[Cite as *State v. King*, 2010-Ohio-290.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1126

Appellee — Trial Court No. CR07-1400

v.

Vincent D. King — **DECISION AND JUDGMENT**

Appellant — Decided: January 29, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, for appellee.

Stephen D. Long, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which sentenced defendant-appellant, Vincent D. King, to a total incarceration time of life plus five years after a jury found him guilty of one count of gross sexual

imposition and one count of rape. Appellant now challenges that judgment through the following assignments of error[1]:

{¶ 2} "1. Appellant was denied his right to counsel as guaranteed by the Sixth Amendment due to ineffective assistance of counsel.

{¶ 3} "2. The trial court erred by not declaring a mistrial of the proceedings and by not conducting the voir direct [sic] of the remaining jurors at the request of counsel, thereby denying appellant the right to due process, equal protection of the law and the right to a fair trial by an impartial jury.

{¶ 4} "3. The trial court erred by overruling appellant's motion for a new trial, filed pursuant to Crim.R. 33 and grounded upon the misconduct of a juror and the failure of the trial court to divulge its knowledge of the misconduct on the first day of trial.

{¶ 5} "4. The trial court erred in sentencing Mr. King separately for the crimes rape and gross sexual imposition herein as they are allied offenses of similar import as contemplated under R.C. 2941.25(A), and as no separate animus existed for the commission of each of the crimes.

{¶ 6} "5. There was insufficient evidence for the jury to find Mr. King guilty of gross sexual imposition and the convictions [sic] for the charge of gross sexual imposition was against the manifest weight of the evidence."

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[1]Appellant filed a brief raising the first three assignments of error on September 18, 2008, by an attorney who has since been suspended by the Supreme Court of Ohio. An amended brief was filed on January 20, 2009, by appellant's current counsel. For the sake of clarity we have numbered the two additional assignments of error raised in the amended brief as Assignments of Error Nos. 4 and 5.

{¶ 7} On February 23, 2007, appellant was indicted and charged with one count of gross sexual imposition of a person less than 13 years of age in violation of R.C. 2907.05(A)(4) and (B), a third degree felony, and one count of rape of a person less than ten years of age in violation of R.C. 2907.02(A)(1)(b) and (B), a first degree felony. The indictment was filed as a result of the events of December 23, 2006, which were testified to at the trial below as follows.

{¶ 8} The victim in this case, I.D, was seven years old at the time of the offenses. On December 23, 2006, I.D. was visiting the home of her great aunt (appellant's mother) while her mother and great uncle went Christmas shopping. Appellant, who at that time was 33 years old, is the first cousin of I.D.'s mother. At some point during the evening, appellant's mother was watching a television program on the first floor of the home that I.D. did not want to watch. I.D. then went upstairs to watch television in appellant's bedroom. Appellant has two televisions in his bedroom and was playing a videogame on one of the sets when I.D. came in to watch the Disney Channel on the other set. I.D. testified that she lay down on appellant's bed to watch a show and that she fell asleep. I.D. stated that when she awoke, her pants and underwear had been pulled down to her ankles and appellant was sitting on the bed next to her. I.D. testified that she felt appellant touch her bottom but she could not be sure with what because he was behind her. She then testified that appellant put two fingers in her "middle part" between her legs and that it hurt. She asked appellant to stop, which he did, but that he again touched her bottom with something she could not identify. I.D. then stated that appellant put his

mouth on her neck. After appellant stopped, I.D. went to use the bathroom but stated that it hurt too much to urinate. She then went downstairs where her mother picked her up a short time later, at approximately 11:00 p.m.

{¶ 9} When I.D. got in the car she told her mother, Angela D., that she needed to tell her something. She was very upset and crying but eventually told her mother what appellant had done. Angela testified that she pulled the car over and got in the back seat with I.D. to comfort her because she was hysterical. Angela then took I.D. to the hospital where she was evaluated for sexual assault.

{¶ 10} Rossana McNeil, a sexual assault nurse examiner at St. Vincent's Mercy Medical Center, evaluated I.D. and testified at the trial below. McNeil took an assault history of I.D., conducted a physical exam of her, and collected evidence using a rape kit. The physical exam included an examination of I.D.'s vaginal area which, upon visual inspection, appeared very red. In particular, McNeil stated that there were flat red circles, or petechiae, on the area to the right of I.D.'s vaginal vault. Petechiae, she stated, are caused by bleeding in the capillaries underneath the surface of the skin and can be caused by blunt force trauma.

