through an online dating website. They had been living together since August 2014. The victim claimed that the relationship began well, but within weeks of moving in together, appellant began to yell, they would argue, and he would get angry, and that it continually got worse. In November 2014, the couple moved to a rental home in Parma, near appellant's family. According to the victim, following the move, the relationship went "downhill." The victim testified that she was "afraid" of appellant. Although the victim testified that appellant "wasn't leaving," she admitted both were on the lease and were maintaining a household together for financial reasons until appellant could move out. The victim also testified appellant had lost his driver's license, she had the only vehicle, and she regularly drove appellant to work.

{¶4} The victim testified that she broke off the relationship in late January or early February 2015 and that she no longer had consensual sexual activity with appellant. She testified that she stopped sleeping in the same room, and in the same bed, with appellant.

{¶5} The victim testified to an incident that occurred on May 28, 2015, in which she maintained appellant had nonconsensual sex with her. The victim testified that she had been sleeping on the couch, was uncomfortable, and went to the bed in the morning to get a few minutes of sleep. She was wearing a nightgown and underwear. According to the victim, when she woke up, appellant was getting ready to take a shower and said "come on, I got 30 minutes," to which the victim responded "no." After he took a shower, he said "now I got 15 minutes," and the victim asked that he leave her alone. The victim testified that appellant then said, "I'm going to show you what I can do in 15 minutes"; he grabbed her arm and put it behind her head; he took off her underwear; and he had sex with her. The victim testified she was "in shock." She testified that before appellant got up, he said "I'm just going to kill you and then I'm going to kill myself."

{¶6} The victim testified she took appellant to work because she did not know what to do and he would "at least be somewhere else," and she later picked him up. She testified she did not call the police because she "didn't know what to do." Later in the day, the victim was at home, and appellant's cousin, with whom the victim talked regularly, came over.

{¶7} The victim confided in the cousin while in the victim's backyard drinking a glass of wine. As a result of the conversation, the two decided to go to the police. The

victim testified that when they were about to leave, appellant came out of the house, grabbed the victim, attempted to kiss her, and held her so she could not get away. According to the victim, he was not holding her where she had been bruised earlier. The cousin broke the two apart. The victim testified that after the victim and the cousin were in a vehicle, appellant opened the vehicle's door. The victim pulled out with the door open and went to the police station.

{¶8} Both the victim and the cousin provided statements to the police. The patrolman to whom the incident was reported described the victim's demeanor as "very emotional, upset."

{¶9} The victim went to the hospital where a rape kit was performed. The sexual assault nurse examiner who performed the victim's exam testified that the victim appeared "very fearful." The nurse testified about the exam she performed. Although she did not indicate seeing any injuries, she testified that was not unusual. She also testified to the victim's report of the incident to her, which was consistent with the victim's testimony at trial. The nurse noticed a bruise on the victim's arm. An examiner from the Ohio Bureau of Criminal Investigation identified semen in the vaginal swabs from the victim's rape kit. Appellant's DNA was identified.

{¶10} On cross-examination, the victim conceded she was presently in a relationship with another man, with whom she became friends during the time she was still living with appellant. She testified that she had no recollection of planning a wedding with appellant in spring 2015. She conceded making a reservation at a resort in

Tennessee for herself and appellant. She also admitted she opened a joint bank account with appellant in early 2015. Defense counsel inquired whether the victim had purchased an engagement ring for appellant in early spring 2015. The victim testified she did not and that she was never engaged to appellant.

{¶11} Photographs taken of the victim depicted a bruise on her forearm in the shape of a handprint, which the victim claimed was from being held down by appellant. Photographs were also taken at the victim's home.

{¶12} The detective who performed the follow-up investigation testified to the interviews she performed. She testified that the victim's claim that her relationship with appellant had ended in February 2015 was consistent with the information she learned from other individuals during the investigation.

{¶13} The cousin also corroborated the victim's testimony that the victim's relationship with appellant had become strained and the relationship frayed in February 2015. The cousin testified that when she arrived at the victim's home, she noticed the victim was crying and the victim had a bruise on her left arm. The cousin testified that the victim informed her that appellant had "forced her to have sex with him." The cousin stated that when appellant came outside he "was calling [the victim] a whore and a cunt[.]" The cousin corroborated the victim's testimony as to appellant's actions while they were attempting to leave. She testified that she told appellant they were going to Walmart in an effort to get out of the situation. She further testified that after she broke the victim and appellant apart, appellant "grabbed my back and got * * * into my face"

and that he was saying "he loved [the victim] so much" and something along the lines of "he was going to kill her and then himself."

{¶14} The state dismissed Count 2 (oral rape) and dismissed the sexual motivation specification on Count 5 (kidnapping). The jury returned a verdict of guilty on the remaining counts, which had been renumbered by the trial court. The rape and the first kidnapping count were merged for sentencing. The trial court imposed a prison sentence of ten years on the rape count and four years on the second kidnapping count, to be served consecutively. The court imposed a prison sentence of six months on the domestic-violence count, to be served concurrently to the other charges. The trial court imposed a total sentence of 14 years. This appeal followed.

{¶15} Appellant raises four assignments of error for our review. Under his first assignment of error, appellant claims the state failed to present sufficient evidence of the offenses for which he was convicted. A claim of insufficient evidence raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing a sufficiency challenge, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶16} Appellant claims that the sexual intercourse was consensual and that there was insufficient evidence to support the rape conviction. Appellant points to a few

inconsistencies with the victim's testimony and to the charge of oral rape being dismissed. Appellant also claims the victim's conduct after the alleged rape was not consistent with someone who had suffered from a violent rape and undermines her claims of being fearful of appellant.

{¶17} Appellant was convicted of rape in violation of R.C. 2907.02(A)(2), which states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶18} A review of the record reflects that the victim testified that she was no longer in a sexual relationship with appellant; that she no longer slept in the same room with him; that she entered the bed in the morning after an uncomfortable night of sleep; that she told appellant "no, leave me alone"; and that appellant forced sex upon her. Insofar as there were minor inconsistencies in the victim's testimony as to the timing of when she entered the bed, this was not material to the crime charged. Although the victim did not immediately report the crime and proceeded to drive appellant to work and back that day, she testified that appellant had threatened to kill her and himself, that she was afraid, and that she did not know what to do. Later in the day, she confided in the cousin, who indicated the victim was crying when the cousin arrived. The nurse examiner who performed the victim's exam testified that the victim appeared "very fearful." The victim's report of the incident was consistent with her testimony at trial. The victim had a bruise in the shape of a handprint on her forearm. Viewing the

evidence in a light most favorable to the prosecution, we find sufficient evidence in the record to support the conviction for rape.

{¶19} The convictions for domestic violence and the second count of kidnapping relate to the conduct that occurred on the evening in question. Appellant argues that the testimony of the victim and the cousin did not describe conduct that could satisfy the elements of the offenses. He claims that the testimony reflected that he was attempting to reconcile with the victim and that he did not attempt to cause physical harm or to terrorize the victim. He maintains that his telling the victim that he loved her and trying to kiss her, coupled with the cousin's indication that the victim was not angry, reflect that he was attempting to soothe the relationship.

{¶20} Appellant was convicted of domestic violence in violation of R.C. 2919.25(A), which provides: "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶21} The record reflects that appellant and the victim were members of the same household. During trial, the state's position was that the domestic violence related to what happened during the evening when appellant was grabbing the victim's shoulder and when he was trying to keep the victim from entering her vehicle. However, there was no evidence that appellant caused or attempted to cause physical harm while trying to prevent the victim from leaving. The victim testified that the bruise on her forearm was caused earlier in the day when appellant held her arm down and raped her. The cousin also testified that she noticed the victim's bruise when she arrived at the victim's home

that evening. The evidence when viewed in a light most favorable to the prosecution was not sufficient to support the conviction for domestic violence.

{¶22} Appellant was convicted of kidnapping in violation of R.C. 2905.01(A)(3), which provides as follows: "(A) No person, by force, threat or deception * * * shall * * * restrain the liberty of the other person, for any of the following purposes: (3) To terrorize, or to inflict serious physical harm on the victim or another[.]" The trial court properly instructed the jury on physical harm and defined the term terrorize as "impress with terror, fear or to coerce by intimidation."

{¶23} At trial, the state maintained that appellant restrained the liberty of the victim for the purpose of terrorizing her; he held her so she could not move or get to her car. We recognize that what amounts to "terrorize" may differ upon the circumstances presented. It is not for a court to invade the province of the jury, and we must underscore the role of the jury as the finder of fact. Upon the evidence adduced in this case, the jury, as the ultimate finder of fact, could rationally conclude that appellant acted with the purpose to terrorize the victim.

{¶24} The victim testified that appellant had raped her in the morning and told her he was going to kill her. She testified that later in the day, when she and the cousin were about to leave the backyard, appellant came out of the house, grabbed her, attempted to kiss her, and held her so she could not get away. She was not freed until the cousin broke the two apart. She testified that after she got into her vehicle, appellant opened the door and she had to pull out with the door open to get away. The patrolman to whom the

incident was reported described the victim's demeanor as "very emotional, upset" and the nurse examiner testified that the victim appeared "very fearful."

{¶25} The cousin corroborated the victim's testimony concerning what transpired in the evening. She also testified that when appellant entered the backyard, he was calling the victim "a whore and a cunt." She told appellant they were going to Walmart in an effort to "get us out of the situation." The cousin testified that after she broke appellant and the victim apart, appellant grabbed the cousin's back, got into her face, was saying "he loved [the victim] so much," and something along the lines of "he was going to kill her and then himself."

{¶26} Further, there was testimony at trial that the victim ended her relationship with appellant in February 2015 and that the victim was afraid of appellant. Appellant's actions of calling the victim derogatory names, grabbing her, and threatening to kill her are contrary to his claim of an attempt to reconcile with the victim.

{¶27} The totality of the circumstances presented provided a reasonable basis for the jury to find the terrorize element of the crime had been proven beyond a reasonable doubt. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that appellant, with the use of force, restrained the victim's liberty for the purpose of terrorizing the victim.

{¶28} Appellant's first assignment of error is sustained only as to his conviction for domestic violence, and is otherwise overruled.

{¶29} Under his second assignment of error, appellant claims his convictions are against the manifest weight of the evidence. When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶30} Appellant raises similar challenges as above to the evidence, questions the credibility of the victim's testimony, and claims his convictions were against the weight of the evidence. Because we have found that the evidence was insufficient as to the domestic-violence conviction, we only consider appellant's manifest weight challenge as it relates to the rape and kidnapping convictions.

{¶31} Although there were some inconsistencies in the victim's testimony, she consistently testified that she had ended her relationship with appellant and that appellant forced nonconsensual sex upon her, and to the events that transpired later in the day. Other witnesses testified to their observations of the victim's demeanor, her reports of the incident, and corroborated portions of the victim's testimony. The victim was effectively cross-examined, and the jury, as trier of fact, was in the best position to weigh the

credibility of each witness. After reviewing the entire record, we cannot say 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. Appellant's second assignment of error is overruled.

{¶32} Under his third assignment of error, appellant claims he was denied effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. The defendant has the burden of proving his counsel rendered ineffective assistance. *Perez* at ¶ 223.

{¶33} Appellant claims that prior to trial, he informed the trial court that he had only met trial counsel ten minutes before trial and that his attorney had failed to come meet with him during the five months he was in custody. The record reflects that the trial court allowed "an hour or so" for trial counsel to meet with appellant to discuss trial strategies and to obtain proper clothing for appellant. No objection was raised to the amount of time afforded, and the record reflects that trial counsel provided effective representation throughout trial.

{¶34} Nevertheless, appellant argues that his trial counsel failed to present any evidence to impeach the victim when she denied the existence of a continued intimate relationship with appellant, did not present any evidence to contradict the victim's denial of having purchased an engagement ring, did not obtain bank records relating to the joint bank account or the timing of the planned vacation, and failed to retrieve evidence to show the victim had changed her Facebook status to engaged in the spring of 2015. The record reflects that on cross-examination of the victim, trial counsel effectively inquired into the nature of her relationship with appellant. He specifically inquired into whether she had purchased an engagement ring, planned a vacation for appellant and her, and had opened a joint bank account.

{¶35} Appellant also argues that counsel failed to object to hearsay testimony and to bad character evidence. A failure to object to error, alone, does not establish a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant is required to show that there was a substantial violation of defense counsel's essential duties to his client and that he was materially prejudiced by counsel's ineffectiveness. *Cleveland v. Williams*, 8th Dist. Cuyahoga No. 101588, 2015-Ohio-1739, ¶ 33, citing *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 139-140. Here, appellant has not demonstrated the alleged failures constituted a violation of his counsel's duties or caused material prejudice in light of the evidence against him.

{¶36} Appellant's third assignment of error is overruled.

{¶37} Under his fourth assignment of error, appellant claims the trial court erred when it imposed consecutive sentences.

{¶38} When reviewing felony sentences, this court may increase, reduce, or modify a sentence, or it may vacate and remand the matter for resentencing, only if we clearly and convincingly find either that (1) "the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]," or (2) "the sentence is otherwise contrary to law." R.C. 2953.08(G)(2).

{¶39} A review of the record reflects that the trial court specifically stated that it had "considered all of the required factors under R.C. 2929.11, 12 and 13" and found that "a prison sanction is consistent with the purposes of 2929.11." The sentences imposed by the trial court were within the applicable sentencing ranges. The trial court ordered the sentences imposed for the rape and the second count of kidnapping to run consecutively.

{¶40} In order to impose consecutive prison terms, a trial court is required to make all of the findings required by R.C. 2929.14(C)(4) at the sentencing hearing, and it must incorporate its findings into its sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Pursuant to R.C. 2929.14(C)(4), the trial court must find (1) "that the consecutive service is necessary to protect the public from future crime or to punish the offender"; (2) "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public"; and (3) that at least one of the following three circumstances applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶41} Trial courts generally have discretion to impose consecutive sentences pursuant to R.C. 2929.14(C)(4). *State v. Sergent*, Slip Opinion No. 2016-Ohio-2696, ¶ 16. Although a trial court is required to make the findings mandated by R.C. 2929.14(C)(4), the court has no obligation to state reasons for its findings. *Bonnell* at ¶ 37.

{¶42} In this case, the trial court made the requisite findings on the record as follows:

> The Court imposes prison terms consecutively, finding that consecutive service is necessary to protect the public from future crime or to punish this defendant and that consecutive sentences are not disproportionate to the seriousness of this defendant's conduct and the danger that this defendant poses to the public, and the Court also finds that at least two of these

> multiple offenses were committed in this case as part of a course of conduct, and that the harm that was caused by said multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the course of this conduct adequately reflects the seriousness of this defendant's conduct. Also, this defendant's criminal history and history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by this defendant.

The above findings were incorporated into the sentencing entry.

{¶43} Appellant's claim that the trial court did not make the requisite proportionality/seriousness of conduct finding is refuted by the record. Appellant also claims that the record did not support the trial court's findings; that his conduct on the evening of May 28, 2015, did not amount to harm that was so great or unusual to justify the imposition of consecutive sentences; and that the court erred in finding his prior criminal history demonstrates that consecutive sentences are necessary to protect the public.

{¶44} The record demonstrates that the trial court considered the nature of the crimes committed and appellant's course of conduct, which entailed the rape of the victim, a threat to kill her, and then kidnapping her with the purpose to terrorize her. The court noted that it had reviewed all of the verdict forms and had "participated in the trial itself and observed all of the witnesses firsthand." The court was "familiar with

[appellant's] criminal history," which included prior convictions in the state of Tennessee "for negligent homicide involving a prior relationship or prior girlfriend that [appellant] was involved with," menacing by stalking, which involved a former partner, and domestic violence.

{¶45} The balance or relative weight to be given to relative factors were within the discretion of the trial court. It is not for this court to substitute our judgment where the findings made were supported by the record.

{¶46} Upon our review, we cannot clearly and convincingly find that the record does not support the sentencing court's findings under R.C. 2929.14(C)(4), or that the sentence is otherwise contrary to law. The fourth assignment of error is overruled.

{¶47} Judgment affirmed in part, reversed in part. Case is remanded to the trial court to vacate the conviction and sentence for domestic violence.

It is ordered that appellant and appellee share 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 convictions having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

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

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
MELODY J. STEWART, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

MELODY J. STEWART, P.J., CONCURRING IN PART, DISSENTING IN PART:

{¶48} I concur in part with the decision of the majority except for its disposition of the second kidnapping count. I do not find that the state presented sufficient evidence that Vigil restrained the victim's liberty for the purpose of terrorizing her. The victim's testimony regarding this kidnapping charge is as follows:

> Q. Did you think or were you concerned that he would see you leaving the house after having this conversation with [the cousin]?
>
> A. No.
>
> Q. Were the two of you able to leave without seeing him again?
>
> A. No.
>
> Q. What happened when the two of you attempted to leave?
>
> A. He came out of the house, and we told him we were going to Wal-Mart. And when I tried to get up to leave, he tried to make me kiss him. And he held me and I couldn't get away. So [the cousin] came in between us and separated us. Then he wouldn't let her go. Finally she got away, and I got in the front seat of the truck. She got in, but by the time she got in, he already opened my door and she couldn't lock it fast enough for my lock to

close. So I had like pulled out of my driveway with my door wide open, and we just left and went straight to the police station.

{¶49} The victim's testimony also characterized this event as "[h]e hugged me. Like he grabbed me around my whole chest." The victim's testimony clearly demonstrates that Vigil restrained her liberty, regardless of how brief. However, there is nothing in her testimony to demonstrate that Vigil did so at any point for the purpose of terrorizing her. Vigil was obviously trying to get the victim to do something she did not want to do — remain with him at the home and/or kiss him — both those actions do not demonstrate a purpose to terrorize. I would therefore vacate the kidnapping conviction under R.C. 2905.01(A)(3).