[Cite as *State v. McGhee*, 2009-Ohio-4887.]

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

STATE OF OHIO,	:	APPEAL NO. C-080801 TRIAL NO. B-0801767
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
EDWARD McGHEE,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 18, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *James Michael Keeling*, Assistant Prosecuting Attorney, for Appellee,

Michaela M. Stagnaro, for Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Judge.

{¶1} Defendant-appellant, Edward McGhee, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of two counts of compelling prostitution under R.C. 2907.21(A)(2) and two counts of unlawful sexual conduct with a minor under R.C. 2907.04(A). He was convicted after a jury trial.

McGhee's Relationship with "B.B."

{¶2} The alleged victim of the offenses, "B.B," was born on November 12, 1990. After allegations that her stepfather had sexually assaulted her, B.B. was removed from her home and placed in foster care.

{¶3} When she was 15 years old, B.B. ran away from her foster home and began life as a prostitute. One afternoon in August 2006, she was walking in front of McGhee's home, and he solicited her for sex. McGhee was 41 years old at that time.

{¶4} After B.B. and McGhee had engaged in sexual intercourse, she informed him that she was only 15 years old. That same day, McGhee suggested that he become B.B.'s pimp. According to his plan, he would tell prospective customers that B.B. was 19 years old and that she was from Atlanta. McGhee told B.B. that she could make more money working for him than she could make on her own.

{¶5} That evening, McGhee and B.B. put McGhee's plan into action, and B.B. had sex with two men at McGhee's house in exchange for money. On a later date, McGhee solicited a customer at a bar, after which B.B. had sexual intercourse with the man at McGhee's residence.

{¶6} B.B. testified that she had engaged in sexual intercourse with McGhee in September and October of 2006. In December 2006, she discovered that she was

pregnant. Subsequent paternity tests revealed that McGhee was the father of the child.

{¶7} According to B.B., McGhee had at first been happy about the pregnancy. Then, in early 2007, B.B. returned to foster care so she could obtain medical coverage for herself and the child. B.B. testified that she had attempted to protect McGhee by not revealing that he was the father of her child. But when B.B.'s foster mother eventually learned that McGhee was the father, she contacted the police.

{¶8} B.B. testified that when McGhee had become aware that the police had been notified, his attitude toward the pregnancy changed. He became verbally abusive, and one day he came to her "Life Skills" class and "tried to push" her in the stomach.

{¶9} Cincinnati Police Detective Jane Noel testified that she had first become acquainted with B.B. during the investigation of the stepfather's alleged sexual abuse. She testified that, during her investigation of the instant offenses, B.B. had at first refused to reveal the identity of her child's father. But after B.B. had lived with her foster mother for a short time, she had informed Noel that McGhee was the father of the child.

{¶10} After the state's case, McGhee rested without presenting evidence. The jury found him guilty, and the trial court sentenced him to an aggregate term of 15 years' imprisonment.

Other Acts

{¶11} In his first assignment of error, McGhee now contends that he was denied a fair trial because of inadmissible "other acts" evidence. Specifically, he

argues that it was erroneous to admit evidence that he had attempted to assault B.B. at her Life Skills class.

{¶12} Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶13} But because McGhee failed to object to the evidence, we review the assignment under a plain-error standard. Under the plain-error standard, an appellate court will reverse a judgment only where the outcome clearly would have been different absent the alleged error.[1]

{¶14} In the case at bar, there was no plain error. The state apparently introduced the evidence to demonstrate why B.B. had not come forward earlier with the allegations of sexual abuse. Until the police had learned of the sexual conduct, McGhee had been supportive of B.B. and the pregnancy; but once exposed as the father of a 16-year-old's child, he became physically abusive. It was then that B.B. informed the police of the complete details of McGhee's offenses. The incident, therefore, was relevant in explaining the impetus for B.B. finally coming forward with the allegations underlying the charges.

{¶15} And in fact, McGhee himself used the assault as part of his defense. He attempted to demonstrate that B.B. had fabricated her testimony in retaliation for the assault. In light of McGhee's own use of the evidence, the trial court's admission of the testimony did not constitute plain error.

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[1] *State v. Miller,* 1st Dist. No. C-070691, 2008-Ohio-5899, ¶22.

{¶16} In the second assignment of error, McGhee argues that the trial court erred in admitting hearsay evidence. He takes issue with Noel's descriptions of B.B.'s tumultuous childhood and her life on the streets as a prostitute. He also contends that the trial court erred in permitting Noel to repeat B.B.'s statements about her sexual conduct with McGhee. He argues that the statements had the cumulative effect of unfairly evoking sympathy for B.B. and of improperly bolstering her testimony. But because McGhee failed to object to the statements, we again review their admission under a plain-error standard.

{¶17} We find no plain error. Noel's statements merely described how she had become involved with the investigation and were not inflammatory or otherwise unfair to McGhee. And as McGhee acknowledges, they were cumulative to the statements of B.B. herself. Accordingly, we cannot say that the result clearly would have been different absent the testimony. We overrule the second assignment of error.

{¶18} In his third assignment of error, McGhee contends that he was denied a fair trial as a result of improper remarks made by the prosecutor in closing argument. He takes issue with the prosecutor's argument that B.B.'s testimony was credible, as well as the prosecutor's pleas for the jury not to "let down" B.B. and to "give her the justice that she deserves."

{¶19} To obtain a reversal on the ground of improper remarks made during closing argument, the defendant must demonstrate not only that the comments were improper, but also that they deprived the defendant of a fair trial.[2]

{¶20} In this case, McGhee has failed to show undue prejudice. In arguing that B.B.'s testimony was credible, the prosecutor simply asserted that B.B.'s

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[2] *State v. Pearson* (Dec. 1, 2000), 1st Dist. No. C-990860.

testimony was internally consistent and that it was consistent with the other evidence.

{¶21} And while the prosecutor's plea for the jury to give the victim justice was arguably improper,[3] we cannot say that it deprived McGhee of a fair trial. The trial court instructed the jury that the arguments of counsel did not constitute evidence, and in the context of the entire proceedings, the remarks were inconsequential.[4] We overrule the third assignment of error.

{¶22} In his fourth assignment of error, McGhee argues that he was denied the effective assistance of trial counsel. He contends that counsel was deficient in failing to object to the other-acts evidence, the hearsay statements, and the remarks of the prosecutor already discussed under the first, second, and third assignments of error.

{¶23} To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable performance and that prejudice arose from counsel's performance.[5] A defendant demonstrates prejudice by showing that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different.[6]

{¶24} In this case, we find no deficiency. As we have already discussed, there was no undue prejudice in the hearsay statements of Noel or in the remarks of the prosecutor. As for the other-acts evidence, defense counsel attempted to use the assault on B.B. as a means of demonstrating that she had a motive to falsely accuse

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[3] See *State v. Brown,* 5th Dist. No. 2005CA00094, 2006-Ohio-826, ¶18.
[4] See id. at ¶17.
[5] *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.
[6] *Strickland,* supra, at 694, 104 S.Ct. 2052.

McGhee of the sex offenses. Although the trial strategy was ultimately unsuccessful, we cannot say that counsel's performance fell below an objective standard of reasonableness.[7]

Sufficiency and Weight of the Evidence

{¶25} In his fifth and final assignment of error, McGhee maintains that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶26} In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[8] To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.[9]

{¶27} R.C. 2907.21(A)(2) provides that "[n]o person shall knowingly * * * [i]nduce, procure, encourage, solicit, request, or otherwise facilitate * * * [a] minor to engage in sexual activity for hire, whether or not the offender knows the age of the minor * * *." R.C. 2907.04(A) states that "[n]o person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the

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[7] See, e.g., *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶63 (reaffirming "the presumption that defense counsel's performance constituted sound trial strategy").
[8] *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.
[9] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶28} In this case, the convictions were in accordance with the evidence. The state demonstrated that McGhee had induced and solicited B.B. to engage in sexual activity for hire and that he had facilitated the activity by procuring customers and by allowing the activity to occur in his home. The evidence also established that McGhee had engaged in sexual conduct with B.B. at least two times after learning that she was 15 years of age. Although McGhee questions B.B.'s credibility and emphasizes that she had engaged in prostitution before they met, we cannot say that the jury lost its way in finding him guilty.

{¶29} We overrule the fifth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

HENDON, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.