[Cite as *State v. Hancock*, 2005-Ohio-127.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 19434
v.	:	T.C. CASE NO. 02 CR 1173
JAMES E. HANCOCK	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 14th day of January, 2005.

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FREDERICK N. YOUNG, J.

{¶ 1} This matter is before this court following our decision and judgment entry granting the application of appellant James Hancock to reopen his direct appeal

pursuant to App.R. 26(B).

{¶ 2} The background facts of this case that are relevant to this reopening, as we stated in Hancock's direct appeal, are as follows.

{¶ 3} "On Easter Sunday, 2002, [the minor], who was almost 13 years old, left her home, lying to her mother about her destination. Although she had intended to go to a friend's home in Centerville, she missed the last bus for Centerville, and went north from downtown Dayton, instead. She met up with a male acquaintance, whom she had known about three weeks, at the Parkway Inn, where she remained, in various rooms, the next four days. [The minor] testified that she had smoked marijuana since she was 9 years old, but had not smoked crack cocaine before this incident. While at the Parkway Inn, [the minor] encountered defendant-appellant James E. Hancock and his son, and co-defendant, Jamael Hancock. Crack cocaine was being sold from the room occupied by the Hancocks. Crack cocaine was also being smoked in that room, by various persons. Typically, but not always, the persons in the room desiring to smoke crack cocaine would do so in the bathroom. [The minor] initially smoked crack cocaine with her male acquaintance, and had sexual intercourse with him.

{¶ 4} "[The minor], and a woman who was also occupying the room for several days, Christina Bledsoe, testified that on numerous subsequent occasions James Hancock, whom they also knew as 'Red,' provided [the minor] with crack cocaine, putting it in the pipe and lighting it for her.

{¶ 5} "[The minor] testified that at one point she became dissatisfied and left the room. [The minor] testified that Hancock went out, picked her up, put her over his shoulder, and took her back to the room. [The minor] testified that Hancock then

'smacked her,' more than twice, and told her 'I'm your master,' and 'you will do as I tell you.'

{¶ 6} "[The minor] also testified concerning an earlier incident in which she went with Bledsoe to a flea market across the street from the Parkway Inn, and Hancock came over, took her by the wrist, and pulled her back to the hotel.

{¶ 7} "On April 4, 2002, the fourth day of [the minor's] presence at the Parkway Inn, Montgomery County sheriff's deputies received a tip that a minor female might have been abducted or assaulted there, and that crack cocaine usage might be involved. An initial dispatch to the hotel proved fruitless, because no particular room or rooms had been specified, and nothing out of the ordinary was observed. Shortly thereafter, however, the deputies received information concerning a particular room, and they returned to the hotel. Their initial attempts to gain entrance to the room were unsuccessful. Sounds from within the room persuaded the deputies that there was somebody inside, but no one was responding to the deputies. Eventually, a master key obtained from the owner of the hotel permitted the deputies to gain entry to the room. Inside, they found [the minor], Bledsoe, Brandon Woosley (Bledsoe's boyfriend), and James and Jamael Hancock. The Hancocks were arrested and charged, in the indictment with which this appeal is concerned, with Kidnapping. James Hancock, but not Jamael Hancock, was charged with Corrupting Another with Drugs."

{¶ 8} *State v. Hancock*, Montgomery App. No. 19434, 2003-Ohio-2080, ¶¶3-7.

{¶ 9} In June of 2002, Hancock was found guilty of corrupting another with drugs and unlawful restraint, a lesser included offense of kidnaping. He was sentenced to serve six years for the corruption charge and sixty days for the unlawful restraint

charge. The trial court ordered the sentences to be served concurrently.

{¶ 10} Hancock's appellate attorney filed a brief in accordance with *Anders v. California*, (1976), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. After reviewing the record, we concluded that there were no potential assignments of error having arguable merit and affirmed the trial court's judgment.

{¶ 11} Hancock subsequently filed a timely application for reopening. On July 19, 2004, this court found that Hancock's application for reopening raised a genuine issue as to whether he was denied effective assistance of trial counsel for having failed to seek an instruction of contributing to the delinquency or unruliness of a child as a lesser included offense of corrupting another with drugs.

{¶ 12} Hancock sets forth the following assignments of error, which we will address simultaneously as they are interconnected:

{¶ 13} "Appellant was denied a fair trial because the jury was not instructed on the lesser included offense of contributing to unruliness or delinquency of a child in violation of O.R.C. §2919.24."

{¶ 14} "Appellant received ineffective assistance of counsel at trial, in violation of his rights under the Sixth and Fourteenth Amendment[s] to the United States Constitution, and under Section 10 Article1 of the Ohio Constitution, when counsel failed to seek an instruction on the lesser-included offense."

{¶ 15} In his assignments of error, Hancock asserts that trial counsel was ineffective for failing to ask for an instruction on contributing to the delinquency or unruliness of a child as a lesser included offense of corrupting another with drugs. Because of counsel's failure, Hancock argues that he was denied a fair trial.

{¶ 16} In order to demonstrate ineffective assistance of trial counsel, Hancock must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, and that Hancock was prejudiced by counsel's performance; that is there is a reasonable probability that but for counsel's unprofessional errors, the result of Hancock's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 17} As counsel failed to raise this issue at the trial level, we must evaluate the fairness of his trial under the plain error standard. In order to prevail under a plain error analysis, Hancock bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804. Thus, Hancock is entitled to relief only if the outcome of trial would have been different had the jury been given the opportunity to consider the lesser included offense.

{¶ 18} In this case, Hancock focuses upon trial counsel's failure to request an instruction on a lesser included offense. In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, the Ohio Supreme Court set forth this three-part test to determine whether an offense is a lesser included offense of another: (1) the offense carries a lesser penalty than the other, (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed, and (3) some element of the greater offense is not required to prove the commission of the lesser offense. When comparing the elements of the two offenses under the second part of the *Deem* test, those elements must be compared in the abstract, without

reference to specific facts or evidence. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240; *State v. Kidder* (1987), 32 Ohio St.3d 279, 282, 513 N.E.2d 311.

{¶ 19} In order to determine whether a lesser included offense instruction should be given, the court must first determine what constitutes a lesser included offense, and then must review the evidence to decide whether a jury could reasonably find the defendant guilty of the lesser offense while acquitting the defendant on the greater offense. *Kidder*, supra, at 280. While one offense may be a lesser included offense of the offense charged, the court must give an instruction for the lesser included offense only where the evidence presented at trial would reasonably support both a conviction upon the lesser included offense and an acquittal on the crime charged. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶ 20} Hancock was charged with corrupting another with drugs in violation of R.C. 2925.02(A)(4)(a), a second degree felony, which states that "[n]o person shall knowingly *** [b]y any means, *** [f]urnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard[.]" Under R.C. 2919.24(A), contributing to the delinquency or unruliness of a minor, a misdemeanor of the first degree, was defined at the time the crime occurred as "[n]o person shall do either of the following:

{¶ 21} "(1) Aid, abet, induce, cause, encourage, or contribute to a child or a ward of the juvenile court becoming an unruly child, as defined in section 2151.022 of the Revised Code, or a delinquent child, as defined in section 2152.02 of the Revised Code;

{¶ 22} "(2) Act in a way tending to cause a child or a ward of the juvenile court to

become an unruly child, as defined in section 2151.022 of the Revised Code, or a delinquent child, as defined in section 2152.02 of the Revised Code[.]"

{¶ 23} The State argues that regardless of whether or not the crime of corrupting another with drugs cannot be committed without committing the lesser crime of contributing to the delinquency or unruliness of a child, Hancock was not entitled to the instruction because the evidence at trial would not have supported both an acquittal on the greater and a conviction on the lesser. We agree.

{¶ 24} At trial, the minor stated that Hancock had provided her with crack cocaine in a hotel room in North Dayton the previous year, when she was just twelve years old. Christine Bledsoe testified that she was present in the hotel room when Hancock had provided the minor with crack. Hancock's trial counsel attempted to discredit the minor, focusing on her testimony that she had been familiar with the term "shotgun" prior to meeting Hancock. The minor explained that the term "shotgun" referred to when "one person takes a hit of crack cocaine and blows it into the other person's mouth." Trial counsel also focused upon the minor's admission of having used marijuana since she was nine years old. There was also evidence that the minor had lied to her mother about where she was going when she left the house. Additionally, Hancock's trial counsel emphasized that the other witness present in the hotel, Christine Bledsoe, had been on a four-day crack binge at the time of the incident.

{¶ 25} After reviewing the evidence, we find that Hancock either provided the minor with drugs and thus was guilty of corrupting another with drugs, or he did not provide the minor with drugs, in which case he would not be guilty of anything, in particular contributing to the delinquency or unruliness of a minor. Accordingly, we find

that the evidence does not support both an acquittal on the greater charge and a conviction on the lesser charge. Furthermore, because it was not possible for Hancock to be convicted on the lesser charge without being guilty of the greater, trial counsel was not ineffective for failing to request the instruction.

{¶ 26} We thus overrule Hancock's assignments of error.

{¶ 27} The judgment of the trial court is affirmed.

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WOLFF, J. and GRADY, J., concur.

Copies mailed to:

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