IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO. 2007-0833
Appellee,	:	
v.	:	Fifth District Court of Appeals Case No. 06-CA-52
KENYAN SELMON,	:	
Appellant.	:	

STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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FILED

MAY 17 2007

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Explanation as to why this case is not a case of public or great general interest and does not involve a substantial constitutional question:

The State of Ohio submits that this case is not a case of great public or general interest. This case presents absolutely no unique facts, rulings, or issues. The Appellant, Kenyan Selmon, was convicted of one count of assault, two counts of retaliation, two counts of intimidation of a crime victim, and one count of aiding or abetting perjury. The charges arose as a result of injuries suffered by his girlfriend, Ouida Birdow, on November 28, 2005, and threats made to the victim in jail phone calls after the assault.

This case began as an incident of domestic violence. The Appellant struck Ms. Birdow in the face, causing two black eyes. He also knocked her to the ground, breaking her collarbone. When police arrived, Officer David Minard attempted to speak with Ms. Birdow. She was reluctant to tell him what happened. However, based upon his experience as a police officer, Officer Minard filled out and signed a domestic violence packet, charging the Appellant was domestic violence.

Because of the severity of her injuries, Ms. Birdow was transported to Med Central Hospital for x-rays. While she waited for the results of the x-ray, she asked to speak with Officer Minard. At that time, she stated that the Appellant caused her injuries. She also told paramedics and the emergency room physician that she had been beaten. Once Officer Minard learned that Ms. Birdow had a broken collarbone, the Appellant was charged with felonious assault.

On December 4, 2005, four days before the Appellant's preliminary hearing, he called Ms. Birdow from jail. He told her to say that she got into a fight with another woman by the name of "Jennifer" that the Appellant was having an affair with. He specifically instructed her to say that he had nothing to do with causing her injuries.

At the preliminary hearing on December 8, 2005, Ms. Birdow testified under oath, giving essentially the same story the Appellant told her to give. She testified that she got into a fight with another woman, and that she slipped and hurt her shoulder because she was drunk. However, she did testify that she had been in an argument with the Appellant that night. Officer Minard also testified at the preliminary hearing regarding the statement the victim gave at the hospital.

After the preliminary hearing, the Appellant repeatedly called Ms. Birdow on the jail phone, enraged that she gave a statement to the police at the hospital. He was also angry about her testimony that they argued the night she was injured. The Appellant called Ms. Birdow a rat, and told her that she "burnt him" by making a statement to the police. During those phone calls, the Appellant admitted to beating the victim, telling her that her mouth got her those black eyes. He also pressured Ms. Birdow to drop the charges against him. He encouraged her to come to court and lie, or to not show up for court at all so that he could beat the case. The Appellant tried to make her feel guilty because he was in jail and was facing ten years in prison. When that didn't work, his threats became more violent.

This case also does not raise any substantial constitutional questions worthy of review by this Court. The Appellant's trial took place before a fair and impartial jury, and he was convicted on the basis of the weight of the evidence. Furthermore, the Appellant has had a full and fair appellate review of his conviction. With the assistance of new counsel, he filed a direct appeal in the Fifth District Court of Appeals. On March 28, 2007 the Court of Appeals issued an opinion affirming the judgment of the trial court.

ARGUMENT

Proposition of Law No. I: The prosecution presented sufficient evidence to establish every essential element of the crime of retaliation, and his conviction was not against the manifest weight of the evidence.

Proposition of Law No. II: The trial court did not err in denying the Appellant's Crim.R. 29 motion for acquittal.

In State v. Thompkins, this Court explained the distinction between the legal concepts of sufficiency and weight of the evidence. (1997), 78 Ohio St.3d 380, 678 N.E. 2d 541. Sufficiency of the evidence refers to the legal standard reviewing courts apply to determine whether the evidence presented is legally sufficient to support the jury's verdict as a matter of law. Thompkins, 78 Ohio St.3d at 386. Weight of the evidence does not involve a question of law. When reviewing questions of weight of the evidence, an appellate court is concerned with the amount of credible evidence offered at trial in support of one side of an issue or the other. Id. at 387.

In reviewing a claim a verdict is against the weight of the evidence, a reviewing court must examine the entire record, weigh the evidence and all reasonable inferences which could be drawn from it, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial. Id. The power to grant a new trial should be exercised only in an exceptional case where the evidence weighs heavily against the conviction.

In the case *sub judice*, the evidence presented at trial was clearly sufficient to convict the Appellant of retaliation against Ouida Birdow, and his conviction was not against the manifest weight of the evidence. The Appellant claims that Ms. Birdow did

not constitute a "victim" under R.C. 2921.05(B), because she did not sign the domestic violence packet bringing charges against him. However, if the Court adopts the Appellant's interpretation of the statutory language, it would exclude prosecution for retaliation in nearly all cases of domestic violence where the victim initially refuses to press charges, but later provides a statement to police and testifies at a preliminary hearing or at trial after charges are brought.

Ms. Birdow is still the victim of an assault committed by the Appellant, and his threats against her constitute retaliation. Although she was not fully cooperative with the prosecution, she did provide a statement to police at the hospital, and she testified against the Appellant at his preliminary hearing. (T. 409-410). At trial, the State played portions of jail phone conversations in which the Appellant threatened Ms. Birdow as a result of her preliminary hearing testimony. Those calls began immediately after his preliminary hearing. In the calls, the Appellant blamed her for his incarceration, and made threats of physical harm against her.

In a call from December 9, 2005, the Appellant told Ms. Birdow "You really didn't understand what I was telling you when I said tell them I didn't d[o] nothing, did you? * * * I said tell them I didn't do nothing. When I say nothing, I mean nothing. I lied. Everybody lies sometimes. Now I'm about to cop out and go to the penitentiary, Ouida * * *." (T. 484). The next day, the Appellant told Ms. Birdow, "It's on. So you better duck and hide. They going to indict me. I'm going to get a bond eventually. And, bitch, when I see you – I swear to god I'm going to see you, bitch, and this time, I don't give a fuck because you ain't going to – you can't make it to court this time because I'm going to

make sure you won't. I will make sure you won't. Make sure, I promise you." (T. 530-531).

In a phone conversation from December 21, 2005, the Appellant told the victim "[i]f you wouldn't have said that shit to the police I wouldn't be in this mother-fucking shit anyway." (T. 590). He also told her not to show up at court. (T. 590). During that same phone call, when Ms. Birdow said "you put your hands on me," the Appellant responded that he was "going to do it again." (T593). He told her "You can put money on this one, bitch, you won't breathe. I'll make sure this time your mother-fucking ass won't have nothing to say. I bet you that one." (T. 593). The Appellant stated repeatedly that she was "going to pay for everything" she was doing. (T. 598).

Based upon the Appellant's statements in the jail phone calls, it is clear that he was threatening to retaliate against Ouida Birdow as a result of her prosecuting criminal charges against him. While Ms. Birdow may not have signed the charging document or been fully cooperative with the prosecution, she did provide a statement to Officer Minard at Med Central Hospital, indicating that the Appellant had beaten her up and caused the injury to her shoulder. (T. 405). Furthermore, despite the Appellant's attempts to coerce her, Ms. Birdow did testify that she fought with the Appellant on the night of November 28, 2005. (T. 418-419, 427-431).

The State submits that her actions in providing a statement and testifying at the preliminary hearing are acts of "prosecuting criminal charges" for purposes of retaliation under R.C. 2921.05(B). Ms. Birdow meets the legal definition of a "prosecuting witness" because she was a private person upon whose information the criminal action against the Appellant was founded. Moreover, The Appellant's threats, starting the day after the

preliminary hearing, are a direct result of Ms. Birdow's testimony at the preliminary hearing. Thus, his conviction for retaliation was based on sufficient evidence and was not against the manifest weight of the evidence. As sufficient evidence was presented to sustain a conviction, the trial court did not err in denying the Appellant's Crim.R. 29 motion for acquittal.

While the Appellant asserts that he cannot be convicted of retaliation because he had not yet been convicted of the underlying assault charge, there is nothing in the language of the statute which specifically requires a conviction. R.C. 2921.05(B) merely requires that the victim filed or prosecuted criminal charges. The legislative intent of the statute was clearly to protect crime victims from retaliation at all stages of a criminal proceeding. Other Ohio Appellate courts have construed the statute to include retaliation for threats occurring while underlying charges are still pending. See, State v. Goodwin, 2004 Ohio 2482, 2004 Ohio App. LEXIS 2203; State v. Alltop, 2006 Ohio 2719, 2006 Ohio App. LEXIS 2558.

Proposition of Law No. III: The trial court did not prejudice the Appellant's right to a fair trial by overruling his motion for a mistrial.

The decision to grant a mistrial is within the sound discretion of the trial judge. State v. Sage (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. A trial judge may exercise his discretion to declare a mistrial where (1) "manifest necessity" or a "high degree of necessity" dictate; (2) the trial judge has no reasonable alternative to declaring a mistrial; and (3) the public interest in fair trials designed to end in just judgments is best served by ordering a mistrial. State v. Widner (1981), 68 Ohio St.2d 188, 190, 429 N.E.2d 1065. In reviewing a trial court's decision to grant or deny a mistrial, this Court has adopted an approach which grants deference to the trial court's discretion in this area, in recognition

of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial. State v. Glover (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900.

Appellant contends that he was denied his right to a fair trial when the trial court overruled his motion for a mistrial following the admission of statements regarding his criminal record. In the first challenged statement, the Appellant stated "* * * I'm to the point now I'm at the bottom of the mother-fucking barrel now in the penitentiary again."(T. 483). Later, when the Appellant was yelling at the victim about her preliminary hearing testimony, he said "[n]ow I'm about to cop out and go to the penitentiary, Ouida, and know goddamn well I've got three, four mother-fucking numbers * * *" (T. 484).

At that point, the tape was cut off and the attorneys approached the bench. When Attorney Brown stated that he thought the tape was going to be redacted to exclude any references to the Appellant's prior convictions, Assistant Prosecutor Tunnell responded "I didn't know that was there. I am sure most jurors didn't pick up on it." (T. 484). When the trial court stated "[y]ou need to keep that out," the prosecutor stated that he had his staff working on it all week and that he had noted were there were redactions that needed to be done." (T. 485). The trial court also noted that the prosecution had been doing some redactions as they went along at trial by turning off the tape. (T. 485). The court stated "It's hard to [keep] all those things out. He rattles it off in the middle of stuff and puts the guilt trip on her, it's part of the guilt trip he's putting on her when he talks about sending him back to prison. I want him to limit it, the amount of it, but I can't strike it out all together because of the pressure he's putting on her." (T. 485). The bench conference

concluded after a curative instruction was declined and defense counsel's objection was noted on the record. (T. 484-485).

The State submits that the trial court properly handled the Appellant's objection as to this issue. As noted by the court, the prosecution had made attempts outside of court, and was making ongoing attempts during the course of trial, to find and redact all references to the Appellant's prior criminal convictions. The references in question were made in the middle of the Appellant's tirade against the victim for her preliminary hearing testimony. The Appellant was agitated and was speaking very quickly at the time. As a result, those references could very easily have been missed by the person doing the redactions, and by the jury.

Furthermore, the trial court also found that those references were relatively minor, and that the jurors may not have understood the significance of the Appellant's statement that he has "three, four numbers." Finally, the court correctly noted that the Appellant's statements were part of the pressure that he placed on Ms. Birdow, and were relevant to the charges of intimidation and retaliation. For that reason, the trial court chose to modify its prior ruling, finding that not all of the statements were capable of being redacted, but that they must be limited.

The Appellant also challenges the admission of his statements in call number eleven, and the trial court's subsequent denial of his motion for a mistrial. During that phone conversation, while the Appellant was yelling at the victim for failing to visit him in jail, he stated:

> "I'm saying, Ouida, you didn't even have to show up to that courtroom, man. I'm telling you, dawg, if you had a warrant they would have picked you up on that in that courtroom. I'm telling you from what I know. Like

> they did me. I know Mansfield (inaudible). I have enough warrants. I've been to jail enough, don't you think, huh? Hello?"

(T. 519).

As a result of that statement and the statements in call number seven, the Appellant's counsel requested a mistrial. Attorney Brown argued that a mistrial should be granted because the Appellant was prejudiced by the jury hearing about his criminal record. (T. 565).

In overruling the motion for a mistrial, the trial court stated that the Appellant knew the phone calls were recorded and voluntarily put references to his criminal record before the jury by couching them in the form of threats to the victim. (T. 565-566). The court, also noted that the prosecution made a good faith effort to redact references to the Appellant's criminal record from hundreds of hours of phone conversations. (T. 566). The three missed references, even if taken cumulatively, constitute a minuscule portion of the phone conversations that were played during the course of the Appellant's trial. In light of the overwhelming evidence of the Appellant's guilt, the trial court did not abuse its discretion in overruling the motion for a mistrial.

Proposition of Law No. IV: Appellate counsel did not render ineffective assistance of counsel.

First, the State would argue that the Appellant's claim of ineffective assistance of appellate counsel is premature. As of the date this appeal was filed, he has not filed an App.R. 26(B) application for reopening in the Fifth District Court of Appeals. As the Appellant's claim has not yet been examined and denied by the Fifth District Court of Appeals, there is no basis for his argument that failure to address this issue would result in the denial of appellate relief. In Fautenberry v. Mitchell, the United States Court of

Appeals for the Southern District of Ohio held that in Ohio, claims of ineffective assistance of appellate counsel must be presented to the appellate court in a motion for delayed reconsideration pursuant to State v. Murnahan and Ohio R. App. P. 26(B). 2001 U.S. Dist. LEXIS 25700, (Dec. 24, 2001), S. D. Ohio Case No. C-1-00-332, unreported.

Furthermore, the State contends that Attorney O'Donell Kitzler, did not render ineffective assistance of appellate counsel. The standard of review for ineffective assistance of counsel is well established. Pursuant to Strickland v. Washington, in order to prevail on such a claim, the Appellant must establish that counsel's performance was deficient and that prejudice resulted, *i.e.*, errors on the part of counsel are of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the proceeding would have been different. (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064.

Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. State v. Bradley (1989), 42 Ohio St. 3d 136, 142, 538 N.E.2d 373. The Strickland test applies to all claims of ineffective assistance of counsel, against either trial counsel or appellate counsel. State v. Godfrey, 1999 Ohio App. LEXIS 4253, (Sept. 2, 1999), Licking App. No. 97CA0155, unreported. The standard for reopening an appeal, set forth in State v. Murnahan, is that an appellant is entitled to reopen an appeal where there is a "*colorable* claim of ineffective assistance of counsel." (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204.

No "colorable claim" of ineffective assistance of counsel exists in this case. Id. Attorney O'Donell Kitzler is an experienced and respected attorney who has represented

many defendants accused of serious crimes both at the trial and appellate level. Her handling of Appellant's direct appeal was well within the duty of a licensed attorney to practice in an ethical and competent manner. State v. Smith (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; Vaughn v. Maxwell (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

The Appellant argues that Attorney O'Donell Kitzler was ineffective for failing to raise claims challenging Officer Minard's "expert" opinion testimony; authentication of the taped phone calls; violation of his right to a speedy trial; and a Foster challenge to his maximum consecutive sentences. However, the State submits that she was merely exercising her discretion to determine the strongest issues for appeal. Pursuant to Strickland, the Court must accord deference to counsel's strategic decisions and cannot examine the strategic choices of counsel through hindsight. 466 U.S. at 689. In addition, it is well settled that Appellate counsel cannot be considered ineffective for failing to raise every conceivable assignment of error on appeal. Jones v. Barnes (1983), 463 U.S. 745, 103 S. Ct. 3308; State v. Gumm (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253; State v. Campbell (1994), 69 Ohio St.3d 38, 630 N.E.2d 339.

Appellant cannot establish that counsel's failure to challenge Officer Minard's testimony would have changed the outcome of his appeal. This testimony was properly admissible under Evid.R.701 as the testimony of a lay witness. Officer Minard testified that when he saw Ouida Birdow, her hair was in disarray; she was crying; she had a lot of redness and swelling in her facial area; and she was holding her shoulder. (T. 401). Ms. Birdow only told him that she fell down, and that she did not need to go to the hospital. (T. 401-402). Officer Minard testified that in his ten years as a police officer, he had responded to numerous domestic violence calls. (T. 403). Based on his training,

experience, and his observations at the scene, he determined that Ms. Birdow was a domestic violence victim. (T. 403-404). As this testimony was based on Officer Minard's observations and training, it was properly admissible as testimony of a lay witness. Thus, Attorney O'Donell Kitzler was not ineffective for failing to challenge it on appeal.

