

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

MARTIN T. NAGEL,

Appellant.

Supreme Court No. 2010-1449

Williams County Court of Appeals
Case No. 09-WM-018

On Appeal from the Williams County Court of
Appeals, Sixth Appellate District

**MEMORANDUM OF APPELLEE, STATE OF OHIO,
IN OPPOSITION TO JURISDICTION**

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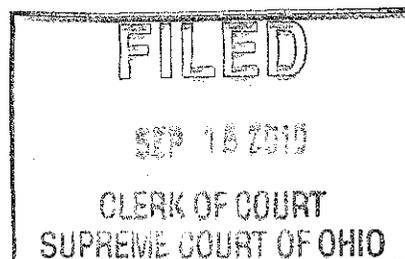
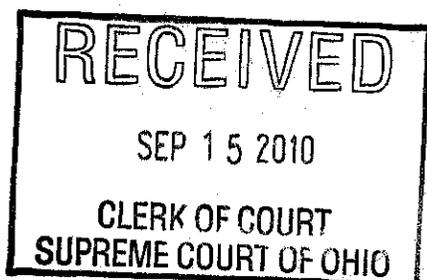


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EXPLANATION OF WHY THIS COURT SHOULD DENY LEAVE TO APPEAL

Now comes Appellee, State of Ohio, and asks this Court to deny Appellant's request for jurisdiction, as this case does not present a substantial constitutional question, is not of public or great general interest, and leave to appeal should not be granted.

Appellant Martin Todd Nagel ("Appellant") appeals his criminal convictions of five counts of Sexual Battery, in violation of R.C. 2907.03(A)(5), felonies of the third degree, and one count of Rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. The jury also made a specific finding regarding the Rape conviction that the State did prove beyond a reasonable doubt that Appellant purposely compelled the victim to submit by force or threat of force. Appellant was sentenced to a term of life imprisonment on the Rape conviction, and a prison term of five years on each of the Sexual Battery convictions, all sentences to run consecutively. Appellant appealed his convictions to the Sixth District Court of Appeals of Ohio, which affirmed the convictions.

Appellant's leave to appeal before this Court should be denied because Appellant advanced the same general arguments he now makes to the Sixth District, and the Sixth District rejected those arguments in accordance with settled Ohio law.

Appellant's first argument, regarding whether Appellant's trial counsel was ineffective, does not present a substantial constitutional question, is not of public or great general interest, and provides no reason why leave to appeal should be granted. The Sixth District found that Appellant's trial counsel was not ineffective to the prejudice of Appellant. Instead of providing this Court with some reason why the Sixth District made an incorrect decision, Appellant's argument appears to be that his trial counsel must have been ineffective because he was found to be guilty on the charges that he was convicted of. It is hard to determine what Appellant wants,

but he has not advanced any argument that has any merit.

Appellant's second argument, regarding the admission of Appellant's failed polygraph examination in light of newly enacted R.C. 2933.81, also does not present a substantial constitutional question, is not of public or great general interest, and provides no reason why leave to appeal should be granted. Appellant misreads R.C. 2933.81—that statute does not require the State to record interviews or polygraph examinations, but rather declares confessions made during videotaped interviews to presumably be voluntary. R.C. 2933.81 does not require the State to videotape anything. Further, the Sixth District determined that the admission of the polygraph evidence and the trial court's rulings regarding issues surrounding that evidence were not made in error, in accordance with this Court's settled precedents. Therefore, there is no reason why leave to appeal should be allowed on this question.

Finally, Appellant's third argument, regarding the trial court's alleged bias in favor of the State and against Appellant, also does not present a substantial constitutional question, is not of public or great general interest, and provides no reason why leave to appeal should be granted. This question was thoroughly considered by the Sixth District. That court reviewed the entire record and found no such improper bias on the part of the trial court. Appellant simply wants another opinion. He has presented this Court with no reason to allow his appeal.

ARGUMENT

RESPONSE TO APPELLANT'S PROPOSITION OF LAW I

Appellant first argues that his trial counsel, who Appellant retained, provided ineffective assistance of counsel. This argument was advanced before the Sixth District, which examined each of counsel's alleged deficiencies and concluded that even assuming any errors on the part of counsel, such errors did not prejudice Appellant. The Sixth District concluded, "Counsel clearly represented appellant as vigorously as possible. In fact, appellant was acquitted of four of the ten counts in the indictment."¹

It is unclear what remedy Appellant is looking for, other than a reversal of his own case. First, he is arguing that a defense counsel should be defending his client in any manner and should be pursuing every line of possible defense. This is not possible. An attorney, no matter how competent, cannot pursue every possible defense because the number of defenses (that is, strategies or tactics for examining witnesses, attacking evidence, presenting evidence, as well as presenting affirmative defenses, for example) are limitless. No attorney will do something the same way as another attorney, and that fact does not make either one per se ineffective.