{¶ 11} The Toledo Police Department was notified of the possible sexual assault and Officers Connie Lepla and John Newman went to the hospital to investigate. Lepla testified that after interviewing I.D., she collected the rape kit, returned it to the police station and logged it into the evidence room. The rape kit was subsequently processed but revealed no scientific evidence implicating appellant.

{¶ 12} Several days later, Detective Ron Permar, an investigator in the special victims unit of the Toledo Police Department, interviewed I.D. about the assault. Through the use of anatomical drawings and the feeling faces tool, I.D. described to Permar what happened to her and identified her assailant. Thereafter, appellant was brought to the Toledo Police Department where Permar questioned him about I.D.'s allegations. Appellant denied that he sexually assaulted I.D. and only admitted to wrestling with her when she tried to remove money from his pockets. Permar's interview of appellant was videotaped and the video was played for the jury at the trial below.

{¶ 13} In addition to the state's witnesses, appellant testified in his own defense, denying the allegations in the indictment.

{¶ 14} At the conclusion of the trial, after the parties rested, and outside the hearing of the jury, the court notified counsel as follows:

{¶ 15} "By the way, it's my understanding the court reporter informs me that during the testimony of the defendant at one point in his testimony Juror Number 1 made a statement, I heard a statement, I didn't hear exactly what the words were. The reporter she believes that she heard Juror Number 1 say liar, and there was another point in the trial where you heard her say during other testimony make a statement which I didn't hear, but what was it, and you put it in the record."

{¶ 16} There was then a discussion held off of the record and the court then recessed for a short time. While in recess, the court held an on-the-record discussion with the parties and informed them as follows:

{¶ 17} "The court reporter just stated to counsel that during the cross-examination of the victim by counsel for the defendant that at one point the court reporter heard and put in the record at the appropriate place the Juror Number 1, the same juror, make a statement to the affect that she's just a kid."

{¶ 18} In light of the revelation that Juror Number 1 made the two statements during the trial, appellant's counsel requested that the court conduct a voir dire of that juror to determine if she made the remarks and if she had already made up her mind as to whether appellant was guilty or not guilty of the crimes. The court granted the request and questioned Juror Number 1 about her comments. She admitted that she had made the statements and apologized. Although she stated that she had not yet formed an opinion as to appellant's guilt, the court ordered Juror Number 1 removed from the jury and seated alternate Juror Number 1 in her place. The parties then proceeded to closing arguments and the court charged the jury. After the jury returned with guilty verdicts on both counts, appellant's trial counsel made an oral request for the court to individually voir dire the jurors to determine if they had heard the comments of the original Juror Number 1 and, if so, what effect, if any, they may have had upon the jurors. Appellant's trial counsel noted that he would be filing a motion for a new trial based on possible juror misconduct and believed it would be economical to conduct the voir dire at that time. The court denied the request.

{¶ 19} Subsequently, and prior to sentencing, appellant filed a motion for a new trial on the ground of juror misconduct. Appellant requested that the court order all of

the jurors be summoned into court to be questioned about the effect of the comments of Juror Number 1 on their determination of the guilt or innocence of appellant, whether the comments were discussed during deliberations, and what effect the removal of Juror Number 1 had upon their deliberations. The state agreed with appellant's request for a hearing on the motion for a new trial. The case proceeded to a hearing at which all of the jurors were individually asked whether they had heard Juror Number 1's comment during the cross-examination of the victim; whether they had heard Juror Number 1's comment during appellant's direct examination; whether each juror had any discussions with Juror Number 1 about the case before she was dismissed; whether Juror Number 1's comments were ever discussed among the jurors during their deliberations in the case; and whether Juror Number 1's comments had any effect on the each juror's verdict in the case. Four of the jurors stated that they had heard Juror Number 1's comment during the victim's testimony and nine of the jurors stated that they heard Juror Number 1 call appellant a liar during his testimony. None of the jurors, however, stated that they had discussed the case with Juror Number 1 before she was dismissed and all of the jurors stated that Juror Number 1's comments had no effect on their verdict. Only two jurors admitted to hearing or having a conversation with other jurors regarding the comments but the discussions were limited to the fact that the juror was removed and shock that the she made the comments.

{¶ 20} On March 21, 2008, the lower court issued an order denying the motion for a new trial. In an opinion from the bench, the court found that while there was juror

misconduct in this case, it was harmless beyond a reasonable doubt in that the comments had no effect on the verdict. The court subsequently sentenced appellant to a five year term of imprisonment on the gross sexual imposition conviction and life on the rape conviction, with the GSI term to be served consecutively to the rape term.

{¶ 21} Appellant's first, second and third assignments of error will be discussed together as they collectively address the trial court's and appellant's trial counsel's treatment of the juror misconduct issue in the proceedings below. Appellant asserts that he was prejudiced and denied the right to a fair trial by his trial counsel's ineffectiveness in failing to object and move for a mistrial at the time of the juror misconduct, the lower court's failure to voir dire the remaining jurors and declare a mistrial upon learning of the juror misconduct, and the lower court's failure to grant appellant's motion for a new trial.

{¶ 22} "An accused is entitled to a trial before an impartial, unprejudiced, and unbiased jury." *State v. Daniels* (1993), 92 Ohio App.3d 473, 486. This right is guaranteed by both the Ohio and United States Constitutions. *State v. Jaryga*, 11th Dist. No. 2003-L-023, 2005-Ohio-352, ¶ 72. A jury's verdict must be based solely on the evidence and argument presented in open court, not on any outside influence. *Patterson v. Colorado* (1907), 205 U.S. 454, 462; see, also, *Smith v. Phillips* (1982), 455 U.S. 209, 217. ("Due process [requires] a jury capable and willing to decide the case solely on the evidence before it.")

{¶ 23} It is well-established that "the party complaining about juror misconduct must establish prejudice." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 42.

In the present case, it is undisputed that the original Juror Number 1 committed misconduct in making comments during the testimony of the victim and defendant during the trial below. The trial court acknowledged the misconduct when he removed her from the jury panel. Appellant asserts, however, that the trial court and his own counsel did not thereafter act properly when the misconduct became apparent.

{¶ 24} The Supreme Court of Ohio has directed that on reviewing issues of juror misconduct, a reviewing court is to "show deference to the trial judge, who sees and hears the events and thus is in a better position to accurately evaluate the situation and determine the appropriate scope of inquiry. *State v. Huertas* (1990), 51 Ohio St.3d 22, 29 * * *; *United States v. Ramos* (C.A.5, 1995), 71 F.3d 1150, 1153-1154. Therefore, we employ an abuse-of-discretion standard and will not reverse the trial court unless it has handled the alleged juror misconduct or ruled upon the post-trial motion in an 'unreasonable, arbitrary, or unconscionable' manner." *State v. Hessler* (2000), 90 Ohio St.3d 108, 115-116, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 25} The record reveals that, after the first day of trial, the court reporter called the judge to inform him that Juror Number 1 had made a statement during the victim's testimony and to ask him what she should do. The judge had not heard the comment but told her to put it on the record. Then, on the second day of trial and after all of the evidence had been submitted, the court notified the parties that the court reporter had informed him that Juror Number 1 had made a comment during appellant's testimony. The judge stated that although he had heard a statement, he did not hear the words of the

statement. It was at this point that the court informed the parties of Juror Number 1's previous statement. In light of these revelations, appellant's counsel requested the voir dire and ultimate removal of the juror. The court conducted the voir dire, removed the offending juror and allowed the case to proceed to verdict.

{¶ 26} Thereafter, appellant's trial counsel informed the court that he anticipated filing a motion for a new trial based on juror misconduct and asked the court for an individual voir dire of the remaining jurors before the court dismissed them. The court denied the request. Subsequently, however, when counsel filed a formal motion for a new trial, the court did hold a hearing and individually questioned the jurors as discussed above. From those questions, it was clear that although some of the jurors heard the comments made by Juror Number 1, she had never discussed her comments with any of the other jurors and her comments had no affect whatsoever on the verdict. That is, there was no evidence that appellant's right to a fair trial was prejudiced by the improper comments. We fail to see how the outcome would have differed had the court notified the parties upon learning of the first comment, or conducted a voir dire of the remaining jurors at that time or when appellant's counsel first requested it.

{¶ 27} Accordingly, the trial court did not abuse its discretion in failing to declare a mistrial or in denying the motion for a new trial on the ground of juror misconduct and the second and third assignments of error are not well-taken.

{¶ 28} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the

trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 686-687. In essence, appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. Id. at 693.

{¶ 29} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. Id. at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85. Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland*, supra at 689; *State v. Keenan* (1998), 81 Ohio St.3d 133, 152.

{¶ 30} Appellant asserts that his trial counsel was ineffective in failing to immediately request a mistrial once the juror misconduct became apparent. As we discussed above, however, the lower court conducted a full hearing on the issue and

determined that appellant was not prejudiced by the misconduct. We agree. Accordingly, appellant has not established that his trial counsel was ineffective in his approach to the juror misconduct issue and the first assignment of error is not well-taken.

{¶ 31} In appellant's fifth assignment of error, he asserts that there was insufficient evidence to support a conviction for gross sexual imposition and that the guilty verdict for that offense was against the manifest weight of the evidence.

{¶ 32} The Supreme Court of Ohio has ruled that "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. Upon review of the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 33} Under a manifest weight standard, however, an appellate court sits as a "thirteenth juror" and may disagree with the fact finder's resolution of the conflicting testimony. *Thompkins*, supra at 387. The appellate court, "'reviewing the entire record,

weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 34} Under this assignment of error, appellant challenges his conviction for gross sexual imposition in violation of R.C. 2907.05(A)(4) and (B). That statute reads in relevant part:

{¶ 35} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶ 36} "* * *

{¶ 37} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 38} R.C. 2907.01(B) defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶ 39} Appellant contends that because the victim could not identify what appellant touched her buttocks with, the state could not prove that the touching was done for the purpose of sexually arousing or gratifying appellant and, therefore, did not prove the elements of gross sexual imposition.

{¶ 40} The Ohio Revised Code does not define the phrase "for the purpose of sexually arousing or gratifying either person." As to sexual contact and the required proof of sexual arousal or gratification in prosecutions such as this for gross sexual imposition, the court in *State v. Cobb* (1991), 81 Ohio App.3d 179, 185, stated:

{¶ 41} "[T]he proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01. In making its decision the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts the trier of facts may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines, that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved."

{¶ 42} Upon a review of the record below, we find that there was sufficient evidence from which a trier of fact could find that appellant touched the victim's buttocks for the purpose of his own sexual gratification. When I.D. awoke, appellant had removed her pants and underwear. She then felt him touch her buttocks but she was not sure with

what because her back was to him. The statute does not require the state to prove what an offender uses to touch a victim. Rather, it requires that the touching be done for the purpose of sexually gratifying either the offender or the victim. We conclude that given the surrounding circumstances of the contact and I.D.'s description of the series of actions on the part of appellant, there was sufficient evidence from which a jury could find that appellant touched I.D.'s buttocks for the purpose of his own sexual gratification and that all of the elements of the offense of gross sexual imposition were proven beyond a reasonable doubt. Furthermore, we cannot say that the jury clearly lost its way in finding appellant guilty of gross sexual imposition. The fifth assignment of error is not well-taken.

{¶ 43} In his fourth and final assignment of error, appellant asserts that the lower court erred in sentencing him separately for both offenses because rape and gross sexual imposition are allied offenses of similar import and no separate animus existed for the commission of each offense.

{¶ 44} R.C. 2941.25 states:

{¶ 45} "(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.

{¶ 46} "(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."

{¶ 47} For merger to apply under R.C. 2941.25, appellant must demonstrate that his conduct constituted allied offenses of similar import, and that the offenses were not committed separately or with a separate animus. The test for determining whether multiple offenses are allied offenses of similar import was established in *State v. Logan* (1979), 60 Ohio St.2d 126, 128, where the court stated, "in order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed. The offenses and their elements must correspond to such a degree that commission of the one offense will result in the commission of the other."

{¶ 48} Gross sexual imposition is a lesser included offense of rape. *State v. Johnson* (1988), 36 Ohio St.3d 224, paragraph one of the syllabus. Accordingly, a defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct. *State v. Foust*, 105 Ohio St.3d 137, 162, 2004-Ohio-7006. Where, however, the evidence shows that the act of gross sexual imposition was separate and distinct from the act of rape, the defendant may be convicted of both.

{¶ 49} In the present case, the evidence established that both before and after appellant vaginally raped the victim with his fingers, he touched her buttocks with something that the victim could not identify. Although these incidents were in close proximity to the rape, they were separate and distinct from the rape and did not assist or

enable the rape in any way. See *State v. Younger*, 8th Dist. No. 86235, 2006-Ohio-296, ¶ 52, reversed on other grounds in *In re Ohio Criminal Sentencing Statutes Cases*, 110 Ohio St.3d 70, 2006-Ohio-3663. Accordingly, under the circumstances of this case, the trial court did not err in sentencing appellant for both gross sexual imposition and rape and the fourth assignment of error is not well-taken.

{¶ 50} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

John R. Willamowski, J. _____
CONCUR.
JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.