[Cite as *State v. Burkholder*, 2013-Ohio-1589.]

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

State of Ohio — Court of Appeals No. L-11-1216

Appellee — Trial Court No. CR0201003021

v.

Robert Burkholder — **DECISION AND JUDGMENT**

Appellant — Decided: April 19, 2013

* * * * *

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

Joseph W. Westmeyer, III, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for rape and gross sexual imposition following a jury trial in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On August 6, 2010, as a Toledo couple prepared to take their family for the weekend to a Sandusky water park, they discovered their eight-year-old daughter, M.B., in her room masturbating. Concerned that sexual acting out for a child so young could be indicative of something greater, over the weekend the parents questioned her. M.B. told her parents that something had occurred approximately two months earlier during a sleepover at the home of M.B.'s uncle, appellant Robert Burkholder.

{¶ 3} According to M.B., "Uncle Bobby" and his wife had gone to bed leaving M.B., her sister and three cousins to watch television. At some point, M.B. said, appellant came into the room, saying that he could not sleep. He sat in a chair, watching television with the girls, and then asked M.B. if she would like to sit on his lap. M.B. sat on appellant's lap and appellant put a blanket over them. M.B. later testified that appellant put his hand down her pajama bottoms to her "private part area" and rubbed it, then "tried to put his finger in my hole." The girl reported "it hurted." M.B. testified that after she pulled appellant's hand from her pants, appellant put her hand on his "private part area." When the girl pulled away, appellant told her not to tell anyone.

{¶ 4} E.B's parents reported the incident to police who involved children's services. M.B. was examined by a physician specializing in child abuse who later testified that, although there were no physical findings, M.B.'s behavior was consistent with child abuse.

{¶ 5} On November 10, 2010, appellant was named in a two count indictment charging him with one count of rape of a child under age 13 and one count of gross

sexual imposition of a child under age 13. He pled not guilty and the matter proceeded to a trial before a jury.

{¶ 6} At trial, M.B. testified to the events at appellant's house. The physician and abuse nurse who examined M.B. also testified, as well as police and her parents. One of the cousins present in the room when the rape allegedly took place testified to being there and confirmed that appellant had come into the room and invited M.B. to his lap. The state also introduced certified copies of appellant's prior conviction for gross sexual imposition. Appellant rested without presenting any evidence.

{¶ 7} The jury returned a guilty verdict on both counts, as well as a specification that the victim was under age ten. The trial court entered judgment on the verdict and, following a presentence investigation, sentenced appellant to life imprisonment without the possibility of parole on the rape count and an additional consecutive five-year term of imprisonment for the gross sexual imposition. From this judgment, appellant brings this appeal. Appellant sets forth the following five assignments of error:

I. The trial court erred in its decision admitting evidence of Robert Burkholder's prior convictions.

II. The trial court erred in admitting multiple instances of hearsay.

III. The jury verdict finding Robert Burkholder guilty of rape and gross sexual imposition is against the manifest weight of the evidence.

IV. The trial court erred in failing to remove juror #20 for cause.

V. Robert Burkholder was denied effective assistance of counsel at trial.

I. Similar Acts

{¶ 8} Prior to trial, the state filed a notice of intent to present evidence of similar acts during trial; specifically, appellant's 2005 conviction on three counts of gross sexual imposition for touching the vagina of a nine-year-old female relative. Appellant filed a motion in limine, seeking to exclude this evidence. The trial court overruled appellant's motion. Appellant renewed the motion during trial and was again overruled. On appeal, appellant insists that this ruling was erroneous.

{¶ 9} Appellant notes the general rule that the state may not introduce evidence of an offense or bad act not charged in the instant proceeding merely to show a trait or disposition to commit the offense of which he or she is presently accused. *See State v. Hector*, 19 Ohio St.2d 167, 174-175, 249 N.E.2d 912 (1969). Appellant concedes exceptions to the general rule, but insists that, even if one of the exceptions is shown, the court must still balance the probative value of the evidence with its capacity to prejudice the defendant. According to appellant, evidence concerning his prior gross sexual imposition convictions only tends to suggest a character trait to show that he acted in conformity with that trait. Moreover, even if the convictions peripherally fall within one of the exceptions, there is nothing in the record to suggest that the court balanced their probative value with their capacity to unfairly prejudice the defendant.

{¶ 10} The state responds that Evid.R. 404(B), while prohibiting the introduction of evidence of a defendant's character to demonstrate that he acted in conformity with that character, allows "bad acts" evidence to establish motive, intent or plan. The state maintains, and the trial court found, that appellant's prior convictions tended to show a scheme or plan to commit sexual acts against minor female relatives.

{¶ 11} In material part, Evid.R. 404(B) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶ 12} R.C. 2945.59 permits the introduction of proof of the acts of a defendant which tend to show his or her motive, intent, scheme, plan or system in doing an act, if such proof is material, notwithstanding that such proof may show or tend to show commission of another crime.

> Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. The rule and the statute contemplate acts which may or may not be similar to the crime at issue. If the other act does in fact "tend to show" by substantial proof any of those

> things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, then evidence of the other act may be admissible. (Citations omitted.) *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

{¶ 13} "Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994).

{¶ 14} The admission or exclusion of evidence is within the trial court's discretion and will not be reversed absent an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 15} The first witness at trial was the officer who investigated the allegations that led to appellant's 2005 convictions. According to the officer, during that investigation appellant admitted to inappropriately touching a nine-year-old female relative at appellant's home.

{¶ 16} Appellant's admissions and the following convictions provide substantial proof that the other acts were committed by him. Moreover, the circumstances that led to the prior conviction tend to prove motive (sexual gratification) and a modus operandi

(targeting prepubescent female relatives in the home.) This is relevant evidence, admissible under Evid.R. 404(B). Any unfair prejudice implicated was negated by the court's limiting instruction that the jury could only use the convictions as proof of motive and intent.

{¶ 17} With respect to appellant's argument that, pursuant to Evid.R. 403, the trial court did not properly weigh the probative value of appellant's prior convictions against the capacity of this evidence to unfairly prejudice appellant, the court expressly found that the probative value of this evidence substantially outweighed the danger of any unfair prejudice. Such a finding is justified by the evidence. Accordingly, appellant's first assignment of error is not well-taken.

II. Multiple Hearsay

{¶ 18} In his second assignment of error, appellant complains that he was prejudiced during trial by the trial court's repeated erroneous admission of hearsay testimony. Appellant asserts that most of the witnesses against him reported statements from M.B. about an event nearly two months prior to the first disclosure. Admission of these statements over appellant's objection was error, appellant maintains. Moreover, the statements, as reported by others, were less equivocal than M.B.'s own testimony, operating to appellant's prejudice, he insists.

{¶ 19} "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). In general, hearsay is inadmissible in court, Evid.R. 802,

unless the testimony falls under one of the hearsay exceptions articulated in Evid.R. 803 and 804 or deemed "not hearsay" by Evid.R. 801(D).

{¶ 20} Appellant claims that the statements made by M.B. to her parents should not have been admitted because they were clearly hearsay. In the trial court, and here, the state concedes these statements were hearsay, but insists that they are admissible through the excited utterance exception provided for in Evid.R. 803(3). That provision permits the introduction of hearsay when such statements "relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 21} Excited utterance statements may be admitted when the trial court reasonably finds:

> (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual

impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus.

{¶ 22} Appellant argues that, while the alleged touching may have been a startling event, possibly as much as two months elapsed between the time of that alleged event and M.B.'s disclosure. This, appellant insists, seems more than sufficient time for nervous excitement to have abated. Any excitement M.B. may have exhibited was as likely due to having been caught masturbating as to any event two months earlier, appellant suggests.

{¶ 23} The state responds that there is no per se amount of time after which a statement can no longer be considered an excited utterance. Citing *State v. Taylor*, 66 Ohio St.3d 295, 303-304, 612 N.E.2d 316 (1993), the state asserts that the exception is liberally construed when it relates to young children who have been the victims of sexual assault. The inability of children to fully reflect makes it likely that the statements are trustworthy. Ohio courts have held the excited utterance exception viable after as long as two months for a six year old, *State v. Ames*, 12th Dist. No. CA2000-02-024, 2001 WL 649734 (June 11, 2001), to approximately seven months for a 13 year old. *State v. List*, 9th Dist. No. 17295, 1996 WL 221899 (May 1, 1996).

{¶ 24} Given the liberal construction to the excited utterance exception we are directed to apply when considering children, *Taylor* at 304, we cannot say that the trial court's application of the excited utterance exception was unreasonable. Moreover, we note that M.B. herself testified and was subject to cross-examination at trial. If appellant sought to test the truth of the child's statements to her parents, he had every opportunity. Accordingly, we conclude that the trial court did not abuse its discretion in admitting M.B.'s hearsay statements. Appellant's second assignment of error is not well-taken.

III. Manifest Weight of the Evidence

{¶ 25} In his third assignment of error, appellant maintains that the jury's verdict was against the manifest weight of the evidence.

{¶ 26} A verdict 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).

{¶ 27} Both of appellant's arguments within this assignment of error go more to the sufficiency of the evidence than its weight. With respect to the rape count, appellant points out that R.C. 2907.02(A)(1)(b) prohibits sexual conduct with any non-spousal person under age 13. R.C. 2907.01(A) defines sexual conduct to include "the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another."

{¶ 28} Appellant maintains that the only testimony going to penetration was that of M.B., who testified that appellant "tried" to put his finger in her "hole." This testimony, appellant insists, proves only attempt, which was not charged. The state's physician sexual abuse expert's conclusion, that M.B.'s statement that "it hurted" suggested penetration, was not specifically linked to M.B., according to appellant.

