[Cite as *State v. Hunt*, 2018-Ohio-1637.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105689

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT N. HUNT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610111

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: April 26, 2018

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PATRICIA ANN BLACKMON, J.:

{¶1} Robert N. Hunt ("Hunt") appeals his convictions for various sex related offenses and assigns the following errors for our review:

> I. Trial counsel rendered ineffective assistance of counsel.
>
> II. The state committed prosecutorial misconduct when it made improper statements in closing argument, played to the jury's sympathies, broke the golden rule, and commented on the defendant's post-arrest silence during the rebuttal portion of its summation.
>
> III. Even if the errors complained of in the foregoing assignments are not, by themselves, deemed sufficiently prejudicial to warrant reversal, their cumulative effect requires it.

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} On August 1, 2016, B.B. went to the leasing office of her apartment building to pay rent and take her ex-boyfriend's name off the lease. Hunt, who was the leasing manager for the complex, and a woman named Latoya, were in the office at the time, and the three had a conversation. Immediately after B.B. left the office, Hunt texted her asking if he could come over and talk to her. B.B. said, "Yes," walked back to her apartment, and smoked marijuana. B.B. then went into her bathroom, and when she walked back into her living room, Hunt was standing there. Hunt approached B.B. and began kissing her "all over." B.B. asked Hunt to stop. The two ended up on B.B.'s couch, with Hunt still kissing B.B. and B.B. still asking him to stop. Hunt removed B.B.'s pants and rubbed her vagina. B.B. continued to ask Hunt to stop, and although Hunt said he would stop, he did not. B.B. eventually "zoned out," and Hunt continued to kiss and rub her body including her thighs, chest, and breasts. Hunt attempted to penetrate her vagina with his penis, but she resisted.

{¶4} Hunt asked B.B. to go into the bedroom. B.B. went into her bedroom with Hunt and showed him where the condoms were. Hunt and B.B. had sex. Hunt left her apartment and B.B.'s sister arrived. When B.B. opened the door, she was wearing a sheet around her waist and testified that she was "lost" and "not there." B.B. went to the hospital where a rape kit was performed.

{¶5} On October 18, 2016, Hunt was charged with three counts of rape, one count of kidnapping with a sexual motivation specification, and one count of burglary. On March 3, 2017, a jury found Hunt not guilty of rape, but convicted him of gross sexual imposition ("GSI"), kidnapping, and burglary. On April 6, 2017, the court merged the GSI and kidnapping counts, and sentenced Hunt to three years in prison for the kidnapping and two years for the burglary. The court ran Hunt's sentences concurrently for a total of three years in prison.

I. Ineffective Assistance of Counsel

{¶6} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 3743 (1989).

{¶7} In the case at hand, Hunt argues that trial counsel failed to object to the nurse's testimony as well as the prosecutor's improper remarks during closing arguments. The parties agree that we review failure to object arguments under a plain error standard. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." A "[p]lain error is an obvious error or defect in the trial proceedings that affects a substantial right. Under this standard, reversal is warranted only when the outcome of the trial would have been different without the error." *State v. Wilcox*, 8th Dist. Cuyahoga No. 96079, 2011-Ohio-5388, ¶ 7.

{¶8} Hunt also argues that trial counsel was ineffective when it "barred" him from testifying on his own behalf.

A. Failure to Object to Victim's Statements to SANE Nurse

{¶9} Pursuant to Evid.R. 803(4), hearsay may be admissible at trial if it is a statement "made for purposes of medical diagnosis or treatment and describing medical history, or past or

present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶10} At trial, Angelita Olowu testified that she is a sexual assault nurse examiner ("SANE") at Hillcrest Hospital. Olowu explained that an important part of a SANE examination is getting the victim's "narrative history," which is "what exactly happened during their assault."

> It is because it helps us to know where to focus when we're looking for injury, where to pay a little bit more attention to, and also if there's — if we're going to have to be assessing for pain, so sometimes when patients are in the moment of everything that's happening, even when they are talking about it, sometimes they have pain in places where they don't realize until you actually palpate or touch it and then they realize that something is hurting them.

{¶11} At 7:50 p.m. on August 1, 2016, Olowu examined B.B. Olowu testified as to B.B.'s narrative regarding her encounter with Hunt, and it is this testimony that Hunt argues was improperly admitted at trial:

> She states that while she was home, the male leasing agent that she had just spoken to contacted her and asked her if he could come by to talk to her about what was going on with her further and she told him sure. She states that she was in the bathroom washing her face and he appeared in her apartment and that she had not opened the door for him, that "he just appeared there." She stated that he immediately became aggressive with her by touching all of her body and kissing her. She states that he kept telling her that he had been wanting her and making comments about her boyfriend. She states that she kept asking him to stop touching her and asking him wasn't he on his job. She stated that he proceeded to aggressively grab, kiss, and lick her all over, pulling at her clothing

and touching her skin. Patient states she proceeded to tell him to stop and to just leave, and the assailant proceeded to tell her that she knows she wants him. Patient admitted to me that she had been smoking (clarification — marijuana) and that she said to the assailant, “You gone [sic] do this while I’m high, are you really gonna do this to me? Aren’t you on your job? * * * [Y]ou gone [sic] do this on your job?” Patient stated that the assailant continuously attempted to penetrate the patient with no condom with his penis to her vagina. Patient informed me of how scared she was and of how she was trying to just get the assailant to just leave. She informed him that her sister would be coming in soon and could he please just leave, but he continued touching and licking on her. Patient stated that the assailant continued to “aggressively” come at her and that he ripped off her pants and her panties. She stated that he grabbed her with one hand from the front by her neck pushing up on her chin and was pulling her head back by her hair. Patient proceeded to tell me how scared she was and how much she could not believe what was happening to her. She stated, “I didn’t even see this coming, everything happened so fast. He was all over me. He was touching and licking all over me!” Patient repeatedly said, “He asked if he could talk about my situation, I never expected he would do this to me. I never wanted any of this, I never even led him to believe that I wanted any of this.” She informed me that she was * * * fearful for her younger sister and did not want anything to happen to her. She states, “I just wanted him to do what he was gone [sic] do and get out before my sister got there. I just wanted him to get out before my sister walked in.” Patient stated that the assailant did put a condom on

> at some point but that she did not think that he ejaculated because she stated to her: "It usually takes me a long time to come, that's why I do threesomes." Patient states that the condom was initially on the floor, but when her ex-boyfriend searched for it, they could not find it anywhere.

{¶12} Before we analyze whether trial counsel was ineffective for failing to object to Olowu's testimony, we review whether or not Hunt was prejudiced by this testimony. In other words, would Hunt have been convicted without Olowu reading B.B.'s narrative into the record? The analysis is particularly important in this case, because the jury acquitted Hunt of two counts of rape and convicted him of one count each of GSI, kidnapping, and burglary.

{¶13} Gross sexual imposition is defined in R.C. 2907.05(A)(1) as follows: "No person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force." Kidnapping is defined in R.C. 2905.01(A)(4) as follows: "No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity * * * with the victim against the victim's will * * *." Burglary is defined in R.C. 2911.12(A)(1) as follows: "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * when another person * * * is present, with purpose to commit in the structure * * * any criminal offense * * *."

{¶14} B.B. testified as follows about the events of August 1, 2016: She moved into the apartment with her boyfriend in November 2015. Hunt was the leasing agent at the apartment complex. When asked to describe her relationship with Hunt, B.B. testified, "It was nonexistent. He was my leasing manager." On August 1, 2016, B.B. dropped off her rent at the leasing building. Hunt and a woman named Latoya were in the office. B.B. asked Hunt and

Latoya if she could get her boyfriend's name off the lease. B.B. learned that she would have to wait until the lease expired. B.B. then talked with Latoya about B.B. and her boyfriend breaking up. Hunt was listening to the conversation, but did not say much. B.B. left the leasing office after about 30 minutes.

{¶15} Hunt sent B.B. a text message "not even two minutes" later stating: "Do you want me to come over now and talk to you I didn't want to ask you in the office." B.B. responded, "Sure. I'm walking back now." Six minutes later, Hunt texted B.B., "Okay. I'm coming ba." She responded, "Okay." B.B. testified that she did not know what "ba" meant. Ten minutes later, B.B. received another text from Hunt stating, "Are you there?" She responded, "Yes, Rob." B.B. smoked marijuana and went to the bathroom to wash her face. Hunt sent two more messages stating, "I'm at the door" and "Open the door," but B.B. did not see them. When B.B. went back into her living room, Hunt was standing there. B.B. testified that, although she knew he was coming over, she did not let Hunt into her apartment.

{¶16} Hunt began asking B.B. about her ex-boyfriend. Hunt then came up behind B.B. and started kissing her neck. B.B. testified: "I asked him to stop. I was confused. I was still smoking. I said: I have drugs in my hand. He said: I don't care about that. * * * I was so confused. I ended up on the couch and that's when, you know, he's still kissing all over me and everything and I had asked him to stop." B.B. testified that Hunt "pushed" her onto the couch and knelt on the floor in front of her. "That's when he was still touching on me and he started to pull my pants down." B.B. testified that Hunt pulled her pants and underpants down to "knee length." Hunt said, "If you want me to stop, I'll stop." B.B. testified that "I kept telling him to stop. He wasn't stopping. And that's when he used his fingers to rub on my vaginal area. And I was still telling him to stop." When asked if she felt free to leave, B.B. replied, "No."

{¶17} B.B.'s testimony continues; however, upon review, we find that Hunt cannot demonstrate that Olowu's testimony was prejudicial to him when the jury heard B.B. testify directly that Hunt trespassed into her apartment, had forceful sexual contact with her, and restrained her liberty against her will. B.B.'s testimony aligns with Hunt's three convictions, and it appears that the jury did not believe that Hunt raped B.B. Assuming, without deciding, that counsel's performance of not objecting to the testimony in question was deficient, we cannot say that this prejudiced Hunt to the point of depriving him of a fair trial. "Acts or omissions by trial counsel which cannot be shown to have been prejudicial may not be characterized as ineffective assistance." *State v. Davie*, 80 Ohio St.3d 311, 332, 686 N.E.2d 245 (1997).

B. Failure to Object to Prosecutor's Closing Remarks

{¶18} As will be discussed under Hunt's second assigned error, the prosecutor did not make improper statements during closing arguments that were prejudicial to Hunt. Therefore, we cannot say that his counsel's failure to object was ineffective.

C. Failure to "Elicit" Hunt's Testimony that the Sex Was Consensual

{¶19} Hunt's final argument that his counsel was ineffective concerns counsel allegedly "barring" or "failing to elicit" Hunt's testimony at trial that his DNA was found on B.B. because they had consensual sex.

{¶20} "Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused." *State v. Bey*, 85 Ohio St.3d 487, 499, 709 N.E.2d 484 (1999). However, this court has repeatedly held that the "advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is 'a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance,'" unless it can be shown that the decision was the result of coercion. (Citations omitted.) *State v.*

Winchester, 8th Dist. Cuyahoga No. 79739, 2002-Ohio-2130, ¶ 12. *See also State v. Bell*, 8th Dist. Cuyahoga No. 105000, 2017-Ohio-7168; *State v. Hunt*, 8th Dist. Cuyahoga No. 84528, 2005-Ohio-1871.

