[Cite as *State v. Ector*, 2010-Ohio-6515.]

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

State of Ohio — Court of Appeals No. L-10-1002

Appellee — Trial Court No. CR0200903184

v.

John Ector — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2010

* * * * *

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

Nicole I. Khoury, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, John Ector, appeals from a judgment of the Lucas County Common Pleas Court following two separate jury trials. In one trial, appellant was found guilty of two counts of gross sexual imposition, violations of R.C. 2907.05(A)(4) and (C), and in the other, appellant was found guilty of two counts of rape, violations of R.C. 2907.02(A)(1)(b) and (B). For the reasons that follow, we affirm.

I. BACKGROUND

{¶ 2} As a result of allegations that appellant had molested his stepdaughter, P.C., appellant was indicted and convicted of two counts of gross sexual imposition and two counts of rape.[1] That conviction, however, was overturned by this court in *State v. Ector*, 6th Dist. L-07-1169, 2009-Ohio-515. This court in *Ector* held that the trial court had erred in failing to allow appellant to cross-examine P.C. about her responses to a Toledo Planned Parenthood clinic administration questionnaire ("questionnaire"). The state had argued that the questionnaire should be excluded under R.C. 2907.02(D), Ohio's rape-shield law.

{¶ 3} The questionnaire at issue was filled out by P.C. at a Planned Parenthood clinic. She went to the clinic at the urging of her aunt to obtain birth control pills because of her sexual relationship with her boyfriend. In filling out the questionnaire, P.C. did not use her mother's address or phone number as contact information. It is alleged that at least one of P.C.'s responses on the questionnaire is in direct conflict with her statements to police and her trial testimony on an issue that is an element of each of the offenses charged.

{¶ 4} In a second trial on November 16, 2009, appellant was re-tried on these four counts. Appellant was convicted of two counts of gross sexual imposition. The jury could not agree on the two counts of rape. In that trial, appellant was allowed to cross-

[1]The original indictment charged appellant with four counts of rape. Prior to commencement of trial, the state advised the court that it intended to nolle prosequi two counts of rape, leaving two counts of rape for trial.

examine P.C. about the questionnaire, which was admitted into evidence, and appellant testified in his defense.

{¶ 5} In a third trial on December 7, 2009, appellant was re-tried on the two rape counts. In this trial, appellant was allowed to cross-examine P.C. about the questionnaire. The trial court, however, declined to admit the questionnaire into evidence. Appellant did not testify in his defense.

{¶ 6} On December 17, 2009, appellant was sentenced on the two counts of gross sexual imposition and two counts of rape. Appellant appeals, raising two assignments of error.

II. ADMISSION OF QUESTIONNAIRE INTO EVIDENCE

{¶ 7} In his first assignment of error, appellant maintains:

{¶ 8} "Application of the rape shield law, by not allowing evidence to be directly admitted to the jury, resulted in a denial of John Ector's constitutional rights to present a full defense, his right to a fair trial and due process of law, in violation of the U.S. Constitution's Fifth, Sixth, and Fourteenth Amendments and Article I, Section 10 and 16 of the Ohio Constitution."

{¶ 9} Appellant argues that the trial court abused its discretion in refusing to admit the questionnaire into evidence during the third trial.

{¶ 10} We agree that the questionnaire could have been admitted into evidence, but we find that the trial court's failure to do so did not materially prejudice appellant.

{¶ 11} In this case, appellee questioned P.C. about prior inconsistencies on direct examination, presumably to dilute the impact of such statements when later elicited on cross-examination by exposing a prior inconsistent statement on direct examination. See *State v. Tyler* (1990), 50 Ohio St.3d 24, 34, superseded by constitutional amendment as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 103.

{¶ 12} Appellant then cross-examined P.C. about her responses to the questionnaire in an effort to attack her credibility. Implicit in appellant's cross-examination was the allegation that P.C. had fabricated the claim that she had been molested by her uncle because she did not want her mother to find out that she was sexually active with her boyfriend.

{¶ 13} Appellant argues that the trial court abused its discretion in refusing to admit the questionnaire into evidence so that the jury could physically have it, read it, and refer to it during deliberations.

{¶ 14} Appellee counters that the trial court did not abuse its discretion in refusing to admit the questionnaire into evidence, and relies upon Evid.R. 612 which permits the recollection of a witness to be refreshed through the use of a document though the document itself is not evidence. Neither appellant nor appellee's arguments are relevant to the admissibility of the questionnaire.

{¶ 15} In addressing appellant's first assignment of error, we consider:

(A) whether one of the hearsay exceptions for the admissibility of the out-of-court

statement is applicable; and (B) if appellant's due process rights were violated by the trial court's decision to not admit the questionnaire.

A. Out-of-court statement

{¶ 16} In *Rigby v. Lake Cty*. (1991), 58 Ohio St.3d 269, 271, the Supreme Court of Ohio reaffirmed the longstanding test for appellate review of the admission of evidence:

{¶ 17} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. E.g., *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus."

{¶ 18} A trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception and its decision will not be reversed absent an abuse of that discretion. *State v. Clark* (1994), 71 Ohio St.3d 466, 469. See *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163; *City of Parma v. Manning* (1986), 33 Ohio App.3d 67, 69. The term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621; *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 19} A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264. The trial court must determine whether the probative

value of the evidence or testimony is substantially outweighed by the danger of unfair prejudice or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 99.

{¶ 20} Thus, if a statement is offered for some purpose other than to prove the truth of the matter asserted, admissibility should be governed by the standards of relevancy and prejudice. Evid.R. 403; *Maurer*, supra, at 262-263; *United States v. Rubin* (C.A.5, 1979), 591 F.2d 278, certiorari denied, *Rubin v. United States* (1979), 444 U.S. 864.

{¶ 21} The questionnaire, if offered for the truth of what it asserted, is hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the exceptions. Evid.R. 802, 803, 804; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119. See *State v. Davis* (1991), 62 Ohio St.3d 326, 344. In *State v. Kline* (1983), 11 Ohio App.3d 208, 211, this court held that "[e]xtrajudicial statement[s] offered for impeachment purposes are not hearsay because they are not offered for the truth of what they state."

{¶ 22} In this case, the questionnaire was offered both to impeach the credibility and veracity of P.C., and as substantive evidence.

{¶ 23} Evid.R. 801(D)(1)(a) controls the admission of statements which were testified to at a trial or hearing, given under oath, and subject to cross-examination, and Evid.R. 801(D)(2) controls the admission of statements by a party-opponent. These rules

do not pertain to the witness statements in this case and, therefore, we need only consider whether the statements could be properly admitted under Evid.R. 803.

{¶ 24} Evid.R. 803(4) provides, as follows:

{¶ 25} "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶ 26} "* * *

{¶ 27} "(4) * * * Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶ 28} It is well-settled in Ohio that statements made for the purposes of medical diagnosis or treatment are admissible under Evid.R. 803(4). See *State v. Boston* (1989), 46 Ohio St.3d 108, 122, overruled, in part, on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 46, and *State v. Dever* (1992), 64 Ohio St.3d 401, 409.

{¶ 29} Here, the written questionnaire was clearly designed to elicit responses upon which diagnosis or treatment could be predicated. See *State v. Chappell* (1994), 97 Ohio App.3d 515, 529; *State v. Vaughn* (1995), 106 Ohio App.3d 775, 780. See, also, Evid.R. 801(A); Evid.R. 803(4).

{¶ 30} In *State v. Brewer*, 6th Dist. No. E-01-053, 2003-Ohio-3423, ¶ 28, this court observed that the hearsay exception for statements pertinent to medical treatment "* * * is based upon the belief that the declarant's subjective motive generally guarantees

the statement's trustworthiness. Since the effectiveness of the treatment depends upon the accuracy of information given to the physician, the declarant is motivated to tell the truth." Id., quoting *State v. Eastham* (1988), 39 Ohio St.3d 307, 312.

{¶ 31} In this case, P.C.'s responses to the questionnaire could have been admitted into evidence under the exclusion to the hearsay rule in Evid.R. 803(4).

B. Due Process Rights

{¶ 32} Appellant complains that his due process rights were violated because the trial court refused to admit the questionnaire. We have concluded that the questionnaire was admissible under Evid.R. 803(4).

{¶ 33} A trial court has discretion to exclude evidence if its probative value is substantially outweighed by consideration of needless presentation of cumulative evidence. Evid.R. 403(B). Appellate courts will not interfere with the trial court's balancing of probativeness and prejudice "* * * unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby." *State v. Slagle* (1992), 65 Ohio St.3d 597, 602, certiorari denied, *Slagle v. Ohio* (1993), 510 U.S. 833.

{¶ 34} Appellant was not materially prejudiced because, as he admits, the questionnaire was read essentially in its entirety by both parties to the jury. As well, appellant was afforded the opportunity to, and did, thoroughly cross-examine P.C. concerning the contradictory statements. Appellant does not allege that he was unable to bring to the jury's attention any other inconsistent statements or any other issues with the questionnaire, or that he did not have the opportunity to fully cross-examine P.C.

{¶ 35} In *State v. Williams* (Nov. 25, 1981), 1st Dist. No. C-810034, the appellate court rejected appellant's claim that he had been prejudiced by the trial court's failure to admit the written statement of the police officer's recall of an interview between the officer and the appellant. The *Williams* court stated, "[I]t seems inconceivable to us that the error was prejudicial in view of the access defense had to the statement and the use he made of it in cross-examination." Id.

{¶ 36} In this case, appellant was not denied the opportunity to cross-examine C.P. about the questionnaire. Cross-examination is the primary means by which the credibility of a witness is tested. *Davis v. Alaska* (1974), 415 U.S. 308, 316. See *State v. Au* (Sept. 15, 2010), 5th Dist. No. 09-CA-108. Exposing a witness's motivation in testifying is a proper and important function of the right of cross-examination. *Greene v. McElroy* (1959), 360 U.S. 474, 496; *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, ¶ 35.

{¶ 37} Although appellant argues that evidence of his acquittal of both counts of rape in the second trial and his conviction of both counts of rape in the third trial is evidence of the prejudice resulting from the trial court's refusal to admit the questionnaire, we decline to attribute the absence of the questionnaire from the jury room as the sole reason for the jury's verdict. As appellee pointed out, appellant testified in the second trial, but not the third. Appellant's decision not to testify in the third trial may have had more to do with the jury's decision to convict of rape in the third trial than the jury's inability to see a document that had been fully discussed during trial.

{¶ 38} Appellant was not materially prejudiced by the trial court's failure to admit the document since he had full opportunity to cross-examine P.C. about the questionnaire and the contents of the questionnaire were fully disclosed to the jury.

{¶ 39} Accordingly, appellant's first assignment of error is not well-taken.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 40} In his second assignment of error, appellant maintains:

{¶ 41} "The appellant was denied his right under the Sixth and Fourteenth Amendments of the United States Constitution to the Effective Assistance of Counsel When Defense Counsel failed to protect his rights during trial." [Sic.]

{¶ 42} Appellant claims that the trial court committed plain error when it allowed P.C.'s mother to testify that P.C. told her that appellant had molested her.

{¶ 43} We disagree.

{¶ 44} A reviewing court may not reverse a conviction for ineffective assistance of counsel unless the defendant shows first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. See *Strickland v. Washington* (1984), 466 U.S. 668, 687. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's error, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. A "reasonable probability" in this

context is one that undermines confidence in the outcome. See *State v. Sanders* (2001), 92 Ohio St.3d 245, 274.

{¶ 45} When conducting its inquiry, "[a] reviewing court must strongly presume that 'counsel's conduct falls within the wide range of reasonable professional assistance,' and must 'eliminate the distorting effects of hindsight, * * * and * * * evaluate [counsel's] conduct from counsel's perspective at the time.'" Id. at 273, quoting *Strickland*, 466 U.S. at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 46} Appellant's second assignment of error is predicated on counsel's purported ineffectiveness in failing to object to the admission of the mother's statements as hearsay. Appellant complains that trial counsel should have objected to the following colloquy between the prosecutor and P.C.'s mother about what P.C. told her mother:

{¶ 47} "Q. And you kept asking her, and then she told you. What did she tell you?

{¶ 48} "A. She told me that she had been molested.

{¶ 49} "Q. I'm sorry?

{¶ 50} "A. She told me that she had been molested. She told me.

{¶ 51} "Q. Did she tell you by whom?

{¶ 52} "A. Yes.

{¶ 53} "Q. And who did she say?

{¶ 54} "A. John Ector.

{¶ 55} "Q. Did she tell you details about --

{¶ 56} "A. Yeah, she told me that she had -- just she told me -- she didn't tell me everything, but she told me a lot."

{¶ 57} This testimony that appellant complains of occurred during the second trial (November 16, 2009), following which he was convicted of two counts of gross sexual imposition. Although appellant's trial counsel did not object to this line of questioning, trial counsel's decision to make or not make objections does not establish ineffective assistance of counsel. *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, ¶ 24, citing *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, ¶ 76; *State v. Guenther*, 9th Dist. No. 05CA008663, 2006-Ohio-767, ¶ 74.

{¶ 58} In the present case, the testimony was part of a line of questioning in which the prosecutor elicited from the witness why she called the police to report that her daughter had been molested. Answers given in this type of questioning are not hearsay because the witness did not give this information for the truth of the matter asserted. Instead, the mother was explaining her reasoning for taking a certain action.

{¶ 59} Testimony which explains the actions of a witness to whom a statement is directed is not hearsay. In *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, the Supreme Court of Ohio held:

{¶ 60} "The testimony at issue was offered to explain the subsequent investigative activities of the witnesses. It was not offered to prove the truth of the matter asserted. It is well established that extrajudicial statements made by an out-of-court declarant are

properly admissible to explain the actions of a witness to whom the statement was directed. * * * The testimony was properly admitted for this purpose."

{¶ 61} See *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958, ¶ 39. See, also, Crim.R. 52.

{¶ 62} We find that the mother's statements about P.C. being molested did not constitute impermissible hearsay. Furthermore, P.C. testified to the same matters. *State v. Griffin*, 8th Dist. No. 80499, 2002-Ohio-4288, ¶ 97. We therefore conclude that appellant's trial counsel was not ineffective for failing to object to the witness's admissible testimony. We cannot say that appellant was prejudiced by trial counsel's failure to object to the mother's statement. Nor can we say that the outcome of the trial would have been any different if the mother's statements had not been admitted.

{¶ 63} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶ 64} The trial court did not abuse its discretion in failing to admit the questionnaire even though it was admissible under Evid.R. 803(4). Appellant was not materially prejudiced by the failure to admit the questionnaire. Nor was trial counsel ineffective for failing to object to the line of questioning about why P.C.'s mother made the police report which alleged that appellant had molested her daughter.

{¶ 65} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial. Accordingly, the judgment of the Lucas County

Common Pleas Court is affirmed. Appellant is ordered to pay the 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR. JUDGE