[Cite as *State v. Hensley*, 2010-Ohio-3822.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-156
	:	O P I N I O N
- vs -		8/16/2010
	:	
BRANDON HENSLEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR26069

Rachel A. Hutzel, Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 54036, for plaintiff-appellee

Thomas R. Koustmer, 125 East Court Street, Suite 1000, Cincinnati, Ohio 45202, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Brandon Hensley, appeals his conviction and sentence in the Warren County Common Pleas Court for gross sexual imposition.

{¶2} The charges in this case arose from separate allegations of improper sexual contact between appellant and his former girlfriend's 11-year-old daughter, "S.W." and S.W.'s 11-year-old best friend, "E.M." The prosecution presented the

following evidence at trial.

{¶3} E.M. testified that the incident with appellant occurred after S.W.'s mother, Elizabeth L.W. (Elizabeth), took the girls swimming on June 27, 2009. Upon return to S.W.'s house, E.M. and S.W. fell asleep on the living room couch, wearing only their bathing suits. E.M. testified she awoke at 5:30 a.m. because she felt someone's hand beneath her bathing suit "squeezing" her buttocks. E.M. testified that Elizabeth subsequently entered the living room and asked appellant what he was "doing to her." At that point, E.M. testified she discovered appellant sitting beside her and that he "jerked his hand away when [Elizabeth] came in." E.M. testified that a short while later, appellant and Elizabeth began to argue, at which time appellant flipped a television and a coffee table, kicked an air conditioning unit and threw a bucket.

{¶4} Detective Brandi Carter of the Warren County Sheriff's Office testified she interviewed E.M. and S.W. separately regarding their allegations against appellant. Carter interviewed E.M. first, who appeared "obviously upset" and "confused as to why this happened." The next day, Carter interviewed S.W. in the presence of a Warren County Children's Services employee, Allison Handy. During the interview, S.W. stated that two incidents with appellant occurred in October 2008, when he babysat S.W. and her siblings while her mother, Elizabeth, was incarcerated. Handy testified as follows:

{¶5} "The first incident [S.W.] discussed that she had woken up to [appellant] carrying her from her brother's bedroom, where she had fallen asleep, into another bedroom in the home. She said that he touched her bare breasts and her bare butt and that she was able to escape from him and she had run into the living room

towards the front door in an attempt to try to get away from him. That night, prior to going to bed, she said he had given her Nyquil and Robitussin cough medicine before going to bed and that after she had awaken and he had touched her, that he tried to give her more medication. The second incident, she described that she was sleeping and he had carried her into her brother's bedroom. * * * he --- pulled her pants down and touched her bare butt. Again, she got away from him and she ran into the living room towards the door. She was hiding behind various pieces of furniture. And, again, he had given her medication, again that night before she had gone to bed and then come into the living room and tried to give her medication once more * * * which her brothers were witnesses to. She had spit the medication out on herself and he had asked her to take a shower and she was afraid to take a shower. She didn't want to."

{¶6} S.W. also testified at trial, but recanted her statements to Carter and Handy. S.W. testified that she lied throughout the investigation because she wanted her mother, Elizabeth, and appellant to "break up." S.W. also testified that she set the allegations in October 2008 because she knew her mother was incarcerated during that time.

{¶7} At the close of the state's evidence, appellant moved for a dismissal of Counts One and Two pursuant to Crim.R. 29, arguing that the evidence was insufficient to support a conviction for gross sexual imposition against S.W. The trial court granted appellant's motion and presented Count Three, involving E.M., to the jury. Prior to the verdict, the state moved to amend the indictment to reflect that appellant was charged with a third-degree, rather than a fourth-degree, felony under

R.C. 2907.05(A)(4).[1] After the jury returned a guilty verdict, the trial court amended the indictment to reflect that the charge was a third-degree felony, and subsequently classified appellant as a tier II sexual offender and sentenced him to two years in prison.[2]

{¶8} Appellant now appeals his conviction, raising four assignments of error. For ease of discussion, appellant's third and fourth assignments of error will be addressed out of order.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ALLOWING THE STATE TO AMEND THE INDICTMENT AFTER THE TRIAL IN VIOLATION OF CRIMINAL RULE 7(D) AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶11} In his first assignment of error, appellant argues that the trial court should not have amended the indictment because it changed the degree of the charged offense, thus altering its identity. We find no merit in appellant's argument.

{¶12} Pursuant to Crim.R. 7(D), a trial court may amend an indictment "at any time before, during, or after trial * * * provided no change is made in the name or identity of the crime charged." See, also, R.C. 2941.30. Whether or not an

1. The original text of the indictment read, in pertinent part, as follows: Count Three: "[O]n or about the 26th day of June, 2009 throught the 27th day of June, 2009 * * * Brandon Hensley, did, have sexual contact with another, not the spouse of the offender, and the person is less than thirteen years of age * * * said offense a Felony of the 4th degree, contrary to and in violation of Section 2907.05(A)(4)[.]"

2. In granting the amendment, the trial court stated: "This crime clearly charged the defendant with gross sexual imposition, a violation of R.C. 2907.05(A)(4) * * * the indictment in it's [sic] language clearly indicates that the A4 section was implicated, because of the age of the victim, being a child under the age of 13, therefore the Court finds that there is no change in the name or identity, that there simply is a typographical error in the body of the indictment, indicating that this is a felony of the 4th degree when it is not. * * * there is no alternative section that the Grand Jury could've been confused about. * * * the law cannot be any more clear, that this is a felony of the 3rd degree, not a felony of the 4th degree."

amendment changes the name or identity of the offense with which one is charged is a matter of law. See *State v. Craft*, Butler App. No. CA2008-01-023, 2009-Ohio-675, ¶22. As such, we must review this issue de novo. Id.

{¶13} As a general rule, where the "name" of the offense remains the same, even after amendment, there is no violation of Crim.R. 7(D). Id. at ¶23. However, to determine whether the "identity" of the offense is changed, we must determine whether the amended indictment changed the "penalty or degree" thereof. See id. at ¶24.

{¶14} In the case at bar, it is obvious that the name of the offense was not changed, as both the original and amended indictments charged appellant with gross sexual imposition under R.C. 2907.05(A)(4). Further, we do not find that the identity of the offense changed as a result of the amendment.

{¶15} We first note that the Supreme Court of Ohio held that Crim.R. 7(D) "does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶9. In *Davis,* the defendant was originally charged with selling or offering to sell a controlled substance in "less than the bulk amount * * * in violation of 2953.03(A)(1)." However, the amended indictment charged the defendant with selling or offering to sell "greater than five times the bulk amount but less than fifty times the bulk amount, in violation of 2953.03(A)(1)." In prohibiting the amendment, the supreme court held "the amendment significantly increased the quantity of drugs alleged to have been sold * * * [which] changed the degree of the offense to a second-degree felony from a fourth-degree felony and altered the

potential penalties as well." Id. at ¶9.

{¶16} We find that the general rule espoused in *Davis* has no application to the case at bar. Here, the amendment did not alter the substantive activities or the potential penalties associated with appellant's charge. Rather, both the original and amended indictments charged appellant with the exact same crime, a violation of R.C. 2907.05(A)(4). Under R.C. 2907.05(B), a violation of R.C. 2907.05(A)(4) is *always* a third-degree felony. Thus, the trial court was merely correcting the state's unfortunate, yet harmless, typographical error. Because the penalty of this particular offense remains a third-degree felony in all circumstances, we do not find that the amendment changed the identity of the offense in this case.

{¶17} Having established that the amendment did not change the name or identity of the offense charged, we must now review the trial court's decision to allow the amendment under an abuse-of-discretion standard. *Craft*, 2008-Ohio-675 at ¶27. To constitute reversible error, appellant must show not only that the trial court abused its discretion, but also that the amendment hampered or otherwise prejudiced appellant's defense. Id.

{¶18} We find that the trial court did not abuse its discretion by permitting the amendment because appellant was not prejudiced by it. First, the statutory language quoted in the original indictment put appellant on notice that he was charged under R.C. 2907.05(A)(4). Secondly, subsection (A)(4) is the only portion of R.C. 2907.05 that refers to the victim being "less than thirteen years of age." Therefore, any doubts as to the degree of the offense charged were easily remedied by reference to the statute, which clearly states "[a] violation of division (A)(4) of this section is a felony of the *third* degree." R.C. 2907.05(B). (Emphasis added.) In addition, the

arraignment entry, dated eleven days after the indictment and signed by appellant's counsel, stated that appellant was indicted for three counts of "Gross Sexual Imposition F3." Finally, we note that the purpose of Crim.R. 7(D) is to provide a defendant with notice of the essential facts for which he is charged. See *Craft*, 2008-Ohio-675 at ¶30. Because the original indictment contained the correct statutory section and language, we find that appellant was aware of the charges against him and was not prejudiced by the amendment.

{¶19} Therefore, appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRONEOUSLY ADMITTED CERTAIN HEARSAY TESTIMONY IN VIOLATION OF EVIDENCE RULE 807, DENYING THE DEFENDANT HIS RIGHT TO CONFRONTATION AS GUARANTEED BY THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION RESULTING IN UNDUE PREJUDICE."

{¶22} In his second assignment of error, appellant challenges portions of Detective Carter's testimony as inadmissible hearsay. Appellant argues that the trial court erroneously admitted Carter's testimony regarding statements E.M. made to her, describing her alleged unwanted sexual encounter with appellant. Appellant argues that Carter's testimony was highly prejudicial and "heavily influenced the verdict."

{¶23} In light of E.M.'s extensive testimony regarding her encounter with appellant, Detective Carter's testimony was merely cumulative. Thus, even if Carter's testimony was improper, we find such alleged hearsay error did not affect appellant's substantial rights and therefore constitutes harmless error. See Crim.R. 52(A). See,

also, *State v. Curren*, Morrow App. No. 04 CA 8, 2005-Ohio-4315, ¶22.

{¶24} Therefore, appellant's second assignment of error is overruled.

{¶25} Assignment of Error No. 4:

{¶26} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ADMITTED OTHER-ACTS EVIDENCE IN VIOLATION OF R.C. 2945.59, EVID.R. (403), EVID.R. 404(B) AND APPELLANT'S RIGHTS UNDER SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION AND THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶27} In his fourth assignment of error, appellant argues that the trial court committed plain error in admitting photographs and testimony regarding an alleged domestic violence incident on June 28, 2009. The evidence showed that on this date, appellant became violent and threw furniture around S.W.'s mother's living room during an argument. Appellant argues this evidence was admitted to show that because he was "previously charged with domestic violence, he has a violent character and a propensity to commit violent acts." On the other hand, the state argues the evidence was offered "for the purpose of showing that E.M. and S.W. may have had reason to fear the Appellant and as a possible explanation for S.W.'s recantation."

{¶28} The record shows that at the outset of trial, the court overruled appellant's motion in limine and admitted State's Exhibits 1-3, depicting an overturned coffee table and television set, and damage to an air conditioning unit and door hinges. The trial court also admitted, without objection from appellant, testimony from E.M., S.W., Elizabeth, Deputy Randy Asencio, and Detective Carter regarding appellant's alleged violence toward these household items.

{¶29} At the outset, we note that a motion in limine, if granted, "is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue." *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶11, quoting *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-203. A motion in limine is "directed to the inherent discretion of the trial judge, about an evidentiary issue that is anticipated, but has not yet been presented in full context." *State v. Harris*, Butler App. No. CA2007-11-280, 2008-Ohio-4504, ¶27; *Grubb* at 201. The trial court's ruling on a motion in limine does not preserve the record on appeal. *Harris* at ¶27. Instead, "any claimed error regarding a trial court's decision on a motion in limine must be preserved at trial by an objection, proffer, or ruling on the record[.]" Id.

{¶30} Appellant's failure to object to the admissibility of this evidence at trial waived any error except plain error. Id.; Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶23. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.; *State v. Landrum* (1990), 53 Ohio St.3d 107, 111. Therefore, we will not reverse the trial court's decision unless the outcome of trial would have been different but for the alleged error. See *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶63.

{¶31} In the case at bar, appellant has not established that the outcome of trial would have been different but for the alleged error. As previously discussed, the jury heard ample evidence of appellant's guilt, including extensive testimony from

E.M. regarding her encounter with appellant. Further, the trial court gave the jury a limiting instruction regarding this evidence, stating "[y]ou've heard some testimony and there may be some more testimony about things being knocked over in the apartment. That testimony has to be used by you for a very limited purpose. * * * the evidence is being admitted for the limited purpose of whether or not it might have * * * affected any of the witness testimony, whether or not they might be fearful of the individual, because of his behavior, but it's not to be used for any other purpose. If you think he is a bad person for tearing up the room, that is in no way to be used to convict him of these crimes. So, be sure that you use it for that limited purpose only."

{¶32} Based on the evidence presented, the court's limiting instruction, and the jury's ability to determine the witnesses' credibility, there was ample evidence to support appellant's conviction, such that testimony regarding the alleged domestic violence incident did not taint or undermine the jury's determinations. Cf. *State v. Rankin*, Clinton App. No. CA2004-06-015, 2005-Ohio-6165, ¶42-52; *State v. Dubose*, Mahoning App. No. 00-C.A.-60, 2002-Ohio-3020, ¶43 (evidence that appellant beat up his girlfriend after learning of her affair with appellant's shooting victim was "relevant to show why [the victim] may have been afraid of Appellant and why [the victim] could have briefly recanted his identification of Appellant as the shooter"). We decline to recognize any plain error. Crim.R. 52(B).

{¶33} Accordingly, appellant's fourth assignment of error is overruled.

{¶34} Assignment of Error No. 3:

{¶35} "DEFENDANT-APPELLANT WAS DENIED HIS RIGHTS OF DUE PROCESS AND ASSISTANCE OF COUNSEL AS GUARANTEED BY THE 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1

AND 16 OF THE OHIO CONSTITUTION BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

{¶36} In his third assignment of error, appellant argues that his counsel's failure to (1) move for severance pursuant to Crim.R. 14, and (2) contemporaneously object to inadmissible evidence at trial constituted ineffective assistance.

Ineffective Assistance of Counsel: Severance

{¶37} Appellant first argues his trial counsel was ineffective for failing to move to sever Counts One and Two, involving S.W., from Count Three, involving E.M. As a result, appellant believes he suffered prejudice and would not have been convicted, but for the evidence of other criminal acts introduced as a result of the joinder. We find no merit in appellant's argument.

{¶38} In an ineffective assistance of counsel claim, a defendant must (1) demonstrate that his counsel's performance fell below an objective standard of reasonable representation, and if so (2) show that he was prejudiced by such deficient performance, i.e., that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052; *State v. Raleigh*, Clermont App. No.CA2009-08-046, CA2009-08-047, 2010-Ohio-2966, ¶13.

{¶39} In order to prevail on a claim of ineffective assistance of counsel in a case involving a failure to make a motion on behalf of a defendant, the defendant must show "(1) that the motion * * * was meritorious, and (2) that there was a reasonable probability that the verdict would have been different had the motion been made[.]" *Raleigh* at ¶14, quoting *State v. Kring*, Franklin App. No. 07AP-610, 2008-

Ohio-3290, ¶55.

{¶40} Upon a demonstration of prejudice, a defendant may move to sever the offenses within an indictment, pursuant to Crim.R. 14. *Raleigh* at ¶15. To determine whether such a motion would have been meritorious, we must utilize one of two tests. *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶79. Under the "other acts" test, a reviewing court must decide whether evidence of the joined offenses could have been introduced at separate trials, pursuant to the "other acts" provision in Evid.R. 404(B). Alternatively, under the "joinder test," a reviewing court must decide whether the evidence of each offense joined at trial was "simple and direct." Id.; *State v. Lott* (1990), 51 Ohio St.3d 160, 164; *State v. Ashcraft*, Butler App. No. CA2008-12-305, 2009-Ohio-5281, ¶16; *State v. Quinones*, Lake App. No. 2003-L-015, 2005-Ohio-6576, ¶39. See, also, R.C. 2945.59. If the state can meet the "joinder test," it need not meet the stricter "other acts" test. See *Moshos* at ¶69; *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276. In other words, "[a] showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper." *Moshos* at ¶80, quoting *State v. Bice*, Clermont App. No. CA2008-10-098, 2009-Ohio-4672, ¶53.

{¶41} After a thorough review of the record, which includes a lengthy transcript of the two-day jury trial, we believe that the evidence relating to each crime was simple and direct under the "joinder test." At trial, the state elicited victim specific testimony from each witness, ensuring that discussions regarding each victim's unwanted sexual encounters with appellant remained separate.[3] Moreover,

3. **{¶a}** For example, during Detective Carter's testimony, the state avoided intermingling Carter's testimony regarding her interview with each victim. First, Carter testified that she interviewed E.M. on

during its opening and closing statements, the state presented an organized overview of the facts as to each of the three offenses alleged by the two victims. See *Moshos*, 2010-Ohio-735 at ¶82.

{¶42} In sum, the state made it clear that each victim's alleged encounters with appellant were separate, distinct incidents. As a result, we find that the evidence pertaining to each victim and each offense could easily be segregated and was unlikely to confuse the jury.

{¶43} In light of the foregoing, we find that, had appellant's trial counsel moved to sever, the court would have denied the motion. Because the evidence of each crime was simple and direct, a motion to sever would not have been meritorious. Therefore, appellant cannot succeed on this ineffective assistance of counsel claim. See *Raleigh*, 2010-Ohio-2966.

July 6, 2009, and carefully relayed E.M.'s description of her encounter with appellant. Carter then testified that she interviewed S.W. "the next day," depicting only S.W.'s version of the events. Further, E.M. and S.W.'s testimony remained victim-specific. The state effectively separated each victim's encounters by making the following statements:

{¶b} MR. SIEVERS [prosecuting attorney]: "Now, have you ever talked to S.W. about anything that may have happened to her?"

{¶c} E.M.: "No."

{¶d} Additionally, during S.W.'s direct testimony, the state asked the following questions:

{¶e} MR. SIEVERS [prosecuting attorney]: "Okay. And now, the night when all this happened, did you and [E.M.] talk about what happened to her at all?"

{¶f} S.W.: "No."

{¶g} MR. SIEVERS: "Did you and [E.M.] talk at all about what she says [appellant] did to her?"

{¶h} S.W.: "No."

{¶i} MR. SIEVERS: "Okay. Have you talked to [E.M.] about what you told the police he did to you?"

{¶j} S.W.: "No."

Ineffective Assistance of Counsel: Domestic Violence Evidence

{¶44} Appellant next argues that his trial counsel's failure to object to evidence pertaining to the alleged domestic violence incident in June 2009 constituted ineffective assistance of counsel.

{¶45} As discussed above, appellant must first show that his counsel's performance fell below an objective standard of reasonable representation. *Strickland*, 466 U.S. at 687. Second, appellant must show that he was prejudiced by such deficient performance. Id. An appellant is prejudiced by his trial counsel's performance if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

{¶46} Just as appellant could not demonstrate plain error, appellant cannot show that a reasonable probability exists that, but for his trial counsel's failure to object to this evidence, the outcome of his trial would have been different. See *State v. Phelps*, Warren App. No. CA2009-04-035, 2010-Ohio-1105, ¶36-37. Accordingly, appellant's final assignment of error is overruled.

{¶47} Judgment affirmed.

BRESSLER and POWELL, JJ., concur.