{¶21} In the case at hand, Hunt does not set forth what he would have testified to at trial, nor does he allege that his attorney coerced him into not testifying. Furthermore, there is no evidence, in the form of a sworn affidavit or otherwise, that Hunt and B.B. had consensual sex, other than Hunt's unsupported allegations in his appellate brief that "trial counsel introduced no evidence that supported the trial theory and defense strategy that the presence of Defendant-Appellant's DNA was the result of consensual sex."

{¶22} Hunt has failed to show that he was prejudiced by defense counsel's performance, and he has failed to show that his counsel's performance was deficient. Accordingly, his first assigned error is overruled.

II. Prosecutorial Misconduct

{¶23} "The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. The touchstone of analysis is the fairness of the trial, not the culpability of the prosecutor." (Citations omitted.) *State v. Eisermann*, 8th Dist. Cuyahoga No. 100967, 2015-Ohio-591, ¶ 43. Prosecutorial misconduct constitutes reversible error only in rare cases. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993).

{¶24} Under this assigned error, Hunt first argues that the prosecutor improperly referred to Hunt "kissing [B.B.'s] vagina," despite B.B.'s testimony that she did remember whether Hunt performed oral sex on her. Second, Hunt argues that the state impermissibly asked the jury to

"put themselves in the victim's shoes." Third, Hunt argues that the state impermissibly commented on Hunt's post-arrest silence.

{¶25} Upon review, we find that Hunt's arguments lack merit. First, Hunt was acquitted of two counts of rape and convicted of one count of GSI. There is overwhelming evidence in the direct testimony of B.B. to convict Hunt of GSI — B.B. testified multiple times that Hunt kissed and rubbed her "all over" and touched her vaginal area without consent. The jury did not find Hunt guilty of rape, therefore, any comments in closing argument referring to oral sex were not prejudicial.

{¶26} Furthermore, the state did not ask the jury to "put themselves in the victim's shoes." Rather, the prosecutor stated, "Imagine the embarrassment and shame" that B.B. felt after the incident. "A 'golden rule' argument exists where counsel appeals to the jury to abandon their position of impartiality by placing themselves in the place of one of the parties. Courts have further determined that while the golden rule argument is no longer per se prejudicial so as to warrant a new trial, this type of argument remains objectionable." (Citations omitted.) *Hunt v. Crossroads Psychiatric & Psychological Ctr.*, 8th Dist. Cuyahoga No. 79120, 2001 Ohio App. LEXIS 5388 (Dec. 6, 2001). Once again, we cannot say this reference in closing argument was prejudicial to Hunt because of the evidence against him regarding the offenses of which he was convicted.

{¶27} In Hunt's final argument under this assigned error, he alleges that, during closing arguments, the state improperly commented on his post-arrest silence. During closing arguments, the prosecutor stated that Hunt's wife, "as pregnant as can be [and] remarkably similar" in appearance and age to B.B., testified as a character witness on Hunt's behalf. The prosecutor continued as follows:

> She took the stand, said how great he was. We asked her, anybody ever tell you about that DNA? And you saw her reaction. She learned about it on the stand. Does that make any sense, folks? Does that make — he never told his wife about the DNA. Why? Because he's got to hide from it. He never told any of his character witnesses about the DNA, because he's got to hide from it. He has zero explanation for it. I'm sure his wife wouldn't have reacted like that if we weren't in a courtroom if she found out that fact, that he's hiding from it. He's trying to do it to you.

{¶28} Hunt takes the unusual position that his failure to tell his wife that his DNA was found in B.B.'s rape kit is "post-arrest silence" protected by the Fifth Amendment. We disagree. Typically, post-arrest silence encompassed by the Fifth Amendment "refers to a defendant's asserted silence during custodial interrogation," not his failure to tell his wife of his infidelity. *See State v. Perryman*, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976), paragraph one of syllabus. This court recently explained a defendant's right to remain silent during a custodial interrogation in *State v. Kimmie*, 8th Dist. Cuyahoga No. 99236, 2013-Ohio-4034, ¶ 63:

