

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

 V_1

GARY R. MOLEN

Defendant-Appellant

Appellate Case No. 23381

Trial Court Case No. 06-CR-1339

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 30th day of April, 2010.

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Defendant-Appellant, *pro se*

BROGAN, J.

{¶ 1} Gary Molen appeals from the denial of his post-conviction relief petition without a hearing. Molen was convicted of two counts of rape of a child under thirteen, and we affirmed his conviction on November 26, 2008 in *State v. Molen*, Montgomery App. No. 21941, 2008-Ohio-6237. The facts underlying Molen’s

conviction are set out in our appellate opinion and are as follows:

{¶ 2} “The record reflects that Molen was indicted in April 2006 on three counts of gross sexual imposition, one count of disseminating material harmful to juveniles, and four counts of rape. The charges stemmed from allegations that Molen had sexually abused Z.D. and G.R., the children of his former girlfriend, between November 2001 and May 2002. The allegations were made by Z.D., who was nine years old when he disclosed them. According to Z.D., the abuse occurred when he was five years old and G.R. was one and a half years old.

{¶ 3} “The trial court held a competence hearing on July 5, 2006 and found Z.D. competent to testify without objection from defense counsel. The matter proceeded to trial in September 2006. At trial, Z.D. was the only witness to the alleged abuse. On direct examination, he testified that on one occasion Molen pushed him down on a bedroom floor and pulled his pants down. Molen then got on the floor naked and ‘shoved a little something up [Z.D.’s] butt[.]’ (Tr. Transcript at 250-251). Z.D. ‘had no idea what it was,’ but it felt ‘bad’ and ‘kind of’ hurt. (Id. at 251). According to Z.D., the ‘something’ felt like it was inside his ‘butt’ because ‘it was tickling [his] stomach.’ (Id. at 257). Z.D. further testified that Molen was laughing and making a ‘tickly kind of noise.’ (Id. at 252). Z.D. added that Molen’s body was touching his ‘butt’ and that Molen was ‘moving it a little bit.’ (Id. at 254, 256). After about thirty seconds, Molen got off of Z.D. and went to bed. (Id. at 257-258). Z.D. testified that he subsequently looked in a mirror and saw ‘blood in [his] butt’ when using the bathroom. He also testified about seeing blood in his underwear. (Id. at 270, 325).

{¶ 4} “Z.D. then described a second incident in the bedroom. On this occasion, Molen allegedly pulled his own pants down, pushed Z.D. to the ground, got on top of Z.D., and ‘put his weanie on [Z.D.’s] lips.’ (Id. at 261). Z.D. testified that the ‘weanie’ remained outside his mouth, and only the tip of it touched his lips. (Id. at 260). Z.D. did not see or feel anything wet, and Molen’s ‘weanie’ looked ‘soft.’ (Id. at 262, 300). Z.D. ‘tried to stop it but [he] couldn’t get out of it, but then [Molen] stopped.’ (Id. at 261).

{¶ 5} “Although Z.D. also testified about other incidents, the jury found Molen not guilty on four of the counts against him. In addition, two gross sexual imposition counts were dismissed at the close of the State’s case. The jury convicted Molen on two counts of rape for the incidents described above. The trial court imposed concurrent ten-year sentences. This timely appeal followed.

{¶ 6} “In his first assignment of error, Molen contends the trial court committed plain error by conducting a deficient pre-trial competence examination of Z.D. In particular, Molen claims the trial court failed to question Z.D. about his ability to recall events that took place around the time of his abuse. Molen asserts that questioning Z.D. about his ability to recall relatively recent events was insufficient. This is so, Molen reasons, because Z.D. was not being evaluated so he could testify about events from his recent past. Instead, nine-year-old Z.D. was being evaluated so he could testify about abuse that allegedly occurred in 2002 when he was five years old. Therefore, Molen argues that the relevant inquiry was whether Z.D. accurately could perceive and recall events from that time period.” *Molen*, supra, at ¶3-7.

{¶ 7} In finding that Molen's conviction was not against the manifest weight of the evidence, we noted the following in our opinion:

{¶ 8} "In support of his manifest-weight argument, Molen recites a number of inconsistencies between Z.D.'s trial testimony and earlier statements he made when interviewed by social worker Pat Serie and Dayton police detective Jo Quinn. In particular, Z.D. denied certain acts of abuse in his pre-trial interview but testified about them at trial. Most notably for purposes of the present appeal, Z.D. shook his head 'no' during the interview when asked whether Molen ever had 'put anything in [his] butt.' With regard to certain other events, he recalled them differently in his pretrial interview and at trial. He also failed to remember details at trial that he had spoken about in his pre-trial interview and vice versa. Finally, in both his pre-trial interview and at trial, Z.D. described a seemingly incredible series of events involving him fending off and fleeing from Molen, who was chasing him with a knife. Although Z.D. described the incident somewhat differently in his pre-trial interview and at trial, either version of events appears highly improbable given Z.D.'s age at the time.

{¶ 9} "After reviewing the transcript of Z.D.'s pre-trial interview and comparing it to his trial testimony, we do not dispute the presence of notable inconsistencies. On the other hand, many of the inconsistencies involved the six counts on which Molen was not convicted, either because the State dismissed them or because the jury returned not-guilty verdicts. This is not to say that Z.D.'s inconsistencies and fantastic allegations were irrelevant to the two rape counts on which Molen was convicted. To the extent that Z.D. made inconsistent statements, he negatively affected his

credibility in general, potentially affecting the weight to be given to all of his testimony. Moreover, as noted above, at least one of Z.D.'s inconsistencies concerned whether Molen 'put anything in [his] butt.' This inconsistency related directly to an anal rape charge on which Molen was convicted. By virtue of its multiple not-guilty verdicts, however, we note that the jury does appear to have taken Z.D.'s inconsistencies and fantastic allegations into account when assessing his credibility.

{¶ 10} "Bearing in mind that the decision regarding the extent to which to credit the testimony of a witness 'is within the peculiar competence of the factfinder,' *Ross, supra*,

{¶ 11} we do not believe Molen's rape convictions are against the manifest weight of the evidence. In reaching this conclusion, we make several observations. First, it was within the province of the jury to find credible Z.D.'s trial testimony that supported the rape charges based on allegations of anal sex and fellatio. At trial, Z.D. described separate incidents where Molen allegedly engaged in the conduct underlying these charges. There is nothing incredible, fantastic, or inherently unbelievable about these portions of Z.D.'s trial testimony. Second, the State presented testimony from pediatric psychologist Linda Miceli, who explained that young boys who have been sexually abused sometimes tell fantastic tales about resisting their abuser in order to help themselves cope with the abuse and to feel more empowered. (Trial transcript at 558-560). This testimony gave the jury a reasonable basis for believing Z.D.'s rape allegations despite his seemingly tall tales of resisting Molen's knife attack. Third, Miceli also explained that an abused child initially might deny acts of oral or anal sex or fail to mention them due to

embarrassment and uncertainty about how adults will respond. (Id. at 563, 565). This explanation gave the jury a reasonable basis for discounting some of the more meaningful inconsistencies in Z.D.'s pre-trial interview and trial testimony. Fourth, Z.D.'s mother and his biological father, who had visitation with Z.D., attested to negative behavioral changes they noticed in their son following the alleged incidents of abuse. Fifth, Miceli expressed her expert opinion that Z.D. had been sexually abused by someone and gave reasons for that belief based on her interviews with him. (Id. at 565). After reviewing the record, weighing the evidence and all reasonable inferences, and considering witness credibility, we do not find that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Molen on two counts of rape.

{¶ 12} Despite the inconsistencies and other deficiencies in Z.D.'s testimony, the evidence before us does not weigh heavily against Molen's convictions. Accordingly, his second assignment of error is overruled." *Molen*, supra, at ¶17-19.

{¶ 13} In his present petition for post-conviction relief, Molen contended his trial counsel provided him ineffective assistance by failing to call at trial a psychologist like Dr. Bob Stenson, who would have explained factors which can cause "false reporting" by alleged child abuse victims. In support of the petition, Molen provided the affidavit of Dr. Stenson. Stenson stated he reviewed the trial testimony of Z.D., his mother, and Dr. Linda Miceli. Stenson stated that Dr. Miceli misstated the percentage of false sexual abuse allegations at six to eight percent when psychological literature places the percentage at twenty-three to twenty-five percent in cases where comprehensive criteria are used to identify false allegations.

He also stated that Dr. Miceli's methodology of treating Z.D. before and during an assessment of him was inconsistent with forensic psychology standards for expert witnesses. Also, he stated that it is not standard procedure for a treatment provider to also serve as a forensic evaluator and witness.

{¶ 14} Stenson stated there were a number of factors contributing to the possibility that Z.D. may have falsely accused Molen of the sexual abuse.

{¶ 15} (a) As the time interval between the alleged event and the recall lengthens, children do not recall events as well.

{¶ 16} (b) Young children are more likely than older children to have difficulty in determining whether they have obtained information from their own experiences or from other sources.

{¶ 17} (c) Generally, younger children are more susceptible to suggestions, and multiple interviews provide greater opportunity for children to report false allegation.

{¶ 18} (d) Reinforcement from others can lead to false allegations.

{¶ 19} (e) Signs and symptoms of emotional disturbance sometimes attributed to sexual abuse more often than not have their origins in something other than sexual abuse, such as domestic violence the child witnesses at home.

{¶ 20} In granting the State's summary judgment motion, the trial court began with a detailed analysis of the lengthy cross-examination of Dr. Miceli. As set forth below, the trial court noted that counsel's cross-examination established the following points and concessions from the State's expert:

{¶ 21} "· Dr. Miceli has never been called as an expert witness 'by anybody

other than [the] state of Ohio.’ (Trial Transcript at 567.)

{¶ 22} “ Dr. Miceli has never ‘taught a seminar for any defense lawyer organizations.’ Id.

{¶ 23} “ Dr. Miceli's role is not that of an independent investigator; her role was that of Z.D.'s therapist; her job was to be ‘supportive and helping.’ Id. at 568.

{¶ 24} “ ‘Bedwetting can be normal for little boys up to five or six years old.’ Id. at 569.

{¶ 25} “ Dr. Miceli is not aware of the statistic regarding bedwetting that ‘it is normal in 75% of boys after five and six but there's 25% where it's not normal for these kids.’ Id. at 569.

{¶ 26} “ It is not necessarily unusual that bedwetting occurs at ages of eight or nine after it had stopped at age three. Id. at 569-570.

{¶ 27} “ Bedwetting ‘can keep going if there's still turmoil.’ Id. at 570.

{¶ 28} “ If a person is repressing memory, it does not mean that internal conflict has gone away. Id. at 570-571.

{¶ 29} “ In relying on reported ‘history’ and relying on what she has seen, Dr. Miceli has in the past ‘of course’ been wrong. Id. at 571.

{¶ 30} “ In 2004 and 2005, Dr. Miceli conducted seminars in which she made presentations to other psychologists on the subject of children who witness violence. Id. at 571-572.

{¶ 31} “ ‘Children who witness domestic violence display various emotional, physical and behavioral disturbances;’ they experience feelings of anger, fear, guilt, confusion, helplessness, withdrawal, low self-esteem, nightmares, aggressive

behavior against peers, family members, and property. Id. at 573-574.

{¶ 32} “ Kids who witness domestic violence suffer physical problems such as bedwetting, insomnia, diarrhea, and stomach problems. Id. at 574.

{¶ 33} “ Children who witness domestic violence have difficulty concentrating. Id. at 575.

{¶ 34} “ Children who have witnessed domestic violence experience the same type of trauma or emotional disturbances as children who have been sexually abused. Id. at 575.

{¶ 35} “ If a child saw a parent being choked, spit on, or called vicious names, this would cause the child to experience some of the aforesaid types of trauma or emotional disturbances. Id. at 575.

{¶ 36} “ Six to ten year old boys typically are not as mature as girls of the same age. Id. at 577.

{¶ 37} “ ‘A lot of boys now are much more informed’ about sex; it’s a ‘different world.’ Id. at 578.

{¶ 38} “ *The American Psychological Association Journal of Social and Personal Psychology* is a respected journal. Id. at 579.

{¶ 39} “ Dr. Miceli is aware of studies that playing violent video games, such as Mortal Combat, is correlated to a person’s aggressive thoughts, feelings, and behavior. Id. at 579.

{¶ 40} “ Dr. Miceli has heard of the ‘mature rated games’ of Mortal Combat and Doom that contain gore, blood, and violence. Id. at 580.

{¶ 41} “ Dr. Miceli does not disagree with a study that indicates that ‘children

who are being predisposed to aggressive (sic) may become more aggressive with this exposure.’ Id. at 581.

{¶ 42} “ Defense Counsel presented to Dr. Miceli a study involving college students which established that even a brief exposure to violent video games can temporarily increase aggressive behavior. Id. at 581.

{¶ 43} “ It is possible that even brief exposure to violent games by a child can increase the child's aggressive behavior. Id. at 582.

{¶ 44} “ Memory is ‘very constructive’; ‘memory storage is both emotional and cognitive.’ Id. at 583.

{¶ 45} “ If there is ‘a mismatch between what we expect and what we actually experience, it's not uncommon for us to resort back to what is expected to be in our memory.’ Id. at 583.

{¶ 46} “ There are three phases of memory: encoding, storage, and retrieval. Id. at 583-584.

{¶ 47} “ The final step in memory - retrieval - is ‘never perfect.’ Id. at 585.

{¶ 48} “ Suggestibility can impact ‘what we think that we're retrieving.’ Id.

{¶ 49} “ Children, especially preschool children, are more susceptible to unconscious suggestibility. Id. at 585-586.

{¶ 50} “ Someone can suggest something to a child that may not have occurred that results in the child perceiving it as having occurred and reporting that it did occur. Id. at 586.

{¶ 51} “ Someone can suggest something to a child that the child does not decipher as ‘the real or fake,’ but becomes part of memory. Id.

{¶ 52} “· When the child retrieves that ‘fake’ thing, ‘it still comes out as if it was something that happened.’ Id.

{¶ 53} “· Suggestibility can come from both external and internal sources. If someone is afraid or emotionally aroused, it can distort what that person is perceiving or what that person believes he is perceiving. Id. at 587.

{¶ 54} “· ‘None of this an exact science’ and ‘there are margins of error.’ Id.

{¶ 55} “· Dr. Miceli described both the normal and abnormal behavior of a preschooler sexually acting out. Id. at 588.

{¶ 56} “· Sexualized behavior could indicate inappropriate boundaries of the home such as children witnessing parents in sexual activity. Id. at 589.

{¶ 57} “· Children's appropriate behavior ‘in terms of showering together, in terms of physical contact, etc.’ can contribute to some sexual acting out. Id. at 590.

{¶ 58} “· Preschool children and elementary teachers see children sexual acting out. Id.

{¶ 59} “· Dr. Miceli explained false reports of sexual abuse. For instance, a child who reports that his bottom hurts - which may be the result of a father ‘wiping when they had a bowel movement’ or spanking - may result in the other parent jumping to the conclusion that the child was sexually abused and then reinforcing that false belief in the child. Id. at 592.

{¶ 60} “· Dr. Miceli introduced Z.D. to an eight-week group session involving two to three boys in which they ‘talk about school, talk about behavior, talk about anger, talk about families. We talk about sexual abuse.’ Id. at 593.

{¶ 61} “· In the group session, the boys disclose their sexual abuse, the

‘ramifications of what happened to them,’ and how people did or did not pay attention to them after their disclosure. Id. at 594.

{¶ 62} “ Based upon the fact that Z.D. had made a disclosure, Dr. Miceli ‘went with that’; she did not conduct a forensic interview; she did not conduct an objective hypothesis-testing interview. Id. at 595-596.

{¶ 63} “ A child having difficulty walking or sitting may be a physical symptom immediately after anal sexual abuse. Id. at 597.

{¶ 64} “ Dr. Miceli’s job is to ‘help children.’ Id. at 600.

{¶ 65} “ Observing domestic violence is a form of abuse. Id.

{¶ 66} “ Some children exhibit traumatic behaviors before disclosure and some after disclosure. Id. at 601.

{¶ 67} “ ‘Some children do fight back, but most do not.’ Id. at 602.

{¶ 68} “ ‘A child who pees on himself could have a problem and may not have a problem.’ Id.

{¶ 69} “ It is not unusual for a child to be told more than once to clean his room or brush his teeth. Id.

{¶ 70} “ It is not unusual for a child to forget to bring homework home on four or five occasions; it may be the result of laziness or a failure to write down the assignment. Id. at 603.

{¶ 71} “ It is not unusual for kids to get an attitude. Id. at 604.

{¶ 72} “ False disclosures by preschoolers may be the result of misinterpretation by the child or misinterpretation by the adult to whom the report is made. Id. at 604-605.

{¶ 73} “· There are ‘other reasons, other motivations’ for a preschooler to say something happened that didn't happen. Id. at 605.

{¶ 74} “· When asked, ‘Do you always know when someone is lying to you?’ Dr. Miceli replied, ‘Of course not, nobody does.’ Id.

{¶ 75} “· ‘If a person is extremely emotional and passionate about a thing and they're telling you that thing,’ that does not necessarily make it true. Id. at 606.

{¶ 76} “· Dr. Miceli has ‘had experience in that situation with someone being passionate about something and it not being true.’ Id. at 606

{¶ 77} “Mr. VanNoy's recross-examination of Dr. Miceli covered the following items:

{¶ 78} “· Post Traumatic Stress Disorder (PTSD) can occur over a period of time; there is not [a] test to determine the exact date and time when it occurred. Id. at 620.

{¶ 79} “· Witnessing a mother being kicked, hit, and spit on is a traumatic event which can cause a child to feel helpless and experience emotional turmoil. Id. at 621.

{¶ 80} “· Dr. Miceli has no personal knowledge as to whether Z.D. attempted to drown a dog or his baby brother. Id.

{¶ 81} “· It is possible that young people Dr. Miceli has dealt with have purposefully lied, but she ‘didn't catch them’ lying. Id. at 621-622.

{¶ 82} “· If the perpetrator of the abuse is still living in the house, in half the cases the child will report the abuse, while in the other half the child will not report the abuse. Id. at 622.

{¶ 83} “· Mr. VanNoy questioned Dr. Miceli regarding a study ‘that indicates that 74% of the disclosures by preschoolers are accidental.’ Id. at 623.

{¶ 84} “· Dr. Miceli testified that ‘typically it is an accidental discovery.’ Id. at 624.

{¶ 85} “· Dr. Miceli has never treated individuals who have been falsely accused. However, she has ‘had some families that I've worked with where there have been inaccurate reports, things that the children have said while they were in family mediation.’ Id.” (Trial Court’s March 16, 2009, Decision and Entry at 15-20).

{¶ 86} Elsewhere in its ruling, the trial court addressed *State v. Thompson* (1987), 33 Ohio St.3d 1, which held that the failure of defense counsel to call an expert witness and instead to rely on cross-examination of the State’s expert did not constitute ineffective assistance of counsel. The trial court quoted the following language from *Thompson*:

{¶ 87} “In proposition of law eleven, appellant contends that he was denied effective assistance of counsel. Essentially, appellant argues that his counsel failed to obtain the appointment of a forensic pathologist to assist him in presenting evidence and rebutting the state's witness on the issue of rape. Appellant also argues that his counsel should have sought to preserve certain potentially exculpatory physical evidence, namely the vaginal swabs that were taken of the victim. Again, we disagree.

{¶ 88} “In *Strickland v. Washington* (1984), 466 U.S. 668, 686, the United States Supreme Court stated that ‘[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' The court therein outlined a two-part test for evaluating whether assistance of counsel was so ineffective as to require reversal:

{¶ 89} "First the defendant must show that counsel's performance was deficient. This requires showing the counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.' *Id.* at 687.

{¶ 90} "Additionally, '* * * a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' (Citation omitted.) *Strickland*, *supra*, at 689. (Citations omitted.)

{¶ 91} "In the instant cause, appellant's counsel were not ineffective so as to have precluded a fair trial or to have created an unreliable result. Appellant was represented by two experienced trial attorneys who presumably were aware of the issues involving the evidence of rape. Appellant's counsel decided not to request the appointment of a forensic pathologist, choosing instead to rely on their cross-examination of the state's expert in order to rebut the evidence of rape. In light of these circumstances, the errors alleged by appellant were neither so serious that

his counsel were not functioning as the 'counsel' guaranteed by the Sixth Amendment, nor so serious that the result of his trial was rendered unreliable.

{¶ 92} "Accordingly, we will not second-guess the judgment of appellant's counsel, and appellant's eleventh proposition of law is overruled." (Trial Court's March 16, 2009 Decision and Entry, quoting *Thompson*, 33 Ohio St.3d at 10-11).

{¶ 93} In denying Molen's petition, the trial court found that Molen's trial counsel had conducted a thorough cross-examination of Dr. Miceli. The trial court noted Molen's counsel had established that she had never testified as a defense expert and that she had accepted Z.D.'s report of sexual abuse without conducting an investigation. The court noted that Molen's counsel had established that Dr. Miceli lacked objectivity with regard to the child because she acted as his therapist. The court noted that Molen's counsel got Dr. Miceli to concede that Z.D.'s emotional and physical disturbances were within a normal range and could be the result of his witnessing his mother being the victim of domestic abuse.

{¶ 94} Finally, the court noted that Molen's counsel obtained important concessions from Dr. Miceli that memory retrieval is never perfect; that children are more susceptible to suggestibility; that suggestibility can come from both external and internal sources; that someone can suggest something to a child that may not have occurred that results in the child perceiving it as having occurred and reporting that it did occur; that false disclosures by preschoolers may be the result of misinterpretation by the child or misinterpretation by the adult to whom the report is made; that Dr. Miceli has had experience in that situation with some one being passionate about something and it not being true.

{¶ 95} It is important to note that the trial court accepted as true the statements made by Dr. Stenson in his affidavit. The court simply indulged the strong presumption that Molen's counsel's decision not to call his own expert fell within the wide range of reasonable professional assistance, and the challenged action of not calling an expert might be considered sound trial strategy. It is clear from the record that Molen's counsel prepared himself to conduct an extensive cross-examination of the State's expert. Appellant's counsel was not so ineffective so as to have precluded a fair trial or to have created an unreliable result. *Thompson*, supra. The appellant's assignment of error is Overruled. The judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

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