[Cite as *State v. Simmons*, 2011-Ohio-916.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JOHN J. SIMMONS Appellant	C.A. No. 25275 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 09 3003

DECISION AND JOURNAL ENTRY

Dated: March 2, 2011

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant John Simmons appeals the decision of the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} Mr. Simmons met S.W., the victim herein, at the end of August 2007. Shortly after they met, Mr. Simmons moved into S.W.'s home. On September 6, 2007, Mr. Simmons was involved in an altercation with S.W.'s next-door neighbors and his cousin who lived across the street. Due to the altercation, Mr. Simmons obtained a bag of weapons from his grandmother's home, which was down the street. When he arrived back at S.W.'s home, Mr. Simmons initiated sexual relations with S.W. The parties disagree as to the subsequent course of events. According to S.W., she refused and in response, Mr. Simmons pointed a knife at her and choked her. S.W. stated that, although she told him no, she removed her clothes. Mr. Simmons forced her to have sexual intercourse. She testified that he hurt her and that she was scared. S.W.

testified that Mr. Simmons then fell asleep on top of her. The next day, S.W. drove Mr. Simmons to his ex-girlfriend's place of employment to retrieve a book. S.W. and Mr. Simmons got into a verbal argument regarding the ex-girlfriend. When they returned home, S.W. testified that Mr. Simmons physically assaulted her. After the assault, S.W. left to pick up her son at school. S.W. testified that she told the principal that she had been assaulted, and the principal called 911. As a result, Mr. Simmons was arrested.

{¶3} Mr. Simmons was indicted on September 18, 2007. He was charged with one count of rape, in violation of R.C. 2907.02(A)(2), with a repeat violent offender specification, as defined in R.C. 2929.01(DD), in violation of R.C. 2941.149[2929.14(C)(D)(2)]. In addition, he was charged with one count of felonious assault, in violation of R.C. 2903.11(A)(1), with a repeat violent offender specification, as defined in R.C. 2929.01(DD), in violation of R.C. 2941.149 [2929.14(C)(D)(2)]. Finally, he was charged with one count of domestic violence, in violation of R.C. 2919.25(A). He pleaded not guilty to the charges and waived his right to a jury trial. On October 29, 2007, Mr. Simmons filed a motion to appropriate funds to hire an expert witness. The trial court denied this motion. On January 28, 2008, Mr. Simmons filed a motion in limine seeking a preliminary ruling to preclude "other acts" evidence, pursuant to Evid.R. 404. The trial court held a hearing on this motion, at which several witnesses testified. The parties agreed that the witnesses' testimony at the hearing would serve as their trial testimony. The trial court did not rule on the motion in limine, but rather, held its ruling in abeyance.

{¶4} On February 25, 2008, the case was tried to the bench. On April 30, 2008, the trial court found Mr. Simmons guilty of rape, with a repeat offender specification, and guilty of domestic violence. Mr. Simmons was acquitted of felonious assault. The trial court determined

Mr. Simmons to be a Tier III sex offender. He was sentenced to a total of 20 years of incarceration. Mr. Simmons timely appealed the decision and sentence. This Court affirmed.

{¶5} Thereafter, Mr. Simmons filed a motion to certify a conflict related to inter-district conflicts in the application of the law of *Old Chief v. United States* (1997), 519 U.S. 172. This Court granted the motion, and the Supreme Court of Ohio agreed that a conflict existed. The State then filed a motion to dismiss the appeal based upon improper notification of post-release control. The Supreme Court granted the State's motion, vacated the judgments of this Court and the court of common pleas, and remanded the case to the court of common pleas for resentencing. *State v. Simmons*, 123 Ohio St.3d 1491, 2009-Ohio-6015.

{¶6} Mr. Simmons was subsequently resentenced to the same prison term. Mr. Simmons has appealed, raising five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED WHEN IT ACCEPTED INTO EVIDENCE A RECORDING OF A 911 CALL THAT WAS INADMISSABLE HEARSAY AND A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶7} Mr. Simmons contends in his first assignment of error that the trial court erred in admitting a 911 call in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. In addition, he asserts the call contained inadmissible hearsay.

{¶8} "The Confrontation Clause of the Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right [* * *] to be confronted with the witnesses against him.'" *Davis v. Washington* (2006), 547 U.S. 813, 821. "[T]his provision bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to

testify, and the defendant had had a prior opportunity for cross-examination.'" Id., quoting *Crawford v. Washington* (2004), 541 U.S. 36, 53-54.

{¶9} The principal at the school of S.W.'s son initially placed the 911 call at issue. Mr. Simmons' assignment of error is premised upon his suggestion that the 911 call consisted solely of dialogue between the principal and the 911 dispatcher. However, the principal spoke to the operator for the first half of the call and then gave the phone to S.W. so she could provide the operator with more specific information. Both the principal and S.W. testified at trial and were subject to cross-examination. ""[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."" *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶128, quoting *Crawford v. Washington* (2004), 541 U.S. 36, 59, fn. 9. Thus, we see no violation of the Confrontation Clause.

{¶10} Mr. Simmons also asserts that the 911 call was inadmissible hearsay and did not fit under one of the hearsay exceptions in Evid.R. 803 or 804, as the call was not made to "avoid immediate danger[.]" While Mr. Simmons did object to the playing of the 911 call when S.W. testified, he did not similarly object when the 911 call was later played while the principal was testifying. Further, based upon his brief on this issue, which cites only to the portions of the transcript from S.W.'s testimony, it does not appear that Mr. Simmons challenges the second playing of the call. Thus, even assuming the 911 call contained inadmissible hearsay, any error in playing the call over objection was harmless as the same call was played without objection later in the trial. See Evid.R. 103(A), Crim.R. 52(A). In addition, Mr. Simmons has not argued

how admission of the call prejudiced his substantial rights. See App.R. 16(A)(7); Crim.R. 52(A); Evid.R. 103(A). Therefore, we overrule Mr. Simmons' first assignment of error.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOCATE FUNDS FOR AN EXPERT WITNESS ON BEHALF OF AN INDIGENT DEFENDANT."

{¶11} In Mr. Simmons' second assignment of error, he contends that the trial court abused its discretion by failing to allocate funds for an expert witness on behalf of an indigent defendant. We do not agree.

{¶12} We review a trial court's decision whether to allow an indigent defendant the resources to obtain an expert witness for an abuse of discretion. *State v. Stevens* (Sept. 1, 1999), 9th Dist. No. 2904-M, at *2, citing *State v. Mason* (1998), 82 Ohio St.3d 144, 150. The Supreme Court of Ohio has held that:

> "due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *Mason*, 82 Ohio St.3d at 150.

{¶13} Aside from stating in a conclusory manner that the trial court denied him due process, Mr. Simmons has not set forth any argument in his brief to this Court explaining how he demonstrated to the trial court how the expert he wished to hire would have aided in his defense or how the lack of having such an expert caused his trial to be unfair. See App.R. 16(A)(7). In fact, Mr. Simmons does not even articulate in his brief to this Court why he believed he needed a medical expert witness, apart from stating one was needed to review medical records and testimony and to "counter the prosecutor's witness from the 'DOVE Program.'" Clearly, Mr.

Simmons has not met the standard set forth in *Mason.* See *Mason*, 82 Ohio St.3d at 150, quoting *Broom*, 40 Ohio St.3d at 283. Mr. Simmons has failed to demonstrate that there was a reasonable probability that a medical expert would aid in his defense, as he has completely failed to explain what evidence or testimony he believed a medical expert would offer in support of his defense or even why he could not achieve the same result without the aid of a medical expert. See id. ("Due process * * * does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need.") He has also failed to explain how the denial of his request resulted in an unfair trial. See id. Accordingly, based upon Mr. Simmons' argument to this Court, we cannot say that the trial court abused its discretion in denying Mr. Simmons' motion. Mr. Simmons' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE ABOUT PRIOR, SEPARATE CRIMINAL CONDUCT IN VIOLATION OF OHIO STATUTORY LAW AND OHIO RULES OF EVIDENCE 403, 404 AND IN VIOLATION OF OLD CHIEF V. UNITED STATES."

{¶14} In Mr. Simmons' third assignment of error, he contends that the trial court erred by allowing the prosecutor to introduce evidence about prior separate criminal conduct in violation of the Revised Code and Evid.R. 403 and 404. We do not agree.

{¶15} Mr. Simmons filed a motion in limine as a result of the State's notice of intention to use "other acts" evidence pursuant to Evid.R. 404(B) and R.C. 2945.59. Specifically, the State sought to present evidence of prior rapes, attempted rapes, domestic violence, and menacing. The trial court held a hearing on Mr. Simmons' motion. At the beginning of the hearing, the State stated that "the testimony that [the witnesses] give today for the similar act hearing is going to, by agreement with defense counsel, is going to serve as their testimony for

purposes of the bench trial." Mr. Simmons' counsel did not dispute this or object to this statement by the State. The State further attempted to introduce medical records of witnesses who would not testify. The trial court made a preliminary decision that the testimony of one witness would be excluded. As to the remaining two witnesses and the medical records, the trial court held its ruling in abeyance until all the evidence had been presented at the bench trial.

{¶16} Mr. Simmons appears to assert that the trial court erred in holding a hearing on the "other acts" evidence prior to the bench trial, and in holding its ruling on the admission of that evidence in abeyance until the completion of the trial. Mr. Simmons suggests that doing so tainted the trial court and biased it against Mr. Simmons. We disagree.

{¶17} Assuming the procedure the trial court used in addressing the "other acts" evidence did somehow negatively impact the trial court against Mr. Simmons, Mr. Simmons invited the error. "Under the invited error doctrine, a party is not 'permitted to take advantage of an error which he himself invited or induced the trial court to make.'" *State v. Carswell*, 9th Dist. No. 23119, 2006-Ohio-5210, at ¶21, quoting *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 254. Here, the State stated on the record that Mr. Simmons' counsel and the State had agreed that the hearing testimony would also be used as the trial testimony for those witnesses. Mr. Simmons' counsel did not object to this statement or dispute it. From this stipulation, it is clear that (1) the parties agreed to have an "other acts" hearing in which witnesses would testify, and that (2) the testimony from that hearing would be used at trial if the trial court found it admissible. Thus, because Mr. Simmons agreed to have the trial court hear all of this evidence before the trial, he cannot now complain that it negatively impacted the trial court. See id.

{¶18} With regard to the "other acts" evidence, the trial court stated in its judgment entry that "[t]he Court, in the interests of judicial economy heard the evidence, but held its ruling

as to admissibility in abeyance. For the reasons stated herein, the Court does not consider the issue of the other acts." The trial court then stated that once Mr. Simmons decided to testify, his felony history became admissible. The trial court noted, and the record supports, that Mr. Simmons admitted to the prior offenses of aggravated burglary, sex with a juvenile, domestic violence against his sister and domestic violence against another female victim. Notably, Mr. Simmons does not challenge the trial court's determination that his felony record became admissible when he chose to testify. Mr. Simmons' argument instead focuses on the admissibility of the witness testimony at the "other acts" hearing as well as the medical records of the individuals who did not testify. Mr. Simmons contends that this evidence was not admissible and should not have been considered by the trial court. The Supreme Court of Ohio has stated that it "indulges in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." (Internal citations and quotations omitted.) *State v. Post*, 32 Ohio St.3d 380, 384. As the trial court suggested that it did not consider the evidence that Mr. Simmons contests, we conclude that he cannot overcome the presumption that the trial court only considered admissible evidence. Accordingly, Mr. Simmons' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN JOURNAL ENTRIES OF DEFENDANT'S PRIOR CONVICTIONS WERE ACCEPTED BY THE TRIAL COURT IN VIOLATION OF OLD CHIEF V. UNITED STATES."

{¶19} In Mr. Simmons' fourth assignment of error, he contends the trial court committed plain error and that he was denied a fair trial when journal entries of his prior convictions were accepted as evidence by the trial court. We do not agree.

{¶20} Mr. Simmons asserts that the holding of *Old Chief v. United States* (1997), 519 U.S. 172, applies to the facts of the instant matter. In *Old Chief*, the Supreme Court of the United States held that a trial court errs when it refuses to allow a defendant to stipulate to the existence of a prior conviction, and instead admits the full record of conviction, "when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." Id. at 174. Further, Mr. Simmons argues that in cases where a prior conviction is an element of a charge, the journal entry should be excluded pursuant to Evid.R. 403. See, also, id. at 174, 191-192.

{¶21} This Court has found *Old Chief* completely inapplicable to state prosecutions, concluding it was not binding precedent as it involved interpretation of a federal statute. See *State v. Kole* (June 28, 2000), 9th Dist. No. 98CA007116, at *4, overruled on other grounds by *State v. Kole* (2001), 92 Ohio St.3d 303. But, see, *State v. Baker*, 9th Dist. No. 23713, 2009-Ohio-2340, at ¶ 23 (Belfance, J., concurring in judgment only). However, Mr. Simmons' argument would not succeed even if this Court were to elect to apply the holding of *Old Chief*.

{¶22} The judgment entries at issue are State's Exhibits 30-32 and 56-57. We note that it does not appear from the record that the trial court even admitted Exhibit 57 into evidence, as the trial court only discussed Exhibits 1-56. Thus, we focus our attention on Exhibits 30-32 and 56. Exhibit 30 is a certified copy of the municipal court docket from one of Mr. Simmons' convictions for domestic violence. Exhibits 31 and 32 are certified copies of the judgment entries from Mr. Simmons' other two convictions for domestic violence, while Exhibit 56 is a certified copy of the judgment entry from Mr. Simmons' aggravated burglary conviction.

{¶23} The factual distinctions between this case and *Old Chief* are numerous. The issue in *Old Chief* arose when the prosecution refused to join the defense's proposed stipulation, which

would have prevented the trier of fact from learning the nature of the previous conviction. *Old Chief*, 519 U.S. at 177. At trial, defense counsel renewed its objection to the admission of the judgment entry of conviction. Id. Thus, *Old Chief* did not involve a plain error analysis. In the instant case, Mr. Simmons' counsel did not propose a stipulation prior to trial, nor did counsel object to the admission of the judgment entries of conviction at trial.[1] In addition, the defendant in *Old Chief* did not testify in his defense, and therefore his criminal record was not admissible for impeachment purposes. Id. at 176, fn. 2. Here, Mr. Simmons did testify at trial and admitted, without objection from his counsel, that he had three convictions for domestic violence and a conviction for aggravated burglary. Thus, the trier of fact had before it evidence of the nature of the prior crimes even without the admission of the judgment entries. See id. at 174 (noting defendants generally prefer to stipulate to a conviction to avoid disclosure of the nature of the conviction and the resultant possible prejudice). Further, with respect to Exhibits 30-32, Mr. Simmons stipulated at trial to the admission of the judgment entries themselves. ("Thirty, 31, 32, 33 and 34 are previously stipulated to.") Thus, this Court does not see how the holding in *Old Chief* would apply to the facts of this case even if the Court were to adopt it. Therefore, we overrule Mr. Simmons' fourth assignment of error.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT ERRED BY DENYING DEFENDANT'S CRIMINAL RULE 29 MOTION BECAUSE THE RAPE CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

[1] Defense counsel did file a notice entitled "DEFENDANT'S INTENTION TO OBJECT TO THE USE OF ENTRY OF JUDGMENT [OF PRIOR CONVICTIONS]" but never objected at trial or offered a stipulation in lieu of the judgment entry.

{¶24} In Mr. Simmons' fifth assignment of error, he contends that the trial court erred in denying his Crim.R. 29 motion because the rape conviction was not supported by sufficient evidence. We do not agree.

{¶25} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. "Whether a conviction is supported by sufficient evidence is a question of law that [we] review[ ] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶ 18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows the factfinder to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. Id.

{¶26} Mr. Simmons contends that his rape conviction was not based on sufficient evidence. Pursuant to R.C. 2907.02(A)(2), "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Mr. Simmons contends that the State did not demonstrate that Mr. Simmons compelled S.W. to engage in sexual conduct by force or threat of force, but that the sexual conduct was consensual. Mr. Simmons specifically contends that "[a] review of S.W.'s testimony shows that she never asked [Mr.] Simmons to stop his sexual contact[.]" Our review of the testimony does not support this contention.

{¶27} S.W. testified that on the night in question, she was lying in her bed when Mr. Simmons came into her room and informed her that he wanted to have sexual relations. She testified that she told him that she was not in the mood and to leave her alone. According to S.W., Mr. Simmons approached her from the side and pulled out a knife, which he ran up her tank top to her throat. He informed her that if she did not take her clothes off, he would do it for her. S.W. testified that she was terrified that Mr. Simmons was going to hurt her and was in shock. She stated that when she told him no, Mr. Simmons said, "You can't tell me no, you are my woman." S .W. testified that she had had consensual sex with Mr. Simmons in the past and that this encounter was very different. S.W. stated that prior to taking off her clothes, Mr. Simmons choked her. "He was on top of me, and he took his fingers like this and choked me until I blacked out." She stated that during this time she was screaming that he was hurting her. Simmons forced S.W. to perform oral sex on him and then proceeded to have vaginal intercourse with her. She stated that he forced her into positions that hurt and that she again told him no. S.W. testified that after the rape was completed, Mr. Simmons fell asleep on top of her.

{¶28} In his merit brief, Mr. Simmons does not mention S.W.'s testimony regarding being threatened with the knife and her acquiescence to the sexual conduct in light of the threat of force. Instead, he contends that S.W. did not ask Mr. Simmons to stop his sexual contact. He also contends that after the alleged rape, S.W. calmly checked her email and played on her computer. He also suggests that the rape allegation only surfaced after S.W. became upset seeing Mr. Simmons being affectionate with another woman. However, these arguments concern S.W.'s credibility and hence the weight of the evidence rather than the sufficiency of the evidence. See, *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *Thompkins,* 78 Ohio St.3d at 390. Mr. Simmons has failed to identify in what respect the State failed to present

sufficient evidence that Mr. Simmons engaged in sexual conduct with S.W. by purposefully compelling her to submit by force or threat of force.

{¶29} In viewing the evidence in the light most favorable to the prosecution, we conclude that the trial court could have found that the State proved the essential elements of rape beyond a reasonable doubt. Accordingly, Mr. Simmons' fifth assignment of error is overruled.

III.

{¶30} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.