[Cite as *State v. Kamer*, 2012-Ohio-722.]

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

State of Ohio

Appellee

v.

Gregory Kamer

Appellant

Court of Appeals Nos. L-10-1103
L-10-1189

Trial Court No. CR0200902378

DECISION AND JUDGMENT

Decided: February 24, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of conviction for rape and gross sexual imposition entered on a jury verdict in the Lucas County Court of Common Pleas. Because we conclude that the trial court did not abuse its discretion in determining that a five-year-old was competent to testify, we affirm.

{¶ 2} In 2008, T.R. was four years old. T.R.'s father and appellant, Gregory Kamer, were friends. Appellant was married to T.R.'s mother's aunt. The couples frequently socialized. In November 2008, T.R.'s father began to work long and odd hours and T.R.'s mother was uncomfortable being home alone at night. Added to this, appellant and his wife owned a car, but neither held a valid driver's license. T.R.'s mother had a driver's license, but no car. T.R., her mother, father and younger sister moved in with appellant's family at appellant's home on North Ontario Street in Toledo. This arrangement continued until January 2009.

{¶ 3} On March 29, 2009, T.R. was playing in her bedroom in her parents' home. Two cousins, another four-year-old girl and a two-year-old boy, were with her. T.R.'s parents were in another part of the house. At some point, T.R.'s parents noted that the play in T.R.'s room had become unusually quiet. T.R.'s father went to investigate. He found T.R.'s door closed, which was also unusual.

{¶ 4} When T.R.'s father opened her door, he found T.R.'s four-year-old cousin on her bed, under the covers. When he pulled the covers back he found T.R. on her back and her two-year-old cousin on top of her. Both were attempting to pull up their underwear.

{¶ 5} According to T.R.'s father's later testimony, he picked up T.R. and the two-year-old and "whooped" them "on the butt." He then took all three into the living room where T.R.'s mother asked T.R. what they were doing. T.R. responded that they were playing a "grown-up game." Asked by her mother who taught them this game, T.R.

responded, “Uncle Greg.” T.R. told her mother that Uncle Greg had touched her with his hands and his “private areas * * * down there,” pointing to her own pubic area. This activity had occurred more than once while T.R.’s family was staying at appellant’s house.

{¶ 6} T.R.’s mother took her to a nearby hospital where T.R. received a physical examination and was interviewed by a sexual abuse nurse examiner. Medically, the results were consistent with the type of activity the cousins were participating in without other evidence of trauma. T.R.’s report to the nurse was essentially a reiteration of her account to her mother.

{¶ 7} On July 15, 2009, appellant was named in a two count indictment charging him with two counts of rape of a child less than ten years of age and two counts of gross sexual imposition of a child under age ten.

{¶ 8} After a hearing at which T.R. was deemed competent to testify, the matter proceeded to a trial before a jury. At trial, T.R. testified that “Uncle Greg,” whom she identified as appellant, on more than one occasion had “sticked his pee pee in mine.” According to T.R., when she told Uncle Greg that it hurt, he did not stop. Uncle Greg, T.R. testified, also touched her “pee pee area” with his hands while her pants were pulled down. This occurred “a lot.” Uncle Greg called this activity “grown-up stuff” and warned T.R. not to tell anyone or “[h]e would go to jail.”

{¶ 9} Appellant testified in his own defense, denying T.R.s accusations and suggesting that the child may have misconstrued his innocent check to see if she had wet

her pants as something else. Appellant also presented the testimony of a research psychologist who critiqued the interview techniques of the sex abuse nurse examiner, police and a physician expert in child sex abuse. The form of some of the questions asked may have been suggestive to a four-year-old, according to the psychologist.

{¶ 10} At the close of the state's case in chief and at the close of all evidence, the trial court rejected appellant's Crim.R. 29 motions. The court submitted the matter to the jury which found appellant guilty on all counts. The trial court accepted the verdict and sentenced appellant to two terms of from 15 years to life imprisonment for rape and two terms of five years imprisonment for the gross sexual imposition convictions. The court ordered that the sentences be served consecutively.

{¶ 11} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following four assignments of error:

A. The trial court abused its discretion by permitting the victim in the case to testify[.]

B. Appellant's convictions were against the manifest weight of the evidence[.]

C. The trial court erred by entering separate judgments of conviction for applied offenses of similar import in violation of R.C. 2941.25(A)[.]

D. Appellant was denied effective assistance of counsel[.]

I. Competency of Child Witness

{¶ 12} In his first assignment of error, appellant insists that the trial court abused its discretion in concluding that five-year-old T.R. was competent to testify at trial.

{¶ 13} Evid.R. 601provides; "Every person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶ 14} In order to determine whether a child under age ten is competent to testify, a trial court must examine whether the child can (1) receive accurate impressions of fact or observe acts about which he or she will testify, (2) recall those impressions or observations, (3) communicate what was observed, (4) understand truth and falsity and (5) appreciate the responsibility to be truthful. *State v. Frazier*, 61 Ohio St.3d 247, 574 N.E.2d 483 (1991), syllabus. Because the trial court has the opportunity to observe the child's appearance, ability to respond to questions, demeanor and ability to relate facts accurately and truthfully, the determination of competency is within the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *State v. McNeill*, 83 Ohio St.3d 438, 442, 700 N.E.2d 596 (1998). An abuse of discretion is more than a mistake of law or an error of judgment, the term connotes that the court's attitude is arbitrary, capricious or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} Appellant complains that the trial court's voir dire of T.R. was insufficient to permit the court to make a valid determination of all of the markers of competency. According to appellant, the court focused on T.R.'s ability to tell the difference between the truth and a lie to the exclusion of the other attributes articulated in *Frazier*. Moreover, the court seems to have ignored inconsistencies and non sequiturs in T.R.'s responses and failed to follow up on opportunities presented to examine the child's ability to accurately recall past events and relate those events in the present. For these reasons, appellant insists, the trial court abused its discretion in declaring T.R. competent to testify.

