[Cite as *State v. Huntley*, 2010-Ohio-6102.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23545
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-778
v.	:	
	:	(Criminal Appeal from
DESHAUN HUNTLEY	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 10th day of December, 2010.

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MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. #0070162, and LAURA M. WOODRUFF, Atty. Reg. #0084161, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

STEVEN T. PIERSON, Atty. Reg. #0002659, 424 Patterson Road, Dayton, Ohio 45419
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Deshaun Huntley appeals from his conviction and sentence for Gross Sexual Imposition of a person under the age of thirteen, in violation of R.C. 2907.05(A)(4). Huntley contends that the trial court erred in allowing a minor victim to testify, and that trial counsel was ineffective for: (1) failing

to object to the admission of the minor's testimony without a competency hearing and finding of competency; and (2)failing to object to the admission of the minor's out-of-court statements.

{¶ 2} We conclude that the trial court did, in fact, find the minor competent to testify, following a competency hearing, so that the trial court did not err in allowing the minor to testify, and trial counsel was not ineffective for failing to object to the minor's testifying. With respect to the out-of-court statements by the minor, we conclude that they were admissible as excited utterances, under the liberal jurisprudence pertaining to unprompted statements made by young children, so that trial counsel was not ineffective for having failed to object to their admission in evidence. Accordingly the judgment of the trial court is Affirmed.

I

{¶ 3} The minor victim, S.W., was four years old at the time of the offense, and was left in the care of Huntley's mother, Donna Gray, while S.W.'s mother worked nights as a licensed practical nurse. Gray provided what was testified to as "home care," or daycare, for S.W. and S.W.'s older brother, E.W. S.W.'s mother, Monica W., used Gray's services four to six times a week, depending on her work schedule. Monica and S.W.'s father, Robby, had been separated since S.W. was about a year old.

{¶ 4} Monica would typically drop the children off at Gray's home around 6:00 or 6:30 p.m. and pick the children up around 7:00 a.m. the next morning. When the children would spend the night at Ms. Gray's home they would sleep in the living

room on a Spider-man couch or on the floor. Space was tight in Gray's home, since her husband and six children, including twenty-one-year-old Huntley, all lived in the three-bedroom home. Huntley shared a room with his younger brother, who was being disciplined by having the door to the room removed.

{¶ 5} At some point before mid-October 2006, while S.W. was still being cared for by Gray, Huntley snuck into the living room where S.W. was sleeping and touched what S.W. testified to as her "poo-poo" (vagina) with his hands, opened her vagina, and licked it. S.W. testified that Huntley then told her not to tell anyone.

{¶ 6} At the time of the incident, Robby generally saw S.W. every other weekend and a couple of nights during the week, but Monica was sole custodian. Robby was also living with his girlfriend at the time, Teresa, who generally took part in feeding, bathing and dressing S.W. while she was in their care. During one of S.W.'s visits to her father's home in mid-October 2006, Teresa testified that she was helping S.W. dress herself after taking a bath when S.W. spontaneously opened her legs, pointed to her vagina, and said "Shaun [Huntley] kissed me here * * * but I told him to stop, though." There was confusion as to who "Shaun" was; it was assumed that it was another child that Gray was babysitting. It is unclear in the record if Monica was fully informed as to what happened when Robby called her after the revelation to Teresa. Teresa's hearsay statements as to what specifically S.W. told her was the subject of a motion in limine, but the statements were never objected to by defense counsel during the trial.

{¶ 7} S.W. spent Christmas 2006 with Robby and Teresa, who were having a family dinner to celebrate the holiday. During this time, Teresa went upstairs to care

for her own infant son. S.W. followed her and handed Teresa a crumpled note. S.W. told Teresa it was a Christmas note. When Teresa unfolded it, she found that is was covered in hand drawn hearts and read, “I love you very much.” When asked who gave her the note S.W. responded, “Shaun.” Still unclear as to who “Shaun” was Teresa asked S.W., “what’s Shaun’s mommy’s name,” to which S.W. replied, “Miss Donna” (Gray). At this point, Robby contacted Monica about the note. Monica testified that at this time she was fully informed as to the context of the note and S.W.’s disclosure of the incident to Teresa. Monica testified that she was extremely upset and insisted that S.W. be brought home. Monica then took S.W. to her mother’s house, which is in the jurisdiction of the Trotwood Police Department, which was notified about the incident.

{¶ 8} S.W. was deemed competent to testify at trial following a competency hearing held in chambers, which was recorded, in June 2009 shortly before the trial started. At this time, S.W. was asked a number of questions about what she learned about in school last year, her favorite books, and the difference between lying and telling the truth. During the competency hearing, the judge actively observed S.W. and heard her answers. S.W.’s answers to the judge’s voir dire indicate that she is able to tell truth from a lie, and recall facts as remembered. Immediately following the examination of S.W., the judge met with the prosecutor and defense counsel in chambers to ask if they had any additional questions they felt needed to be added; both indicated that they did not have any further questions. Upon deeming S.W. competent to testify at trial, the judge issued a written entry to that effect on the same day.

II

{¶ 9} Huntley's First Assignment of Error is:

{¶ 10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE TESTIMONY OF A SIX-YEAR-OLD WITNESS IN CONTRAVENTION OF OHIO R. CRIM. P. 22 AND OHIO R. EVID. 601(A)

{¶ 11} "A. THE TRIAL COURT ERRED UNDER OHIO R. CRIM. P. 22 IN FAILING TO HOLD AND RECORD A COMPETENCY HEARING OF A CHILD WITNESS PRIOR TO ADMITTING THE TESTIMONY OF THE INFANT WITNESS AT TRIAL.

{¶ 12} "B. THE TRIAL COURT COMMITTED PLAIN ERROR UNDER OHIO R. EVID. 601(A) IN PERMITTING AND RELYING ON THE TESTIMONY A CHILD WITNESS WHOSE COMPETENCE IS NOT SUPPORTED IN THE RECORD.

{¶ 13} "i. THE COURT'S ADMISSION AND RELIANCE ON S.W.'S TESTIMONY RISES TO THE LEVEL OF PLAIN ERROR SINCE THE CHILD'S TESTIMONY UNEQUIVOCALLY SHOWS THAT SHE WAS NOT COMPETENT TO TESTIFY.

{¶ 14} "1. S.W.'S TESTIMONY SHOWS SHE DOES NOT APPRECIATE NOR UNDERSTAND HER RESPONSIBILITY TO BE TRUTHFUL.

{¶ 15} "2. S.W.'S TESTIMONY SHOWS THAT SHE DOES NOT POSSESS THE ABILITY TO OBSERVE, RECOLLECT OBSERVATIONS, OR COMMUNICATE THOSE RECOLLECTIONS."

{¶ 16} Huntley argues that the trial court committed plain error by not holding a

competency hearing for S.W. prior to trial, and all that is mentioned in the record is an entry on the docket stating, "Court determines witness is competent to testify." Huntley contends that there is no way of knowing with which witness this entry is concerned, or whether a competency hearing even took place. Huntley further argues that since S.W.'s testimony at trial does not support the finding of competency, the trial court committed further error by relying on S.W.'s testimony, when it is clear that she was not competent to testify.

{¶ 17} Under Crim. R. 22, "[i]n serious offense cases all proceedings shall be recorded. * * * Proceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device." Under Evid. R. 601(A), "[e]very person is competent to be a witness except * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." An examination as required under Evid. R. 601(A) allows the trier of fact the opportunity to, "observe the child's appearance, his or her manner of responding to the questions, general demeanor and any indicia of ability to relate the facts accurately and truthfully. Thus, the responsibility of the trial judge is to determine through questioning whether the child of tender years is capable of receiving just impressions of facts and events and to accurately relate them." *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

{¶ 18} Huntley's argument is predicated upon the failure of the record to reflect that any competency proceeding was had concerning S.W.'s competency. During the pendency of this appeal, the State moved to supplement the record to

include a transcript of a hearing in the trial court on June 18, 2009 on the competency issue. By entry filed herein on September 8, 2010, we granted the State's motion, and the transcript of the hearing was filed herein on September 10, 2010, after the briefs were filed.

{¶ 19} During the competency hearing, the judge asked S.W. what grade she was in, who her teacher was, what she had learned in school, what her favorite books were, and questioned her understanding of the difference between telling the truth and telling lies. This hearing was held in chambers, with counsel for the parties in another room where they would be able to follow the proceedings on closed-circuit television. Evidently, the monitor was not on in the room where counsel were during the hearing, but when the trial court discovered that they had not been able to observe the proceedings, the audiovisual record was played back for them so that counsel could observe and hear the in-camera proceeding. Meanwhile, S.W. was waiting in chambers where the proceeding had taken place.

{¶ 20} After replaying the record of the hearing for counsel, the trial court asked if either counsel had any questions that they felt needed to be added. Both the prosecutor and defense attorney indicated that they were satisfied with the trial court's questions, and had no additional questions for S.W. At this point, the trial court made the determination that S.W. was competent to testify.

{¶ 21} The trial court did not err in allowing S.W.'s testimony, since she had already been deemed competent to testify at the competency hearing. There was also no need to show that she was competent to testify when she was sitting in the witness chair, because her competency to testify had already been established.

Huntley makes reference to some inconsistencies in S.W.'s testimony, but these were not of sufficient magnitude that the trial court should, sua sponte, have revisited the issue of S.W.'s competency. They were appropriate matters for counsel to argue to the jury concerning the proper weight to be given to S.W.'s testimony.

{¶ 22} Huntley's First Assignment of Error is overruled.

III

{¶ 23} Huntley's Second Assignment of Error is:

{¶ 24} "APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL (1) FAILED TO OBJECT TO THE ADMISSION OF THE CHILD WITNESS'S TESTIMONY WITHOUT REQUIRING THE COURT TO MAKE THE REQUIRED FINDING OF COMPETENCE; AND (2) BY FAILING TO OBJECT TO THE CHILD'S STEP-MOTHER'S TESTIMONY CONCERNING THE CHILD'S HEARSAY STATEMENTS.

{¶ 25} "A. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SIX-YEAR-OLD WITNESS'S TESTIMONY FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS.

{¶ 26} "B. TRIAL COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS WHEN COUNSEL FAILED TO OBJECT TO THE TESTIMONY OF THE CHILD'S STEP-MOTHER CONCERNING HER STEP-DAUGHTER'S OUT-OF COURT HEARSAY STATEMENTS.

{¶ 27} "C. BUT-FOR TRIAL COUNSEL'S ERRORS, THERE IS A

REASONABLE PROBABILITY THE TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME."

{¶ 28} Huntley argues that trial counsel was ineffective for having failed to object to the admission of S.W.'s testimony without the trial court's having made a finding of competency, and by having failed to object to Teresa's testimony regarding out-of-court statements made by S.W. to Terersa while in her care. Huntley further argues that but for trial counsel's ineffectiveness, there would have been a reasonable probability that the trial would have had a different outcome.

{¶ 29} "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.

{¶ 30} Huntley's argument that trial counsel was ineffective for having failed to object to S.W.'s testimony based on the lack of a competency determination is without merit for the reasons set forth in Part II, above.

{¶ 31} In the case before us, Huntley's trial counsel never objected to the hearsay testimony of Teresa during the trial. The only record of any discussion of the admissibility of the hearsay statements took place minutes before opening statements, when three different motions in limine were addressed. Trial Transcript at 145. During this discussion, defense counsel did note that the statements did not qualify under the hearsay exception set forth in Evid. R. 803(2), because the statements were not excited utterances. *Id* at 146. Nowhere else in the record did defense counsel object to the hearsay testimony of Teresa.

{¶ 32} In *State v. Harr*, 158 Ohio App.3d 704, 2004 -Ohio- 5771, we held that hearsay statements that a minor made to her mother concerning the location where the defendant touched her were inadmissible. In *Harr*, the minor was asked leading questions by her mother and was in a state of distress for having disobeyed her mother. *Id*. The minor also was deemed competent to testify, but once on the witness stand the minor broke into tears, and was inconsolable. *Id*. The hearsay statements testified to by the minor's mother were the only statements in evidence that any form of gross sexual imposition took place. *Id*. The situation in the case before us does not include the extraordinary circumstances set out in *Harr.*

{¶ 33} In this case, S.W. did not make the statements to Teresa after an in-depth questioning of the minor, nor was the minor unable to testify. To the contrary, S.W. made the hearsay statements to Teresa spontaneously at bath time.

Up until the statements were made, none of the parental figures in S.W.'s life had any idea that any inappropriate behavior had taken place.

{¶ 34} The excited utterance exception to the hearsay rule should be applied liberally in a case involving the sexual abuse of a young child. *State v. Boston* (1989), 46 Ohio St.3d 108. This is based upon the age of the child, the shocking nature of the act, and the surprising nature of the assault. *Id*.

{¶ 35} The passage of time between the event and the child's out-of-court statement, while obviously a factor, is not dispositive. Even when the statement is made after a substantial lapse of time, it may be admitted under the excited-utterance exception. *State v. Taylor*, (1993), 66 Ohio St.3d 295, 303-304. Where a young child claims to have been the victim of a sexual assault, the test for admission of the child's statements does not focus upon the progression of the startling event or occurrence, but upon the spontaneous nature of the child's statement. *In re D.M.*, 158 Ohio App.3d 780, 2004-Ohio-5858, ¶ 13. See, also, *State v. Wagner* (1986), 30 Ohio App.3d 261.

{¶ 36} At the time that S.W. reported the incident to Teresa, S.W. was four years old. She made the statement spontaneously, without any prompting. Although this disclosure may have occurred up to three months after the incident, the "timeliness of the declaration following the event is not strictly applied in child sex abuse cases. Because of the limited reflective abilities of an infant declarant, other indicia of reliability may be considered as the child's age, the type of assault and the circumstances of the declaration." *State v. Negolfka* (November 19,1987), Cuyahoga App. No. 52905.

{¶ 37} In fact, in the case before us, a pediatric psychologist with specialized training in sexual abuse involving children, Dr. Joy Miceli, testified that younger children do not typically think of things that are not in their immediate presence, and they do not talk about them unless there is something that triggers that thought. She testified that disclosure of sexual abuse in young children often occurs not soon after the event, but during bath time or bed time, when the involved parts of the body are exposed, causing the child to think about the experience.

{¶ 38} Some have doubted the reliability of testimony of very young children in sexual abuse cases. See, for example, "Comment, Invasive, Inclusive, and Unnecessary: Precluding the Use of Court-Ordered Psychological Examinations in Child Sexual Abuse Cases," 102 Northwestern Law Review 1441, 1453-1457 (Summer, 2008). Absent exceptional circumstances, once a child witness is found to be competent, and the testimony of the witness has been determined to be admissible, these concerns are for the adversary system and the trier of fact to resolve.

{¶ 39} We conclude that Huntley's trial counsel was not ineffective for having failed to object at trial to the hearsay statements made by S.W. to Teresa. The statements met the liberal test for the excited-utterance exception applicable to young children, so that an objection, had one been interposed, would likely have been overruled. Therefore, under the first prong of the test in *Strickland,* Huntley's trial counsel did not fall below the objective standard of reasonableness, and under the second prong of the test, the alleged deficiency in trial counsel's performance did not create a reasonable probability that, but for the deficiency, the result of the trial

would have been different.

{¶ 40} Huntley's Second Assignment of error is overruled.

IV

{¶ 41} Both of Huntley's assignments of error having been overruled, the

{¶ 42} judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck
Kirsten A. Brandt
Laura M. Woodruff
Steven T. Pierson
Hon. Barbara P. Gorman