Likewise, a claim regarding the authentication of the taped phone calls would not have changed the outcome of the Appellant's appeal. Sherry Heyde, a systems analyst for the Richland County Sheriff's Office, testified that all phone calls from the jail are recorded, and that an inmate must enter his jail identification number to make a call. (T. 261-265). She identified State's Exhibits 11, 13, and 15 as CDs of phone calls made using the Appellant's identification number. (T. 267-270). Furthermore, Officer Minard identified the Appellant's voice on the calls. (T. 414). This is sufficient to authenticate the taped phone calls that were played at trial. Moreover, the issue was not preserved for appeal as trial counsel did not raise an objection to the authentication of the tapes.

Similarly, Attorney O'Donnell Kitzler properly exercised her discretion in determining that a speedy trial claim was not warranted. This issue was raised and overruled by the trial court. The Appellant's trial was set for February 23, 200, well within the statutory speedy trial time. Thereafter, Appellant's counsel filed a motion to continue, a motion to suppress evidence, and a motion in limine, all of which tolled his speedy trial time. His trial was reset for March 2, 2006.

On February 28, 2006, his attorney, Randall Fry, filed a motion to withdraw and accompanying motion for a continuance, once again tolling speedy trial time. Attorney Josh Brown was appointed to represent the Appellant after Attorney Fry's motion to withdraw was granted. He filed a motion for bond reduction on March 9, 2006. Attorney

Brown and the Appellant, pro se, also filed motions to dismiss for speedy trial violations. These motions tolled the Appellant's speedy trial time while the court reviewed and ruled on their merits.

The State would note that each of the delays in his trial was occasioned by the Appellant or his counsel. None of the delays were attributable to the State of Ohio. Furthermore, all trial dates were continued by judgment entry finding that good cause necessitated the continuance.

Finally, Attorney O'Donnell Kitzler did not render ineffective assistance of appellate counsel by failing to raise a claim that the Appellant's maximum, consecutive sentences violated State v. Foster (2006), 109 Ohio St.3d 1, 845 N.E.2d 470. The Appellant was sentenced on April 26, 2006, well after the Foster decision, and the sentences imposed were in full compliance with that ruling. Pursuant to Foster, the trial court was authorized to impose maximum consecutive sentences within the felony sentencing range without stating its reasoning on the record.

The Appellant was sentenced to three years on each count of intimidation of a crime victim, a felony of the third degree. For each count of retaliation, a felony of the third degree, the Appellant was sentenced to four years in prison. Finally, he was sentenced to a maximum sentence of five years in prison on aiding and abetting perjury, a felony of the third degree. These sentences are within the one to five year range for third degree felonies set forth in R.C. 2929.14(A)(3). Pursuant to Foster, the trial court exercised its discretion in determining that all five sentences should be served consecutively.

As there is no reasonable probability that these claims would have succeeded if presented on appeal, the Appellant cannot prevail on an ineffective assistance of appellate counsel claim. He cannot show that, but for Attorney O'Donell Kitzler's failure to raise these arguments, the outcome of his direct appeal would have been different.

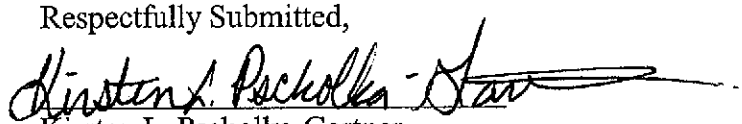
Proposition of Law No. V: There were no other plain errors which prejudiced the outcome of the Appellant's trial.

In his final proposition of law, the Appellant claims that there were other unspecified plain errors which prejudiced the outcome of his trial. The State submits that the Court cannot consider this claim because the Appellant failed to specify the nature of those errors. He also failed to point to areas in the record where those errors supposedly occurred, and failed to fully brief those issues. See, App.R. 16(A)(7), and State v. Weese, 2005 Ohio 4093, 2005 Ohio App. LEXIS 3731.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that the Court deny Appellant jurisdiction to pursue his appeal.

Respectfully Submitted,



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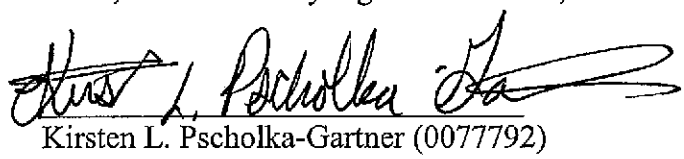
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing State of Ohio's Memorandum in Opposition to Jurisdiction was sent to Kenyan Selmon, Inmate # A503-747, Richland Correctional Institution, P.O. Box 8107 Mansfield, Ohio 44901 by regular U.S. Mail, this 18th day of May, 2007.



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