[Cite as *State v. Jones*, 2011-Ohio-2173.]

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

State of Ohio — Court of Appeals No. L-09-1262

Appellee — Trial Court No. CR0200803575

v.

Levoyd Jones — **DECISION AND JUDGMENT**

Appellant — Decided: May 6, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Sarah K. Skow, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of two counts of rape of a minor under ten years of age in violation of R.C. 2907.02(A)(1)(b) and 2907.02(B). For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. The trial court committed prejudicial error when it failed to consider all of the *Frazier* factors at the competency hearing and the state failed to satisfy its burden of establishing the girls' competency.

{¶ 4} "II. The trial court violated Mr. Jones' due process rights when it permitted the state's expert to offer an opinion based solely on the veracity of the girls' hearsay statements.

{¶ 5} "III. The jury's verdicts must be reversed because the evidence does not support them.

{¶ 6} "IV. Mr. Jones' trial counsel was constitutionally deficient and ineffective.

{¶ 7} "V. The trial court erroneously sentenced Mr. Jones to consecutive sentences without first making statutorily-required factual findings."

{¶ 8} On October 30, 2008, appellant was indicted on one count of rape of a minor under ten years of age between April 26, 2006, and April 25, 2007, and one count of rape of a minor under ten years of age between February 8, 2007, and February 7, 2008. Appellant was accused of raping his two nieces, who were approximately five years and four years of age at the time of the alleged offenses.

{¶ 9} Appellant moved the trial court for a competency hearing and on June 1, 2009, the trial court held hearings to determine the competency of the two complaining witnesses. Over defense counsel's objection, the trial court found both witnesses competent to testify at trial.

{¶ 10} Trial to a jury began on August 31, 2009. On September 2, 2009, the jury found appellant guilty of both counts as charged. Appellant was sentenced to two consecutive life terms.

{¶ 11} In support of his first assignment of error, appellant asserts that when the trial court determined that the two young victims in this case were competent to testify at trial it failed to consider the five factors set forth in *State v. Frazier* (1991), 61 Ohio St.3d 247. Appellant argues that the girls' testimony at the competency hearing demonstrated that they could not recall events from over a year earlier, when the alleged offenses occurred.

{¶ 12} 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 251. (Citations omitted.)

{¶ 13} Additionally, Evid.R. 601 provides in relevant part: "Every person is competent to be a witness except: (A) * * * 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." It is the duty of the trial judge to conduct a voir dire examination of a child under ten years of age to determine the child's competency to testify. Such a determination of competency is within the sound discretion of the trial judge. *Frazier*, supra, at 251. The trial judge may rely on the child's appearance, the

child's general demeanor, his or her manner of responding to questions, and any other indicia of ability to relate the facts accurately and truthfully. Id.

{¶ 14} In the case before us, the victims were six years old ("A.") and eight years old ("T.") at the time of the competency hearing. The judge spoke to each child separately. When asked, T. stated her age, grade in school, the names of her school and her teacher, and the day school would be over for the summer. Additionally, T. knew her birthday and related details of her recent birthday party. She told the judge the names of the people living in her house, as well as the first names of her mother, father and both grandmothers. She also discussed some details from the previous Christmas, about five months before the hearing. When questioned, T. stated that when you tell a lie you get in trouble. T. promised the judge to tell the truth.

{¶ 15} A. stated that she was six years old and told the judge she was in kindergarten. When asked the name of her school, she gave her teacher's name. A. said the alphabet correctly, counted accurately to 25 and spelled her first and last names. She named her siblings, other family members and several school friends. When questioned, A. said she did not know the difference between telling the truth and telling a lie. But she then told the judge that she always tells her mother exactly what happened if her mother asks her, and said she does not ever tell her mother "a story." When asked by the judge if everything she told the judge that day was "right," A. said that it was. In response to questions from the judge about facts that could be discerned in the courtroom, such as the color of the judge's shirt, A. indicated correctly whether the statements were the truth or a

lie. She also stated that the judge should tell her the truth and if the judge did not, she would get angry.