> A jury is permitted to make reasonable inferences from the presentation of other facts. Further, a series of facts or circumstances may be used by a jury as a basis for ultimate findings or inferences. In reviewing a judgment of criminal conviction, the evidence must be viewed in a light most favorable to the state; all permissible inferences which can be drawn from the evidence may be used to determine the sufficiency of the

evidence. (Citations omitted.) *State v. Minniefield*, 6th Dist. No. S-88-44, 1989 WL 123324 (Oct. 20, 1989).

{¶ 29} The state's sex abuse expert testified that pain suggests that there was an incursion into the vagina, because the inside of the vagina in a young girl is very sensitive, while the area outside is substantially less sensitive. This testimony, coupled with M.B.'s report of pain and consideration of the language skills of a nine year old permit the jury to infer that there had been penetration. Consequently, there was sufficient evidence to support the jury's finding on the rape charge. Moreover there was nothing in the record to suggest that the jury lost its way in reaching this finding.

{¶ 30} Appellant makes the same sort of argument with respect to the gross sexual imposition count. M.B. testified that appellant "tried" to put her hand on his "private area." Again, appellant points out, no attempt was charged.

M.B. testified:

A. [H]e said, do you want to put my – your hand on my private part area.

Q. Did you answer him?

A. And I said no, but he said – and he put my hand there already.

Q. So he already had your hand on his private area?

A. And then I pulled away really fast.

Q. [D]o you have a name for that area?

A. No.

Q. Is it where he goes pee out of?

A. No, like, on his, like, skin, like, right, like – I don't know what it's called.

Q. Okay, between his legs?

A. Yeah, like, right here, like, I don't – like, on his skin and stuff. [Points between her legs.]

Q. But you felt his skin?

A. Yeah.

Q. Between his legs?

A. Yeah.

{¶ 31} "Sexual contact" of the type required for gross sexual imposition pursuant to R.C. 2907.05(A)(4), "means 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." R.C. 2907.01(B).

{¶ 32} Again, the jury may take into consideration the language skills of a witness of tender years and make reasonable inferences from the testimony from such a witness. It is reasonable to infer that what M.B. described was the touching of a thigh or genitals for the purpose of appellant's sexual gratification. Accordingly, appellant's third assignment of error is not well-taken.

IV. Juror No. 20

{¶ 33} Appellant's remaining assignments of error relate to the selection of a juror. During voir dire, defense counsel asked the panel of prospective jurors if there was any among them who "feels that because an eight-year-old child makes an allegation against an adult that they [sic] are automatically true." Juror No. 20 responded, "I do."

{¶ 34} What followed was a long conversation between Juror No. 20, the defense and the court. Juror No. 20 explained that she would "find it hard to believe that an eight-year-old would lie about something like that." The court then asked the juror, if it was obvious the child was not telling the truth, "[W]ould you still weigh that testimony more heavily?" Juror No. 20 responded:

> No, I think there's a point where you're telling the truth and not telling the truth, but just from the nature of the crime and everything I feel like if there was a slight chance that she seemed to be telling the truth that I would take her opinion more strongly.

{¶ 35} After some further discussion, Juror No. 20 agreed that she would follow the court's instructions when evaluating the testimony of the witnesses, including the weight of the child's testimony. Appellant's challenge for cause was overruled. At the conclusion of peremptory challenges, appellant's counsel had a remaining challenge, but elected not to exercise it with respect to Juror No. 20.

{¶ 36} In his fourth assignment of error, appellant asserts that the trial court erred when it denied his challenge for cause for Juror No. 20. In his fifth assignment of error,

appellant maintains that he was denied effective assistance of counsel, because trial counsel failed to use an available peremptory challenge on Juror No. 20.

{¶ 37} A defendant in a criminal case cannot complain of prejudicial error in overruling a challenge for cause if such ruling does not force the defendant to exhaust his or her peremptory challenges. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 87, citing *State v. Eaton*, 19 Ohio St.2d 145, 279 N.E.2d 897 (1969). Absent prejudice, an assignment of error may not be sustained. App.R. 12(B). Accordingly, appellant's fourth assignment is not well-taken.

{¶ 38} In his remaining assignment of error, appellant asserts that his trial counsel was ineffective for failing to exercise his remaining peremptory challenge to remove Juror No. 20 from the jury.

> 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).

{¶ 39} Scrutiny of counsel's performance must be deferential. *Strickland* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *Smith, supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland* 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. *Strickland* 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.

{¶ 40} Appellant fails both prongs of the *Strickland* test. The selection of a jury is largely a matter of strategy and tactics. *State v. Keith*, 79 Ohio St.3d 514, 521, 684 N.E.2d 47 (1997). Trial counsel is in the best position to determine the relative merits of any specific prospective juror and weigh those merits against those of the panel member who might replace an excused juror. *Id.* Thus, we cannot say that trial counsel's decision to leave Juror No. 20 on the panel constituted deficient performance. Moreover, there is nothing in the record that would suggest that, had Juror No. 20 been excused, the

result of the proceeding would have been different. Accordingly, appellant's final assignment of error is not well-taken.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE