[Cite as *State v. J.G.*, 2009-Ohio-2857.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-921
v.	:	(C.P.C. No. 07CR01-88)
[J.G.],	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	
State of Ohio,	:	
Plaintiff-Appellant,	:	
	:	No. 08AP-972
v.		(C.P.C. No. 07CR01-88)
	:	
[J.G.],		(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 16, 2009

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

W. Joseph Edwards, for defendant.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant/appellee, J.G. ("defendant"), appeals his convictions from the Franklin County Court of Common Pleas. Plaintiff-appellee/appellant, the state of Ohio ("plaintiff"), also appeals. For the following reasons we affirm.

{¶2} The Franklin County Grand Jury indicted defendant on six counts of rape, four counts of gross sexual imposition, and two counts of disseminating matter harmful to juveniles. The charges alleged that defendant sexually abused his daughter, J.A.G., when she was less than 13 years old. Defendant pleaded not guilty.

{¶3} Defendant decided to take a polygraph examination. Before the examination, defendant, defendant's counsel, and plaintiff stipulated that the person administering the examination is authorized to testify about the results. Steve Herron administered the examination. Defendant denied sexually abusing J.A.G., but Herron concluded that defendant was not telling the truth.

{¶4} A jury trial ensued. Herron testified about the results of defendant's polygraph examination, and J.A.G. testified about defendant sexually abusing her. Also testifying was Diane Lampkins of the Center for Child and Family Advocacy ("Advocacy Center") at Children's Hospital. Lampkins testified as follows. Lampkins is a social worker and forensic interviewer at the Advocacy Center. Lampkins interviews a sex abuse victim with no one else present in the room. Lampkins avoids the use of leading or suggestive questions during the interview. Afterward, the child has a medical

examination. The medical examiner relies on information that Lampkins gathered, and this information assists the medical examiner in making an accurate medical diagnosis. Lampkins' written summary of her interview goes to the medical records department.

{¶5} Lampkins interviewed J.A.G. A police detective, a prosecutor, and nurse Gail Hornor, J.A.G.'s medical examiner, watched the interview from closed circuit television. Police and prosecutors watch these interviews in order not to subject the child to repeated interviews. J.A.G.'s interview was recorded on video, and police have a copy of the video. Lampkins said the video is not part of the medical record. The defense objected to the prosecution playing the video and claimed that the evidence was cumulative to J.A.G.'s testimony. Plaintiff did not play the video, but, without objection, Lampkins testified about the details that J.A.G. provided on how defendant sexually abused her.

{¶6} Hornor examined J.A.G. after the interview and testified as follows. Hornor watched the interview. It assisted her medical assessment and diagnosis and helped her determine whether to test J.A.G. for sexually transmitted diseases. Hornor testified about the sex abuse that J.A.G. disclosed to Lampkins. The trial court sua sponte instructed the jury that this testimony is "hearsay" and "offered for background information about what the people at the [Advocacy Center] did and how the medical examination was produced." (Aug. 20, 2008 Tr. 104.) The court told the jury that "you have to consider [J.A.G.'s] testimony in regard to what actually was her version of events." (Aug. 20, 2008 Tr. 104.)

{¶7} The prosecution sought admission of the summary report of Hornor and Lampkins. The report reiterated J.A.G.'s sex abuse disclosures. The defense objected, arguing that the report was cumulative to J.A.G.'s testimony. The trial court overruled the objection and admitted the report into evidence.

{¶8} During closing argument, defense counsel referred to a newspaper report of a prisoner who failed polygraph examinations, but was ultimately exonerated through DNA evidence. The prosecution objected, but the trial court overruled the objection.

{¶9} The jury found defendant guilty of three counts of rape and three counts of gross sexual imposition. The jury found defendant not guilty on the remaining charges.

{¶10} Defendant appeals asserting the following assignments of error:

> ASSIGNMENT OF ERROR ONE
>
> THE TRIAL COURT COMMITTED ERROR BY ALLOWING HEARSAY TESTIMONY AGAINST APPELLANT, THEREBY DEPRIVING HIM OF HIS RIGHT TO CONFRONT WITNESSES CONTRA THE U.S. AND OHIO CONSTITUTIONS.
>
> ASSIGNMENT OF ERROR TWO
>
> THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING HEARSAY STATEMENTS CONTAINED IN A SOCIAL WORKER'S REPORT CONTRA EVIDENCE RULE 803(4).
>
> ASSIGNMENT OF ERROR THREE
>
> THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING A POLYGRAPH EXPERT TO TESTIFY THEREBY VIOLATED APPELLANT'S DUE PROCESS UNDER BOTH THE OHIO AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR FOUR

WHEN COUNSEL'S PERFORMANCE IS DEFICIENT IN THE CONDUCT OF TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT, HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL ARE VIOLATED CONTRA THE OHIO AND FEDERAL CONSTITUTIONS.