{¶ 16} At the conclusion of the hearing, the judge found that T. was very capable of giving an accurate impression of facts, was able to recollect things that had happened to her in the past and knew the difference between truth and falsity. As to A., the judge found that the child appeared to be nervous but gave very clear answers to the questions asked of her. The judge noted that while A. said she did not know the difference between the truth and a lie, she was able to correctly identify statements made by the judge as either true or false. The judge concluded that both children were competent to testify.

{¶ 17} Appellant finds error in the trial court's failure to question the children regarding the rape during the competency evaluation. Many Ohio courts have affirmed a trial court's finding of competency in cases where the competency hearing did not include questions about the crime at issue. Often, a competency hearing contains only general questions about the child's everyday life. Although it arguably may have been helpful if the trial court in this case had questioned the children as to some of the events of the indictment, we find that doing so was not necessary to the trial court's competency evaluation. See, e.g., *State v. McNeill* (1998), 83 Ohio St.3d 438; *State v. Allard* (1996), 75 Ohio St.3d 482; *State v. Kelly* (1994), 93 Ohio App.3d 257; *State v. Wild*, 2d Dist. No. 2009 CA 83, 2010-Ohio-4751.

{¶ 18} "Once the court determines that a person can properly recount events from the past and knows that she should tell the truth in court, she is competent." *State v.*

Mayhew (1991), 71 Ohio App.3d 622, 629. We find that both A. and T. exhibited an understanding of truth and falsity and appeared to appreciate their responsibility to be truthful in court. The transcript of the competency hearing in this case reveals that the trial court applied the *Frazier* factors and therefore did not abuse its discretion. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 19} In his second assignment of error, appellant asserts that the trial court erred by permitting, over objection, the state's expert to offer his opinion as to the girls' veracity. Appellant also argues that the trial court committed plain error by permitting the expert to testify about the girls' hearsay statements.

{¶ 20} An appellate court's review of a trial court's admission or exclusion of evidence must be limited to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104; Evid.R. 104.

{¶ 21} We will first consider appellant's argument that Dr. Schlievert offered his opinion as to the veracity of the girls' statements to him when he examined them after they reported the abuse. Appellant asserts that Schlievert's testimony that both girls had been sexually abused was improperly based solely on his belief that the girls were telling the truth. Appellant further asserts that the trial court permitted the doctor to "regurgitate" the girls' statements and that the doctor improperly gave his opinion that the girls had not been coached regarding any of the events they reported to him.

{¶ 22} State's witness Randall Schlievert testified that he is a board-certified pediatrician specializing in the areas of child sexual abuse and neglect. The doctor

explained the protocol he follows in examining and interviewing a child who may be the victim of sexual abuse. He stated that he interviews a child for purposes of diagnosis and possible treatment. The doctor further testified that the girls' physical exams were completely normal, which he stated was not unusual. Schlievert explained that most sexual abuse evaluations result in normal exams even when there has been penetration. The doctor said the lack of physical signs of abuse can be attributed to a delay between the act of abuse and the disclosure and subsequent exam. Also, with small children, often penetration is not deep enough to reach and injure internal tissue; when tissue is torn, it can heal within a few weeks or months and leave no scarring. The doctor cited studies that have shown that anywhere from 59 to 98 percent of abused children seen days, weeks or months after the act of abuse have normal exam results. In the absence of physical findings, the doctor makes a diagnosis of sexual abuse based on information provided by the child.

{¶ 23} The record in this case reflects that the prosecution did not ask Schlievert for his opinion as to the girls' veracity; at no time did the doctor give his opinion as to the truthfulness of the girls' statements to him. The doctor testified that he performed a physical examination of both girls and spoke to them about what they reported had happened with their uncle. Schlievert clearly testified that his medical examination and interviews were for the purpose of diagnosis and possible treatment—specifically, to determine whether either girl was in need of further psychological treatment and counseling.

{¶ 24} With respect to the issue of coaching as raised by appellant, Schlievert testified that he did not see any behavior or hear anything from either girl that led him to believe they had been coached. The doctor testified that the statements made to him were "either spontaneous or detailed, they were age appropriate."

{¶ 25} Appellant bases his arguments on the decision in *State v. Boston* (1989), 46 Ohio St.3d 108, in which the Supreme Court held that a trial court must not allow a physician to offer an opinion on whether a child had fantasized her abuse. *Boston* emphasized that the fact finder, not the expert witness, bears the burden of assessing the credibility and veracity of trial witnesses. Id. at 129.

{¶ 26} This court has thoroughly reviewed the transcript of Dr. Schlievert's testimony. We find that at no time did the doctor improperly comment on the veracity of A. or T. The doctor expressed his opinion that neither child appeared to have been coached as to what to tell him. Saying that he did not believe the children had been coached is not the same as saying that he believed their statements to be truthful. While the doctor was asked whether he thought the girls had been coached by anyone, he never was asked whether he thought the girls had told him the truth. Schlievert testified that, based on the history and information he received during his evaluations, he "felt comfortable" with the diagnoses of sexual abuse for both children. Based on the foregoing, we find that the trial court did not err by allowing the doctor's testimony regarding his examination of the girls.

{¶ 27} In support of his second argument, appellant asserts that the trial court committed plain error when it permitted Dr. Schlievert to testify about statements made by

A. and T. during his examination of the children. Appellant argues that the doctor improperly vouched for the credibility of the two children through his inadmissible hearsay statements. Appellant asserts that the statements the girls made to the doctor were not for the purpose of diagnosis or treatment but were elicited by the doctor for purposes of his future testimony. We note that defense counsel failed to object to Dr. Schlievert's testimony on this basis. Therefore, our review of the alleged improper testimony is discretionary and limited to plain error only.

{¶ 28} Pursuant to Crim.R. 52(B), "* * * plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the trial court." However, this court has held that "* * * notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only in order to prevent a manifest miscarriage of justice. In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges." *State v. Jones*, 6th Dist. No. L-05-1101, 2006-Ohio-2351, ¶ 72. (Citations omitted.)

{¶ 29} As discussed above, when Dr. Schlievert was asked about interviewing the children incident to the physical exam, he responded that the interview and the children's statements were intended to assist with medical treatment or diagnosis:

{¶ 30} "Q. Do you do this as part of the law enforcement function or are you doing it in order to render diagnosis and treatment?

{¶ 31} "A. I do it for the purposes of allowing me to either treat or know how to evaluate a patient or provide referrals for treatment."

{¶ 32} Hearsay statements are admissible when given for the purpose of medical diagnosis and treatment. Evid.R. 803(4). A referral for psychological treatment and/or counseling is considered to be medical treatment. *Sterbling v. Sterbling* (1987), 35 Ohio App.3d 68, 70.

{¶ 33} In a case similar to the one before us, the defendant challenged the admission of a doctor's testimony concerning a sexual assault against a minor child, arguing that the testimony amounted to inadmissible hearsay. *State v. Braxton*, 8th Dist. No. 86859, 2006-Ohio-3008. In *Braxton*, the doctor testified that in making a diagnosis of sexual abuse, she took all factors into consideration, including the fact that most sexual assaults do not leave physical trauma and her verbal interaction with the victim. The *Braxton* court held that any statements made by the minor victim which were relayed in the doctor's testimony were in fact offered for the purpose of diagnosis or treatment and therefore admissible under Evid.R. 803(4).

