

[Cite as *State v. Young*, 2018-Ohio-84.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104627

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GEORGE YOUNG

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-13-573242-A
Application for Reopening
Motion No. 510757

RELEASE DATE: January 10, 2018

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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MARY EILEEN KILBANE, P.J.:

{¶1} George Young has filed a timely application for reopening pursuant to App.R. 26(B). Young is attempting to reopen the appellate judgment, rendered in *State v. Young*, 8th Dist. Cuyahoga No. 104627, 2017-Ohio-7162, that affirmed his conviction for the offenses of rape and kidnapping. We decline to reopen Young's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Young is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶4} Young has raised one proposed assignment of error in support of his application for reopening. Young’s sole proposed assignment of error is that:

Appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution where appellate counsel omitted a dead bang winner, prejudicing the appeal from receiving a full review by the Court.

{¶5} Young, through his sole assignment of error, argues that the trial court’s verdict was against the manifest weight of the evidence. Specifically, Young states that the testimony of the victim and the victim’s mother “was not believable” and that “Appellant respectfully urges the Court to sit as the thirteenth juror and determine whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created a manifest injustice” that requires reversal and a new trial.

{¶6} A challenge to the manifest weight of the evidence involves whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). This court, when reviewing a manifest weight challenge, is required to review all of the evidence contained in the record and in resolving any conflicts, determine whether 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.” *Id.* at 387.

{¶7} When considering the manifest weight of the evidence, this court must also determine the credibility of each witness. However, we are aware that determinations regarding the credibility of any witness and the weight of offered testimony are primarily

issues for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶8} The trial court, as the trier of fact, was best able “to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. The trial court, as the trier of fact, was at liberty to take note of any inconsistencies and resolve the inconsistencies by “believ[ing] all, part, or none of a witnesses’s testimony.” *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶9} Herein, the trial court heard the testimony of the victim, the victim’s mother, and Young, and chose to believe the victim and the victim’s mother over Young. Despite any inconsistencies or contradictions in the testimony of the victim or the victim’s mother, the trial court was free to believe the testimony of the victim and the victim’s mother.

{¶10} In addition, after reviewing all of the testimony and exhibits presented at trial, we cannot find that this case is the “exceptional case” where the “evidence weighs heavily against the conviction.” *Thompkins, supra*, at 387. The testimony and exhibits adduced at trial demonstrated that: 1) a key was used by a male to unlock the apartment door in which the victim was staying (tr. 289); 2) the male that entered the apartment was

“one of her [mother’s] guy friends” (tr. 294); 3) the male pushed the victim onto the bed and engaged in oral sex and intercourse with the victim (tr. 294); 4) the victim was transported to the hospital by ambulance where a “rape kit” procedure was performed upon the victim, which included hair samples from the victim’s head and pubic area, vaginal swabs, mouth swabs, and fingernail scrapes (tr. 302); 5) the mother of the victim gave a key to the apartment to Young (tr. 375); 6) the doctor that performed the physical examination of the victim observed that there were copious amounts of white secretions within the victim’s vaginal vault (tr. 486); 7) the victim’s rape kit was tested for the presence of semen by the forensic biology laboratory, DNA section, of the Ohio Bureau of Criminal Investigation (tr. 527); and 8) Young could not be excluded as the source of the semen that was taken from the victim’s vaginal swabs, based upon the DNA analysis (tr. 558, 684). After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of all witnesses and resolving any conflicts, we cannot agree that the trial court, as 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.” *Id.* Thus, we find no merit with regard to Young’s proposed assignment of error. Young was not prejudiced by the failure of appellate counsel to raise the issue of manifest weight upon appeal.

{¶11} Application for reopening is denied.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR