

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

STATE OF OHIO,	:	APPEAL NO. C-060573
	:	TRIAL NO. B-0506476
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
MARK KAEDING,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Mark Kaeding has appealed his convictions for two counts of rape. He was sentenced to an aggregate term of 20 years' incarceration. The rapes occurred in 2003, when the victim was 12 years old. The victim testified that she had met Kaeding in 2003 at the apartment of Midge, a friend and neighbor. The first time the victim had met Kaeding, she had gone into Midge's bedroom to borrow some clothes. Kaeding had come into the bedroom and had performed vaginal and oral sex on the victim. Kaeding bought the victim clothes and took her to dinner. Kaeding promised to give the victim a Corvette. Kaeding told the victim that he was going to get her false identification so that he could take her to Canada. Kaeding went to New York and Canada. While Kaeding was away, he wired the victim money. Kaeding returned in June of 2005. He again began to take the victim shopping and out to dinner. The victim's mother grew

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

suspicious, discovered what Kaeding was doing, and attempted to beat him with a pipe before police stopped her.

The first assignment of error alleges that prosecutorial misconduct in the closing argument denied Kaeding's rights to due process and a fair trial.

Prosecutors are normally entitled to a certain degree of latitude in closing argument.² A defendant must support a claim of prosecutorial misconduct in closing argument by showing that the prosecutor's remarks were improper and that they prejudicially affected the defendant's substantial rights.³ The remarks must not be viewed in isolation, but in light of the entire closing argument.⁴ "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."⁵ The prosecutor's conduct cannot be grounds for error unless the conduct deprives the defendant of a fair trial.⁶

Kaeding argues that the prosecutor committed misconduct in the closing argument by calling Kaeding a pedophile and engaging in other "name calling," and by referring to Kaeding's relationship with another young girl who had had Kaeding's child when she was 15. Following a review of the record, we hold that none of the instances of alleged prosecutorial misconduct was so egregious as to affect Kaeding's substantial rights or to deny him a fair trial. The first assignment of error is overruled.

Kaeding's second assignment of error alleges that his convictions were against the manifest weight of the evidence. To reverse a conviction based upon the manifest weight of the evidence, we must determine that the jury, in resolving conflicts in the evidence,

² See *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883.

³ See *id.*; *State v. Hessler*, 90 Ohio St.3d 108, 2000-Ohio-30, 734 N.E.2d 1237.

⁴ See *State v. Keenan* (1993), 66 Ohio St.3d 402, 613 N.E.2d 203.

⁵ See *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940.

⁶ See *State v. Keenan*, *supra*; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577.

clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.⁷ The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine.⁸

Kaeding essentially argues that the victim's testimony was not credible. Kaeding denied having sex with the victim. He also presented evidence that tended to show that if any sexual activity had occurred, it would have had to have taken place in 2004 when the victim was 13, not in 2003 when she was 12. Kaeding tried to show that the sex acts could not have occurred in 2003 by attempting to tie them to the birth of his child by another woman in 2004, and to the time that he had moved into Midge's apartment, which Kaeding contended was in 2004. Kaeding argues that the credible evidence showed that he did not even meet the victim until 2004.

The victim testified that she was sure that the sexual activity had taken place in 2003 because that was the year that her grandmother had died, and she remembered that the sex had occurred near her mother's birthday in April of that year. The victim also testified about a photograph that Kaeding had taken of her in 2003 when she was 12.

Issues of credibility were for the jury and it believed the victim's testimony. The second assignment of error is overruled.

The third assignment of error alleges that the trial court erred in denying Kaeding's motion for a mistrial.

The prosecutor asked the victim on direct examination if she knew Timothy Tate. The victim answered, "I believe that's his parole - -." Defense counsel interrupted with an objection. The trial court sustained the objection and struck the answer. Outside the presence of the jury, defense counsel moved for a mistrial based on the answer. Tate was

⁷ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

⁸ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

Kaeding's parole officer. The prosecutor stated that the victim had been instructed not to say anything about Kaeding having been on parole or in prison. The prosecutor further stated that he had asked the victim about Tate because defense counsel had indicated that he was going to attack the victim's credibility by asking her if she had told Tate about the sex with Kaeding. The court pointed out the problem that defense counsel was creating. Defense counsel wanted to ask the victim if she had told Tate about the sex. Apparently, the answer was no. But, the court pointed out, the reason that the victim had not told Tate was because Tate was Kaeding's parole officer, and she had not wanted Kaeding to get into trouble. The court noted that if defense counsel asked the question, the victim would be required to answer truthfully about why she did not tell Tate. The trial court overruled the motion for a mistrial.

The grant or denial of a motion for a mistrial is within the trial court's sound discretion.⁹ A jury is presumed to follow the trial court's curative instructions.¹⁰ The trial court should declare a mistrial only when the ends of justice so require and a fair trial is no longer possible.¹¹

The reference to Kaeding's parole officer was fleeting. The trial court promptly sustained defense counsel's objection and struck the remark. The court did not abuse its discretion in refusing to declare a mistrial. The third assignment of error is overruled.

Kaeding's fourth assignment of error alleges that he was denied the effective assistance of counsel. Kaeding does not cite any specific instance of counsel's alleged ineffectiveness; he merely asks this court to "examine trial counsel's performance in light of *Strickland v. Washington*."¹²

⁹ See *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623.

¹⁰ See *id.*; *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.

¹¹ See *State v. Garner*, *supra*; *State v. Franklin* (1991), 62 Ohio St.3d 118, 580 N.E.2d 1.

¹² (1984), 466 U.S. 668, 104 S.Ct. 2052.

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Reversal of a conviction based upon the ineffective assistance of counsel requires a showing by the defendant that his counsel's performance was deficient and that he was prejudiced by the deficiency.¹³ We have reviewed the record, and we hold that it does not demonstrate either deficient performance or prejudice to Kaeding. The fourth assignment of error is overruled.

The fifth assignment of error, alleging that the effect of cumulative error denied Kaeding a fair trial, is overruled because Kaeding has not demonstrated any prejudicial error in the proceedings in the trial court.

Therefore, the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

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

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on November 7, 2007
per order of the Court _____.
Presiding Judge

¹³ See id.; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.