Not Reported in N.E.2d
Not Reported in N.E.2d, 1984 WL 3442 (Ohio App. 12 Dist.)
(Cite as: 1984 WL 3442 (Ohio App. 12 Dist.))
<KeyCite History>
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Preble County.
STATE OF OHIO, Plaintiff-Appellee
v.
JERRY NEELEY, Defendant-Appellant
CASE NO. CA83-10-029.

October 9, 1984.

Wilfrid G. Dues, Prosecuting Attorney, and Rebecca J. Ferguson, Assistant Prosecuting Attorney, Preble County Courthouse, Third Floor, 100 East Main Street, Eaton, Ohio 45320, for Plaintiff-Appellee.

Konrad Kuczak, P. O. Box 963, Mid City Station, Dayton, Ohio 45402, for Defendant-Appellant.

MEMORANDUM DECISION AND JUDGMENT ENTRY

PER CURIAM

*1 This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Preble County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

Defendant-appellant, Jerry Neeley, was indicted and subsequently convicted of raping one Clara Jane Smith in violation of R.C. 2907.02. Neeley and Smith had been romantically involved with each other and had lived together for a period of time during 1975, and evidently remained speaking acquaintances up to the time of the incident. At trial, Smith testified that Neeley arrived at her home at 502 Lexington Avenue in Eaton, Preble County, Ohio, at approximately 6:30 p.m. on May 3, 1983, for the stated purpose of leaving a telephone number for someone. At the time, Smith stated that she was at home alone, watching television and crocheting. After answering Neeley's rap on the door and hearing his request, Smith testified that as she reached for a package of cigarettes located upon a small end table near the door Neeley entered the house, grabbed her arm and demanded that she kiss him. Smith then allegedly told Neeley that she did not want him in the house and attempted to free her arm from his grasp, but Neeley ignored her recalcitrance, pulling her closer to him while attempting to kiss and caress her. As he proceeded, Neeley was allegedly talking about how things were between them in 1975 when they were living together. Smith stated that Neeley, despite her continued resistance, unsnapped her blouse, raised her bra and lowered her pants and underpants. Ultimately, according to Smith's testimony, Neeley pushed her up against a wall behind the door through which he had entered the premises and forced her to have intercourse with him. Smith stated that Neeley achieved slight vaginal penetration prior to ejaculating onto her stomach and clothing.

Appellant, who testified on his own behalf at trial, admitted that he had had sexual relations with Smith on the day, at the time, and in the manner alleged, but asserted that Smith voluntarily admitted him into her home, and that she consented to the intercourse following a brief conversation wherein Smith and Neeley reminisced about their past relationship.

Appellant was found guilty of rape following a trial by jury held October 12 and 13, 1983. Judgment was entered on the verdict the following day, and appellant was subsequently sentenced to serve five to twenty-five years in the Ohio State Penitentiary. Having timely filed the instant appeal from his conviction, appellant presents the following nine assignments of error:

ASSIGNMENT OF ERROR NO. 1:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING EVIDENCE OF PRIOR SEXUAL ACTS BETWEEN THE DEFENDANT-APPELLANT AND THE COMPLAINING WITNESS."

ASSIGNMENT OF ERROR NO. 2:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE TESTIMONY OF GAIL IRENE TAYLOR AS TO 'OTHER ACTS'."

*2 ASSIGNMENT OF ERROR NO. 3:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GRANT DEFENSE COUNSEL'S MOTION FOR A MISTRIAL UPON THE WILLFUL VIOLATION OF THE COURT'S ORDER IN LIMINIE [sic]."

ASSIGNMENT OF ERROR NO. 4:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO RECESS THE TRIAL FOR TWO HOURS FOR THE DEFENDANT-APPELLANT TO UNDERGO MEDICAL TESTS TO DETERMINE IF A

VASECTOMY, WHICH HAD BEEN PERFORMED TEN YEARS EARLIER, HAD BEEN SUCCESSFUL."

ASSIGNMENT OF ERROR NO. 5:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO PERMIT THE DEFENDANT TO RESPOND TO THE QUESTION 'DID YOU, JERRY NEELEY, IN FACT RAPE CLARA JANE SMITH ON MAY - -?"'

ASSIGNMENT OF ERROR NO. 6:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE MOTIONS BY THE DEFENDANT-APPELLANT FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE."

ASSIGNMENT OF ERROR NO. 7:

"BY IMPOSING HIS OWN OPINION AS TO WHAT REASONABLE EXPECTATIONS OF THE DEFENDANT SHOULD HAVE BEEN CONCERNING HIS SEXUAL RELATIONSHIP WITH THE COMPLAINING WITNESS UPON THE JURY, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR."

ASSIGNMENT OF ERROR NO. 8:

"THE DEFENDANT-APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL BY THE APPOINTMENT OF INEFFECTIVE LEGAL COUNSEL TO REPRESENT HIM DURING THE PROCEEDINGS"

ASSIGNMENT OF ERROR NO. 9:

"THE JUDGMENT AND VERDICT OF THE TRIAL COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

Appellant's first two assignments of error concern the admissibility of certain "prior acts" testimony below. Two prior acts were allegedly improperly admitted, the first involving appellant and the complaining witness, Smith, while the two were living together during 1975. On redirect examination, Smith testified that appellant forced her to have sex with him on one occasion after they had returned from a movie late at night. As they lay in bed, Smith testified that appellant began to make sexual advances toward her, which she rejected. Appellant then, according to Smith, made a comment to the effect that it would be "more fun to take it, anyway," and proceeded to have sex with her against her will. Smith stated that she did not physically resist appellant's advances after he had made clear his intentions, but instead elected to remain passive and not offer appellant any encouragement. Smith further stated that she and appellant had both been drinking prior to the incident, and were somewhat intoxicated at the time the incident took place.

In his first assignment of error, appellant asserts that the trial court improperly admitted Smith's testimony about allegedly nonconsensual sexual activity between them during 1975. Appellant's brief reveals both procedural and substantive objections to the testimony. Procedurally, appellant claims that admission of the disputed testimony was prejudicial error because the testimony constituted improper redirect examination. We do not agree.

*3 The record indicates that the testimony complained of was presented out of order because the issue of appellant's past sexual activities with Smith was not broached on direct examination or oncross-examination. However, R.C. 2945.10, which addresses the order of proceedings in criminal cases, provides that the trial court, "for good reason, in the furtherance of justice, may permit evidence to be offered by either side out of its order." R.C. 2945.10(D). Further, any claim that the trial judge erred in allowing testimony to be presented out of order must be accompanied by a demonstration of resulting prejudice. State v. Bayless (1976), 48 Ohio St. 2d 73, vacated insofar as death penalty left undisturbed (1978), 438 U.S. 911, 98 S.Ct. 3135.

The record indicates that the trial court was well aware that Smith was going to testify about previous nonconsensual sexual conduct between Smith and appellant, as the disputed testimony was heard in chambers before it was presented to the jury. Apparently, the court elected to allow the state to present Smith's testimony out of order. as we can conceive of no prejudice to appellant due to the trial court's departure from the usual order of presentation, we must find appellant's allegation of procedural impropriety with regard to Smith's prior act testimony to be without merit. See Baylees, supra.

The question as to whether the prior act testimony by Smith should have been admitted below on a substantive basis is a more complex one. R.C. 2907.02(D) provides that evidence of specific instances of the defendant's sexual activity shall not be admitted unless

> "* * * it involves evidence of * * * the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, [dealing with acts probative of the defendant's motive, intent, scheme, plan or system, or absence of mistake or accident] and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

The trial court admitted Smith's testimony about prior sexual activity with Neeley as being relevant to the issue of consent.

