[Cite as *State v. Books*, 2009-Ohio-5018.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA51
	:	
v.	:	
	:	**DECISION AND**
CLAYTON L. BOOKS,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 9-22-09

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for appellant.

James E. Schneider, Washington County Prosecutor, and Alison L. Cauthorn, Washington County Assistant Prosecutor, Marietta, Ohio for appellee.

Kline, P.J.:

{¶1} Clayton L. Books appeals his convictions below for kidnapping and rape. On appeal, Books contends that his convictions are against the manifest weight of the evidence. We disagree, finding that substantial evidence supports his convictions. Books next contends that the trial court committed plain error in allowing an expert witness to vouch for the victim's testimony in this case. We, however, find Books has failed to establish that the trial court committed plain error. Finally, Books contends that his attorney provided ineffective assistance because his attorney failed to object to the impermissible vouching. However, we find that Books fails to demonstrate any prejudice from the alleged ineffective assistance. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} On June 26, 2008, a Washington County Grand Jury returned a five count indictment against Books for two counts of Rape, one count of Attempted Rape, and two counts of Kidnapping.

{¶3} At trial, the State's evidence demonstrated the following: The victim in this case is a mildly or moderately retarded sixteen-year-old boy. He rode his bike to Wendy's and filled out a job application. Books, a twenty-eight-year-old man, filled out an application for a position at Wendy's at the same time. Books offered to get the victim a job at seven dollars an hour to clean some trailers. Books and the victim then left Wendy's, and they walked into a forested area.

{¶4} Books seized the victim, placed a hand over his mouth, and threatened to kill him if he ever told anyone or screamed. Books then undressed the victim and forced him to engage in sexual intercourse.

{¶5} The victim walked out of the woods and immediately went back to Wendy's. He then told a Wendy's employee that he had just been raped. When confronted, Books initially denied having sexual intercourse with the victim. However, after a DNA test, Books said that the intercourse was consensual.

{¶6} Books also testified at trial that the intercourse was consensual. He said that the victim had lured him to the secluded area and that the victim had initiated the sexual encounter.

{¶7} The jury returned a guilty verdict on counts two through five. The trial court sentenced Books to six years imprisonment for count two (rape involving anal intercourse). The trial court found that counts three (attempted rape), four (kidnapping),

and five (kidnapping) all were offenses of similar import and merged into Books's rape conviction on count two.

{¶8} Books appeals and asserts the following three assignments of error: I. "APPELLANT'S CONVICTIONS IN THIS CASE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." II. "THE TRIAL COURT COMMITTED PLAIN ERROR IN PERMITTING LEANNE BATES, A THERAPIST FOR CHILDREN SERVICES, TO TESTIFY, AS AN EXPERT, THAT [THE VICTIM] WAS TELLING THE TRUTH." And, III. "APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO LEANNE BATES'S TESTIFYING, AS AN EXPERT WITNESS, THAT [THE VICTIM] WAS TELLING THE TRUTH IN THIS CASE."

II.

{¶9} Books contends in his first assignment of error that his convictions are against the manifest weight of the evidence. Books, in essence, claims that his testimony at trial was more believable than the victim's. The State argues that these questions regarding credibility are better left to the jury.

{¶10} The trial court merged all of Books's four convictions into the rape conviction under R.C. 2907.02(A)(2), which states that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶11} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988),

38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶12} Here, Books and the victim admitted that sexual intercourse occurred. Books claimed it was consensual while the State claimed that it was not consensual.

{¶13} Books gives three reasons why the State's case is unbelievable. First, Books "gave his real name, address, [and] phone number to Wendy's, moments before he left with [the victim.]" Therefore, Books contends that no reasonable juror could conclude that he intended to lure the victim for the purpose of raping the victim because the trail would lead straight back to Books.

{¶14} Second, Books asserts that the forensic evidence indicated that he had seminal fluid in his rectum, but the victim did not. The significance of this evidence is that in Books's account the victim had anal intercourse with Books, but on the stand the victim indicated that he could not remember whether he had anal intercourse with Books. Books also states that the State did not produce any evidence of bleeding or

redness around the victim's rectum. However, we note that even in Books's version, he said that he had anal intercourse with the victim.

{¶15} Finally, Books contends that the victim had told a worker at McDonald's that he did not know whether he had been raped or not. This allegedly occurred well after Books and the victim had sexual intercourse. This, Books maintains, casts doubt on the victim's account.

{¶16} However, as the State demonstrates, Books's testimony of events presents similar, if not greater, challenges to credulity. In Books's testimony, the victim, a mentally retarded sixteen-year-old boy, lured a twenty-eight-year-old man out into the woods to engage in sexual intercourse. Books initially denied having sexual intercourse with the victim. After the DNA test, Books admitted to the sexual intercourse but claimed that it was consensual. The State produced an expert witness who diagnosed the victim with post traumatic stress disorder, and who also testified that the victim's behavior was consistent with the behavior of a victim of sexual abuse.

{¶17} The jury listened to both versions and chose to believe the State's version. That is its province. After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot find that in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial granted. We find that substantial evidence exists within the record to support Books's convictions.

{¶18} Accordingly, we overrule Books's first assignment of error.

III.

{¶19} In his second assignment of error, Books contends that the trial court committed plain error in permitting the state's expert witness to vouch for the victim's credibility.

{¶20} Ordinarily, we review the scope of an expert's testimony for an abuse of discretion. See *Werts v. Goodyear Tire & Rubber Co.*, Cuyahoga App. No. 91403, 2009-Ohio-2581, at ¶33. However, Books failed to object below and so must demonstrate that the trial court committed plain error in allowing this testimony.

{¶21} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill* (2001), 92 Ohio St.3d 191, 203.

{¶22} "Once qualified, '[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence.'" *State v. Konkel*,

Summit App. No. 23592, 2007-Ohio-6186, at ¶20, quoting *State v. Stowers*, 81 Ohio St.3d 260, 261. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston* (1989), 46 Ohio St.3d 108, at the syllabus, overruled on other grounds by *State v. Dever* (1992), 64 Ohio St.3d 401.

{¶23} In *Boston*, the expert testified that the victim "had not fantasized her abuse and that [the victim] had not been programmed to make accusations against her father." *Boston* at 128. The Supreme Court of Ohio held that the admission of this testimony was "egregious, prejudicial and constitutes reversible error." Id. But as the Supreme Court of Ohio explained in *Stowers*: "*Boston*'s syllabus excludes expert testimony offering an opinion as to the truth of a child's statements (*e.g.*, the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person). It does not proscribe testimony which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity." *Stowers* at 262-63 (emphasis sic).

{¶24} Here, Washington County Children's Services hired Leanne Bates to provide private violence counseling for the victim. Books contends Bates impermissibly vouched for the victim's testimony at trial. Books points to Bates's testimony that the victim lacked the mental capacity to concoct a story either before the incident (to lure Books) or after it (to incriminate Books). Bates essentially testified that the victim lacked the capacity to manufacture a complex lie.

{¶25} The relevant testimony is as follows: "A. That takes a lot of abstract thinking, to concoct a story like that. And [the victim] is a concrete thinker. It --"

{¶26} "Q. What does that mean?"

{¶27} "A. It means, things are black and white. They are either or they're not true, and [the victim] goes on factual events. He doesn't really have the ability to kind of make believe and things like that. It's – It's just, he deals with reality as it is." Transcript 608-09.

{¶28} Books claims that "[w]ithout that testimony, the jury, as laypeople, might have decided that even a ten-year-old could say 'he made me do it' and answer 'I don't remember,' when asked an awkward question." Books's Brief at 10.

{¶29} The victim in this case testified. Transcript at 348. Under Crim.R. 52(A), "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Ohio courts have previously concluded that a *Boston* violation is harmless error where the victim testifies and is available for cross examination. See *State v. Thompson*, Washington App. No. 06CA28, 2007-Ohio-5419, at ¶51, citing *State v. Morrison*, Summit App. No. 21687, 2004-Ohio-2669, at ¶64. The jury was appropriately instructed both before (Transcript at 285) and after the trial that they were "the sole judges of the facts of this case, the credibility or the believability of the witnesses and the weight of the evidence." Transcript at 687. "[T]here is a presumption that the jury follows the instructions given to it by the trial court." *State v. Edgington*, Ross App. No. 05CA2866, 2006-Ohio-3712, at ¶26, citing *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195.

{¶30} In the context of Bates's testimony, we agree with the State that any impermissible vouching was minor and was outweighed by the detail and length of Bates's permissible testimony diagnosing the victim with post traumatic stress disorder

and her testimony that indicated that the victim's behavior was consistent with an individual who had suffered sexual abuse. All in all, the permissible testimony preponderates both in substance and persuasiveness. Even if we suppose Bates's testimony was impermissible, we are convinced that any error is harmless.

{¶31} Accordingly, we overrule Books's second assignment of error.

IV.

{¶32} Books contends in his third assignment of error that his counsel provided ineffective assistance below. "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [law;]" and (2) "that the deficient performance prejudiced the defense[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to establish either element is fatal to the claim." *In re B.C.S.*, Washington App. No. 07CA60, 2008-Ohio-5771, at ¶16, citing *Strickland* at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶33} "A defendant establishes prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Meddock*, Ross App. No. 08CA3020, 2008-Ohio-6051, at ¶13, quoting *Strickland* at 694.

{¶34} Books claims his trial counsel was ineffective because his counsel failed to object to Bates's vouching testimony as outlined in his second assignment of error. However, we have already found that no prejudicial error occurred. Therefore, Books's counsel was not ineffective for failing to object or otherwise raise this issue in the trial court. Consequently, Books has failed to show that any defect in his counsel's performance prejudiced him as required by the second prong of the *Strickland* test.

{¶35} Accordingly we overrule Books's third assignment of error.

V.

{¶36} Having overruled all of Books's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Not Participating.
McFarland, J.: Concurs in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.