

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150311
	:	TRIAL NO. B-1401980
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
DEVIN HICKS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Raising five assignments of error, defendant-appellant Devin Hicks appeals his conviction for the rape of a fellow student at Cincinnati State Technical and Community College. Hicks and his female victim took a math class together. After studying in the library with friends, the victim walked to her bus stop. Hicks walked with her and followed her into a parking garage elevator for a five-floor trip to the bus stop. The victim testified that during the elevator ride, Hicks pinned her in the corner of the elevator car and digitally raped her. Hicks pulled her back into the elevator when it reached her desired floor. The victim fell to the floor, but was able to kick Hicks and run from the elevator to her bus. Two days later, a friend convinced the victim to report the crime to the police.

When questioned by police, Hicks initially stated that “nothing really happened” on the elevator. He then admitted that when the victim had tripped over his foot exiting

from the elevator, he had tried to help her up, but his hand had gone inside her pants. He finally admitted to police that he had penetrated the victim's vagina. Video recordings of these admissions were shown to the jury at trial. Hicks also testified at trial. He stated that he was clumsy and had accidentally grabbed the outside of the victim's groin while attempting to lift her from the floor of the elevator. The jury returned a guilty verdict. The trial court entered judgment on the verdict and imposed a three-year prison term. It also classified Hicks as a Tier III sex offender.

In his first assignment of error, Hicks challenges the manifest weight of the evidence adduced to support his rape conviction. Hicks argues that the victim's account of the events was "impossible and inconsistent," and that only his explanation of the events was reasonable.

But our review of the entire record fails to persuade us that the jury, acting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We can find no basis in this record to conclude that this is that "exceptional case" in which the jury lost its way. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

The jury was entitled to reject Hicks' explanation, made to the jury at trial, that he had innocently grabbed the victim's groin in an attempt to help her off the floor of the elevator. The state presented ample evidence to support the conviction, including Hicks' own statement to police that he had digitally penetrated the victim's vagina. The rape victim testified that Hicks had followed her into the elevator, had pinned her into the corner, had pulled her pants down, and had placed his finger into her vagina while he smiled at her.

As the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact to determine, the jury, in resolving conflicts in the testimony, including differences in the timing and duration of the events, could properly have found Hicks guilty of the charged crime and thus did not lose its way. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The first assignment of error is overruled.

Hicks next argues, in his second assignment of error, that he was denied the effective assistance of counsel for various claimed deficiencies of his defense counsel, including his failure to investigate more thoroughly, to question evidence surrounding the length of the elevator ride, and to object to potential prosecutorial misconduct.

To prevail on a claim of ineffective assistance of trial counsel, Hicks must show, first, that trial counsel's performance was deficient and, second, that the deficient performance was so prejudicial that he was denied a reliable and fundamentally fair proceeding. *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *see also Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. A reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

Here, Hicks' trial counsel worked to discredit the state's theory of the case and conducted a spirited defense. After reviewing the entire record, we hold that counsel's efforts were not deficient, and that Hicks was not prejudiced in any way. The result of the trial was reliable and fundamentally fair. The second assignment of error is overruled.

Hicks next argues that the trial court erred in allowing the state to engage in seven instances of prosecutorial misconduct, including four made in closing argument. To

prevail, Hicks must show that the prosecutor's remarks were improper, and that the remarks prejudicially affected his substantial rights. *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 200. The touchstone of our analysis "is the fairness of the trial, not the culpability of the prosecutor." *State v. Bey*, 85 Ohio St.3d 487, 495, 709 N.E.2d 484 (1999).

Hicks objected to only one of the challenged comments. We find no impropriety associated with the state's question posed to Hicks, in recross-examination, challenging the credulity of his explanation that he was a "clumsy guy" and that his hand had accidentally gone into the victim's pants.

Hicks did not object to the remaining six comments he now challenges on appeal. For these comments, Hicks must establish "both that misconduct occurred and that but for the misconduct, the outcome of the trial clearly would have been otherwise." *See State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 109. Each of the four challenged statements in closing argument presented fair comment on the evidence adduced at trial. The two remaining statements made during the examination of an investigating officer and the cross-examination of Hicks did not clearly alter the outcome of the trial. The third assignment of error is overruled.

In his fourth assignment of error, Hicks contends that the trial court erred in instructing the jury on the standard required to reach a not-guilty verdict. The court had told the jury that "[i]f you find that the State failed to prove beyond a reasonable doubt *all* the essential elements of rape as charged in Count 1 of the indictment, then your verdict must be not guilty." (Emphasis added.) Hicks argues the instruction mislead the jury into believing that it could acquit Hicks only if it found that the state had failed to prove every element of rape.

Because Hicks did not object to the instruction, and did not make any proposed jury instructions a part of this record, we review for plain error. *See* Crim.R. 30(A); *see also State v. Everett*, 1st Dist. Hamilton No. C-140275, 2015-Ohio-5273, ¶ 8. To prevail under the plain-error standard, Hicks must show that an error occurred, that it was an obvious error, and that it affected his substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) (also holding that an error affects substantial rights under Crim.R. 52(B) only if it affects the outcome of the trial). We take notice of plain error only under exceptional circumstances and only to prevent a manifest miscarriage of justice. *See id.*; *see also State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21-23. In determining whether the challenged jury instruction had an effect on the outcome of the case, we examine the jury instructions as a whole. *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶ 90 (1st Dist.).

Immediately before giving the challenged instruction, the trial court correctly charged the jury that Hicks could only be found guilty if the state proved all essential elements of the offense beyond a reasonable doubt. *See* R.C. 2901.05(A) and 2938.08. Earlier in the instructions, the trial court had told the jury that Hicks “must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt of *every* essential element of the offenses charged in the indictment.” (Emphasis added.) In light of these correct instructions on the state’s burden at trial, the jury could only conclude that it was required to acquit Hicks if the state failed in its proof of any one element. *See State v. Thompson*, 4th Dist. Washington No. 06CA72, 2007-Ohio-6839, ¶ 17-18, citing *State v. Conner*, 8th Dist. Cuyahoga No. 65385, 1996 Ohio App. LEXIS 2707, *9-10 (June 27, 1996). Thus we hold that the challenged instruction did not misled the jury, and that the trial court did not commit plain error. The fourth assignment of error is overruled.

OHIO FIRST DISTRICT COURT OF APPEALS

Hicks' fifth assignment of error, in which he alleges that he was denied a fair trial because of the cumulative effect of the errors in the case, is overruled. Since the trial was not infected with multiple instances of harmless error, the cumulative-error doctrine does not apply. *See State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631, ¶ 57 (1st Dist.); *see also State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 112.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on June 17, 2016
per order of the court _____.
Presiding Judge