Further, it is not clear what Appellant wishes the reviewing court had done. In this case, the Sixth District reviewed counsel's alleged errors and determined that even if there were errors, Appellant was not prejudiced thereby. As the Sixth District said, "Counsel clearly represented appellant as vigorously as possible." Appellant may be arguing that his counsel was inadequate and ineffective because he was not found "innocent" on all of the charges. However, the fact that a defendant is found guilty does not make the defendant's attorney ineffective under the law. Rather, a jury found that the evidence proved beyond a reasonable doubt that Appellant

¹ *State v. Nagel*, 6th Dist. No. WM-09-018, 2010-Ohio-3062, at ¶49.

committed the crimes. Appellant does not say what his counsel should have done or what errors Sixth District should have analyzed to find ineffective assistance of counsel. Appellant's arguments thus provide this Court with no reason to reverse his convictions.

Finally, Appellant argues that pursuant to R.C. 2921.45(A), a reviewing court should act as co-counsel in actively determining what defense a criminal defendant's counsel should have advanced. R.C. 2921.45(A) makes it a criminal misdemeanor for a public servant to knowingly deprive any person of a constitutional or statutory right. R.C. 2921.45(A) has no application to this case, as the appellate court certainly based its decision on the law and committed no crime in affirming Appellant's convictions.

Overall, Appellant's argument on this Proposition of Law is incomprehensible and does not provide this Court with any reason to grant leave to appeal. As the Sixth District held, Appellant's trial counsel represented Appellant as vigorously as possible, and Appellant received a fair trial.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW II

Appellant next argues that the trial court erred in regards to the admission of the polygraph examination evidence. Appellant bases his argument on R.C. 2933.81, arguing that the polygraph examination done on Appellant "can be construed as an unwilling confession," and must be audio- or video-recorded or else excluded from evidence.

Appellant misunderstands the newly enacted R.C. 2933.81, which became effective on July 6, 2010, nine months after Appellant was convicted and sentenced in this case. After defining some terms in division (A), R.C. 2933.81 states:

(B) All statements made by a person who is the suspect of a violation of or possible violation of section 2903.01, 2903.02, or 2903.03, a violation of

section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03, or an attempt to commit a violation of section 2907.02 of the Revised Code during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary. There shall be no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record as required by this division a custodial interrogation. A law enforcement officer's failure to electronically record a custodial interrogation does not create a private cause of action against that law enforcement officer.

- (C) A failure to electronically record a statement as required by this section shall not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding.
- (D)(1) Law enforcement personnel shall clearly identify and catalog every electronic recording of a custodial interrogation that is recorded pursuant to this section.
 - (2) If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel shall preserve the recording until the later of when all appeals, post-conviction relief proceedings, and habeas corpus proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought.
 - (3) Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings.
 - (4) If no criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded pursuant to this section, law enforcement personnel are not required to preserve the related recording.²

This statute provides that statements made in response to custodial interrogation are presumed to be voluntary if the statements are electronically recorded, and shifts the burden of proving involuntariness on the defense in such cases. This statute does not require law enforcement to videotape interviews or polygraph examinations. As Division (C) of the statute states, a failure to electronically record a statement does not provide the basis to exclude the statement in any

² R.C. 2933.81.

criminal proceeding. Therefore, Appellant's reliance on this statute as a reason why the trial court should have excluded the polygraph examination evidence is misplaced.

It should be noted that Appellant was not subjected to custodial interrogation during the polygraph examination. He was not in custody. Further, in this case, there is no question as to the voluntariness of the polygraph examination. As the trial court and Sixth District found, Appellant and his attorney signed a written polygraph examination agreement and stipulation as to the admission of the evidence relating to the polygraph evidence, in accordance with this Court's directives in *State v. Souel*.³ Therefore, Appellant has not provided this Court with any reason to grant leave to appeal.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW III

Finally, Appellant argues that the trial court manifested improper bias in favor of the State and against Appellant during the trial, to the prejudice of Appellant. This argument was advanced before the Sixth District Court of Appeals, which reviewed the entire record and found the argument to be without merit. The Sixth District examined each of Appellant's arguments, and then concluded, "After careful review of the entire trial transcript, we cannot say that the trial court manifested any particular bias in favor of the state and against appellant."⁴

Evid.R. 611(A) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." A trial judge is presumed

³ *State v. Souel* (1978), 53 Ohio St.2d 123, 372 N.E.2d 1318.