{¶ 16} "We would expect that excessive scrutiny of any communication between an adult and a [young child] would yield a list of discrepancies and miscommunications. A competency voir dire, however, must be viewed in its entirety." *State v. Purrell*, 6th Dist. No. L-92-392, 2000 WL 1298765 (Sept. 15, 2000). In this matter, T.R., in response to the court's inquiries, was able to state and spell her name, give her age and birthday, identify her school and name her sister. She also demonstrated an appreciation for the difference between the truth and a lie and knowledge that if she told a lie she would be punished.

{¶ 17} Viewing the trial court's voir dire as a whole, we fail to find that the court's decision to find T.R. competent to testify constituted an abuse of discretion. Accordingly, appellant's first assignment of error is not well-taken.

II. Manifest Weight

{¶ 18} In his second assignment of error, appellant asserts that the jury's verdict was against the manifest weight of the evidence.

{¶ 19} A verdict in a criminal trial may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id*. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 20} Appellant seems to concede that there was sufficient evidence presented at trial going to each of the essential elements of the offenses for which he was convicted. His argument, rather, goes to the weight of that evidence. Appellant properly points out

that there was no inculpatory physical evidence presented at trial. The only evidence against him came directly or indirectly from T.R.'s account of events. This account, appellant insists, is unreliable.

{¶ 21} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts," *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus, because the jury is in the best position to assess the credibility of trial witnesses by observing their demeanor, gestures and voice inflections. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶ 22} Even from a bare transcript, T.R. appears as a remarkably precocious five-year-old. From the verdict, we infer that this was her demeanor during live testimony as well. Consequently, we can find nothing to suggest that appellant's jury lost its way or that a manifest miscarriage of justice occurred. Accordingly, appellant's second assignment of error is not well-taken.

III. Allied Offenses

{¶ 23} In his third assignment of error, appellant maintains that the offenses of rape and gross sexual imposition are allied offenses of similar import which should have merged and separate sentences for these offenses should not have been entered.

{¶ 24} R.C. 2941.25 provides:

> (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.

(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.

{¶ 25} The statute codifies a long adhered to penal philosophy in Ohio jurisprudence "that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime." *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776 (1971); *see also Woodford v. State*, 1 Ohio St. 427 (1853), paragraph three of the syllabus, *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

{¶ 26} Gross sexual imposition is a lesser included offense of rape, *State v. Johnson*, 36 Ohio St.3d 224, 522 N.E.2d 1082 (1988), paragraph one of the syllabus, and an allied offense of similar import. *State v. Hooper*, 7th Dist. No. 03 CO 30, 2005-Ohio-7084, ¶ 16. As a result, a defendant may not be convicted of both offenses when the counts arise out of the same conduct. *State v. Millhoan*, 6th Dist. Nos. L-10-1328, L-10-1329, 2011-Ohio-4741, ¶ 49, citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 143. By the same token, however, if the offenses do not come out of the same conduct, conviction on both counts is permitted. *Id.*

{¶ 27} T.R. testified that appellant pulled down her pants and "sticked his pee pee in mine," that it went "inside" and that "[i]t hurt." This occurred "[m]ore than once;" in

fact, "[q]uite a few times." Additionally, T.R testified that appellant also touched her "pee pee" with "his hands * * * a lot."

{¶ 28} Although with a child of tender years there is a certain expected imprecision in relating the frequency of events, it is clear that T.R.'s testimony supports at a minimum the two counts of rape and two counts of gross sexual imposition for which appellant was charged and convicted. As to whether these acts occurred in the same course of conduct, T.R, in her testimony, does not connect the penile penetration and the manual handling as part of the same event. Moreover, it is a permissible inference that within T.R.'s description of events there was manipulation independent from occurrences of penetration. Such an inference is sufficient to support a conclusion that there was more than one instance of gross sexual imposition outside the course of conduct charged as rape. Accordingly, appellant's third assignment of error is not well-taken.

IV. Ineffective Assistance of Counsel

{¶ 29} In his final assignment of error, appellant maintains that he was denied effective assistance of counsel.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

> performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 30} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith*, *supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel." *State v. Stevenson*, 5th Dist. No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id*. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *See id*. at 694. *See also State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), for Ohio's adoption of the *Strickland* test.

{¶ 31} Appellant complains that during trial, counsel failed to vigorously challenge hearsay statements and called an expert witness whose testimony was unhelpful and who "opened the door" to the admission of a recording of a police interview with T.R.

{¶ 32} Whether to interpose objections during trial is clearly a matter of trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Hill*, 10th Dist. No. 09AP-398, 2010-Ohio-1687, ¶ 22. Similarly, whether or not to call an expert witness is trial strategy and generally will not support a claim of ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 622, ¶ 44. Moreover, with respect to "opening the door" for the police interview recording, the interview contents were at worst cumulative to T.R.'s live testimony with little probability of altering the outcome of the trial. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 33} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the cost 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

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE