

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

STATE OF OHIO,	:	APPEAL NO. C-140423
	:	TRIAL NO. B-1306140
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
JASON CARPENTER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Reversed in Part, and
Cause Remanded

Date of Judgment Entry on Appeal: April 29, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *David Hoffman*,
Assistant Public Defender, for Defendant-Appellant.

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

SYLVIA S. HENDON, Presiding Judge.

{¶1} Following a bench trial, defendant-appellant Jason Carpenter was convicted of four counts of gross sexual imposition and sentenced to an aggregate term of four years' imprisonment.

{¶2} Carpenter appeals, raising six assignments of error for our review. We affirm Carpenter's convictions, but reverse the trial court's imposition of court costs and remand this cause for resentencing so that the trial court may address the imposition of court costs on the record in Carpenter's presence. On remand, the trial court is also instructed to incorporate into the sentencing entry the findings that it made to support the imposition of consecutive sentences.

Facts and Procedure

{¶3} Carpenter was indicted for three counts of rape pursuant to R.C. 2907.02(A)(2) and one count of gross sexual imposition pursuant to R.C. 2907.05(A)(1). The victim of his offenses was K.M.,¹ the daughter of Carpenter's girlfriend, Jamie Mozer.

{¶4} Count one of the indictment alleged that Carpenter had raped K.M. on an undetermined date between September 1, 2011, and May 31, 2012. Count two alleged that Carpenter had raped K.M. on an undetermined date between June 1, 2012, and December 31, 2012. Count three alleged that Carpenter had raped K.M. on an undetermined date between January 1, 2013, and February 10, 2013. And count four alleged that Carpenter had committed gross sexual imposition against K.M. on

¹ K.M. is also referred to as C.M. throughout the record.

an undetermined date between May 1, 2012, and July 31, 2012. These offenses were alleged to have occurred when K.M. was approximately 13 to 15 years old.

{¶5} Trial testimony established that Carpenter had moved in with K.M., her mother, and her two brothers after he and K.M.'s mother began dating in 2011. They resided in a home on Clark Street in the suburb of Reading. K.M. testified that Carpenter had begun abusing her shortly after moving in. The first instance occurred when Carpenter came up and laid behind her while she was sleeping on a futon. He covered her mouth, whispered in her ear, and began touching her all over her body, including, as K.M. described, inside her "no no square." K.M. described an ongoing pattern of abuse from that point forward. She testified generally that her encounters with Carpenter occurred every night at first, but spread out as time went by. According to K.M., Carpenter abused her both at home and at his job sites where he worked as a flooring installer, and he was very controlling of her.

{¶6} K.M. described several episodes of Carpenter's abuse with specificity, including an encounter in which Carpenter's brother, John Wiechering, interrupted Carpenter groping her with her clothes off. She further described an incident on New Year's Eve of 2012, in which her mother had witnessed Carpenter abuse her. K.M. testified that Carpenter abused her for the last time in February of 2013. Following that incident, K.M. ran away from home to reside with an aunt. K.M. testified that Carpenter had threatened to kill all members of her family if she revealed his abuse.

{¶7} The state presented testimony at trial from Allen Tucker, a neighbor of K.M. and her family. Tucker testified that in May of 2012, he had been working in his backyard, which had a clear view into the backyard of K.M.'s home. Tucker

witnessed Carpenter touch K.M. on her behind, hug her, and rub against her. Tucker reported this incident to the Reading Police Department. Reading Police Lieutenant John Lagory testified that, in 2012, he had investigated allegations of Carpenter's misconduct with K.M. that had been raised by Carpenter's brother, John Wiechering, and neighbors. The investigation was dropped at that time, but it was reactivated in 2013 after K.M. reported the abuse. K.M. explained that she had initially denied the abuse in 2012 because Carpenter had threatened her and had instructed her on how to respond to the investigation.

{¶8} John Wiechering testified for the state at trial. Wiechering had resided with Carpenter and K.M.'s family at the Clark Street house in May of 2012. When asked by the prosecutor if he had witnessed anything unusual while residing there, Wiechering responded that he had witnessed Carpenter be a role model to kids that did not have a father figure in their life. He further stated that he had been on drugs during that time, and that he had exaggerated in statements that he had given about Carpenter's relationship with K.M. He specifically denied stating that he had seen K.M.'s head in Carpenter's crotch, insisting that her head had, instead, been on Carpenter's stomach.

{¶9} After Wiechering refused to provide direct answers to the prosecutor's questions, the trial court declared him a hostile witness. The prosecutor then questioned Wiechering about his prior statement indicating that he had seen Carpenter's pants on the living room couch while Carpenter was under the covers with K.M. in her bed. Wiechering attempted to contradict that statement by admitting that, while he had seen a blanket over somebody in K.M.'s bed, he had not actually seen who had been under the blanket. He explained that he had only gone to

the police in 2012 because he had concerns at that time, but that, after getting off drugs and talking to K.M.'s mother, he realized that he had been wrong.

{¶10} Carpenter testified on his own behalf and denied all of K.M.'s allegations. When questioned about Allen Tucker's testimony that Tucker had witnessed him touch K.M. on her behind, Carpenter conceded that he had smacked K.M.'s buttocks, but he insisted that he had done so as a form of discipline to punish K.M. for throwing a basketball at her brother's face.

{¶11} When delivering its verdict, the trial court stated that it had found K.M. to be a very credible witness. The court found Carpenter guilty of gross sexual imposition in count four, but because the state had not proven the element of penetration beyond a reasonable doubt, found him guilty of the lesser offenses of gross sexual imposition in counts one, two, and three. The court imposed consecutive prison sentences of 18 months on counts one and two and 12 months on count three, along with a concurrent sentence of 12 months on count four, for a total of four years' imprisonment.

Indictment and Due Process

{¶12} In his first assignment of error, Carpenter contends that his due process rights were violated because his indictment lacked specificity and contained duplicate charges, leaving him unable to prepare a meaningful defense. He alleges that the first three counts of his indictment were identical but for the included date range. In support, he cites *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005).

{¶13} In *Valentine*, the defendant had been convicted of 20 counts of child rape and 20 counts of felonious sexual penetration. *Id.* at 628. All rape counts in Valentine's indictment had been identically worded and could not be differentiated.

Each count of felonious sexual penetration was also identically worded. Valentine's indictment alleged that all offenses had occurred in the same date range, and the state failed to distinguish the factual bases of the charges at any point. *Id.* Valentine challenged his indictment on the ground his due process rights were violated when he was charged with an indictment that failed to specify a date or distinguish between conduct on any given date. *Id.* at 630.

{¶14} The Sixth Circuit found no problem with the indictment's date range and noted that "large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice provisions." *Id.* at 632. But the court was persuaded by Valentine's argument with respect to the state's failure to factually distinguish any of the counts in the indictment. It stated that "[t]he problem in this case is not the fact that the prosecution did not provide the defendant with exact time and places. If there had been singular counts of each offense, the lack of particularly would not have presented the same problem." *Id.* The Sixth Circuit concluded that the indictment as worded made it difficult for the jury to consider each count on its own and resulted in Valentine being tried in an "all or nothing fashion." *Id.* at 633-634.

{¶15} This court considered and rejected a similar argument in *State v. Webster*, 1st Dist. Hamilton No. C-120452, 2013-Ohio-4142. In *Webster*, we held that "[t]he state, as permissible, used the same language in each of its counts of sexual conduct with a minor. But it distinguished the charges by narrowing the time frame of each." *Id.* at ¶ 25.

{¶16} Unlike the indictment in *Valentine*, in this case the state charged Carpenter with solely one offense of rape in each time frame, and it presented

supporting evidence specifically relating to each time period as alleged in the indictment. The indictment allowed the trier of fact to consider each count on its own and did not result in Carpenter being tried in an all or nothing fashion.

{¶17} We hold that Carpenter suffered no due process violation, and we overrule the first assignment of error.

Hostile Witness

{¶18} In his second assignment of error, Carpenter contends that the trial court erred in declaring the state's witness John Wiechering to be a hostile witness.

{¶19} A trial court may declare a state's witness hostile, thus allowing the state to ask the witness leading questions, when "the witness is shown to have a strong affinity for the defendant, frequently gives incomplete or evasive answers, and testifies differently from any statements previously given." *State v. Hall*, 1st Dist. Hamilton No. C-940227, 1995 Ohio App. LEXIS 1926, *8 (May 10, 1995). A determination as to whether a witness is hostile is within the trial court's discretion. *Id.* An abuse of discretion is more than an error of law or of the trial court's judgment. Rather, it implies that the trial court's determination was unreasonable, arbitrary, or unconscionable. *Pembaur v. Leis*, 1 Ohio St.3d 89, 91, 437 N.E.2d 1199 (1982).

{¶20} Wiechering was Carpenter's brother, and his testimony clearly demonstrated a strong affinity for Carpenter. In response to the prosecutor's question regarding whether he had witnessed anything unusual when living in the Clark Street home, Wiechering stated that he saw Carpenter as a good father and role model. This testimony clearly surprised the prosecutor and was in direct contradiction to that offered by the neighbor, Allen Tucker, who had, with

Wiechering, reported their concerns about Carpenter's relationship with K.M. to the Reading Police Department. Wiechering refused to give direct answers to the prosecutor's questions, prompting the trial court to question Wiechering. And Wiechering attempted to qualify prior statements, including his statement that he had seen K.M.'s head in Carpenter's crotch.

{¶21} The trial court did not abuse its discretion in declaring Wiechering a hostile witness. The second assignment of error is overruled.

Sufficiency and Weight

{¶22} In his third assignment of error, Carpenter contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶23} Carpenter was convicted of four counts of gross sexual imposition pursuant to R.C. 2907.05(A)(1). This statute provides in relevant part that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he offender purposely compels the other person, or one of the other persons, to submit by force or threat of force."

{¶24} We first consider counts one, two, and three of Carpenter's indictment, each of which charged Carpenter with raping K.M. during a specified date range. K.M. provided definite testimony tying Carpenter's abuse of her to the relevant time frames stated in each count. Her testimony indicated that Carpenter had threatened to harm her and her family if she revealed his abuse.

{¶25} Both K.M. and Allen Tucker provided testimony in support of count four of the indictment, which charged Carpenter with committing gross sexual imposition against K.M. on an undetermined date between May 1, 2012, and July 31,

2012. This count specifically concerned Carpenter's grabbing of K.M.'s buttocks on the balcony of the Clark Street home.

{¶26} We hold that the trial court, when viewing this testimony and all reasonable inferences drawn therefrom in the light most favorable to the prosecution, could reasonably have found the elements of gross sexual imposition proven beyond a reasonable doubt with respect to each count of the indictment. Carpenter's convictions were supported by sufficient evidence. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶27} We further hold that Carpenter's convictions were not against the manifest weight of the evidence. Carpenter testified on his own behalf and denied all of K.M.'s allegations. But the trial court, who was in the best position to judge the credibility of the witnesses, stated on the record that it found the testimony of K.M. to be credible. We will not second-guess that determination. This was not the rare case in which the trier of fact lost its way and committed such a manifest miscarriage of justice in convicting Carpenter that his convictions must be reversed. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶28} Carpenter's third assignment of error is overruled.

Evid.R. 404

{¶29} In his fourth assignment of error, Carpenter contends that the trial court erred by admitting other-acts testimony into evidence in violation of Evid.R. 404(B). Carpenter essentially argues that, although he was only charged with one offense during each time period specified in the indictment, the trial court erred in allowing testimony concerning numerous instances of abuse that K.M. had suffered

during any one time period. He refers to this testimony as describing “instances of uncharged misconduct” that should have been excluded pursuant to Evid.R. 404(B).

{¶30} Carpenter was charged with a continuing course of conduct involving the abuse of K.M. The state separated his conduct into various time frames, but only charged Carpenter with one offense during each time frame. K.M. testified about all the abuse that she had suffered. Her testimony, as Carpenter accurately contends, described more than one episode of abuse in each time frame. But this was not improper.

{¶31} The Twelfth District considered a similar argument in *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, 966 N.E.2d 958 (12th Dist.). Blankenburg had been convicted of numerous offenses, including, as relevant to this discussion, four counts of corruption of a minor, six counts of gross sexual imposition, and three counts of compelling prostitution or complicity thereto. *Id.* at ¶ 3. He argued on appeal that the state had “introduced evidence of multiple acts of sexual misconduct to prove single counts.” *Id.* at ¶ 7. Blankenburg did not couch his argument in terms of Evid.R. 404(B), but instead alleged “duplicity” or “double pleading.” The Twelfth District rejected his argument. It first noted that, as in this case, Blankenburg had been charged with a continuing course of conduct charged as separate offenses occurring in different time frames. *Id.* at ¶ 20. It then held that “[w]hile some of the separate acts might have been separately charged, the possibility of but one conviction rather than many was to the accused’s advantage.” *Id.* at ¶ 23, citing *State v. Nebe*, 26 Ohio Law Abs. 581 (8th Dist.1937).

