[Cite as *State v. Eaton*, 2010-Ohio-3767.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 41
v.	:	T.C. NO. 2009CR00051
TODD M. EATON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 13th day of August, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Todd Eaton, filed October 1, 2009. Eaton appeals his convictions and sentences, following a jury trial, on one count of rape, in violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4)(C)(2), a felony of

the second degree. The victim, A.S., was under 10 years old, having been born on March 11, 2001.

{¶ 2} On May 5, 2009, Eaton filed a motion to suppress, seeking exclusion of, inter alia, his June, 2006 conviction for gross sexual imposition involving minor victims. After a hearing and subsequent briefing, the court issued an entry that provided in part, "If the State is going to use at trial prior acts or convictions of the Defendant, counsel shall make that request of the Court. The Court will rule upon the request and make a limiting instruction." At trial the court determined that the prior conviction could not be used in the State's case-in-chief, but that it could be used if Eaton testified, to test his credibility. Eaton did not testify.

{¶ 3} After the trial, Eaton filed a Motion to Set Aside Verdict and for New Trial, which the trial court overruled. Eaton was designated a Tier III Sex Offender, and he was sentenced to a mandatory term of life, with eligibility for parole after 10 years for rape, and he was sentenced to five years for gross sexual imposition, to be served concurrently with the sentence for rape.

{¶ 4} The incident giving rise to this matter occurred behind a shed in the spring of 2005, during a softball practice. Jeffrey Schaffner, the father of A.S., testified that he played softball with Eaton for their church, the Urbana Church of the Nazarene, and that the men were on the same team in the summers of 2005 and 2006. Schaffner often took A.S. with him to practice. Schaffner at one time dated Eaton's sister, and he had a close relationship with Eaton's parents, as did A.S. According to Schaffner, he learned of the incident in the fall of 2006 from A.S., who identified Eaton as her abuser, but he did not

report it to anyone. Schaffner stated that he did not want to put A.S. through a trial, he did not want to "devastate" Eaton's parents, and at the time he learned of the incident he was aware that "Todd had to go away for a very long time, and I knew that [A.S.] wouldn't see him for a very long time at least a year." According to Schaffner, the offenses were reported to law enforcement in November, 2008, when A.S. "told a friend in her class and her friend * * * went home and told her parents and the parents called the school and told the superintendent and he called Children Services and they contacted me." Schaffner stated, "this was [a] big relief for me."

{¶ 5} A.S. initially testified that she knew Eaton from her church, and that he played softball with her father. She stated that she did not remember going to softball practices with her father, and that she had never been on the softball field. She denied telling Schaffner about the incident with Eaton. A.S. then stated that she remembered talking about Eaton in the prosecutor's office, and she went on to describe the incident at issue. According to A.S., she wandered around to the other side of the shed from the practice field, where she encountered Eaton, who was urinating. Eaton told A.S. that it was okay for her to come behind the shed where he was, and she continued toward him. Eaton then "said put your mouth on his pee-pee." A.S. "kept on saying no," and Eaton "kept saying do it." A.S. finally complied, "[b]ecause my parents said obey adults," and Eaton placed his penis "not very far" into A.S.'s mouth. A.S. stated that she only told her best friend Lauren about what had happened, and she denied talking to her father and mother about it.

{¶ 6} Sergeant Aaron Brown of the Champaign County Sheriff's Office testified

regarding his interviews of Eaton. Brown first met with Eaton in December, 2008, in Brown's office, and he questioned him in the presence of Sara Shokouhi, a Children's Services investigator. According to Brown, "Todd denied having any sort of sexual contact with [A.S.]; however, he admitted * * * to being a member of the baseball team. He admitted to knowing [A.S.]. He indicated that he remembered the specific incident that [A.S.] has described as far as the team playing softball out on the field, she being present in the area of the bleachers, and that he remembered going back behind the white utility shed of the Nazarene Church to urinate.

{¶ 7} "* * *

{¶ 8} "He further stated that [A.S.] was playing right there near the building and that [A.S. had come into the vicinity, very close vicinity, where they could see each other while he was urinating. I then asked him specific questions, again, as to the sexual contact. He denied having any sort of sexual contact with her and stated that he returned back to the softball field."

{¶ 9} Later in the course of his investigation, Brown and Eaton were traveling in Brown's unmarked vehicle, and as they approached the Nazarene Church, Brown testified that Eaton "stated that this is where the incident happened." Brown told Eaton "that we could speak about this incident; however, this was not the time or place to do it[,] outlining his constitutional rights. And that if he still chose to speak with me, we could do that once we stopped the vehicle. I further told him that we could do that at my office where we were heading to and he stated that he would." Upon arrival at the office, Brown read Eaton his rights and told him that he was free to leave. The interview was recorded. Brown

testified that Eaton told him that while he was behind the shed during softball practice, "[A.S.] came over to him, reached up specifically with her right hand, and touched his penis." A redacted transcript of the interview was admitted into evidence.

{¶ 10} Sara Shokouhi testified regarding her interview of A.S. in November, 2008. She stated that her initial referral listed an "unknown perpetrator." When Shokouhi went to Schaffner's home to speak to A.S. the first time, the child was not at home. A.S.'s step-mother, who was at home, phoned Schaffner, who supplied Eaton's name to Shokouhi and told her the incident had happened at the church. According to Shokouhi, when A.S. was later interviewed in her office, A.S. told her that "Todd was bad." A.S. "indicated that [she and Schaffner] were at the church and her father was playing softball. That Todd was urinating behind a shed and that she had gone around and had seen him. And that he called her back over to him and asked her to put her mouth on his penis and that she did." She also told Shokouhi that she "said no in a succession, no, no, no, no. And it was escalating in tone as she said it." A.S. told Shokouhi that she ultimately did what Todd asked "because she listens to what adults tell her because adults know what is best for her." When Shokouhi asked A.S. what the contact felt like, she "said it felt like a bump." A.S. stated that Todd "just laughed," according to Shokouhi. A.S. told Shokouhi that she told her father and a woman in the bleachers what had happened immediately, and she also told a friend at school. The woman in the bleachers was not identified.

{¶ 11} The following witnesses, all of whom played softball with Eaton in 2005 and/or 2006, testified for the defense: Jesse Williams, Larry Gleeson, Matthew Sertell, Adam Trowbridge, Chris Eaton (Todd's brother), Mike McKenzie, Brian Pasko, and Steve

Jacobs, the team coach. The witnesses generally described the procedure of their practices and A.S.'s presence there. None of them indicated that they observed anything out of the ordinary at any practice.

{¶ 12} Eaton's parents, Larry and Deborah Eaton, testified. Larry stated that Schaffner and A.S. have been guests in his home "many times," some of which were after the fall of 2006, when Eaton also resided in the home. Larry stated that when A.S. visited, Eaton was usually at work. Deborah stated that Schaffner had dated her daughter and A.S. "was basically a makeshift granddaughter." According to Deborah, Schaffner never indicated to her that A.S. should not be around Eaton, and in the summer of 2008, Schaffner asked Deborah to babysit for A.S., but she was unable to do so, although A.S. "came to visit occasionally." Deborah stated that Eaton was never left alone with A.S.

{¶ 13} Eaton asserts four assignments of error. His first assignment of error is as follows:

{¶ 14} "THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING PRIOR CONSISTENT STATEMENTS OF THE ALLEGED VICTIM."

{¶ 15} Eaton directs our attention to Shokouhi's testimony regarding her interview of A.S. and to State's Exhibit 3, which is a DVD of the interview, and he argues that the statements were inadmissible and improperly bolstered A.S.'s credibility. Eaton did not object at trial to the testimony and exhibits. "Defense counsel's failure to object waives all but plain error. (Internal citation omitted). Counsel's failure to object 'constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly could have been otherwise.'" *State v. Boykin*, Montgomery App. No. 19896,

2004-Ohio-1701, ¶ 18.

{¶ 16} Having throughly reviewed the record before us, we see no plain error. A.S., herself, testified that Eaton, who was urinating behind the shed during baseball practice, asked her to put her mouth on his penis, and she stated that she did so. While Eaton's story that he urinated behind the shed in the presence of A.S. during softball practice was consistent with A.S.'s testimony, his version of the physical contact between them, differed markedly; Eaton initially denied that sexual contact occurred, then he changed his story and stated that A.S., a five year old, initiated the sexual contact by touching his exposed penis with her right hand. Although the record is unclear when A.S. told her father about the incident, Schaffner testified that A.S. made him aware of it, and when contacted by Shokouhi regarding an unknown perpetrator, Schaffner identified Eaton by name. The numerous defense witnesses did not exculpate Eaton. In other words, if the prior consistent statements had not been admitted, it is not likely that the outcome of the trial would have been different. Eaton's first assignment of error is overruled.

{¶ 17} Eaton's second assignment of error is as follows:

{¶ 18} "THE TRIAL COURT ERRED BY ENTERING SEPARATE JUDGMENTS OF CONVICTION FOR ALLIED OFFENSES OF SIMILAR IMPORT IN VIOLATION OF R.C. 2941.25(A)."

{¶ 19} The State concedes that this assigned error is meritorious.

{¶ 20} "As we recently noted in *State v. Reid*, Montgomery App.No. 23409, 2010-Ohio-1686, * * * the Supreme Court of Ohio determined, 'our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.' *State v. Rance* (1999), 85 Ohio St.3d 632, 635, * * * quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, * * * . Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 12.' *Reid*, ¶ 28.

{¶ 21} "R.C. 2941.25 determines the application of the Double Jeopardy Clause to the issue of multiple punishments and provides:

{¶ 22} '(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 23} '(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or

information may contain counts for all such offenses, and the defendant may be convicted of all of them. ‘

{¶ 24} “‘A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, * * * ; *Rance*, 85 Ohio St.3d at 636, * * * . Recently, in *State v. Cabrales* 118 Ohio St.3d 54, 2008-Ohio-1625, * * * we stated: “In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.” Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. Id. at ¶ 31.’ *Williams*, at ¶ 16.

{¶ 25} “Courts have sometimes applied R.C. 2941.25 as requiring merging of ‘convictions.’ That is conceptually incorrect. When its terms are satisfied, the court must merge multiple offenses of which a defendant is found guilty into a single conviction. That scenario contemplates multiple charged offenses on which the verdicts returned by the trier of fact pursuant to Crim.R. 31(A) contain a finding of guilt. Following the State’s election of which allied offenses should survive, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the court must merge the offenses concerned into a single judgment of conviction entered pursuant to Crim.R. 32(C), followed by the court’s imposition of a

sentence on that conviction pursuant to Crim.R. 32(A). The convictions stand undisturbed." *Reid*, ¶ 32-33."

{¶ 26} *State v. Scandrick*, Montgomery App. No. 23406, 2010-Ohio-2270, ¶ 43-48.

{¶ 27} As the State concedes, "[g]ross sexual imposition and rape are allied offenses of similar import within the meaning of R.C. 2941.25 (citation omitted). Likewise, gross sexual imposition is a lesser included offense of rape, (citation omitted), for purposes of double jeopardy." *State v. Jones* (1996), 114 Ohio App.3d 306, 325. Eaton cannot be convicted of and sentenced for both where, as here, they arise from the same conduct. It is prejudicial plain error to impose multiple sentences under these circumstances. Eaton's conviction and sentence for gross sexual imposition is vacated.

{¶ 28} Eaton's third assigned error is as follows:

{¶ 29} "DEFENDANT-APPELLANT WAS DENIED AFFECTIVE [sic] ASSISTANCE OF COUNSEL BY THE FAILURE OF TRIAL COUNSEL TO OBJECT TO THE ADMISSION OF PRIOR CONSISTENT STATEMENTS BY THE ALLEGED VICTIM AND FURTHER FAILURE TO OBJECT TO THE ENTRY OF JUDGMENT OF CONVICTION THAT WAS BARRED BY THE ALLIED OFFENSE STATUTE, R.C. 2941.25."

{¶ 30} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable

assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 31} Because we consider it unlikely, for all of the reasons set forth in our discussion of Eaton's first assignment of error, that the result of his trial would have been different if his trial counsel had objected to the admission of his victim's prior, consistent statements, we find that the prejudice prong of *Strickland v. Washington*, supra, is not satisfied as to this omission by counsel. Secondly, as discussed above, rape and gross sexual imposition are allied offenses of similar import. Accordingly, Eaton's third assigned error is overruled regarding the prior consistent statements and moot regarding the imposition of sentence for allied offenses.

{¶ 32} Eaton's fourth assigned error is as follows:

{¶ 33} "APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 34} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in

resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 35} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, * * * . "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 36} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 37} As to the element of the age of the victim, rape is a strict liability offense. *State v. O'Dell*, Montgomery App. No. 22691, 2009-Ohio-1040, ¶ 9 -10. R.C. 2907.02 provides: "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies: * * * (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other

person." "'Sexual conduct'" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; * * * ." R.C. 2907.01(A). "'Fellatio' is committed by touching the male sex organ with any part of the mouth.' (Citation omitted). Fellatio does not require oral penetration." (Citation omitted). *State v. Hudson*, Montgomery App. No. 22793, 2009-Ohio-2776, ¶ 42.

{¶ 38} Having reviewed the entire record, weighed all of the evidence and all of the reasonable inferences, and considered the credibility of the witnesses, we conclude that the jury did not lose its way and create a manifest miscarriage of justice warranting a new trial. The jury clearly believed A.S. when she testified that Eaton instructed her to place his penis in her mouth, such that fellatio was committed, and we defer to their assessment of her credibility. A.S.'s father, Schaffner, identified Eaton by name when he spoke to Shokouhi, and he had been told of the incident by A.S. Eaton admitted to Brown to urinating in front of A.S. behind the shed during a softball practice, and the jury clearly discounted his description of the contact that occurred between him and A.S. Eaton's conviction for the offense of rape is not against the manifest weight of the evidence, and his fourth assignment of error is overruled.

{¶ 39} Judgment affirmed in part, vacated in part, and remanded for re-sentencing in accordance with this opinion.

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FAIN, J. and VUKOVICH, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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