[Cite as *State v. Cameron*, 2009-Ohio-3341.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008-CA-0008
THADDOUEAS CAMERON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Richland County Court Of Common Pleas Case No. 2006 CR 0587D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 25, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. Prosecuting Attorney Richland County, Ohio	DALE MUSILLI 105 Sturges Avenue Mansfield, Ohio 44903
BY: KIRSTEN PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	

Edwards, J.

{¶1} Defendant-appellant, Thaddoueas Cameron, appeals his conviction and sentence from the Richland County Court of Common Pleas on one count of attempted gross sexual imposition and one count of burglary. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 13, 2006, the Richland County Grand Jury indicted appellant on one count of attempted gross sexual imposition in violation of R.C. 2923.02(A) and R.C. 2907.05(A)(4), a felony of the fourth degree, and one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree. At his arraignment on September 5, 2006, appellant entered a plea of not guilty of the charges.

{¶3} On October 26, 2006, appellant filed a motion asking the trial court to hold a hearing to determine the competency of S.M., age nine, who the State intended to call as a witness at trial. A competency hearing was held on November 27, 2006. Pursuant to a Judgment Entry filed on November 29, 2006, the trial court found that S.M. was competent to testify as a witness.

{¶4} Thereafter, a jury trial commenced on January 4, 2007. The following testimony was adduced at trial.

{¶5} D.M. is the mother of S.M., age nine, A., age four, and J., who was two years old as of the time of trial. D.M. testified that she dated appellant in the summer of 2003 and that he lived with her during that time for a few months. The two ceased living together when D.M. kicked appellant out of her house. D.M. testified that, prior to March of 2006, the last time that she saw appellant was after Thanksgiving of 2005.

{¶6} At trial, D.M. testified that during the early morning hours of March 12, 2006, she was sleeping when her daughter S.M., who was eight years old at the time, woke her up and told her that "somebody was in the house, and they had [A] in the living room." Trial Transcript at 109. The following testimony was adduced when she was asked what happened next:

{¶7} "A. I got up and I went into the living room and I seen Mr. Cameron [appellant] sitting on my couch with my daughter half naked standing in front of the couch wanting her to put her pants on.

{¶8} "He had started yelling at me, asking me why my front door was open, and why she was sleeping naked on the couch. It didn't make sense to me because she had pants on and a long sleeved shirt when she went to bed the night before. It had been storming, so I don't know why she would be in the living room." Trial Transcript at 109.

{¶9} D.M. testified that she was referring to A., her three year old daughter. She further testified that both appellant and A. were on the couch and that A. was trying to put her jeans on. A.'s underwear was on sideways. When asked what A. slept in, D.M. testified that A. went to sleep with her clothes on, including her jeans and underwear. When questioned about the front door, D.M. testified that she was positive that it was locked.

{¶10} After D.M. put S.M. and A. back to bed, she went to speak with appellant in the living room. D.M. testified that appellant told her how much he missed her and that he had come back to check on D.M. and her children because he had a dream that had worried him. Appellant then wanted to have sex with D.M. and tried kissing her on

her neck, but D.M. told him that he had to leave. D.M. testified that while appellant was on his way to the bathroom, she heard the front door click twice, once when appellant unlocked it and again when he locked it. Appellant told D.M. that he locked the door when he went to the bathroom.

{¶11} D.M. further testified that while appellant was in the bathroom, S.M. told her that appellant had gotten A. out of bed. After D.M. questioned appellant when he came out of the bathroom, appellant started yelling at S.M., and D.M. told him to leave. After appellant left at around 6:15 a.m., D.M. went to check on the back door, which she remembered locking before she went to bed, and found that it was partially open. There were muddy footprints from the back door into the kitchen into the hallway. D.M. testified that in 2003, appellant had a key to her residence and that the key went to both doors. She further testified that after appellant moved out, she got a key from him.

{¶12} D.M. took photographs of the muddy footprints and of A.'s underwear and then called the police. She then took A. to the hospital for an examination.

{¶13} At trial, S.M. testified that the last time she saw appellant, he woke her up by stroking her hair and touching her face. Appellant told S.M. that he had something to show her in the living room and told her to lie on the couch, but S.M. refused and went back to the bed that she shared with A. When asked why she refused to lie down on the couch, S.M. testified that she "had a feeling that he [appellant] was going to do something bad." Trial Transcript at 135. According to S.M., appellant then went back into her room and told her that her mother was too drunk and that he "was to take [A.] in my mom's bed with her." Trial Transcript at 132-133. S.M. testified that appellant then

grabbed A. and looked into D.M.'s room. Although appellant told her that her mother had a man in the room with her, S.M. never saw a man in the room.

{¶14} Appellant then took A. in the living room and took off her pants and panties. S.M. testified that she saw appellant sitting on his knees looking at A. with her pants and panties off. A. was lying on the couch wither her legs hanging off and her private area exposed. S.M. testified that she then took A. into her mother's room and told her mother that appellant was in the house. While S.M. was talking to her mother, appellant took A. back into the living room and tried to dress her.

{¶15} At trial, Detective Jeffrey Shook of the Mansfield Police Department testified that he spoke with appellant as part of his investigation and that appellant told him that he had been out drinking on the night in question and had called D.M. to ask if he could sleep at her house. Appellant told the Detective that D.M. gave him permission to do so and told him that either the front or side door would be unlocked. The Detective also testified that appellant told him that he had entered D.M.'s house through the side door and accidentally woke up S.M. and that, while he was putting S.M. back to bed, A. woke up and hugged him. Appellant then told the Detective that he and A. went into D.M.'s room and attempted to wake her up, but were unable to do so. The two then, according to appellant, went into the front room.

{¶16} At the conclusion of the evidence and the end of deliberations, the jury, on January 5, 2007, found appellant guilty of both charges. As memorialized in a Judgment Entry filed on January 9, 2007, appellant was sentenced to an aggregate prison sentence of nine and a half years.

{¶17} Appellant now raises the following assignments of error on appeal:

{¶18} "I. THE TRIAL COURT COMMITTED PLAIN ERROR BY DETERMINING THAT AN EIGHT-YEAR-OLD WITNESS WAS COMPETENT TO TESTIFY.

{¶19} "II. THE TRIAL COURT COMMITTED ERROR IN NOT INCLUDING A JURY INSTRUCTION REGARDING THE LESSER INCLUDED OFFENSE OF BURGLARY UNDER R.C. 2911.12(A)(3) AND (4) AND CRIMINAL TRESPASS.

{¶20} "III. APPELLANT WAS DENIED HIS RIGHTS UNDER THE OHIO CONSTITUTION, ARTICLE I, SECTION 10 AND SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL."

I

{¶21} Appellant, in his first assignment of error, argues that the trial court erred in determining that S.M., who was eight years old at the time of the incident, was competent to testify. We disagree.

{¶22} As an initial matter, we note that because appellant failed to object to the competency finding at the trial court level, this court reviews this issue for plain error. Crim.R. 52(B); *In re Williams* (1997), 116 Ohio App.3d 237, 241, 687 N.E.2d 507. To prevail on a claim governed by the plain error standard, appellant must demonstrate that the trial outcome would have been clearly different but for the alleged errors. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043.

{¶23} It is well-settled, as the trier of fact, the trial court is required to make a preliminary determination as to the competency of all witnesses, including children and, absent an abuse of discretion, competency determinations of the trial court will not be disturbed on appeal. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, 574 N.E.2d 483.

In order demonstrate an abuse of discretion, appellant must show more than error of law or judgment, he must show the trial court's attitude was unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶24} The competency of a witness to testify at trial is governed by Evid. R. 601, which provides, “Every person is competent to be a witness except: (A) Those of unsound mind, and 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.”

{¶25} “In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful.” *Frazier,* supra at syllabus.

{¶26} The Ohio Supreme Court also addressed the issue in *State v. Said*, 71 Ohio St.3d 473, 476, 1994-Ohio-402, 644 N.E.2d 337, noting: “A competency hearing is an indispensable tool in this and similar cases. A court cannot determine the competency of a child through consideration of the child's out-of-court statements standing alone. As we explained in *State v. Wilson* (1952), 156 Ohio St. 525, 46 O.O. 437, 103 N.E.2d 552, the essential questions of competency can be answered only through an in-person hearing: ‘The child's appearance, fear or composure, general demeanor and manner of answering, and any indication of coaching or instruction as to

answers to be given are as significant as the words used in answering during the examination, to determine competency'."

{¶27} We find that the trial court did not abuse its discretion in finding S.M. competent to testify because the trial court's decision was not arbitrary, unconscionable or unreasonable. At the competency hearing, S.M. testified that she was nine years old, attended Sherman Elementary, where she was in the fourth grade, and that her teacher was Mr. Kincaid. She testified that when she was not in school, she helped clean the house by sweeping and doing dishes. S.M. also testified that she lived with her mother, her four year old sister and her one year old brother in a peach colored house. S.M. testified that she went to her grandmother's and aunt's for Thanksgiving and that she received a Leapster game for Christmas in 2006. The following is an excerpt from the competency hearing:

{¶28} "Q. [S.M.], do you know what a lie is?

{¶29} "A. Yeah.

{¶30} "Q. What's a lie?

{¶31} "A. Not telling the truth.

{¶32} "Q. If I said my suit was blue, would that be true or a lie?

{¶33} "A. A lie.

{¶34} "Q. Why is that?

{¶35} "A. Because your suit is gray.

{¶36} "Q. You're right. What happens if you tell a lie?

{¶37} "A. I get in trouble.

{¶38} "Q. What kind of trouble to you get into?

{¶39} "A. The corner or a spanking.

{¶40} "Is it good or bad to tell a lie, do you think?

{¶41} "A. Bad.

{¶42} "Q. And why is that?

{¶43} "A. Because people don't know what really happened.

{¶44} "Q. And why is that?

{¶45} "Because people don't know what really happened.

{¶46} "Q. That's true. That's the thing that we're about here in the courtroom. It's really important to know what really happened. We have to have people tell exactly what really happened. We can't have them tell what didn't happen. That wouldn't help us find the truth, would it?

{¶47} "A. (Nod indicating no).

{¶48} "Q. Do you think if you were here and asked questions, you could tell only the truth? Do you think you could do that?

{¶49} "A. Yeah.

{¶50} "Q. Do you understand how bad it would be to tell a lie? That would be very bad for us to find the truth, wouldn't it?

{¶51} "A. (Nod indicating yes).

{¶52} "Q. Did you learn about God in Sunday school when your grandma took you to Sunday school?

{¶53} "A. Sometimes we missed Sunday school." Transcript of Competency Hearing at 8-9.

{¶54} In addition, at the competency hearing, S.M. gave an example of what constituted pretending and defined "guessing" as "[i]f you ask me a question and I don't know, I can guess." Transcript of Competency Hearing at 11.

{¶55} From our review of the voir dire, we find the trial court did not abuse its discretion in finding that S.M. was competent to testify. The record reveals she was capable of receiving just impressions of facts and relating them clearly. S.M. clearly demonstrated she knew the difference between telling the truth and telling a lie and knew the consequences of telling a lie. While appellant argues that the State failed to prove that S.M. satisfied the first factor listed in *Frazier* because she was not questioned during her voir dire regarding the acts about which she would be called to testify at trial, in *State v. Cobb* (1991), 81 Ohio App.3d 179, 183, 610 N.E.2d 1009, the court held that it is not essential that a child witness be questioned during voir dire regarding the events about which he or she will be called upon to testify at trial. The court, in *Cobb*, held, in relevant part, as follows: "[T]he law requires the trial judge to determine the child's ability to perceive, remember, and relate truthfully, those events about which the child is to testify. We find no case law requiring the judge to inquire into the specific testimony to be elicited from the child at trial. In most cases the child will be a competent witness if the child has the intellectual capacity to accurately and truthfully recount events occurring during the same time period as the events about which he is to testify at trial." Id at 183.

{¶56} Finally, assuming, arguendo, that the trial court erred in finding that S.M. was competent to testify, we find no plain error. Based upon D.M.'s testimony, which is cited in detail above, we find that there was substantial evidence of appellant's guilt. In

short, we cannot say that the outcome of the trial would have been different had S.M. not been permitted to testify at trial.

{¶57} Appellant's first assignment of error is, therefore, overruled.

II

{¶58} Appellant, in his second assignment of error, argues that the trial court erred in not instructing the jury regarding the lesser included offense of burglary under R.C. 2911.12(A)(3)or (4), or criminal trespass. We disagree.

{¶59} When reviewing a court's refusal to give a requested jury instruction, an appellate court considers whether the trial court's refusal to give such instruction was an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, at paragraph two of the syllabus.

{¶60} At the conclusion of the testimony and prior to the completion of jury instructions, appellant asked for a special instruction on criminal trespass in violation of R.C. 2911.21 on the basis of appellant's statement to Detective Shook that D.M. had given him permission to enter her home on March 12, 2006. The trial court declined to

give such an instruction noting that the "whole disputed element here is consent." Trial Transcript at 224.

{¶61} R.C. 2911.21 states, in relevant part, as follows: "(A) No person, without privilege to do so, shall do any of the following:

{¶62} "(1) Knowingly enter or remain on the land or premises of another;

{¶63} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶64} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

{¶65} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either…."

{¶66} We find that the trial court did not err in refusing to give an instruction on criminal trespass. As is stated above, criminal trespass requires that a person act "without privilege to do so." In the case sub judice, appellant's entire defense was that he was in D.M.'s house with her permission. As is stated above, appellant told Detective Shook that he had called D.M. on the date in question and that she had given him

permission to sleep at her house. We concur with the trial court that if appellant had consent to enter, he could not be convicted of criminal trespass.

{¶67} Appellant also argues that the trial court erred in not instructing the jury regarding the lesser included offense of burglary under R.C. 2911.12(A)(3)or(4).

{¶68} Appellant was convicted of burglary in violation of R.C. 2911.12(A)(2). Such section states as follows: "(A) No person, by force, stealth, or deception, shall … (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present with purpose to commit in the habitation any criminal offense."

{¶69} Appellant never requested that the trial court instruct the jury regarding the lesser included offense of burglary under R.C. 2911.12(A)(3)or(4). The failure to request an instruction constitutes a waiver of the right to appeal from the lack of the instruction, absent a showing of plain error. *State v. Keenan,* 81 Ohio St.3d 133, 151, 1998-Ohio-459, 689 N.E.2d 929, citing *State v. Williford* (1990), 49 Ohio St.3d 247, 251, 551 N.E.2d 1279. An appellant cannot establish plain error under the plain error rule of Crim.R. 52(B), unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶70} As is stated above, appellant contends that the trial court erred in not instructing the jury on the lesser included offenses of burglary under R.C. 2911.12(A)(3)

or (A)(4). R.C. 2911.12 states, in relevant part, as follows: "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶71} "(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;

{¶72} "(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

{¶73} The term "trespass" is defined in R.C. 2911.21, which is cited above. Because appellant's defense was that he had permission to enter D.M.'s house and, therefore, had privilege to do so, we find that the evidence did not warrant the giving of such an instruction. As noted by appellee in its brief, "[i]f the jury believed his [appellant's] claim that he had [D.M.'s] permission to enter the residence, he would have been acquitted of burglary under either R.C. 2911.12(A)(2), (3) or (4)…However, based upon the verdict, the jury clearly found his story incredible."

{¶74} In addition, the evidence clearly supports that the occupied structure was the permanent habitation of persons who were present therein and that appellant entered with purpose to commit a criminal offense. We do not find that, had jury instructions been given regarding R.C. 2911.12(A)(3) or (4), the outcome of the trial clearly would have been different. Therefore, we find, that, based upon the evidence adduced at trial, appellant cannot establish that he would have been acquitted of burglary under R.C. 2911.12(A)(2) and convicted of one of the lesser offenses.

{¶75} Appellant's second assignment of error is, therefore, overruled.

III

{¶76} Appellant, in his third assignment of error, argues that he received ineffective assistance of trial counsel. Appellant specifically contends that trial counsel was ineffective in failing to object to the competency finding and in failing to request jury instructions on the lesser included offenses of burglary.

{¶77} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶78} Based on our disposition of appellant’s first and second assignments of error, we cannot say that trial counsel was ineffective.

{¶79} Appellant's third assignment of error is, therefore, overruled.

{¶80} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Delaney, J. concur

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JUDGES

JAE/d0223

[Cite as *State v. Cameron*, 2009-Ohio-3341.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
THADDOUEAS CAMERON	:	
Defendant-Appellant	:	CASE NO. 2008-CA-0008

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES