

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2011-0619
)	
Plaintiff-Appellant and)	On Appeal from the Cuyahoga
Cross-Appellee)	County Court of Appeals.
vs.)	Eighth Appellate District
)	
JASON WILLIAMS,)	Court of Appeals
)	Case No. 94616
Defendant-Appellee and)	
Cross-Appellant)	

**NOTICE OF CROSS-APPEAL OF APPELLEE AND
CROSS-APPELLANT JASON WILLIAMS**

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CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT AND CROSS-APPELLEE
STATE OF OHIO

Notice of Cross-Appeal of Appellee and Cross-Appellant Jason Williams

Appellee Jason Williams hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 94616 on February 10, 2011. Copies of the judgment entry of that date are attached hereto.

This case involves a felony and raises substantial constitutional questions and questions of public or great general importance.

Respectfully submitted,

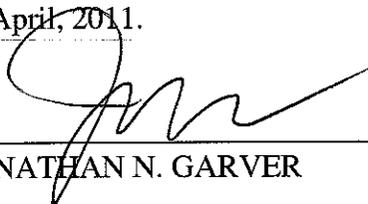


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Certificate of Service

A true copy of the foregoing Notice of Cross-Appeal was sent by regular U.S. mail to Katherine Mullin, Assistant Prosecuting Attorney, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 26th day of April, 2011.



JONATHAN N. GARVER

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94261

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON WILLIAMS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524959

BEFORE: Cooney, J., Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 10, 2011

ON RECONSIDERATION¹

COLLEEN CONWAY COONEY, J.:

Defendant-appellant, Jason Williams (“Williams”), appeals his convictions for rape, kidnapping, and intimidation of a crime victim. We find merit to the appeal and reverse.

In June 2009, Williams was charged with one count of rape, with a sexually violent predator specification, one count of kidnapping with sexual motivation and sexually violent predator specifications, and intimidation of a crime victim or witness. The case proceeded to a jury trial, at which the following evidence was presented.

Williams met the victim, R.J.,² who was seventeen years old, at a bus stop. After talking with Williams, R.J. gave him her phone number. Over the next two and one-half weeks, Williams and R.J. spent time together and talked on the phone.

According to R.J.’s testimony, Williams called her at 10:30 p.m. one night and offered to give her a driving lesson. Although R.J. initially refused because

¹The original announcement of decision, *State v. Williams*, Cuyahoga App. No. 94261, 2011-Ohio-72, released January 13, 2011, is hereby vacated. This opinion, issued upon reconsideration, is the court’s journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

² The anonymity of the victim is preserved in accordance with this court’s guidelines for protecting the identity of sex crimes victims.

it was a school night, Williams persuaded her to go, and he subsequently picked her up and let her drive his car. R.J., who was living with her grandmother, did not tell her she was leaving the house because she was asleep. After R.J. drove the car for about an hour, Williams drove the car to his house. He told R.J. that the car was out of gas and instructed her to wait inside while he attempted to find another way to get her home. R.J. called her grandmother, Sharon Griffin ("Griffin"), and a close friend, Anisha Brown ("Brown"), to see if they could pick her up, but it was approximately 1:00 a.m. and neither of them was able to come at that time.

When R.J. entered Williams's house, she heard someone sleeping in the living room. She followed Williams upstairs to his bedroom. R.J. testified that while she was walking around the room, Williams pushed her onto a bed, held a knife to her face, and told her take off her clothes. He then put on a condom, rubbed his saliva on it, and penetrated her vagina. R.J. further stated that Williams became annoyed by her talking during the intercourse and "felt guilty," so the penetration was brief. Afterwards, R.J. got dressed and Williams drove her home.

When R.J. got home, she told Brown and her grandmother that she had been raped, and they called the police. The police took R.J. to Marymount

Hospital to obtain a rape kit. R.J. also described the rape to Detective Allen Strickler ("Det. Strickler") who interviewed Williams as part of his investigation.

On cross-examination, R.J. testified that Williams had promised to get her some marijuana to sell to make some money. She admitted that she promised to give Williams "something" in exchange for the marijuana. She also admitted that Williams never gave her any marijuana.