{¶ 34} Based on the foregoing, we find that any statements made by A. and T. which were later included in Dr. Schlievert's testimony were originally offered for the purpose of diagnosis or treatment and therefore were properly admitted into evidence under Evid.R. 803(4). See, e.g., *State v. Haschenburger*, 7th Dist. No. 05 MA 192, 2007-Ohio-1562, ¶ 24-25; *State v. Braxton*, 8th Dist. No. 86859, 2006-Ohio-3008, ¶ 21-24. We find

that the trial court did not commit plain error by allowing the testimony to be admitted and, accordingly, this argument is without merit.

{¶ 35} Based on the foregoing, we find that appellant's second assignment of error is not well-taken.

{¶ 36} Appellant presents two arguments in support of his third assignment of error. First, appellant argues that his conviction as to A. (Count 2) is not supported by the sufficiency of the evidence. Additionally, appellant argues that his conviction as to T. (Count 1) is against the manifest weight of the evidence.

{¶ 37} We will first review appellant's argument as to A. "Sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins,* 78 Ohio St.3d 380, 386. When reviewing 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. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins,* supra, at 386-387.

{¶ 38} Appellant asserts that the state failed to prove that he penetrated A.'s anal cavity and that no rational trier of fact could have found that appellant raped A. in violation of R.C. 2907.02 without proof of the essential element of penetration. R.C. 2907.02 requires "sexual conduct," which R.C. 2907.01 defines as "vaginal intercourse between a male and a female; anal intercourse * * * and, without privilege to do so, the insertion, however slight, of any part of the body into the vaginal or anal opening of another."

{¶ 39} In this case, A. testified that, after telling her to take her clothes off, appellant "touched" her with his hand and his "wiener" where she "goes poo-poo." A. further testified that appellant touched the "outside" and that "it hurted."

{¶ 40} Ohio courts have held that there is sufficient evidence of anal rape pursuant to R.C. 2907.02 where the trier of fact finds that the defendant penetrated, however slightly, the victim's anal cavity with any part of the defendant's body. See *State v. Holmes*, 6th Dist. No. L-08-1034, 2009-Ohio-6255, ¶ 38; *State v. Wells* (2001), 91 Ohio St.3d 32, 34.

{¶ 41} After viewing A.'s testimony in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found the essential elements of the crime of rape proved beyond a reasonable doubt. Accordingly, appellant's first argument is without merit.

{¶ 42} As his second argument in support of this assignment of error, appellant asserts that his conviction on Count 1 is against the manifest weight of the evidence

because T. was incompetent to testify. Appellant also argues that Dr. Schlievert's testimony should have been excluded because it was a "regurgitation" of T.'s statements to him and an endorsement of her veracity.

{¶ 43} A manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins,* supra, at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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." *Thompkins*, supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 44} Each of appellant's arguments in support of his manifest weight challenge has been addressed above and found to have no merit. Accordingly, this argument is without merit.

{¶ 45} Based on the foregoing, we find that appellant's third assignment of error is not well-taken.

{¶ 46} In support of his fourth assignment of error, appellant asserts that trial counsel was ineffective in several respects. Appellant asserts that trial counsel's performance fell below the standard of care where counsel failed to make a specific Crim.R. 29 motion for acquittal based on the lack of evidence showing penetration of A., and where counsel failed to introduce critical evidence that would have impeached the

credibility of the complaining witnesses. Appellant further asserts that counsel was ineffective for failing to object to the following: the girls' competency at trial, the state's leading its key witnesses, and prosecutorial misconduct in closing argument that played to the jury's emotions.

{¶ 47} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 48} Appellant lists numerous instances of ineffective assistance but fails to argue most of them separately, indicate how or why counsel was ineffective thereby, or provide references to the record in support. For those reasons, we find the following claims to be without merit: counsel's failure to object when the state engaged in leading its key witnesses, failure to object to prosecutorial misconduct during closing argument, and failure to object to appellant's absence from the minor victims' competency hearing.

{¶ 49} As to appellant's claim that counsel should have moved for acquittal pursuant to Crim.R. 29 based on a lack of evidence of penetration of A., we found in response to

appellant's third assignment of error that the state offered sufficient evidence as to that element of the offense of rape and this assertion is therefore without merit. As to appellant's assertion that counsel should have objected at trial to the girls' competency, we have found in response to appellant's first assignment of error that the trial court did not err by determining that both children were competent to testify. We therefore find that appellant has not shown a reasonable probability that if counsel had objected the result of the trial would have been different. Accordingly, this argument is without merit.

{¶ 50} Appellant also asserts that the doctor's testimony amounted to a "recitation" of statements the children made to him and did not meet any exceptions to the rule prohibiting hearsay, and that trial counsel should have objected on the basis that Ohio law prohibits experts from testifying on the veracity of a child sexual abuse witness. Again, we have considered this challenge to the admissibility of the doctor's testimony under appellant's second assignment of error and have found it to be without merit.

{¶ 51} Lastly, appellant argues that trial counsel should have introduced medical records from the girls' exams after they disclosed the abuse as well as case notes from the family's Children Services caseworker's file. Appellant asserts that those documents would have shown prior inconsistent statements made by both girls. First, we note that trial counsel's decision as to whether or not to offer certain materials into evidence is a matter of trial strategy. A reviewing court must refrain from second-guessing trial strategy decisions. See *State v. Robinson* (2008), 6th Dist. No. L-06-1182, 2008-Ohio-3498, at ¶ 245. Further, the documents to which appellant refers are not in the record before this

court and therefore cannot be used to prove ineffective assistance of counsel. See, e.g., *State v. Campos*, 6th Dist. No. L-06-1272, 2007-Ohio-3316.

{¶ 52} Based on the foregoing, we find that appellant has not shown that, but for trial counsel's actions, the result of the trial would have been different and has failed to establish that counsel was ineffective. Appellant's fourth assignment of error is not well-taken.

{¶ 53} In his fifth assignment of error, appellant asserts that he is entitled to resentencing because the trial court erred by ordering two consecutive life sentences without first making statutorily required factual findings. Appellant bases his argument on the decision of the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160, in which that court held that an Oregon statute that required judicial fact-finding before imposing consecutive sentences was not unconstitutional. Appellant asserts that the *Ice* decision is inconsistent with the Ohio Supreme Court's ruling in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-586, and that *Foster* must be overruled.

{¶ 54} We note that this court and other courts of appeal in Ohio addressed this same argument subsequent to the *Ice* decision, consistently holding that a re-examination of the law set forth in *Foster* can only be undertaken by the Supreme Court of Ohio. *State v. Gardner*, 6th Dist. No. L-10-1222, 2011-Ohio-1268. See, also, *State v. Lenoir*, 5th Dist. No. 10CAA010011, 2010-Ohio-4910; *State v. Banna*, 8th Dist. No. 93871, 2010-Ohio-4887.

{¶ 55} Appellant's reliance on *Ice* is misplaced, based on the recent decision of the Ohio Supreme Court in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320. In *Hodge*, the Ohio Supreme Court considered an argument similar to that posed by appellant herein, also based on the *Ice* decision. *Hodge* noted that *Ice* did not impose a *requirement* for judicial fact-finding to support consecutive sentences, and that any rule requiring automatic revival of former statutes would conflict with fundamental finality interests. Id. at ¶ 26, 29. Further, the Supreme Court noted in *Hodge* that *Ice's* impact on Ohio law is collateral; the decision in *Foster* was not on direct appeal in *Ice* and *Ice* did not directly overrule *Foster*. *Hodge* at ¶ 37. *Hodge* concluded that "* * * the consecutive-sentencing statutes severed by *Foster* are not automatically revived. Accordingly, those statutes remain null and of no effect absent an affirmative act of the General Assembly." *Hodge* at ¶ 36.

{¶ 56} Based on the foregoing, we find that appellant is not entitled to resentencing and his fifth assignment of error is not well-taken.

{¶ 57} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE