

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 11AP-1159  
 : (C.P.C. No. 10CR-2709)  
 Carlos Davenport, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on November 8, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Golden & Meizlish Co., LPA*, and *Keith E. Golden*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Carlos Davenport is appealing from his conviction on rape charges. He assigns four errors for our consideration:

I. The Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to vigorously cross-examine [TW] for her motives in accusing the Appellant of wrongdoing.

II. The Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution was violated when the police destroyed exculpatory evidence.

III. The trial court erred in failing to grant the Appellant's motion for judgment of acquittal based upon insufficient evidence to convict.

IV. The Appellant's rights under the confrontation clause of the Sixth Amendment to the United States Constitution were violated when testimony was admitted regarding the alleged criminal acts herein committed against [TW] from a witness other than [TJW], despite the fact that [TJW] testified.

{¶ 2} Davenport was indicted on two charges of raping a child under the age of 13 and one charge of kidnapping incident to the conduct involved in the rape charges. After hearing evidence, a jury convicted Davenport of the charges. The judge assigned to the case sentenced Davenport to consecutive terms of imprisonment of 25 years to life on the rape charges and considered the kidnapping charge as having merged with the rape conviction.

{¶ 3} Davenport was accused of forcing himself on TW's daughter. Once the daughter made her claims to her mother about Davenport's conduct, the daughter was examined and most of the child's hymen was found to be gone. The daughter was only 10 at the time.

{¶ 4} At the trial, both the mother and daughter testified. The child's testimony clearly indicated that Davenport had engaged in sexual activity with her. The medical testimony clearly demonstrated that the child had been forcibly penetrated. The elements of the rape charges were proved.

{¶ 5} The third assignment of error, claiming insufficient evidence to support the convictions, is overruled.

{¶ 6} The allegations that Davenport's trial somehow involved deprivation of the right to confront witnesses has no merit. TW and TJW both testified in open court. The medical person who examined TW's child testified about her findings. The licensed social worker who interviewed the child to obtain a medical history in preparation for the physical examination testified. Since the child testified in open court, no confrontation issues are presented with regard to her testimony and her prior statements.

{¶ 7} The fourth assignment of error is overruled.

{¶ 8} TW once had a romantic and sexual relationship with Davenport, which was part of why Davenport had access to the child at times. At trial, defense counsel attempted to argue that Davenport did not rape the child but that the accusations were the result of TW feeling like a jilted lover. The defense theory did not adequately rebut the detailed events related by the child when interviewed. The defense's theory also did not offer a cogent explanation for the child's ruptured hymen.

{¶ 9} The first assignment of error argues that defense counsel did not adequately explore the theory of the rape as a malicious hoax perpetrated by the mother. The mother's hostility toward Davenport was obvious, but could easily be explained by the mother feeling Davenport had raped her child. An argument that the mother wanted Davenport back in her home had no prospect of convincing a jury that Davenport had not raped the child, especially given the medical evidence.

{¶ 10} Trial counsel for Davenport basically had to try an un-winnable case, given the medical evidence and the child's testimony. Counsel clearly did not provide ineffective assistance of counsel for purposes of the Sixth Amendment to the United States Constitution, given the requirement of *Strickland v. Washington*, 466 U.S. 668, 686 (1984), that a different outcome of the case be reasonably foreseeable.

{¶ 11} The first assignment of error is overruled.

{¶ 12} The second assignment of error attempts to argue that information in Davenport's cell phone would have supported the theory that the charges were a hoax perpetrated by the child's mother. The contents of the cell phone were not presented in evidence at the trial. Such information was presumably available through a subpoena of the provider's records regarding the cell phone. Further, Davenport claimed to have taped evidence of conversations he had with TW. Finally, he claimed he possessed the memory card from the cell phone. None of the data and information Davenport claimed to possess was presented or proffered at the trial.

{¶ 13} Given Davenport's claims that he had the memory card from the cell phone, there is no basis for his now arguing that police removed information from the cell phone. Police could not remove what Davenport claimed to possess. Further, voicemails and related information are retained by the service provider, in this case T-Mobile. Police did not make any pertinent evidence unavailable.

{¶ 14} Since there was no police misconduct, especially destroying evidence, Davenport was not deprived of Due Process of Law.

{¶ 15} The second assignment of error is overruled.

{¶ 16} All four assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

SADLER and FRENCH, JJ., concur.

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