{¶11} Plaintiff appeals asserting the following assignment of error:

THE COMMON PLEAS COURT ABUSED ITS DISCRETION IN ALLOWING DEFENSE CLOSING ARGUMENT REGARDING THE SPECIFIC CIRCUMSTANCES OF ANOTHER CASE THAT WERE NOT IN EVIDENCE.

{¶12} We address together defendant's first and second assignments of error. Defendant argues that the trial court erred by admitting into evidence J.A.G.'s statements at the Advocacy Center. Defendant asserts that the evidence is inadmissible hearsay and that admission of the evidence violated his right to confront witnesses under the confrontation clauses in the state and federal constitutions. We disagree.

{¶13} The defense objected to this evidence on grounds that it was cumulative to J.A.G.'s testimony. However, the defense did not raise the hearsay and confrontation clause issues at trial and, therefore, forfeited all but plain error on these issues. See *State v. Gulertekin* (Dec. 3, 1998), 10th Dist. No. 97APA12-1607. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the

utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶14} Defendant's hearsay and confrontation arguments are inapplicable to Hornor testifying about J.A.G.'s statements because the trial court limited the testimony and did not admit it for its truth. See Evid.R. 801(C) (defining hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). See also *Crawford v. Washington* (2004), 541 U.S. 36, 59, 124 S.Ct. 1354, 1369, fn. 9, citing *Tennessee v. Street* (1985), 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (stating that the confrontation clause does not bar the use of statements "for purposes other than establishing the truth of the matter asserted"). The trial court did not mention this instruction with J.A.G.'s statements conveyed in the Advocacy Center summary and Lampkins' testimony, and defendant's hearsay and confrontation arguments apply to this evidence.

{¶15} We first hold that, because J.A.G. underwent cross-examination at trial, the trial court did not violate the state or federal confrontation clauses when admitting the evidence on J.A.G.'s statements at the Advocacy Center. See *State v. Ferguson,* 10th Dist. No. 07AP-999, 2008-Ohio-6677, ¶45-46. We next examine whether the evidence on J.A.G.'s statements at the Advocacy Center constitutes inadmissible hearsay. Evid.R. 803(4) provides an exception to the rule against the admissibility of hearsay and allows the admission of statements made for medical diagnosis or treatment. We have repeatedly applied Evid.R. 803(4) to uphold the admission of children's statements to Advocacy Center personnel. *State v. Gilfillan*, 10th Dist. No.

08AP-317, 2009-Ohio-1104, ¶74-79; *State v. Arnold,* 10th Dist. No. 07AP-789, 2008-Ohio-3471, ¶35-39; *Ferguson* at ¶34-42; *State v. D.H.*, 10th Dist. No. 07AP-73, 2007-Ohio-5970, ¶38-48; *State v. Jordan*, 10th Dist. No. 06AP-96, 2006-Ohio-6224, ¶17-21; *State v. Edinger*, 10th Dist. No. 05AP-31, 2006-Ohio-1527, ¶53-64. J.A.G.'s statements are consistent with those at issue in these cases, and these cases establish that J.A.G. made the statements for medical diagnosis or treatment. Defendant argues that Evid.R. 803(4) did not apply because Lampkins testified that the police have a copy of the recorded interview, and Lampkins said that the video is not part of the medical record. Police access to the interview does not change its essential purpose, however. *Jordan* at ¶20. We hold that J.A.G.'s statements were admissible under Evid.R. 803(4). Accordingly, we conclude that the trial court did not commit plain error when it admitted the evidence on J.A.G.'s statements at the Advocacy Center. Thus, we overrule defendant's first and second assignments of error.

{¶16} In his third assignment of error, defendant argues that the trial court erred by allowing Herron to testify about defendant's polygraph examination without first holding a hearing to determine the examination's scientific reliability pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786. The defense did not request a *Daubert* hearing at trial. Instead, defendant and defense counsel stipulated to the admissibility of the polygraph examination. Under the invited error doctrine, a party cannot claim that the trial court erred by accepting the party's stipulation. *Gilfillan* at ¶91. In any event, the parties stipulated to the admissibility of the polygraph examination pursuant to standards prescribed in *State v. Souel* (1978), 53

Ohio St.2d 123. The Supreme Court of Ohio reaffirmed *Souel* in *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, ¶13. This court has recognized that *Daubert* "did not create a *per se* rule of admissibility" and that *Souel*, not *Daubert*, governs the admissibility of polygraph examinations. *State v. Anthony* (Oct. 9, 1997), 10th Dist. No. 96APA12-1721. Accordingly, we overrule defendant's third assignment of error.

{¶17} In his fourth assignment of error, defendant argues that his defense counsel rendered ineffective assistance. We disagree.

{¶18} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id. at 687, 104 S.Ct. 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2068.

{¶19} Defendant argues that defense counsel was ineffective for not raising the hearsay and confrontation clause issues during the admission of J.A.G.'s statements at the Advocacy Center. We have already concluded, however, that the statements were not inadmissible hearsay and that admission of the statements did not contravene the confrontation clause.

{¶20} Defendant argues that defense counsel was ineffective for not requesting a *Daubert* hearing before the admission of Herron's testimony about the polygraph examination. We have already concluded that *Daubert* does not govern the admissibility of polygraph examinations in Ohio, however. In addition, defense counsel's decision to stipulate to the admissibility of the polygraph examination is a matter of trial strategy. *Gilfillan* at ¶65. Counsel exercised reasonable trial strategy when stipulating to the polygraph results because the defense would have benefited if defendant had passed the polygraph examination. Id. at ¶66. We cannot use the benefit of hindsight to render counsel's strategic decision deficient just because defendant subsequently failed the polygraph examination. Id. at ¶66. Having rejected defendant's ineffective assistance arguments, we overrule defendant's fourth assignment of error.

{¶21} We next address plaintiff's single assignment of error. Plaintiff sought leave to appeal a trial court ruling pursuant to R.C. 2945.67(A). Plaintiff claims that the trial court abused its discretion in allowing the defense, during closing argument, to refer to a newspaper report about an inmate who had been "exonerated" by DNA evidence and released from prison. (Tr. 101.) Defense counsel stated that the inmate had "failed polygraphs." (Tr. 101.)

{¶22} Defendant did not object to plaintiff seeking leave to appeal, and this court granted plaintiff's request. Because of double jeopardy principles, a decision on plaintiff's appeal cannot result in a retrial. See *State v. Bistricky* (1990), 51 Ohio St.3d 157, 158-59. We may review plaintiff's argument because it is capable of repetition, yet

evading review. See *State v. McGhee*, 10th Dist. No. 07AP-216, 2007-Ohio-6537, ¶7. Specifically, in future cases, trial courts could allow the type of closing argument that plaintiff asserts is erroneous, and appellate courts would not have occasion to entertain the issue through the usual course of appellate review because the defense would not appeal the favorable ruling.

{¶23} An abuse of discretion standard applies in reviewing rulings related to closing arguments. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194. An abuse of discretion connotes more than an error of law or judgment; it implies a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Although counsel is accorded latitude in making closing arguments, counsel cannot attempt to influence the jury " 'by a recital of matters foreign to the case.' " *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 347, quoting *Maggio v. Cleveland* (1949), 151 Ohio St. 136, paragraph two of the syllabus. A jury must render an impartial verdict according to the law and evidence submitted at trial. Crim.R. 24; R.C. 2945.25(B). "[I]t is improper for counsel to comment on evidence which was excluded or declared inadmissible by the trial court or otherwise make statements which are intended to get evidence before the jury which counsel was not entitled to have the jury consider." *Drake* at 347. The newspaper report that defense counsel mentioned during closing argument was not in evidence. Thus, it was improper for defense counsel to invite the jury to rely on this information. Adding to this impropriety is that the prosecution was unable to verify at trial whether defense counsel truthfully described the newspaper article or whether the article was accurate. The trial

court abused its discretion in allowing defense counsel's argument. Accordingly, we sustain plaintiff's single assignment of error.

{¶24} In summary, we overrule defendant's four assignments of error. We sustain plaintiff's single assignment of error, but this decision cannot result in a retrial. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.