[Cite as *State v. Ross*, 2013-Ohio-1595.]

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

State of Ohio — Court of Appeals No. H-11-022

Appellee — Trial Court No. CRI-2011-0515

v.

Joseph M. Ross — **DECISION AND JUDGMENT**

Appellant — Decided: April 19, 2013

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Jennifer L. DeLand, Assistant Prosecuting Attorney, for appellee.

Charles R. Hall, Jr., for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from judgment of the Huron County Court of Common Pleas, following a jury trial, in which appellant, Joseph M. Ross, was found guilty of one count of importuning, in violation of R.C. 2907.07(A) and (F)(2), a third degree felony. On appeal appellant sets forth the following six assignments of error:

APPELLANT'S FIRST ASSIGNMENT OF ERROR: The

Appellant was denied a fair trial due to the playing of the alleged victims

[sic] recorded statement during the jury trial and submitting it as an exhibit to the jury.

APPELLANT'S SECOND ASSIGNMENT OF ERROR: The Jury erred by finding the Appellant guilty as the verdict lacked sufficient evidence and the verdict was against the manifest weight of the evidence.

APPELLANT'S THIRD ASSIGNMENT OF ERROR: The Appellant was denied a fair trial because the trial court allowed the Detective to testify that he believed the alleged victim was being truthful in his investigation.

APPELLANT'S FOURTH ASSIGNMENT OF ERROR: The trial court erred to the prejudice of the Appellant by not granting his motion for acquittal pursuant to Criminal Rule 29(A).

APPELLANT'S FIFTH ASSIGNMENT OF ERROR: The appellant was denied effective assistance of counsel at trial in violation of the Appellant's Constitutional Rights thereby denying him a fair trial.

APPELLANT'S SIXTH ASSIGMENT OF ERROR: The combination of the cumulative errors are sufficient to call into question the validity of the verdict which prevented the Appellant from obtaining a fair trial.

{¶ 2} On July 11, 2011, the Huron County Grand Jury indicted appellant on one count of importuning, in violation of R.C. 2907.07(A) and (F)(2), a third degree felony.

The charge stemmed from a report made by Virginia Baker, appellant's neighbor. In the report, Baker stated that a 12-year-old girl, K.K., told Baker that she spent the night at appellant's apartment on June 7, 2011, during which time appellant made statements and performed acts that Baker interpreted to be sexual in nature. As a result of Baker's report, Huron County Detective Sergeant Robert Fulton interviewed appellant at his home and removed several items of evidence from the home. An audio recording was made of that interview. In addition, Mary Downing, a social worker, interviewed K.K. concerning the events that took place on or about June 7, 2011. A video recording was made of that interview.

{¶ 3} A jury trial was held on September 7, 2011, at which testimony was presented by Downing, Fulton, Baker and K.K. Baker, who is physically disabled, testified that she asked K.K. to retrieve a package for her on June 8, 2011, after which she had a "conversation" with K.K. that led her to contact police. Downing testified that she and Fulton interviewed K.K. on June 9, 2011. At that point, the video of Downing's interview with K.K. was played, without objection, for the jury.

{¶ 4} The recording, which was authenticated by Downing as an accurate record of the interview, contained statements by K.K. that she went to appellant's apartment on June 7, 2011, at approximately 7 p.m., to ask appellant to fix her bike, and that she spent the night there because appellant refused to walk home with her after dark. K.K. also told Downing that appellant gave her a skirt and a tank top to wear because her clothes were wet. K.K. stated that, sometime that evening, appellant changed into a skirt and

acted "weird." Later, she saw appellant rubbing his "private part" in his bedroom with "lotion" and saying "Oh, baby." K.K. said that, at some point she sat on appellant's bed, and he rubbed her leg above her knee and said it was "soft." K.K. also said that, while she was sitting on the bed, appellant asked her to "sleep with him," but she refused and chose to sleep on the couch until appellant woke her up and walked her home at 5 a.m. the next morning. At that point, Detective Fulton entered the interview room and asked K.K. to identify appellant from a photo line-up, which she did. In response to Fulton's questioning, K.K. said she knows what a "bad touch" is, and that appellant did not do a bad touch.

{¶ 5} After the recording was played, Downing testified that she showed K.K. an anatomically correct drawing of a male, and that K.K. identified the figure's penis as appellant's "private part."

{¶ 6} K.K. testified at trial that she was in appellant's apartment over two days' time in June 2011. K.K. was unclear as to whether she had been swimming that day. K.K. stated that she is not good at judging time, and she could not remember whether she took her bike to appellant to be fixed. K.K. also stated that she could not remember everything she told Downing during the interview; however, she was able to remember more at that point in time than she could remember at trial.

{¶ 7} K.K. said she remembered appellant wearing a skirt, and that appellant gave her a blue patterned skirt to wear, but she did not remember a tank top. After a brief recess, K.K. testified that appellant told her to "come here," after which she approached

and saw him rubbing his "private part" with "lotion" that he got from the living room. She stated that watching appellant rub himself made her "uncomfortable." K.K. then testified that she changed out of a wet bathing suit at appellant's apartment and put on the skirt and tank top. K.K. stated that, before he used the "lotion," appellant asked her to "sleep in his bed" with him, and that she said no. K.K. said that she knows what sex is, and appellant did not directly ask her to have sex. K.K. denied knowing what appellant meant when he asked her to "sleep in his bed."

{¶ 8} At this point in K.K.'s testimony the state asked, over the defense's objection, to have the recorded interview played again to refresh K.K.'s memory. The trial court then admitted the video recording into evidence, and instructed the jury that K.K.'s statements on the video were not made under oath. However, K.K.'s testimony continued without the video being played at that time. After noting that she felt more comfortable now that her grandmother was present in the courtroom, K.K. testified that she remembered being on appellant's bed and that he touched her ankle, leg, and thigh. K.K. then stated that she could not remember more details, and asked that the video be played to refresh her memory.

{¶ 9} After seeing the video, K.K. stated that everything she said in the interview with Downing was accurate. On cross-examination, K.K. stated that she took a shower at appellant's apartment before changing her clothes. K.K. also stated that appellant offered her the choice of his bed or the couch, and she chose the couch. She said she was scared, but not enough to go home alone after midnight. On redirect, K.K. said she thought

appellant touching her leg was "bad," and that he offered her the couch to sleep on after she declined his offer to "sleep with him."

{¶ 10} After K.K.'s testimony, Detective Fulton testified that he and Huron Police Captain Hipp went to appellant's apartment on June 8, 2011, and had a discussion with appellant, during which appellant showed them the skirts that he and K.K. wore, and also showed him the KY "lotion" he used to rub on himself that night. Appellant admitted to being naked that night; however, he said K.K. could not have seen him naked unless she happened to witness him getting out of bed to change the TV channel. Appellant also admitted to consuming alcohol before K.K. arrived. The audio recording of Fulton's discussion with appellant was then played for the jury and subsequently was admitted into evidence. After the recording was played, Fulton testified that all of the details recounted by K.K. were confirmed by his observations at appellant's apartment. Fulton stated, and the recording demonstrates, that appellant told Fulton he would not call K.K. a liar.

{¶ 11} On cross-examination, Fulton testified that appellant denied asking K.K. for sex. Fulton also testified that he did not remember K.K. stating that appellant directly asked for sex; however, she indicated to Fulton that the invitation to "sleep with" appellant meant sex. On redirect, Fulton stated that he arrested appellant because the circumstances supported K.K.'s statements.

{¶ 12} At the close of the prosecution's evidence, appellant's attorney made a Rule 29 motion for acquittal, which the trial court denied. Testimony was then presented

by Tom Sanford, who installed stereo speakers in appellant's apartment, and Robert Brutsche, who testified that he saw K.K. at appellant's apartment on June 7, 2011, and that she seemed uncomfortable, but not scared. The defense then rested. The Rule 29 motion was renewed and denied. On October 16, 2011, the trial court issued a judgment entry of sentencing. A timely notice of appeal was filed in this court on November 7, 2011.

{¶ 13} In his first assignment of error, appellant sets forth two bases on which the trial court erred by allowing the video of K.K.'s interview to be played to the jury. First, appellant asserts that the playing of the video during Downing's testimony constitutes plain error because, if it had not been played, the outcome of the trial would have been different. Second, appellant argues that the trial court erred by allowing the video to be used to refresh K.K.'s memory during her trial testimony because the requirements for such an admission pursuant to Evid.R. 803(5) were not met in this case. We disagree, for the following reasons.

{¶ 14} It is undisputed that no objection was made to the playing of the video interview during Downing's testimony. In such cases, a defendant waives all but plain error. *State v. Howard,* 2d Dist. No. 2012-CA-10, 2012-Ohio-4747, ¶ 7, citing *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488; *State v. Steimle*, 8th Dist. No. 95076, 2011-Ohio-1071; Crim.R. 52(B). "Plain error does not exist unless, but for the error, the outcome of the proceedings would have been different." *Id.* at ¶ 8, citing *State v. Moreland*, 50 Ohio St.3d 58, 552 N.E.2d 894 (1990).

{¶ 15} After reviewing the entire record in this case as set forth above, which included the trial court's instruction to the jury that K.K.'s statements during the interview were not sworn testimony, we find no plain error. Appellant's first argument is without merit.

{¶ 16} As for appellant's second argument, Evid.R. 803(5) provides that a recorded recollection is not excluded by the hearsay rule, even if the declarant is available as a witness, if there is a showing

> (1) that the witness has insufficient memory to accurately testify to crucial information, (2) that the witness can show through his or her testimony that the past recollection recorded was made or adopted when the matter was fresh in the witness's memory, and (3) that the past recollection recorded correctly reflects the knowledge the witness had at the time it was recorded. *State v. Perry*, 147 Ohio App.3d 164, 768 N.E.2d 1259 (6th Dist.2002).

{¶ 17} The foundation for the admission of such a statement under Evid.R. 803(5) must be made through the testimony of the witness himself. *Id.*, citing Evid.R. 803(5) Staff Notes.

{¶ 18} The record shows that, before the video was played for her benefit, K.K. stated that she did not remember everything she told Downing in the interview, and she was able to recall more details at that time than during the trial. After viewing the video, K.K. testified that she told the truth in the video.

{¶ 19} On consideration, we find that an adequate foundation was laid for the use of video pursuant to Evid.R. 803(5) which, coupled with the trial court's jury instruction noted above, does not constitute error on the part of the trial court. Appellant's second argument is without merit.

{¶ 20} For the foregoing reasons, the trial court did not commit plain error by allowing the video to be played during Downing's testimony, or by allowing it to be used to refresh K.K.'s memory at trial pursuant to Evid.R. 803(5). Appellant's first assignment of error is not well-taken.

{¶ 21} In his second assignment of error, appellant asserts that the judgment against him was based on insufficient evidence and was against the manifest weight of the evidence. In determining whether a verdict is based on sufficient evidence, the relevant inquiry "is whether a rational trier-of-fact could have established the elements of the offense beyond all reasonable doubt." *State v. Joyner*, 6th Dist. No. L-09-1058, 2010-Ohio-2794, ¶ 10, citing *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511. In determining whether a verdict is against the manifest weight of the evidence, "an appellate court weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *Id.* Thereafter, the court sits as a "thirteenth juror" and "determines whether the factfinder lost its way, resulting in a manifest miscarriage of justice, such that the conviction must be reversed." *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 22} R.C. 2907.07(A) states that "No person shall solicit a person under thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person."

{¶ 23} R.C. 2907.01(C) defines "sexual activity" as "sexual conduct, sexual contact or both." 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 * * * for the purpose of sexually arousing or gratifying either person."

{¶ 24} On consideration, this court finds that the record contains sufficient evidence to allow a reasonable trier-of-fact to conclude that the elements of the offense of importuning were established beyond a reasonable doubt. Further, after weighing all of the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the trier-of-fact lost its way, resulting in a miscarriage of justice that necessitates the reversal of appellant's conviction. Appellant's second assignment of error is not well-taken.

{¶ 25} In his third assignment of error, appellant asserts that he was denied a fair trial because Detective Fulton was allowed to testify that K.K. was not a liar. This argument is entirely without merit.

{¶ 26} The admission or exclusion of evidence is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Nelson*, 2d Dist. No. 25026, 2012-Ohio-5797, ¶ 45, citing *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). An abuse of discretion connotes more than a mere

error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). Because no objection to Fulton's testimony was made at trial, we must review this issue under a plain error standard.

{¶ 27} Contrary to appellant's assertion, Detective Fulton testified at trial that appellant stated he would not call K.K. a liar during an exchange that took place between Fulton and appellant at appellant's apartment. Such a statement is admissible non-hearsay, as it was appellant's own statement and, therefore, an admission by a party opponent under Rule 801(D)(2)(a) of the Ohio Rules of Evidence. Appellant's third assignment of error is not well-taken.

{¶ 28} In his fourth assignment of error, appellant asserts that the trial court erred by not granting his motion for acquittal. Motions for acquittal are made pursuant to Crim.R. 29(A), which states that

> [t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶ 29} Generally, a court should deny a Crim.R. 29 motion if the evidence is such that "reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Pulaski*, 154 Ohio App.3d 301, 310, 2003-Ohio-4847, ¶ 43 (2d Dist.), citing *State v. Bridgeman*, 55

Ohio St.2d 261, 263, 381 N.E.2d 184 (1978). In reviewing the granting or denial of a motion for acquittal, the evidence is to be viewed in the light most favorable to the prosecution. *Id.*, citing *State v. Wolfe*, 51 Ohio App.3d 215, 216, 555 N.E.2d 689 (9th Dist.1988). On appeal, the relevant inquiry is whether there was legally sufficient evidence to sustain the guilty verdict. *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶ 30} Upon consideration of the record and our determination as to appellant's second assignment of error, and after viewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to justify the denial of appellant's motion for acquittal pursuant to Crim.R. 29. Appellant's fourth assignment of error is not well-taken.

{¶ 31} In his fifth assignment of error, appellant asserts that he was denied effective assistance of trial counsel because trial counsel should have filed a motion to suppress his statements to Detective Fulton. In support, appellant argues that the interview conducted by Fulton was conducted in violation of his constitutional rights pursuant to *State v. Lather*, 110 Ohio St.3d 270, 2006-Ohio-4477, 853 N.E.2d 279, and *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶ 32} It is well-established that claims of ineffectiveness assistance of counsel are reviewed under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and must

also establish that, but for that defect, the trial outcome would have been different. *Id*. at 687.

{¶ 33} "Counsel is not *per se* ineffective for failing to file a suppression motion." *State v. Tibbetts*, 92 Ohio St.3d 146, 166, 749 N.E.2d 226 (2001). Rather, the party asserting a claim of ineffective assistance of trial counsel for failing to file a motion to suppress "must show that the failure to file the motion caused him prejudice." *State v. Johnson*, 12th Dist. No. CA2011-09-169, 2013-Ohio-856, ¶ 52, citing *State v. Hamilton*, 12th Dist. No. CA2001-04-044, 2002 WL 205489, *3 (Feb. 11, 2002). In other words, the failure to file a motion to suppress will not constitute ineffective assistance of counsel unless the record demonstrates that such a motion would have been granted. *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶ 30. (Additional citation omitted.)

{¶ 34} A custodial interrogation consists of "questioning initiated by law enforcement after a suspect has been formally arrested or had his freedom restrained in such a way that is the equivalent of a formal arrest." *State v. J.W.*, 10th Dist. No. 12AP-345, 2013-Ohio-804, ¶ 27, citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). In order to determine whether a reasonable person would have thought he was under arrest at the time of the interrogation, we must examine the totality of the circumstances. *Id.*, citing *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

{¶ 35} On appeal, appellant does not set forth specific instances to demonstrate that he was under arrest at the time of the interview; rather, he simply states that his

constitutional rights were violated because he was not given his *Miranda* rights before he spoke to Detective Fulton. After reviewing the entire record, including the recording of appellant's conversation with Fulton, we find nothing to indicate that a reasonable person in appellant's situation would have thought he was under arrest or in any way restrained of his liberty while that conversation was taking place.

{¶ 36} On consideration of the totality of the circumstances in this case, we conclude that appellant's constitutional rights were not violated when he was interviewed by Fulton and Hipp at his home. Consequently, a motion to suppress those statements would not have been granted by the trial court. Therefore, appellant's trial counsel was not ineffective for failing to file a motion to suppress, and appellant's fifth assignment of error is not well-taken.

{¶ 37} In his sixth assignment of error appellant asserts that the combined effect of multiple errors in this case denied him a fair trial.

{¶ 38} In *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000), the Ohio Supreme Court held that: "In order even to consider whether "cumulative" error is present, [the court] would first have to find that multiple errors were committed in [the] case." Accordingly, "in order to find cumulative errors, there must first be a showing that errors in fact occurred." *State v. Greene*, 8th Dist. No. 91104, 2009-Ohio-850, ¶ 98.

{¶ 39} In support of this assignment of error, appellant argues that the cumulative effect of playing the recording of K.K.'s interview, combined with the lack of evidence that appellant solicited K.K. for any sexual activity, entitles him to a new trial. However,

as set forth above, no plain error arose from the trial court's decision to allow the video to be played in court, and the prosecution presented sufficient evidence to sustain appellant's conviction. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 40} The judgment of the Huron County Court of Common Pleas 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE