[Cite as *State v. Burks*, 2015-Ohio-1246.]

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

STATE OF OHIO Appellee v. JEFFREY M. BURKS Appellant	C.A. No. 27423 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013 07 2041

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

HENSAL, Presiding Judge.

{¶1} Jeffery Burks appeals his convictions for rape and gross sexual imposition in the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} M.S. and R.R. are sisters and are under the age of ten. Their mother occasionally had them stay with a friend, Mr. Burks, when she had other obligations. After the third such visit, M.S. and R.R. reported to her that Mr. Burks had touched them inappropriately, showered with them, and made them engage in fellatio and cunnilingus. The Grand Jury subsequently indicted Mr. Burks for four counts of rape under Revised Code Section 2907.02(A)(1)(b) and four counts of gross sexual imposition under Section 2907.05(A)(4). Each of the rape counts contained a sexually violent predator specification. A jury found Mr. Burks guilty of the offenses, and the trial court found him guilty of the specifications. The court sentenced him to

life imprisonment without the possibility of parole. Mr. Burks has appealed, assigning four errors.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN NOT INSTRUCTING THE JURY ON THE LESSER-INCLUDED OFFENSES OF RAPE.

ASSIGNMENT OF ERROR II

> MR. BURKS WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO REQUEST LESSER-INCLUDED JURY INSTRUCTIONS FOR RAPE.

{¶3} Mr. Burks has argued his first two assignments of error together. Regarding his first assignment of error, he argues that the trial court committed plain error when it failed to instruct the jury that it could consider the lesser-included offenses of sexual battery, gross sexual imposition, and sexual imposition with respect to the rape counts. Mr. Burks notes that, although M.S. testified that he touched and rubbed her private areas with his hands, she said that nothing penetrated her, that he did not engage in cunnilingus on her, and that he did not make her engage in fellatio. There was also no physical evidence establishing penetration. Regarding his second assignment of error, Mr. Burks argues that his trial counsel was ineffective for not requesting lesser-included offense instructions.

{¶4} Under Criminal Rule 30(A), "a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict * * *." Because Mr. Burks did not request any lesser-included offense instructions with respect to the rape counts, he acknowledges that he has forfeited all but plain error. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 52. "Plain error exists only where it is clear

that the verdict would have been otherwise but for the error." *Id*. "[T]he plain error rule should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice." *State v. Underwood*, 3 Ohio St.3d 12, 14 (1983).

{¶5} In *State v. Clayton*, 62 Ohio St.2d 45 (1980), Richard Clayton faced two counts of attempted murder. At trial, he requested that the court instruct the jury on that offense and self-defense. After the jury convicted him, he appealed, arguing that the trial court should have instructed the jury on lesser-included offenses. He also argued that his counsel was ineffective for not requesting the instructions. The Ohio Supreme Court held that the fact that the jury only received instructions on the charged offense did not amount to plain error. *Id*. at 47-48. It also concluded that counsel's tactical decision to not request an instruction on attempted voluntary manslaughter did not constitute ineffective assistance. *Id*. at 49.

{¶6} Mr. Burks has not attempted to distinguish *Clayton* from the facts of this case. Although he has directed this Court to *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, it involved a different issue. The issue in *Wine* was whether a defendant, who wished to pursue an "all or nothing defense" had the right to prevent the trial court from giving lesser-included-offense jury instructions. *Id*. at ¶ 1. The Ohio Supreme Court concluded that he did not. *Id*. It distinguished *Clayton*, explaining that "in *Clayton*, the defendant claimed that the trial court erred in not instructing the jury on lesser included offenses, whereas here Wine argues that the court erred in giving lesser-included-offense instructions." *Id*. at ¶ 27. "*Clayton* establishes the consequences that follow a defendant's decision to waive a jury instruction that may have inured to his benefit. But *Clayton* does not say that a defendant may prevent the trial court from instructing the jury as to a lesser included offense that is warranted by the evidence produced at trial." *Id*. at ¶ 31.

{¶7} "In Ohio, there is a presumption that the failure to request an instruction on a lesser-included offense constitutes a matter of trial strategy * * *." *State v. Hernon*, 9th Dist. Medina No. 3081-M, 2001 WL 276348, *4 (Mar. 21, 2002). Mr. Burks has not identified anything in the record that demonstrates that his counsel's failure to request lesser included offense instructions "was anything other than a tactical election to seek an acquittal rather than a conviction on the lesser-included offense." *State v. DuBois*, 9th Dist. Summit No. 21284, 2003-Ohio-2633, ¶ 6. We, therefore, conclude that, in light of Mr. Burks's counsel's decision not to request lesser-included-offense instructions, the trial court's failure to give them does not amount to plain error. *Clayton* at 47. We also conclude that Mr. Burks has not established ineffective assistance of counsel. *DuBois* at ¶ 6. His first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE ON MR. BURKS' MOTION FOR NEW TRIAL.

{¶8} Mr. Burks argues that the trial court incorrectly denied his motion for new trial on the basis that it was premature. Following the jury's verdict, Mr. Burks filed a pro se motion for new trial. The trial court found that it was not ripe because he had not been sentenced yet. Mr. Burks argues that the court's decision was incorrect because Criminal Rule 33(B) provides that a motion for new trial "shall be filed within fourteen days after the verdict was rendered * * *." The State argues that the motion was not properly before the trial court because Mr. Burks had counsel at the time he filed it.

{¶9} In *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, the Ohio Supreme Court held that "a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel" but may not assert both rights simultaneously. *Id.* at paragraph one of the syllabus. Applying this principal, this Court has concluded that a defendant

who is represented by counsel may not file pro se motions. *State v. Walters*, 9th Dist. Summit No. 23795, 2008-Ohio-1466, ¶ 19. Because pro se motions submitted by a defendant who is represented by counsel were "not properly before the trial court," this Court will not consider them on appeal. *State v. Rice*, 9th Dist. Medina No. 08CA0054-M, 2009-Ohio-5419, ¶ 8. Mr. Burks's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT COMMITTED STRUCTURAL, REVERSIBLE, AND PLAIN ERROR BY VIOLATING MR. BURKS' SIXTH AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION (SIC) BY NOT HAVING A JURY DETERMINE WHETHER MR. BURKS WAS A SEXUALLY VIOLENT PREDATOR.

{¶10} Mr. Burks's final argument is that the trial court incorrectly failed to let the jury decide whether he was guilty of the sexually violent predator specifications. Before trial, Mr. Burks's counsel requested that the trial court decide that issue. After the jury found him guilty of the underlying offenses and the court released the jurors, however, Mr. Burks asserted that he wanted a jury to determine the issue. The trial court denied his motion because it found that Mr. Burks had made a proper election at the beginning of trial under Section 2971.02 and the jury had been dismissed. Mr. Burks argues that the election should not occur until after the jury has found a defendant guilty of the underlying offense and that any election to have the court decide the issue must be in writing like other jury waivers.

{¶11} Regarding Mr. Burks's argument about the timing of the election, Section 2971.02 provides that, "[i]n any case in which a sexually violent predator specification is included in the indictment * * * the defendant may elect to have the court instead of the jury determine the sexually violent predator specification." "If the defendant does not elect to have the court determine the sexually violent predator specification," the underlying offense "shall be

tried before the jury[.]" *Id.* If the jury convicts the defendant, the specification is then tried to the jury. *Id.* "If the defendant elects to have the court determine the sexually violent predator specification," the underlying offense is tried to the jury, and, then, if it convicts him, "the court shall conduct a proceeding at which it shall determine the sexually violent predator specification." *Id.* The section's structure indicates that a defendant decides whether the specification will be tried to the court or jury before trial, which is what occurred in this case.

{¶12} Regarding Mr. Burks's argument that the election must be in writing, there is no language in Section 2971.02 that supports his theory. Unlike Section 2945.05, which provides that a jury trial waiver "shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof," Section 2971.02 only provides that "the defendant may elect to have the court instead of the jury determine the sexually violent predator specification." "[I]t is well established that specific statutory provisions prevail over conflicting general statutes." *Trumbull Cty. Bd. of Health v. Snyder*, 74 Ohio St.3d 357, 359 (1996). The Ohio Supreme Court has also explained that, in determining whether Section 2945.05 applies to specifications,

> [o]ur understanding of [Section 2945.05] is that it encompasses the underlying charge or charges in the criminal action against the accused but does not necessarily encompass the specification or specifications attached thereto. The reason, of course, is that a specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached. Therefore, we have difficulty understanding precisely how it is that R.C. 2945.05 could be found to apply in circumstances where, as here, a defendant has received a jury trial on the merits of the underlying charges alleged in the indictment.

State v. Nagel, 84 Ohio St.3d 280, 286 (1999).

{¶13} We conclude that Mr. Burks has failed to establish that his election to have the trial court determine whether he is a sexually violent predator must be in writing. His fourth assignment of error is overruled.

III.

{¶14} Mr. Burks's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

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