As Smith's testimony concerned a specific instance of appellant's past sexual activity with the alleged victim, such testimony is admissible under the terms of R.C. 2907.02(D) if it is material to a fact at issue, and if its prejudicial nature does not outweigh its probative value. By raising the defense of consent, appellant certainly elevated the issue to the level of a material fact, as required by the statute. A fact is "material" if it is "of consequence to the

determination" of the action. Staff Notes, Evid. R. 401. If Smith freely consented to the sexual conduct at issue as contended by appellant, such conduct would negate the "force" element of R.C. 2907.02 and render appellant not guilty of rape.

The fact that appellant lived with Smith (and impliedly had consensual sexual relations with her) prior to the alleged rape was exposed during both direct and cross-examination of Smith. It would therefore appear that the jury should have been entitled to hear about any alleged nonconsensual sexual activity which took place while appellant and Smith were living tpgether, especially as appellant raised the defense of consent and testified himself as to his version of the alleged act. We therefore feel that the prejudicial effect of Smith's testimony did not outweigh its probative value. This position receives further support from the fact that the "force" alleged in the prior act, and appellant's response to it, are strongly analogous to the facts of the case at bar. This circumstance, we hasten to point out, does not necessarily benefit the state's case because the jury could reasonably have concluded, based on Smith's description of the prior act, that Smith's conception of "force or threat of force" was too tenuous to support a conviction for rape under R.C. 2907.02(A)(1).

*4 For the reasons stated, we find that the prior act testimony by the complaining witness, Smith, was properly admitted below. It was both material to a fact at issue, and its probative value did not outweigh its prejudicial effect. Therefore, appellant's first assignment of error is without merit and the same is, accordingly, overruled.

The second instance of prior act testimony allegedly erroneously admitted below also tended to show prior nonconsensual sexual activity by appellant. One Gail Irene Taylor testified that she met appellant in a bowling alley during 1979, and that although she and appellant were not dating, appellant visited her at her residence at lunchtime on several occasions during 1979 and 1980. During December, 1981, at approximately 1:00 a.m., Taylor testified that appellant knocked on the door of her residence. When Taylor answered the door wearing only a floor-length robe, appellant stated that he needed to talk to her. As Taylor admitted appellant to the premises, she noticed that he smelled of alcohol. Once inside Taylor's residence, appellant allegedly pushed Taylor toward her bedroom, telling her that they could talk there. Once in the bedroom, Taylor stated that appellant started wrestling with her on her bed, attempting to remove her robe and have sexual relations with her. She resisted, bumping her head on a wall and on a small table near the bed in the process, until appellant prematurely ejaculated. Taylor testified that she was crying as appellant started to leave, and told him that she ought to call the police. Appellant allegedly laughed and said the police wouldn't believe her because she let him in.

In his second assignment of error, appellant challenges the admissibility of the prior act testimony of Taylor. Again, appellant raises both procedural and substantive concerns with respect to the testimony complained of. Procedurally, Taylor's testimony was introduced by the state on rebuttal as a response to appellant's negative answer to the following question: "Have you ever forced anyone to have sex with you?" As stated with regard to testimony introduced on recross-examination discussed in response to appellant's first assignment of error, the order of presentation of evidence is within the sound discretion of the trial court. Accordingly, testimony presented in rebuttal which fails to respond to evidence presented by an opposing party and merely constitutes additional evidence-in-chief is admissible in the court's discretion. See State v. Graven (1978), 54 Ohio St. 2d 114; Erie R. v. Kennedy (6th Cir. 1911), 191 F. 332. Any deviation from the traditional mode of presentation will not be reversed on appeal unless it is shown that the trial court's decision resulted in demonstrable prejudice to the complaining party. See Bayless, supra.

A review of the record indicates that the trial judge listened to the testimony that was to be given by Taylor in chambers before the state rested its case. Prior to hearing the testimony, the court described the purpose of the hearing as follows: "* * * to hold an in camera inspection of the testimony of a witness that the state would intend to introduce I believe on rebuttal." (Emphasis added.) It is clear that the court knew that Taylor's testimony, if it was deemed admissible, was to be presented in rebuttal and was disposed to allow the state to present Taylor's testimony at that time. Therefore, if Taylor's testimony was properly admissible in the state's case-in-chief (a proposition considered in detail below), the trial court could properly, in its discretion, have permitted the state to present the testimony on rebuttal.

*5 Evidence of specific instances of a defendant's sexual activities with persons other than the alleged victim are not admissible under the terms of R.C. 2907.02(D) unless they involve evidence of the origin of semen, pregnancy, or disease, or if such testimony is admissible against the defendant per R.C. 2945.59. As Taylor's testimony does not concern the origin of semen, pregnancy, or disease, its admissibility turns on the language of R.C. 2945.59, which reads in its entirety as follows:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

The trial court admitted Taylor's testimony as relevant to the issue of intent, which is an element of rape because the

crime, per R.C. 2907.02(A)(I), requires the mental element "purposely", which is defined in R.C. 2901.22(A) as a specific intention to cause a certain result or to engage in certain conduct.

In determining whether Taylor's testimony is admissible under the terms of R.C. 2945.59 on the issue of intent, we find that the Ohio Supreme Court has set forth two avenues of inquiry for determination of such admissibility: First, it must be asked if the evidence sought to be admitted is relevant to the crime in question. Next, the evidence sought to be admitted must be determined to be material to an issue placed in question by the defendant. See State v. Gardner (1979), 59 Ohio St. 2d 14; State v. Howard (1978), 57 Ohio App. 2d 1; State v. Snowden (1976), 49 Ohio App. 2d 7. Finally, under the terms of R.C. 2907.02(D), it must be determined that the probative value of the testimony sought to be admitted outweighs its prejudicial effect.

To be relevant, a prior act "* * * 'must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question."' Gardner, supra, at 20, quoting State v. Burson (1974), 38 Ohio St. 2d 157, 159. The relevancy inquiry, in other words, "* * * expresses no more than a common sense conclusion that an act too distant in time or too removed in method or type has no permissible probative value to the charged crime." Snowden, supra, at 10.

The incident described by Taylor in the case sub judice occurred during December, 1981, or approximately sixteen months prior to the time appellant allegedly raped Smith. R.C. 2945.59 does not specify how old a prior act must be before it becomes inadmissible, and there is little case law on the subject. In State v. Nolan Ray George (Apr. 30, 1984), Butler App. No. CA83-04-034, unreported, this court held evidence of a prior act fourteen years old to be inadmissible even though the act was modally very similar to the crime with which defendant was charged. In Burson, supra, the Ohio Supreme Court held an act four years old to be inadmissible under R.C. 2945.59, although the court did not specifically rely on the temporal disparity between the prior act and the crime charged as its basis for excluding the prior act. At the other end of the temporal spectrum, the courts in Gardner, supra, Howard, supra, and State v. Giles (1948), 83 Ohio App. 39, held that acts committed within hours or days of the crime charged were admissible.

6 It is our view that a prior act sixteen months removed from the act for which an accused is being tried has little or no probative value as to a mental element such as intent, which requires proof of the accused's subjective mental state by means of objective evidence. [FN1] We see no connection between what appellant intended during the course of his encounter with Taylor and what he intended months later when he allegedly raped Smith as these are two completely unrelated acts. We are extremely doubtful that the former could ever reasonably be probative of the latter. Further, the admission of Taylor's prior act testimony can only be construed as manifestly prejudicial to appellant. Certainly the jury would be much more likely to believe appellant to be guilty of the offense with which he was charged after being exposed to evidence tending to show that appellant had committed a similar crime in the past. See State v. Hector (1969), 19 Ohio St. 2d 167, 174-75. R.C. 2945.59, " * * carries the potential for the most virulent kind of prejudice for an accused - that is, the possibility that he may be convicted not so much for what is proven concerning the crime sub judice, but for what he is shown to have committed on some other occasion." Snowden, supra, at 8.

> FN1 We are aware of only one Ohio case in which prior act testimony was successfully admitted on the issue of the accused's intent, that being Gardner, supra. In Gardner, the prior act sought to be admitted occurred only one day prior to the act of which the defendant was accused.

Accordingly, we find appellant's second assignment of error to be well taken. Taylor's prior act testimony about sexual activity with appellant sixteen months prior to the crime with which appellant was charged was too distant in time to be reasonably probative of appellant's intent during the incident at issue, and therefore irrelevant. We need not decide if Taylor's testimony was material to an issue placed in question by the defendant pursuant to the second part of the test set forth in Gardner, supra, because such testimony fails to satisfy the relevancy requirement.

In his third assignment of error, appellant charges that the court below erred in refusing to grant his motion for mistrial made due to the prosecutor's alleged violation of a pre-trial order. The order, filed on October 6, 1983, prevented the state from making any reference to prior attempted rapes by appellant "* * * until such time as the Court has had an opportunity to specifically rule on the admissibility of such evidence." We have ruled in response to appellant's second assignment of error, that certain prior act testimony prejudicial to appellant was improperly admitted below. Therefore, appellant is entitled to a new trial, and the question of whether appellant's motion for mistrial was properly denied below is moot. Accordingly, we decline to address the issue at this time.

Appellant's fourth assignment of error asserts that the trial court should have granted appellant's motion to recess the trial for two hours while he received medical tests to determine if a vasectomy allegedly performed upon him ten years prior to trial had been successful. The record reveals that appellant made no mention of the vasectomy to either the court or to his own counsel until the second day of trial. Further, the record indicates that appellant and his counsel knew or should have known that spermatozoa had been

discovered on the victim's body and clothing for weeks, even months, before appellant's trial began, and that appellant was free on bond prior to and during his trial, which would have allowed him ample opportunity to undergo a medical examination had he desired to do so.

*7 The decision as to whether to grant a continuance to either party is within the sound discretion of the trial court. State v. Unger (1981), 67 Ohio St. 2d 65; Goudy v. Dayton Newspapers, Inc. (1967), 14 Ohio App. 2d 207. Underthe circumstances related above, we the circumstances related above, we find that the trial court did not abuse its discretion in refusing to grant a continuance to appellant. Appellant had sufficient notice and sufficient opportunity to obtain a medical examination prior to trial. Therefore, the court properly refused appellant's request to continue trial proceedings for that purpose.

Accordingly, we find that appellant's fourth assignment of error is not well taken.

In his fifth assignment of error, appellant questions the trial court's refusal to allow him to answer the following question: "Did you, Jerry Neeley, in fact rape Clara Jane Smith on May -?" The question, which was asked of appellant on direct examination, was never completed due to an objection on behalf of the state. The trial court sustained the objection on the basis that it called for a legal conclusion by the witness. The record indicates that the court's ruling was not objected to by defense counsel.

Evid. R. 704 states that "* * * [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." As indicated by the Staff Note to Evid. R. 704, the rule does not make opinion evidence on an ultimate issue unconditionally admissible, but merely states that such evidence is "* * * not excludable per se." If the opinion, regardless of its relationship to an ultimate issue, assists the trier of fact and is not otherwise excludable, it is admissible. The Staff Notes to Evid. R. 704 also appear to indicate that testimony embracing an ultimate issue is admissible regardless of whether such testimony is provided by an expert or by a laywitness. Accord, see, Gianelli, Ohio Evidence Manual (1981), Author's Comment Sections 704.01; 704.03.

As the record indicates that appellant was precluded from responding to the question at issue solely because the question required him to address the ultimate issue before the trier of fact, we must conclude that the court below erred in sustaining the state's objection to the question. Therefore, appellant's fifth assignment of error is sustained.

Appellant's sixth assignment of error asserts that the court below erred in failing to grant his motion for acquittal made at the close of the state's case and renewed after all evidence had been presented. A motion for acquittal must be granted if the evidence presented is insufficient to sustain conviction of the accused on the offense charged. Crim. R. 29(A). A court shall not enter a judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of the crime charged has been proved beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261; Norman, supra.

*8 Appellant was charged with rape per R.C. 2907.02(A)(1), which reads as follows:

"(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

"(1) The offender purposely compels the other person to submit by force or threat of force."

The only element of the offense challenged by appellant in his brief is whether or not sufficient evidence was presented to constitute "force." He maintains that evidence tending to show that he grabbed Smith's arm in order to kiss her, pulled her blouse open and her pants down, and pinned her against the wall is insufficient to establish force per R.C. 2907.02(A)(1). We disagree. R.C. 2901.01(A) defines "force" as "* * * any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." (Emphasis added.) Surely this definition is broad enough to encompass the actions of appellant outlined above.

Therefore, the state in our view presented sufficient evidence which, if believed, could have caused a reasonable jury to conclude beyond a reasonable doubt that appellant purposely compelled Smith to submit to his sexual advances by force. Accordingly, appellant's sixth assignment of error is overruled.

In his seventh assignment of error, appellant finds error in a portion of the transcript wherein the trial judge allegedly imposes upon a prospective juror his own views regarding the impact of appellant's past sexual relationship with Smith on future sexual relations between them. The portion of the transcript complained of reads as follows:

"THE COURT: * * * Your [the prosecutor's] previous question was would the fact that they lived together - does she believe that the fact that they lived together give him the right to have sexual favors at some time in the future, and I think that is a proper question.

"How about that question, since I've asked it?

"MRS GEORGE: [A prospective juror, on voir dire.] Yes, probably.

"THE COURT: I'm not sure you understood the question. Would the fact that the parties, the alleged victim and the defendant may have lived together in the past give him the right to have sexual favors from that alleged victim at some point in time in the future, after they may have separated?

"MRS. GEORGE: I'm not sure. Could be I guess.

"THE COURT: Maybe stated a little more specifically.

"MRS. GEORGE: Well I'll say -

"THE COURT: Would the mere fact that there had been

consent possibly in the past indicate that the consent would extend into the indefinite future? Or does the woman have the right to say no at some point in time in the future?

"MRS. GEORGE: Right, no, I'll say no.

"THE COURT: The woman has a right to say no at some point in time in the future?

"MRS. GEORGE: No.

"THE COURT: I think your answer is yes, the woman has a right to say no, is that correct?

"MRS. GEORGE: OK.

"THE COURT: I think I understand you know what the answer is."

Appellant's trial counsel, who is not appellant's counsel for purposes of the instant appeal, made no objection to the colloquy related above.

9 In its brief, the state contends that the conversation of which appellant complains was merely the result of miscommunication which appears much more prejudicial in writing than was actually the case. According to the state, the facial expressions, gestures and tone of voice of Mrs. George made it " * * apparent to all persons in the Courtroom that Mrs. George was confused as to what the question actually was, which is why the trial judge persisted in asking her further questions regarding the issue." Given that defense counsel failed to object to the conversation at the time it took place, and that defense counsel likewise failed to exercise an available peremptory challenge to remove Mrs. George from the jury, we find the state's explanation to be both reasonable and persuasive. We are reluctant to substitute our judgment for that of the trial court and trial counsel based on the transcript alone.

Further, as appellant failed to object to the conversation at issue, any error by the trial court would, of necessity, have to be construed as plain error affecting appellant's substantial rights in order to merit our consideration. See Norman, supra; Eiding, supra. It is far from clear that the result of the trial would clearly have been otherwise had the court's discussion with the juror never taken place. See State v. Cooperrider (1983), 4 Ohio St. 3d 226. Accordingly, the record will not support a finding of plain error on this issue.

Therefore, we hereby overrule appellant's seventh assignment of error.

Appellant's eighth assignment of error alleges that he was inadequately represented by counsel at trial. In order to obtain reversal of a conviction based on ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was deficient, and (2) that the deficient performance was prejudicial to the defense. Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 2064. See, also, State v. Lytle (1976), 48 Ohio St. 2d 391, vacated insofar as death penalty left undisturbed (1978), 438 U.S. 910, 98 S.Ct. 3135. The defendant must prove both of the components set forth above to prevail. Strickland, supra, at ---, 104 S.Ct. at 2064. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, supra at ---, 104 S.Ct. at 2064. See, also, State v. Hestor (1976), 45 Ohio St. 2d 71.

In his brief, appellant's counsel sets forth multifarious alleged breaches of duty or discretion by trial counsel:

- Trial counsel unnecessarily presented evidence as to appellant's prior criminal record, as such record was more than ten years old. (See Evid. R. 60 (B).) Also, the prior convictions were mentioned in trial counsel's opening statement.
- Trial counsel failed to object to "fallacious issues" raised by the trial judge and the prosecutor involving whether the complaining witness ever said "no" during the alleged rape.

*10 - Appellant's failure to raise his alleged vasectomy until the second day of trial indicates "an obvious failure of counseling" on the part of trial counsel.

- Trial counsel never sought to introduce testimony by appellant to the effect that he had had a vasectomy. Similarly, trial counsel never proffered testimony by a physician as to the successfulness of the alleged vasectomy.
- The results of a venereal disease examination of appellant ordered by the trial court do not appear in the record.
- Trial counsel erred in failing to insist that in camera hearings held pursuant to R.C. 2907.02 were held three days prior to trial as set forth in the statute.
- The purpose of the testimony of two of the state's witnesses, Connie Jean O'Dell and Cynthia Meyers, was "somewhat vague" and should have been objected to by trial counsel.
- Someone involved in the softball game that appellant stated he was coaching the night prior to the alleged rape should have been called to testify to substantiate appellant's claim that he did not visit the complaining witness on that night, as asserted by Smith at trial.
- Trial counsel should have immediately caused appellant to be medically examined for the purpose of determining whether or not he had undergone a successful vasectomy after the unfavorable verdict was returned so that a motion for new trial could have been perfected based on the alleged vasectomy.

When assessing the efforts of trial counsel; reviewing courts must, of necessity, make ample compensation for trial tactics. Therefore, a strong presumption exists to the effect that legal assistance rendered at trial has been reasonably competent, and the accused must shoulder the burden of proving otherwise. See United States v. Cronic (1984), 466 U.S. 648, 104 S.Ct. 2039, 2046. After a careful review of the record, we can find no merit whatsoever in appellant's claim of ineffective assistance of legal counsel. Each of the alleged errors set forth above

amounts to no more than after-the-fact second guessing of trial tactics by appellate counsel, or sheer speculation as to why certain information appears or fails to appear in the record. There is nothing in the record before us, or contained in appellant's allegations, that even remotely suggests that trial counsel failed to actively and capably represent his client in a manner which served to provide appellant with reasonably effective legal assistance. We would again remind attorneys handling causes on appeal to this court that the duty to zealously represent clients must be tempered by common sense in order to avoid frivolous appeals. See State v. Hogsten (Aug. 20, 1984), Butler App. No. CA84-01-010.

Accordingly, appellant's eighth assignment of error is without merit, and is hereby overruled.

Appellant's ninth and final assignment of error asserts that the verdict below was against the manifest weight of the evidence. As we have held in response to appellant's second assignment of error that evidence extremely prejudicial to appellant was improperly admitted below, appellant is entitled to a new trial in this cause. Therefore, appellant's ninth assignment of error is moot, and we decline to respond thereto.

*11 The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and not inconsistent with this decision.

It is further ordered that a mandate be sent to the Court of Common Pleas of Preble County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by its counsel, excepts.

HENDRICKSON, P.J., KOEHLER and JONES, JJ., concur.

Not Reported in N.E.2d, 1984 WL 3442 (Ohio App. 12 Dist.)

END OF DOCUMENT