⁴ *State v. Nagel*, 6th Dist. No. WM-09-018, 2010-Ohio-3062, at ¶79.

to act in a fair and impartial manner.⁵ This Court has set forth the following rules to adhere in determining whether a trial judge's remarks were prejudicial: "(1) the burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel."⁶ Furthermore, "the failure to object * * * constitute[s] a waiver of the error * * *, for, absent an objection, the trial judge is denied an opportunity to give corrective instructions as to the error."⁷

It should first be noted that neither defense counsel nor Appellant ever objected to any question or comment by the trial court judge. Therefore, the claim that the comments were improper is waived on appeal.

Appellant has failed to demonstrate that the trial judge manifested an improper bias. To the contrary, the trial judge was impartial and acted objectively, was polite to Appellant and defense counsel, and exhibited respect to both throughout the trial, both before the jurors and outside the jury's presence. The judge instructed the jurors several times that Appellant was innocent until proven guilty and that the jurors are the sole judges of Appellant's guilt. Judge Craig Roth is a highly respected, highly just and fair judge, who abides by the rules of law and ethics with the highest standard of care and always maintains a professional, polite, impartial, and intelligent demeanor. He gave Appellant a fair trial and treated Appellant and his counsel fairly and with respect.

⁵ *In re Disqualification of Kilpatrick* (1989), 47 Ohio St.3d 605, 606, 546 N.E.2d 929.

⁶ *State v. Wade* (1978), 53 Ohio St.2d 182, 188, 373 N.E.2d 1244.

⁷ *Id.*

Appellant complains that during voir dire, the judge stated, “Every defendant who appears in this courtroom regardless of whether they are ultimately innocent or ultimately guilty, have an absolute right to have representation by counsel. And Mr. Maassel will not be testifying in this case, nor will any of the lawyers be testifying.”⁸ This statement was proper, as it came following a juror saying that the juror would not get counsel but would just plead guilty if he were guilty, and following Maassel’s statement, “But in your mind if you know that things, that you were innocent and if the facts alleged were just terrible...” Defense counsel’s statement was bordering on testimony about the innocence of Appellant. The judge was just clearing up the law on the right to counsel and the fact that Mr. Maassel was not testifying.

Appellant next complains because, during voir dire, the judge said, “It was your question, Mr. Maassel!”⁹ Defense counsel Maassel had questioned each juror about whether each would feel comfortable having him/herself sitting as a juror on a criminal case against him/herself. One juror said, “[D]id I want my clone [as a juror] if I’m [the defendant]. And it would be no. * * * Cause if I’m guilty, I wouldn’t want to meet me out by the car. If I’m guilty.” The judge then made that comment. Mr. Maassel’s odd question, invited the juror’s response and all were chuckling as to this juror’s response. The judge simply responded to the reaction of the other jurors. It can hardly be said that this made the jurors believe the judge was so prejudiced against the defense as to cause them to abandon their duty and reach the verdicts they did because they were influenced by the judge’s alleged bias.

Appellant next complains that the trial court either asked defense counsel to ask a question or asked defense counsel if what was stated was actually a question. The Sixth District found, “[F]rom the context of the testimony it appears that the court was simply attempting to

⁸ Transcript, September 29, p. 79-80.

⁹ Transcript, September 29, p. 81, 96.

move the questioning along [and] * * * attempt[ing] to keep the questions on topic.”¹⁰ Moreover, the Sixth District noted, “In fact, during appellant’s testimony he was permitted to answer questions in nearly a narrative form.”¹¹

The presumed specific instances Appellant is referring to are as follows. First, at one point during Appellant’s testimony at trial, the judge stated, “May we have another question Mr. Maassel?”¹² This was during Appellant’s testimony under direct examination. Defense counsel Maassel had asked Appellant how he felt after this “mistake” of engaging in sexual intercourse with the victim.¹³ Appellant then went on and on answering this question, in a narrative fashion, going off on tangents about how he was disappointed in the victim for getting pregnant, although the victim’s baby was not a mistake, and how Appellant was very proud of the victim for graduating, and he’s proud of his other children for graduating, and how Appellant himself recently acquired his diploma.¹⁴ Appellant had gotten way off course from the question that defense counsel had asked, and direct examination is not a time during which witnesses are allowed to say anything and everything on their mind. The court properly controlled the testimony in requesting another question.

Second, defense counsel then later asked Appellant, “how did you feel when you were informed about that?”¹⁵ Appellant answered the question, “Oh, I was fired. I was upset, very upset. You got to understand something. It’s hard to-” At this point, the court stopped Appellant, saying he had answered the question, and “why don’t you answer another

¹⁰ *State v. Nagel*, 6th Dist. No. WM-09-018, 2010-Ohio-3062, at ¶78.

¹¹ *Id.* at ¶79.

¹² Transcript, September 30, p. 169-70.

¹³ Transcript, September 30, p. 169-70.

¹⁴ Transcript, September 30, p. 169-70.

¹⁵ Transcript, September 30, p. 173.

question?”¹⁶ Because of all of Appellant’s prior testimony, it was clear that he was veering off course again. Yet, the court allowed the answer to go on, saying, “Is there something further you need to say about how you felt?” When Appellant answered, “It’s very difficult to describe exactly how I felt,” the court again asked, “the question is, is there anything else you want to say about how you felt at the time?” Appellant again answered, “Just that it was hard to actually describe how I felt.” The court then stated, “Next question.”¹⁷ The court’s action in this instance was proper—trying to elicit a complete answer from Appellant without veering off course—and Appellant indicated that he did answer the question. The court did not exhibit any bias, but instead was polite to Appellant and evidently concerned that he should be able to give his answer.

Finally, at one point when Appellant was testifying at trial, defense counsel asked Appellant, “[The polygraph examiner] was asking about if you knowingly or intentionally had sex with her. Did you, in your mind, think that as consensual sex?”¹⁸ The State objected to this question as a leading question, and the trial court sustained the objection. Defense counsel then stated, “Mr Nagel, up to this point, you’ve denied having any sexual contact with Andrea Woods.”¹⁹ Having just sustained an objection for leading the witness, the court stated, “Is that a question, Mr. Maassel?” Defense counsel was again leading Appellant and was not even asking a question, but was making a statement that he wanted Appellant to agree with. Mr. Maassel said, “Yes, sir, * * * Yes, that was a question, Your Honor.” The court allowed it, saying, “You may answer it.”²⁰ The court’s actions in this instance were not improper and did not exhibit any

¹⁶ Transcript, September 30, p. 173.

¹⁷ Transcript, September 30, p. 173-74.

¹⁸ Transcript, September 30, p. 178.

¹⁹ Transcript, September 30, p. 178.

²⁰ Transcript, September 30, p. 178.

improper bias. Mr. Maassel asked leading questions throughout his direct examination of Appellant, and it can be assumed that the court was attempting to get him to ask non-leading questions without scolding him in front of the jury. The court was careful not to exhibit what could be perceived as bias.

Reading through the transcript, it becomes evident that the trial court was always professional and objective; made many rulings in favor of the defense; and did not make any arbitrary rulings in favor of the State. To play Appellant's game, the State can point to dozens of instances where the court ruled in favor of the defense or otherwise exhibited respect for Appellant and his counsel.²¹ Overall, as found by the Sixth District Court of Appeals, the trial court did not manifest such a bias so as to constitute an abuse of the court's discretion, and Appellant received a fair trial.

CONCLUSION

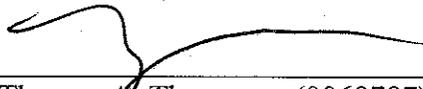
For the reasons discussed above, this case does not involve a matter of public or great general interest, there are no substantial constitutional questions involved, and leave to appeal should not be allowed. The State of Ohio requests that this Court deny jurisdiction to Appellant.


Thomas A. Thompson (0068787)
Williams County Prosecuting Attorney

²¹ Transcript, September 29, p. 2, 8, 17-18, 20, 39, 48, 82, 126, 150, 158, 203-05, 209-10, 211, 215, 252, 286-87, 299, 301, 303, 309; Transcript, September 30, p. 2, 11-12, 16, 32-33, , 58, 64-65, 72, 84, 88, 93, 94, 100, 167, 169, 171, 175, 183, 185, 186, 187, 192-93, 195-96, 197-98, 203-06, 210, 211, 216; Transcript, October 1, p. 5, 12, 18-19, 22, 39-40.

PROOF OF SERVICE

A copy of the foregoing was mailed by ordinary U.S. Mail to Martin T. Nagel, Inmate # A616991, Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036, pro se Appellant, on this 14th day of September, 2010.



Thomas A. Thompson (0068787)
Williams County Prosecuting Attorney