> In *Doyle* [*v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)], the Supreme Court of the United States held that using a defendant's silence at the time of arrest and after the administration of *Miranda* rights, for purposes of impeachment at trial, violates the Due Process Clause of the Fourteenth Amendment. In so holding, the Supreme Court determined that once a criminal defendant receives the *Miranda* warnings, the state may not impeach the defendant by causing the jury to draw an impermissible inference of guilt from the defendant's post-arrest silence. *Id.* "*Doyle* rests on 'the fundamental unfairness

of implicitly assuring a suspect that his silence will not be used against him and then using that silence to impeach an explanation subsequently offered at trial.'" *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), quoting *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

{¶29} Upon review, we find that the prosecutor's comments do not touch upon "protected silence" as envisioned by the Fifth Amendment. Accordingly, Hunt's second assigned error is overruled.

III. Cumulative Error

{¶30} "[A] conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987). "By its terms, the doctrine of 'cumulative error' will not provide a basis for reversal in the absence of multiple errors." *State v. Hale*, 8th Dist. Cuyahoga No. 103654 , 2016-Ohio-5837, ¶ 49.

{¶31} We determined that no error exists under Hunt's previous arguments, therefore, his claim of cumulative error necessarily fails. Hunt's third and final assigned error is overruled.

{¶32} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., CONCURS WITH
MAJORITY OPINION AND CONCURS WITH
SEPARATE CONCURRING OPINION;
MELODY J. STEWART, J., CONCURS WITH
SEPARATE CONCURRING OPINION ATTACHED

MELODY J. STEWART, J., CONCURRING WITH SEPARATE OPINION:

{¶33} I concur with the decision reached by the majority, but write separately with regard to the ineffective counsel claim as it relates to the testimony of the sexual assault nurse examiner.

{¶34} Hunt complains that defense counsel allowed the nurse to read her entire report to the jury without objection, despite that report containing hearsay beyond that allowed by the Evid.R. 803(4) hearsay medical exception. I believe that Hunt is correct that counsel should have objected to much of the nurse's testimony. However, I concur that Hunt was not prejudiced based on the rest of the evidence in the case.

{¶35} The state concedes that much of what the nurse testified to was beyond what is permitted by Evid.R. 803(4). For such statements to be admissible under this exception, the declarant's motive must be consistent with that of a patient seeking treatment and it must be reasonable for the medical provider to rely on the information in diagnosing and treating the declarant. *State v. Ridley*, 6th Dist. Lucas No. L-10-1314, 2013-Ohio-1268, ¶ 49, citing *State v. Clary*, 73 Ohio App.3d 42, 52, 596 N.E.2d 554 (10th Dist.1991). The nurse testified to facts

that predated the alleged rape; for example, how the victim came to know Hunt and the circumstances that caused him to be in her apartment. Obviously, these facts had nothing to do with the victim's treatment for rape. In addition, the nurse's treatment note contained statements by the victim that she described as a "narrative" of the rape that detailed incriminating statements made by the victim before the alleged rape occurred: i.e., the victim "did not think that [Hunt] ejaculated because he stated to her, 'It usually takes me a long time to come, that's why I do threesomes.'" Again, these statements had nothing to do with the nurse's examination.

{¶36} Courts must be vigilant with regard to testimony by sexual assault nurse examiners. There are times when such testimony serves to bolster the victim's allegations in addition to being offered as a medical exception to the prohibition against hearsay. Much of the nurse's testimony in this case had no real medical relevance given that Hunt defended the charges based on consent. Defense counsel should have objected.

{¶37} Nevertheless, as the majority decision notes, it is difficult to conclude that counsel's failure to object was prejudicial. The jury acquitted Hunt of two of the three rape counts. On the third rape count, the jury found Hunt guilty of the lesser included offense of gross sexual imposition. Importantly, Hunt makes no argument that this count was unsupported by the evidence, so the victim's testimony about what happened was paramount given that only she could describe what happened.