{¶32} K.M.’s testimony describing Carpenter’s abuse was not, as Carpenter contends, improper other-acts evidence under Evid.R. 404(B). Rather, it was direct

evidence offered in support of the offenses with which Carpenter had been charged. And as the *Blankenburg* court explained, it was to Carpenter's advantage that he had been indicted for only one offense in each time frame, when, as he alleges on appeal, K.M.'s testimony would have supported charging additional offenses. Further, Carpenter was tried to the bench, and we presume that the trial court considered only evidence relevant to the offenses with which Carpenter had been charged. *See State v. Hill*, 1st Dist. Hamilton No. C-030678, 2004-Ohio-2275, ¶ 20.

{¶33} The trial court did not abuse its discretion in admitting this evidence. Carpenter's fourth assignment of error is overruled.

Ineffective Assistance

{¶34} In his fifth assignment of error, Carpenter argues that his trial counsel had rendered ineffective assistance.

{¶35} To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance will only be considered deficient if it fell below an objective standard of reasonableness. *Id.* at 688. To establish prejudice, a defendant must demonstrate that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.* at 694. This court is highly deferential when judging counsel's performance, and we indulge a strong presumption that it fell within the wide range of reasonable professional assistance. *Id.* at 689.

{¶36} Carpenter first argues that his counsel was ineffective for failing to request a more specific bill of particulars and for failing to object to the lack of

specific conduct to be proven at trial. But because Carpenter's defense at trial was that he had never abused K.M., he suffered no prejudice by the state's failure to provide more specific notice of the exact conduct to be proven. *See State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶ 50 (1st Dist.).

{¶37} Carpenter's contention that his counsel was ineffective for failing to object to the lack of specificity of the allegations at trial is likewise without merit, as we find that the testimony offered at trial did not lack specificity and described explicit acts of abuse that Carpenter had committed against K.M. And because we have already determined that Carpenter's convictions were supported by sufficient evidence, that the trial court did not err in declaring John Wiechering to be a hostile witness, and that the trial court did not admit evidence of uncharged misconduct, we reject Carpenter's arguments that his counsel was ineffective for failing to object on these grounds.

{¶38} Carpenter's final challenge to counsel's effectiveness, for failing to establish the imposition of court costs or to seek to have those costs waived, is rendered moot by our disposition of his sixth assignment of error. *See State v. Worley*, 7th Dist. Belmont No. 13 BE 8, 2014-Ohio-2465, ¶ 22-23.

{¶39} The fifth assignment of error is overruled.

Court Costs

{¶40} In his sixth assignment of error, Carpenter argues that the trial court erred in imposing court costs in its sentencing entry without addressing the imposition of court costs in his presence at the sentencing hearing. He is correct.

{¶41} In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court held that the trial court erred when it imposed court costs

without informing the defendant of that fact in court, because he had not been afforded the opportunity to claim indigency and to seek a waiver of costs. *Id.* at ¶ 1 and 22. We, therefore, reverse that portion of Carpenter's sentence imposing court costs and remand for the trial court to address the issue of court costs in open court and to provide Carpenter with the opportunity to move for a waiver of costs if they are imposed. Carpenter's sixth assignment of error is sustained.

Consecutive-Sentencing Findings

{¶42} Our review of the record additionally reveals that, although the trial court made the necessary findings to support the imposition of consecutive sentences, it failed to incorporate those findings into the sentencing entry, as is required by *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29. This deficiency is subject to correction in a nunc pro tunc entry. *Id.* at ¶ 30.

Conclusion

{¶43} We reverse that portion of Carpenter's sentence imposing court costs and remand this cause to the trial court to address that issue, as well as to incorporate its consecutive-sentencing findings into the sentencing entry. We affirm the judgment of the trial court in all other respects.

Judgment affirmed in part, sentence reversed in part, and cause remanded.

FISCHER and MOCK, JJ., concur.

Please note:

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