Det. Strickler testified that during his investigation he interviewed Williams and specifically warned him not to contact R.J. or he could be arrested for intimidation. Nevertheless, a few weeks later, Williams came to the school that R.J. attended and told the security guard, Kenneth Curtis ("Curtis"), that he was R.J.'s cousin and had some money to give her. Curtis allowed him to pass through the security checkpoint at the entrance of the school and walked him down a hallway. The school's principal, Yolanda Eiland ("Eiland") who is R.J.'s first cousin, did not recognize Williams as R.J.'s relative. Curtis testified that he noticed Williams was holding an "asp baton," which he testified is a "highly lethal" weapon. Williams was escorted back to the entrance and left the premises without incident.

At the conclusion of the State's case, the defense moved for acquittal on the intimidation charge pursuant to Crim.R. 29, which the court denied. The jury found Williams guilty on all three counts, and the court sentenced him to ten

years in prison for the rape, eight years for the kidnapping, and five years for intimidation of a victim. The rape and kidnapping were ordered to be served concurrently with each other and concurrently with prison terms imposed in two unrelated cases. The court ordered the intimidation count be served consecutive to the other counts for an aggregate 15-year sentence. Williams now appeals, raising eight assignments of error.³

We address Williams's assignments of error out of order because several are interrelated and, taken together, are dispositive of this appeal.

In the sixth assignment of error, Williams argues there was insufficient evidence to support his intimidation conviction. We disagree.

A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable

³The assignments of error are set forth in the appendix of this opinion.

doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

Williams was charged with intimidation in violation of R.C. 2921.04(B), which provides:

“No person, knowingly and by force or by unlawful threat of harm to any person or property shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges * * *.”

There is no requirement that the victim feel intimidated or even know of the defendant's attempt to intimidate her to commit the crime of intimidation. The elements of intimidation are simply that the defendant (1) knowingly; (2) attempt to intimidate any person; (3) by unlawful threat of harm. Nothing in the statute requires the victim to even know that the defendant attempted to intimidate the witness. See, e.g., *State v. Brodie*, Montgomery App. No. 21905, 2008-Ohio-196, ¶10.

The evidence at trial established that Williams came to the victim's school carrying a weapon and lied to a security guard by claiming to be the victim's cousin to gain entry into the school. Williams was not a student at the school and had no legitimate reason to be at the school. We find that these actions demonstrate that Williams knew the victim was at the school and that he attempted to intimidate her with an unlawful threat of physical harm with an asp. Accordingly, we find there was sufficient evidence to support the conviction.

Therefore the sixth assignment of error is overruled.

In the fifth assignment of error, Williams argues he was denied his constitutional right to the effective assistance of counsel. He claims his trial counsel invited damaging evidence of his prior felony conviction and then failed to request the appropriate limiting instruction regarding the proper use of such evidence. Williams claims his counsel also failed to object to improper comments made by the prosecutor during closing argument and failed to request a lesser included offense instruction, which was warranted under the facts of this case. In the eighth assignment of error, Williams contends that the cumulative effect of these errors deprived him of a fair trial. We agree.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. A defendant must show that counsel acted unreasonably and that but for counsel's errors, there exists a reasonable probability that the result of the proceeding would have been different. *Strickland* at 696; *Bradley* at paragraph three of the syllabus. In making this determination, the reviewing court must presume that counsel's conduct was competent. *Id.*

Williams argues his trial counsel was ineffective for failing to request a jury instruction regarding the limited purpose for which evidence of Williams's prior conviction could be used. On cross-examination, defense counsel elicited testimony from Det. Strickler regarding Williams's written statement to police in which he denied having intercourse with R.J. but admitted engaging in "sexual contact" with her by "feeling her up." On redirect, the State responded by presenting evidence of Williams's prior felony conviction to impeach him. Thus, Williams's trial counsel opened the door to the State's introduction of Williams's prior felony conviction.

Although we are to presume that trial counsel's actions constitute "sound trial strategy," *Strickland* at 687, the only conceivable strategic or tactical justification for eliciting testimony regarding Williams's admission that he engaged in "sexual contact" ("feeling her up") was to create an evidentiary basis for a verdict on the lesser included offense of gross sexual imposition. The offense of gross sexual imposition, which is a lesser included offense of rape, requires proof that the defendant purposely compelled the victim "by force or threat of force" to have "sexual contact" with him. R.C. 2907.05(A)(1). The term "sexual contact" is defined as "any touching of an erogenous zone of another, including, without limitation, the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying

either person.” R.C. 2907.01(B). Williams’s admission to Det. Strickler that he “felt her up” would constitute gross sexual imposition if it was proven that he did so by force or threat of force.

Whether this was counsel’s trial strategy, once the evidence of sexual contact was admitted, counsel should have requested a charge on the lesser included offense of gross sexual imposition. A charge on a lesser included offense may be given where the evidence would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Braxton* (1995), 102 Ohio App.3d 28, 43, 656 N.E.2d 970, citing *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. In other words, the defendant is entitled to a lesser included offense instruction “if, based on the evidence adduced by the state, the trier of fact can find for the defendant * * * on some element of the greater offense which is not required to prove * * * the lesser offense and for the state on the elements required to prove * * * the lesser offense.” *State v. Solomon* (1981), 66 Ohio St.2d 214, 421 N.E.2d 139, paragraph two of the syllabus.

If the jury believed Williams’s statement to Det. Strickler, it could have found that Williams had “sexual contact” with R.J. but not “sexual conduct,” which includes intercourse, as is required for a finding of rape. Under these facts, Williams’s actions would constitute gross sexual imposition in violation of

R.C. 2907.05(A)(1), which is a fourth degree felony as opposed to rape, which is a first degree felony. R.C. 2907.02(A)(2); R.C. 2907.02(B). Yet, Williams's trial counsel failed to request an instruction on the lesser included offense of gross sexual imposition and none was given.

Williams argues the jury should have been instructed to consider his prior conviction only in regard to assessing his credibility and not for evidence of his character since Rule 404 of the Ohio Rules of Evidence prohibits the use of evidence of an accused's character to show that he acted in conformity therewith. "[I]t is an essential duty of defense counsel to request limiting instructions regarding evidence admitted for purposes of impeachment." *State v. Todd* (Nov. 20, 1980), Cuyahoga App. No. 42056. Williams's trial counsel never objected to this evidence, never requested a limiting instruction, and none was given. Williams claims that without this instruction, evidence of his prior conviction was unfairly prejudicial. The prejudice was compounded during closing arguments when the prosecutor told the jury:

"You heard from Detective Strickler he is a felon. You heard that evidence. He is a criminal. And he does another criminal act against [R.J.]. In fact, he does three of them. And those are the three counts in the indictment."

Defense counsel failed to object to these inappropriate comments, which are a flagrant violation of the fundamental principles of Evid.R. 404. "The principle underlying Evid.R. 404(B) is that evidence of other acts is simply so

prejudicial that to allow it in outweighs its value as relevant evidence.” *State v. Fisher*, Cuyahoga App. No. 90997, 2009-Ohio-476, citing *State v. Prokos* (1993), 91 Ohio App.3d 39, 631 N.E.2d 684. See, also, *State v. Mann* (1985), 19 Ohio St.3d 34, 482 N.E.2d 592.

In his eighth assignment of error, Williams argues that the cumulative effect of these errors, violated his right to a fair trial. Pursuant to the cumulative error doctrine, the existence of multiple errors, which may not individually require reversal, may violate a defendant’s right to a fair trial. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 397, 721 N.E.2d 52, 70, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256. To affirm in spite of multiple errors, we would have to determine that the cumulative effect of the errors is harmless beyond a reasonable doubt. *DeMarco* at 195 (stating that the errors can be considered harmless if there is overwhelming evidence of guilt or other indicia that the errors did not contribute to the conviction). This we cannot do.

The record does not contain overwhelming evidence of Williams’s guilt. Elizabeth Booth, the nurse/“sexual assault examiner” who performed the rape kit examination, testified that she found no injuries or evidence of trauma during her internal examination of R.J., nor did she find any evidence of semen. Although forensic scientists employed by the Ohio Bureau of Criminal

Investigation found a compound in saliva known as amylase on R.J.'s underwear, they were unable to match the DNA with known samples of Williams's DNA. Thus, there was no physical evidence that R.J. had been raped.

R.J.'s testimony was the only evidence indicating that Williams raped her. This was a classic case of "he said — she said." The jury's finding of guilt rested on the credibility of the victim vis-a-vis the defendant. As previously explained, Williams's credibility was prejudiced by the admission of his prior felony conviction without a limiting instruction. The prejudice was exacerbated by the prosecutor's inappropriate comment characterizing Williams as a felon who committed the alleged crimes in conformity with his criminal nature.

We find the accumulation of these errors was unfairly prejudicial. There is a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different. *Strickland* at 696; *Bradley* at paragraph three of the syllabus. Therefore, we cannot say that the cumulative effect of the errors is harmless beyond a reasonable doubt.

The fifth and eighth assignments of error are sustained, rendering the remaining assignments of error moot.

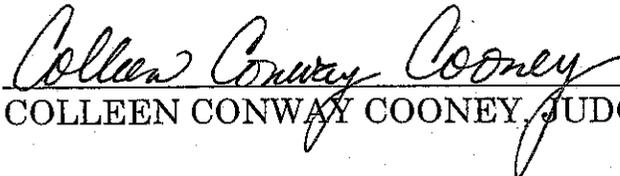
Judgment reversed, and case remanded for a new trial.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


COLLEEN CONWAY COONEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
SEAN C. GALLAGHER, P.J., DISSENTS WITH SEPARATE OPINION
ATTACHED.

SEAN C. GALLAGHER, P.J., DISSENTING:

I respectfully dissent from the majority opinion sustaining the fifth and eighth assigned errors. I would reject both those errors, as well as errors one through four, and six, and affirm the convictions and sentences for both kidnapping and rape. I would, however, sustain the seventh assigned error for intimidation of a crime victim or witness and reverse that conviction and sentence.

Appellant's first assigned error claims that the omission of the phrase "In considering a discrepancy in a witness [sic] testimony, you should consider whether such discrepancy concerns an important fact or a trivial one," rendered the instruction on credibility improper, warranting reversal of the convictions. I would reject such a premise.

The absence of this phrase from the given instruction was not objected to at trial. Thus the instruction is considered under the plain error standard. "An erroneous jury instruction does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-2007, 784 N.E.2d 504, ¶ 56, citing *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus.

The omission of this phrase in isolation from the jury instructions as a whole does not amount to plain error warranting reversal. The instruction as given addressed discrepancies in witnesses' testimony and did not impact the result of the trial.

In the second assigned error, Williams claims the trial court should have given a limiting instruction on the issue of credibility involving use of the appellant's prior conviction under Evid.R. 609.

Again, I note that no objection was raised at trial, so the issue is reviewed under the plain error standard outlined above. Further, the trial court has discretion to determine whether the evidence at trial requires a special instruction.

Essentially, Williams wants this court to hold that where issues involving credibility relating to a prior conviction are raised, a special instruction is required. I would reject such a notion based on the analysis in *State v. Group*,

98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980. While *Group* did not address this specific question, its analysis on special instructions is inescapable. The trial court was in the best position to determine what additional instructions, if any, were necessary, and highlighting this one aspect of credibility would be inappropriate under *Group*. Further, as discussed below, the trial court limited the use of the prior conviction and precluded the state from identifying the nature of the conviction.

In his third assigned error, Williams claims the court erred by failing to give a lesser included offense instruction for gross sexual imposition, which is a lesser included offense of rape. Here, no such instruction was asked for, and the trial court declined to offer the jury the option of considering the lesser included offense. No objection was raised, so again, this issue is evaluated under the plain error standard.

The decision to give or not give a lesser included offense instruction is within the discretion of the trial court. The mere fact that Williams introduced some evidence of the possibility that a gross sexual imposition offense occurred does not entitle him to such an instruction. As the state points out, this court previously addressed this very issue in *State v. Gholston*, Cuyahoga App. No. 88742, 2005-Ohio-4053. Because of that analysis, I would reject this assertion by appellant.

In the fourth assigned error, Williams alleges that the prosecutor committed misconduct in closing argument regarding the offense of intimidation of a crime victim or witness by trying to place the jurors in the position of the victim and asserting that jurors should feel that a reasonable person would feel "threatened, intimidated and fearful" by the conduct of Williams. In addition, Williams claims prosecutorial misconduct occurred when the prosecutor commented that Williams had a prior conviction and referred to him as a "criminal."

The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *Id.* Generally, prosecutors are entitled to considerable latitude in opening statements and closing arguments. *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912; *State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, 910 N.E.2d 14.

Because I agree that the conviction for intimidation of a crime victim or witness should be reversed on other grounds, I need not address the first portion of this issue. Nevertheless, I see nothing wrong with the prosecutor's comments to the jury about the state of mind of the victim. In this instance, the prosecutor

was commenting on what he believed the evidence demonstrated. I would not reverse on that ground.

In the same error, Williams also claims that the prosecutor in his final rebuttal closing argument, mentioned that Williams had a prior conviction, not to assess his credibility, but to impugn his character by calling him a "criminal." A review of the record shows this comment was in response to defense counsel's reference that Williams was "not a criminal." Williams had a prior conviction for gross sexual imposition, but the trial court limited the use of the prior conviction by not letting the prosecutor identify the nature of the crime. In this instance, the prosecutor was merely responding to the assertion by the defense and correcting the facts as they existed. Again, I see no error in a prosecutor setting the record straight during the rebuttal portion of the closing argument. A prosecutor may freely comment in closing argument on what the evidence has shown and what reasonable inferences the prosecutor believes may be drawn therefrom. *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293. In determining whether the prosecutor's remarks were prejudicial, the state's argument must be viewed in its entirety. *State v. Whitfield*, Montgomery App. No. 22432, 2009-Ohio-293.

The majority sustains Williams's fifth assigned error, finding that Williams's trial counsel was ineffective. I would overrule the assigned error and not reverse the case on that basis.

In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. When making that evaluation, a court must determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client" and "whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, vacated on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905.

The majority holds that the convictions should be reversed on cumulative grounds because Williams's trial counsel invited damaging evidence of a prior unnamed felony conviction and then failed to request a limiting instruction regarding the use of that evidence. In addition, the majority finds that improper comments by the prosecutor in closing argument, coupled with the failure to request a lesser included offense, also rendered his trial counsel ineffective.

Williams's trial counsel made a conscious decision to ask Detective Strickler about the written statement Williams gave to police. Counsel's objective was to show Williams had cooperated with authorities, that he claimed a consensual boyfriend-girlfriend relationship, and that he denied the rape allegations. While the statement contained a reference to Williams's saying he "felt her up" and further led to the disclosure of Williams's prior conviction, there were sound reasons for the defense to engage in this line of questioning.

Defendants, like Williams, often face unpleasant alternatives when deciding a trial strategy. Here, Williams was facing serious allegations of rape and kidnapping by a young school-age victim. Presumably, the defense counsel felt it was important to let the jury know that Williams denied the allegations, cooperated with authorities by making a written statement, and was asserting the relationship was consensual as boyfriend and girlfriend. While this could be accomplished by having Williams testify, that is rarely the preferred method to get facts in front of the jury, as that approach results in the defendant being subjected to cross-examination.

The preferred method, and the one utilized here, was to get these facts in front of the jury through the investigative officer. The risk of exposing the prior conviction was limited by the trial court's restricting the use of the conviction by precluding the state from disclosing the nature of the prior conviction. The

revelation that Williams admitted to sexual contact with the victim was not an unreasonable strategy in light of the fact it enabled the defense to show Williams denied the charges of rape, kidnapping, and intimidation of a crime victim to police, as well as show Williams cooperated in the police investigation. Further, the defense was able to argue Williams and the victim had a "boyfriend-girlfriend" relationship. Significantly, this was accomplished without exposing Williams to cross-examination. Thus, these were reasonable trial strategies.

Further, the testimony by the detective that Williams admitted to sexual contact, but not intercourse, with the victim was not necessarily elicited to secure a lesser included offense instruction for gross sexual imposition. First, counsel had to weigh the admission of this testimony against the desire to have the denial of the rape charges and cooperation with authorities admitted without subjecting Williams to cross-examination. Again, these are often unpleasant alternatives.

In my view, it is a leap of speculation to assert this was done to secure a gross sexual imposition instruction that in the end was never asked for. In reality, the absence of the instruction is evidence to the contrary. In this instance, the trial attorney was clearly trying not to have Williams's conduct viewed as a rape and kidnapping. Williams was claiming consensual contact and that the victim was his "girlfriend." Asking for a gross sexual imposition

instruction would be tantamount to admitting guilt at that level and undermine the consensual defense. One can argue that had the trial court indicated a desire to give such an instruction, Williams's counsel would have been ineffective if he did not object to its inclusion.

Williams obtained a fair trial. He was not prejudiced by the failure of counsel to ask for the lesser included offense instruction, or by the court's failure to give the instruction. This was an all or nothing scenario, which was arguably the only way for Williams to avoid a conviction for his alleged conduct. It is not unreasonable for a defense lawyer to set up an "all or nothing" scenario.

As to the second element of the *Strickland* test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In this case, even without the purported damaging inferences created by the admission of certain evidence, it cannot be said the outcome would have been different. The credibility of the victim was the major determining factor in the outcome of this case, and nothing relative to these other evidentiary admissions changes that.

The failure to prove either prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland*, 466 U.S., at 697. In this case, I do not believe either prong was satisfied. For these reasons, I would not reverse this case based on ineffective assistance of counsel.

In the sixth assigned error, Williams challenges his conviction on intimidation of a crime victim or witness under a denial of due process. Williams was charged with intimidation of a crime victim or witness under R.C. 2921.04(B), which reads as follows:

“(B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.”

There is no evidence that I can discern from the record establishing that Williams attempted to intimidate the victim in this case. While it was established that Williams lied in an attempt to gain access to the victim while at school, was warned by the officer not to contact the victim, and had in his possession a potential weapon that was described as an “asp,” there is no evidence he did, in fact, attempt to influence, intimidate, or hinder the victim in

this case. Even examining the facts in a circumstantial context under *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the claim is still too speculative. For this reason, I would reverse the conviction for intimidation of a crime victim or witness.

In the seventh assigned error, Williams claims the convictions for rape, kidnapping, and intimidation are against the manifest weight of the evidence. With the exception of the conviction for intimidation of a crime victim or witness charge addressed above, the state put on sufficient evidence for each element of both rape and kidnapping to support these convictions. The victim's testimony alone was sufficient to establish these elements. For this reason, I would not reverse these convictions on that basis.

In his final assigned error, Williams seeks reversal of all charges on the grounds that he was denied a fair trial because of the cumulative effect of all the errors that occurred during the trial. I have previously addressed these claimed errors, and with the exception of the failure to establish the intimidation of a crime victim or witness, I do not believe these alleged errors resulted in Williams not receiving a fair trial. For these reasons, I would affirm both the rape and kidnapping convictions.

APPENDIX

"Assignments of Error

- "I. The court committed plain error by giving jury instructions on the issue of credibility which invaded the province of the jury.
- "II. The trial court committed plain error by failing to instruct the jury on the limited use of evidence of Appellant's prior conviction. *Evid.R. 609*.
- "III. The trial court committed plain error by failing to instruct the jury on the lesser-included offense of gross sexual imposition.
- "IV. Misconduct of the prosecuting attorney denied Appellant due process of the law and equal protection of the laws. Fourteenth Amendment, Constitution of the United States; Article I; Section 16 of the Constitution of the State of Ohio.
- "V. Appellant was deprived of his right to the effective assistance of counsel.
- "VI. The evidence is insufficient to support of [sic] Appellant's conviction for felony intimidation of a witness and his conviction constitutes a denial of due process of the law.
- "VII. Appellant's convictions for rape, kidnapping, and intimidation are against the manifest weight of the evidence.
- "VIII. Appellant's convictions should be reversed because the cumulative effect of the errors committed by the trial court violated Appellant's right to a fair trial."