[Cite as *State v. Johnson*, 2015-Ohio-1676.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | |
| | : | Hon. William B. Hoffman, P.J. |
| Plaintiff-Appellee | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 14CAA070039 |
| | : | |
| BRIAN A. JOHNSON | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 14CR-I-01-0019

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: April 29, 2015

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Appellant Brian A. Johnson appeals from July 8, 2014 judgment entries of conviction and sentence entered in the Delaware County Court of Common Pleas. Appellee is the state of Ohio.

**FACTS AND PROCEDURAL HISTORY**

{¶2} L.A. is a 56-year-old female who is developmentally disabled. L.A. has an I.Q. of 56 and a diagnosis of dependent personality disorder. At the time of these events, L.A. lived alone in a condo in the Abbeycross neighborhood of Westerville, Delaware County, Ohio. Although L.A. had some ability to live independently, she was closely supervised by her cousin who lived nearby and her caseworker from the Delaware County Board of D.D. Both of her parents are deceased. L.A. does not drive and is dependent upon others to manage her money and to help her meet her own basic needs. She regularly attends a workshop called "All R Friends" and has worked some part-time jobs at care facilities and in her cousin's office.

{¶3} Appellant's cousin has been L.A.'s closest caretaker since both of their mothers were killed in an automobile accident in 2008. L.A. was the sole survivor of that accident. L.A.'s cousin testified she is mentally similar to a five- to ten-year-old child.

{¶4} Evidence at trial established that between September 7 and September 9, 2013, L.A. observed appellant delivering newspapers in her neighborhood. L.A. testified appellant asked to come inside her condo and she allowed him to come in. Once inside, they entered one of the condo's three bedrooms which L.A. referred to as her dad's bedroom.

{¶5} L.A. testified she understood appellant wanted to have "sex" and she said no. She said he pushed her onto the bed and assaulted her. L.A. described digital penetration and intercourse with the aid of anatomically-correct drawings. L.A. said the sexual assault hurt and made a "mess" which she attempted to clean up. At trial she repeatedly said cleaning up the mess was a "mistake" because she later understood the police wanted the evidence.

{¶6} After the sexual assault, L.A. was scared to call police but called the security manager of the Columbus Dispatch to ask for help. The security manager told her to report the matter to the police and she did. Westerville detectives interviewed L.A. with the assistance of her case manager. L.A. became very upset when the detective asked her to explain what happened by role-playing. Her caseworker testified she "freaked" and became distraught. L.A. identified appellant as her attacker in a photo lineup and at trial.

{¶7} The Westerville police made contact with appellant, who worked his mother's paper route throughout L.A.'s neighborhood. Appellant admitted entering L.A.'s condo and admitted digital penetration, although he denied intercourse. He told police L.A. "seemed somewhat normal" but was "a little strange."

{¶8} Appellant was charged by indictment[1] upon one count of rape pursuant to R.C. 2907.02(A)(1)(c) [Count I]; one count of rape pursuant to R.C. 2907.02(A)(2) [Count II]; one count of rape pursuant to R.C. 2907.02(A)(1)(c) [Count III]; one count of rape pursuant to R.C. 2907.02(A)(2) [Count IV]; one count of sexual battery pursuant to

[1] An earlier indictment upon four counts of rape under case number 13 CR I 04 0169 was dismissed on February 26, 2014. All pleadings and bond in the 2013 case transferred to the subsequent indictment under case number 14 CR I 01 0019.

R.C. 2907.03(A)(2) [Count V]; one count of sexual battery pursuant to R.C. 2907.03(A)(1) [Count VI]; one count of sexual battery pursuant to R.C. 2907.03(A)(2) [Count VII]; and one count of sexual battery pursuant to R.C. 2907.03(A)(1) [Count VIII]. Appellant entered pleas of not guilty.

{¶9} Pursuant to the bill of particulars filed on February 5, 2014, the charges represented the following conduct:

> Count I: vaginal penetration when victim's ability to consent was substantially impaired due to mental or physical condition.
>
> Count II: vaginal penetration by force or threat of force.
>
> Count III: digital penetration when victim's ability to consent was substantially impaired due to mental or physical condition.
>
> Count IV: digital penetration by force or threat of force.
>
> Count V: sexual battery by means of vaginal penetration when victim's ability to consent was substantially impaired due to mental or physical condition.
>
> Count VI: sexual battery by means of vaginal penetration when offender coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.
>
> Count VII: sexual battery by means of digital penetration when offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

Count VIII: sexual battery by means of digital penetration when offender coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

{¶10} At a status conference on May 13, 2014, the trial court heard argument on several motions. No exhibits were admitted and no evidence was taken. Appellant's counsel argued in favor of admitting evidence that the fitted bed sheet taken as evidence from L.A.'s condo was swabbed by a forensic analyst and, apparently, found to contain D.N.A. of someone other than appellant. The trial court concluded the evidence was not admissible. Then the parties addressed the matter of the competency of L.A., who was not present for the conference:

[DEFENSE COUNSEL:] Judge, are you intending to do a competency hearing on the 601 on [the day of trial] I mean?

THE COURT: I wasn't. I wasn't.

[DEFENSE COUNSEL:] You were not?

THE COURT: Well, if she--

[DEFENSE COUNSEL:] Okay.

THE COURRT: Who wants it?

[PROSECUTOR:] She knows the difference between telling the truth and telling a lie out of an abundance of caution.

THE COURT: We'll have one then.

[DEFENSE COUNSEL:] I don't know that we necessarily need one. I've not talked with her, but I was just trying to figure out maybe.

> [PROSECUTOR:] If you want to voir dire her right before we go on. I don't think there's going to be a problem with the competency issue. The Court has a copy of the disc.
>
> * * * *.
>
> THE COURT: * * * *.
>
> In light of what the evidence will be, we probably need to voir dire her outside the presence of the jury and we should not, we should do it before we swear the jury--
>
> [PROSECUTOR:] I would agree.
>
> [DEFENSE COUNSEL:] Okay.
>
> THE COURT: --because we don't want jeopardy to attach. * * * *.
>
> * * * *.
>
> THE COURT: All right, we'll have the competency hearing the first thing in the morning.
>
> * * * *.

{¶11} The record is then devoid of any further mention of a competency hearing. No competency hearing was requested or held before trial or prior to the testimony of L.A.

{¶12} The case proceeded to trial by jury. Appellant moved for a judgment of acquittal at the close of appellee's evidence. In response, the trial court amended Counts III, IV, VII, and VIII to attempted offenses. Appellant was thereupon found guilty as charged.

{¶13} At sentencing, the trial court found Counts I, II, V, and VI merge, and Counts III, IV, VII, and VIII merge. The trial court sentenced appellant upon Counts II and IV to an aggregate prison term of 14 years.

{¶14} Appellant now appeals from the judgment entry of conviction and sentence.

{¶15} Appellant raises three assignments of error:

**ASSIGNMENTS OF ERROR**

{¶16} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONDUCT A VOIR DIRE COMPETENCY EXAMINATION OF THE ALLEGED VICTIM WHEN IT WAS INFORMED THAT THE VICTIM IN THIS CASE SUFFERED FROM MENTAL RETARDATION AND CO-DEPENDENCY PERSONALITY DISORDER."

{¶17} "II. APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, AND SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED."

{¶18} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED THAT DNA EVIDENCE OF ANOTHER INDIVIDUAL FOUND AT THE LOCATION OF THE ALLEGED OFFENSE WAS INADMISSIBLE UNDER OHIO'S RAPE SHIELD STATUTE."

**ANALYSIS**

I.

{¶19} In his first assignment of error, appellant argues the trial court abused its discretion in failing to conduct a voir dire competency examination of the victim despite evidence of her cognitive limitations. We disagree.

{¶20} Pursuant to Ohio Evid.R. 601, "Every person is competent to be a witness except 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." See also R.C. 2317.01. "Of unsound mind" includes all forms of mental retardation. R.C. 1.02(C).

{¶21} The competency of a witness to testify at trial is a matter to be determined by the trial court, and absent an abuse of discretion, will not be disturbed on appeal. *State v. Richmond*, 1st Dist. Hamilton No. 824578, 1983 WL 5309, *1 (Nov. 9, 1983), citing *State v. Wildman*, 145 Ohio St. 379, 61 N.E.2d 790 (1945) and *Shupp v. Farrar*, 85 Ohio App. 366, 88 N.E.2d 924 (6th Dist.1949). Beyond the discussion at the May 13 status conference, however, appellant did not move the trial court to hold a pre-trial competency hearing or request a voir dire competency examination. Nor did appellant raise an objection to L.A.'s testimony at trial. We therefore review this claim for plain error. *State v. Laws,* 12th Dist. Clermont No. CA87–12–097, unreported, 1988 WL 75354, *1 (July 18, 1988); *State v. Jackson,* 8th Dist. Cuyahoga No. 79871, 2002–Ohio–2137, ¶ 13. Absent an objection to the testimony of the witness, we must determine whether the court's failure to conduct a voir dire examination of L.A.'s

competency was so obvious and prejudicial as to amount to plain error. See, *State v. Kinney*, 35 Ohio App.3d 84, 86, 519 N.E.2d 1386 (1st Dist.1987).

{¶22} Pursuant to Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The rule places several limitations on a reviewing court’s determination to correct an error despite the absence of timely objection at trial: (1) “there must be an error, i.e., a deviation from a legal rule,” (2) “the error must be plain,” that is, an error that constitutes “an ‘obvious’ defect in the trial proceedings,” and (3) the error must have affected “substantial rights” such that “the trial court’s error must have affected the outcome of the trial.” *State v. Dunn*, 5th Dist. No. 2008-CA-00137, 2009-Ohio-1688, citing *State v. Morales*, 10 Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶ 19 (citation omitted). The decision to correct a plain error is discretionary and should be made “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes*, supra, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶23} We find the instant case distinguishable from *Kinney*, supra, in which the appellate court determined the trial court should have inquired into a child victim's "capacity to receive just impressions of the facts and to relate them truly, and that the failure to do so was error.” 35 Ohio St.3d at 86. In the instant case, appellee established by expert testimony L.A. is a developmentally-disabled adult and suffers a personality disorder. Nevertheless, there was no indication L.A. could not give a correct account of the incident and she testified she knew the most important thing about court is "to tell the truth," therefore satisfying an "inquiry [ ] generally part of the voir dire of a

witness to determine competency." *State v. Miller*, 44 Ohio App.3d 42, 44-45, 541 N.E.2d 105, 108-09 (6th Dist.1988). As in *Miller*, we note L.A. was able to testify to the sexual assault clearly and concisely and there is no indication she did not appreciate the necessity of providing a true account of the sexual assault; so too were her answers adequately responsive and she did not appear to be overtly confused or illogical. See, *State v. Barnett*, 3rd Dist. Defiance No. 4-98-14, 1999 WL 180830, *6 (Mar. 16, 1999), citing *Miller,* supra, 44 Ohio App.3d 42 at paragraph three of the syllabus.

{¶24} The Ohio Supreme Court has noted that a person who suffers from “some unsoundness of mind” can still be competent to testify if he “is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath.” *Wildman* at paragraph three of the syllabus. In this case, L.A. suffered from a mental disability which did not affect her ability to receive just impression of facts and relate them truthfully. See, *State v. Freeze*, 12th Dist. Butler No. CA2011-11-209, 2012-Ohio-5840.

{¶25} We conclude L.A. was a competent witness and the trial court did not err in failing to voir dire her. Appellant's first assignment of error is overruled.

II.

{¶26} In his second assignment of error, appellant argues he received ineffective assistance of counsel because trial counsel failed to properly raise the issue of L.A.'s potential incompetency as a witness. We disagree.

{¶27} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such

claims, “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.’” *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶28} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland,* 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶29} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland,* 466 U.S. at 694.

{¶30} In the instant case, appellant cites counsel's failure to move for a competency hearing of L.A. and to object to her testimony as examples of ineffective assistance. We have already determined in our discussion of the first assignment of error that L.A. was a competent witness, however. Appellant cannot establish that if counsel properly raised the issue, the outcome would have been different.

{¶31} Appellant has therefore failed to establish ineffective assistance of counsel and his second assignment of error is overruled.

III.

{¶32} In his third assignment of error, appellant argues the trial court's decision to exclude alleged DNA evidence of another individual was an abuse of discretion. We disagree.

{¶33} On October 30, 2013, one of appellant's attorneys[2] filed a motion in limine and for an in-camera hearing regarding the admissibility of alleged DNA evidence of a male other than appellant found on the fitted sheet. The trial court requested transcripts of L.A.'s statements and appellant's statements to determine any possible relevance of the DNA report. At the status conference on May 13, 2014, the trial court determined the evidence was inadmissible. We are unable to find any proffer of this evidence in the record and neither party points to any such proffer. We are thus left to determine the admissibility of "evidence of an unknown male's DNA on bedsheets." (Appellee's Brief, 12). Appellant states this evidence "did not include semen." (Appellant's brief, 18).

{¶34} We note the trial court's ruling at the status conference was preliminary. We are also unable to find in the trial record where the error was preserved, if at all. “In general, the ruling on a motion *in limine* does not preserve the record on appeal and an appellate court need not review the ruling unless the claimed error is preserved by an objection at trial.” *State v. Pyo*, 5th Dist. Delaware No. 04CAA01009, 2004-Ohio-4768, ¶ 19, citing *State v. Grubb*, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986), paragraph two of the syllabus; *State v. Leslie*, 14 Ohio App.3d 343, 344, 471 N.E.2d 503 (2nd Dist.1984); *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988), paragraph three of the syllabus; *State v. Maurer*, 15 Ohio St.3d 239, 259, 473 N.E.2d 768 (1984).

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[2] Appellant had at least four succeeding trial counsel, each of whom moved to withdraw; appellant was ultimately represented by Assistant Ohio Public Defender McVay at trial.

{¶35} Our standard of review in this case is therefore plain error. Criminal Rule 52(B) provides that "plain errors or defects effecting substantial rights may be noticed although they were not brought to the attention of the court." In order to prevail under a plain error analysis, appellant bears the burden of demonstrating the outcome of the trial clearly would have been different but for the error. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Simmons*, 5th Dist. Stark No. 2001CA00245, 2002-Ohio-3944, at ¶ 11, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph 3 of the syllabus; *State v. D'Ambrosio,* 67 Ohio St.3d 185, 191, 1993-Ohio-170, 616 N.E.2d 909.

{¶36} We review the admission or exclusion of relevant evidence for an abuse of discretion. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶37} We will not speculate what this evidence might have consisted of; based solely upon appellant's contention here--someone's DNA on a bedsheet--the admission of such evidence would violate Ohio's rape shield law, which excludes reputation, opinion, and specific-acts evidence of a victim's alleged sexual history unless an exception applies. R.C. 2907.02(D); R.C. 2907.05(E). Appellant's summary argument does not include any exception under which such evidence would be relevant or admissible. The trial court did not abuse its discretion in excluding this evidence.

{¶38} Appellant's third assignment of error is overruled.

**CONCLUSION**

{¶39} Appellant's three assignments of error are overruled and the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J. and

Hoffman, P.J.

Farmer, J., concur.