

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 07 MA 80
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
RONALD KOLB,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 06CR814.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Ralph Rivera
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

{¶1} Defendant-appellant Ronald Kolb appeals from his convictions of rape and kidnapping which were entered after a jury trial in the Mahoning County Common Pleas Court. The first issue on appeal is whether the court erred in admitting evidence that the defense witness's boyfriend was incarcerated due to a theft conviction in order to impeach the witness by showing bias in that the victim in this case was also the victim in that case. The second issue is whether the defense was prejudiced when an officer testified to appellant's post-*Miranda* statement even though the court sustained his objection to the statement and issued a curative instruction. For the reasons stated below, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On the night on July 29, 2006, Youngstown Police were called to an address on the West Side to take the statement of an alleged rape victim. Michael Jennings, who suffered from cerebral palsy, reported that he was taking out the trash behind the Handle Bar when a man (later identified as appellant) put a gun to his head and ordered him into a car. (Tr. 295-298). He said appellant drove to a Chinese restaurant down the street, backed into a dumpster while parking his car, put the gun in the console and performed oral sex on him. (Tr. 300-303). Appellant then gave him \$7.50, a piece of paper with his first name and cellular telephone number written on it and said to call if he needed anything. According to the victim, appellant then told him not to call police or he would find him and kill him. (Tr. 311). Soon thereafter, the police stopped appellant's vehicle since both appellant and the vehicle fit the description provided by the victim. The victim was brought to the scene to identify appellant, at which point appellant was arrested.

{¶3} Appellant was indicted for two counts of rape: the first count included the force or threat of force element under R.C. 2907.02(A)(2); and the second count contained the element that the victim's ability to resist or consent was substantially impaired due to a physical or mental condition of which appellant knew or reasonably could have been expected to know pursuant to R.C. 2907.02(A)(1)(c). Appellant was

also indicted for two counts of kidnapping: one count alleged a purpose to engage in sexual activity under R.C. 2905.01(A)(4); and one count alleged a purpose to facilitate the commission of a felony under R.C. 2905.01(A)(2). Firearm specifications were attached to all four counts.

{14} On March 15, 2007, the jury found appellant guilty of the count of rape dealing with the victim's substantially impaired ability to resist and the count of kidnapping requiring purpose to engage in sexual activity. However, the jury found appellant not guilty of the firearm specifications on those counts and declared him not guilty of rape with force and kidnapping with purpose to facilitate a felony.

{15} In an April 24, 2007 entry, the court sentenced appellant to ten years on both counts to run concurrently. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{16} Appellant's first assignment of error provides:

{17} "IT WAS ERROR TO ALLOW THE STATE OF OHIO TO INTRODUCE 'IMPEACHING' EVIDENCE ABOUT THE TRIAL AND CONVICTION OF WITNESS ASH[A]RAY STEWART'S BOYFRIEND ON THE DIRECT EXAMINATION OF MICHAEL JENNINGS."

{18} One of the defense theories was that the victim was lying about the kidnapping and rape because he was allegedly gay and did not want this fact to be discovered, suggesting the victim was worried because he saw the Chinese restaurant owner looking in the car window. In support of this theory, the defense planned to call Asharay Stewart to testify that the victim told her that he created the story of the rape and kidnapping. Prior to presenting Ms. Stewart's testimony, the defense asked the victim on cross-examination if he knew Asharay Stewart and if he ever told her that he concocted the story. The victim admitted that he knew Ms. Stewart but insisted that he never told her that he made the story up. (Tr. 361).

{19} On redirect examination of the victim, the state then asked who Asharay Stewart's boyfriend was, and the victim responded that her boyfriend was Thomas L. Gross. Defense counsel objected, the court overruled the objection, and a sidebar discussion was held off the record. (Tr. 368). The court came back on the record and stated, "I'll note your objection. I think we have it resolved, though."

{¶10} Thereafter, the victim related that Mr. Gross stole his wallet when he was playing pool one night after he had filed the rape and kidnapping charges against appellant. The victim thus filed a police report against Mr. Gross apparently resulting in Mr. Gross's current incarceration. (Tr. 369). The victim further testified that he tried to get a restraining order against Ms. Stewart because she harassed him about appellant's case and wanted to fight him. (Tr. 371).

{¶11} When called in the state's rebuttal to Ms. Stewart's testimony, the victim disclosed that after the rape, Ms. Stewart told him that appellant is a friend of her boyfriend, Mr. Gross. (Tr. 519). The victim insisted that he never told Ms. Stewart that the oral sex appellant performed on him was consensual or that he wanted appellant to do it. (Tr. 518). He then specified that he was friends with Ms. Stewart but that she is now mad at him for putting her boyfriend, Mr. Gross, in jail. (Tr. 517, 519).

{¶12} Under this assignment of error, appellant urges that his objection to the state's question regarding Asharay Stewart's boyfriend at page 368 should not have been overruled. He claims the victim's statements that Ms. Stewart's boyfriend was convicted and sentenced to prison, the victim's opinion that Ms. Stewart was mad at him for having her boyfriend arrested, and the victim's statement that he tried to get a restraining order against Ms. Stewart, were all irrelevant and were elicited in order to inflame the jury so they would not listen to the testimony of Ms. Stewart. Appellant concludes that the evidence admitted was in excess of that necessary to establish bias and claims he was prejudiced because the jury would have acquitted him if they believed Ms. Stewart.

{¶13} The state counters that the trial court did not abuse its discretion in allowing the prosecution to impeach Ms. Stewart's credibility by showing she was biased toward the victim. The state notes that they were permitted to do this either through examination of the witness to be impeached or through extrinsic evidence. The state alternatively urges that any error was harmless.

{¶14} The admission of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An error may not be predicated upon admission of evidence unless a substantial right

was affected and a timely objection was made stating the specific ground for the objection, if the grounds are not apparent from the context. Evid.R. 103(A).

{¶15} Relevant evidence means that having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than without the evidence. Evid.R. 401. Although relevant, evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Evid.R. 403(A).

{¶16} As for impeachment, the credibility of a witness may be attacked by the opposing party. Evid.R. 607(A). A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact. Evid.R. 607(B). In addition to other methods, a witness can be impeached by showing bias, prejudice, interest or any motive to misrepresent, and this may be done by examination of the witness or by extrinsic evidence. Evid.R. 616(A).

{¶17} Here, the disputed evidence is clearly relevant to show the defense witness was biased or prejudiced or had a motive to misrepresent her testimony. Ms. Stewart's bias, prejudice or motive to misrepresent was portrayed by the victim's testimony that: he had Ms. Stewart's boyfriend arrested and incarcerated; Ms. Stewart was mad at him due to this fact and due to the fact that she did not want him to accuse appellant, who was friends with her boyfriend; Ms. Stewart tried to fight him over these issues; and, he tried to get a restraining order against her due to her constant harassment of him on these matters. Such impeachment would tend to make Ms. Stewart's claim, that the victim told her he made the story up, less likely to be true.

{¶18} The probative value of the evidence was high and was not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Notably, it may have been prejudicial, but the state's evidence is intended to be prejudicial. See *State v. Townsend*, 7th Dist. No. 04MA110, 2005-Ohio-6945, ¶61. The real issue is whether the prejudicial evidence was unfair. In other words, was the disputed evidence of such a nature that it would result in an improper basis for the jury's decision? See *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172. Here, the evidence was not confusing, damning of appellant's character or an incident of appellant's other acts. It did not arouse emotional sympathies, evoke a sense of

horror or appeal to an instinct to punish. See *id.* Rather, the testimony was relevant, probative and straight-forward; it was a mere presentation of facts establishing why a defense witness had motive to attempt to untruthfully discredit the victim.

{¶19} Moreover, the use of the victim's testimony instead of merely questioning Ms. Stewart was permissible as extrinsic evidence is specifically admissible in performing this type of impeachment. Evid.R. 616(A). See, also, Evid.R. 616(C)(1). In addition, there was a rational basis for the impeachment questions. See Evid.R. 607(B).

{¶20} Finally, the fact that the state began impeaching Ms. Stewart's claim even prior to her testimony was not error. It was the defense that opened the door to the victim's testimony. That is, the state did not raise the extrinsic evidence of impeachment until redirect, after the defense asked the victim on cross-examination if he told Ms. Stewart that his story is a lie. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

{¶21} Appellant's second assignment of error provides:

{¶22} "IT WAS ERROR FOR THE STATE OF OHIO TO ATTEMPT TO ADMIT AN IRRELEVANT STATEMENT OF THE DEFENDANT AT THE TIME OF HIS ARREST WHICH HAD THE EFFECT OF INFERRING POST ARREST SILENCE AND THEREFORE GUILT."

{¶23} When the prosecution asked a police officer what appellant said after he was arrested, Officer Chaibi responded:

{¶24} "When I told him what the -- what he was being charged with, he said to me, what did that fucking 'tard say I did to him." (Tr. 390).

{¶25} Defense counsel objected and requested a sidebar. The court returned to the record and instructed the jury to completely disregard the last question and answer.

{¶26} Appellant now contends that it was impossible for the jury to ignore the question and answer. Yet, he also urges that the effect of the sustained objection and the subsequent "dropping of the subject" of his post-*Miranda* statements caused the jury to believe that he remained silent after his arrest. He points to law that a defendant cannot be penalized for exercising his post-*Miranda* right to remain silent,

i.e. a jury cannot be told that a defendant remained silent in order to show his guilt. See *State v. Leach*, 150 Ohio App.3d 150, 2002-Ohio-6654, ¶21 (1st Dist.), citing *Doyle v. Ohio* (1976), 426 U.S. 610 (*Miranda* rights implicitly assures that silence carries no penalty).

{¶27} The state points out that appellant's statement was voluntarily provided after he was *Mirandized*. As a result, the state urges there was no prejudice in the jury hearing appellant's question quoted above. The state also notes that appellant's statement was admissible as the party's own statement under Evid.R. 801(D)(2)(a).

{¶28} Appellant arguments seems contradictory. Thus, we start with his first contention that the jury probably did not abide by the curative instruction. Considering the fact that a defendant's statement is admissible under Evid.R. 801(D)(2)(a) and the fact that the trial court denied appellant's untimely motion to suppress statements made to officers, the purpose of the defense's objection is unknown. (See Tr. 2-3). The basis for the objection should have been placed on the record. Without knowing why the court sustained the objection (as defense counsel's sidebar arguments were unrecorded), it is difficult to review the prejudice incurred as a result of the jury hearing the statement. In other words, it seems to us that the court was not required to sustain this objection. Thus, prejudice is not established for purposes of our review.

{¶29} We also note that defense counsel was aware of the statements appellant made to officers and had plenty of time to object to the admission of the statement prior to the officer completing his recitation of appellant's question. In fact, counsel had filed a motion to suppress concerning statements such as this one. In addition, the state warned before trial that it intended to present appellant's statement to the officer. (Tr. 6). Yet, counsel waited until the officer completed his answer before objecting, notwithstanding the fact that the answer was not hard to anticipate from the prosecution's question.

{¶30} In any event, the trial court gave a curative instruction. It is well-established that the jury is presumed to have followed a curative instruction. *State v. Garner* (1995), 74 Ohio St.3d 49, 59.

{¶31} Regarding appellant's remaining argument, as the state points out, even where a *Doyle* violation is assumed for sake of argument, the facts of the situation

here would not impinge on the fundamental fairness of the trial. See *Greer v. Miller* (1987), 483 U.S. 756 (even assuming a *Doyle* violation, an isolated comment subject to curative instructions will not impinge on the fundamental fairness of a trial). Most importantly though, there was no reference to or even indirect implication of an invocation of the post-*Miranda* right to remain silent, and thus, there existed no *Doyle* violation.

{¶32} On that point, appellant is concerned that the jury thought he was silent after his arrest. However, it is clear the jury did not and could not infer that appellant did not speak after his arrest. That is, Officer Chaibi disclosed that appellant spoke to him and that appellant talked even more to Officer Jankowski. (Tr. 389). Thereafter, Officer Jankowski specifically confirmed that appellant answered questions after his arrest. (Tr. 431). Officer Jankowski then expressly reviewed the various questions asked and the corresponding answers given by appellant. (Tr. 431-435). In fact, this officer revealed that appellant denied that he performed oral sex on the victim. (Tr. 435). As such, appellant's confusing arguments here concerning the implications of post-*Miranda* silence are wholly without merit.

{¶33} Finally, appellant asserts that cumulative error can be established by resolution of the issues presented in this and the prior assignment combined with his belief that it was difficult to effectively cross-examine the victim due to his cerebral palsy. As error was not established under either the first or second assignment, there is no cumulative error either.

{¶34} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.
Waite, J., concurs.