[Cite as *State v. Coffey*, 2013-Ohio-3555.]

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

State of Ohio — Court of Appeals No. L-12-1047

Appellee — Trial Court No. CR0201101247

v.

Frederick Coffey — **DECISION AND JUDGMENT**

Appellant — Decided: August 16, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Thomas P. Kurt, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction on three counts of rape with a victim under age 13, entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On the evening of February 4, 2011, 12 year-old T.R.'s mother left T.R. and two younger siblings at home in the north Toledo home they shared with the mother's boyfriend, appellant, Frederick Coffey.

{¶ 3} According to subsequent statements by T.R., earlier in the day, appellant took the children to Chuck E. Cheese. When they returned home, appellant went to a basement recreation room to watch television. After a while, T.R. reported, appellant called her to the basement to take some clothes from a dryer.

{¶ 4} When she came to the basement, according to T.R.'s testimony, appellant forcibly grabbed her and removed her pants and underwear. T.R. stated that appellant had a silver vibrator and a jar of Vaseline which he used to coat the vibrator before he inserted it into her vagina. According to T.R.'s testimony, appellant subsequently licked her vagina, inserted his finger and then inserted his penis. Appellant threatened to shoot T.R. if she told anyone, she said.

{¶ 5} T.R. was able to escape and ran to an upstairs closet where she telephoned her mother. On her mother's advice, T.R. then called police. When police arrived, T.R. accused appellant of raping her. Appellant denied the accusation, telling police that T.R. came to him in the basement saying that she was upstairs using her mother's dildo. Appellant told police that he told T.R. she was too young for sex and that the conversation was inappropriate. At a later interview, appellant told police that T.R. came into the basement, jumped on him and tried to kiss him. When he rebuffed her, appellant

stated, T.R. obtained the dildo and began to masturbate before him. Appellant reported that at that point he told T.R. to stop.

{¶ 6} As detectives questioned appellant, T.R.'s mother took her to a nearby hospital where she was examined by a sexual abuse nurse examiner ("S.A.N.E."). The S.A.N.E. nurse interviewed T.R. and performed a rape kit, preserving T.R.'s clothing, examining and documenting injuries, and taking samples for later DNA analysis. The S.A.N.E. nurse would later testify that T.R.'s injuries were consistent with her report of events.

{¶ 7} Appellant was arrested and later named in an indictment handed down by the Lucas County Grand Jury, charging him with three counts of rape of a person under age 13 in violation of R.C. 2907.02(A)(1)(b) and (B), each a first degree felony. A subsequent bill of particulars alleged that appellant had penetrated T.R. with an inanimate object, his finger and his penis.

{¶ 8} Appellant pled not guilty. During extended pretrial motion practice, the court rejected appellant's motion for a psychiatric examination of T.R. and a subsequent request for a competency hearing. The court also granted the state's motion in limine to apply the Ohio rape shield law to bar appellant's witness testimony regarding a prior purportedly false allegation of sexual assault made by T.R. against a former teacher.

{¶ 9} The matter was eventually tried to a jury. At trial, T.R. testified to the events of February 4, 2011. Police told the jury of their investigation and introduced a

recording of T.R.'s 9-1-1 call and video recording of the police interview with appellant. The S.A.N.E. nurse testified to her examination of T.R.

{¶ 10} The state also introduced forensic evidence. A serologist from a state lab testified that she found large quantities of amylase, a component of saliva, in T.R.'s underwear and in swabs taken from her vagina. A scientist from an independent genetic laboratory presented results of a Y chromosome analysis of the amylase, revealing that the genetic markers in the sample were consistent with appellant's genetic profile. The scientist estimated that the probability of this pattern coming from some male other than appellant or a male relative was one in 2,801. Appellant rested without presenting any evidence. The jury found appellant guilty of all counts.

{¶ 11} The court accepted the verdict and sentenced appellant on each count to a mandatory life sentence with the possibility of parole after ten years. The court ordered these sentences to be served consecutively. The court also adjudicated appellant a Tier III sex offender. From this judgment of conviction, appellant now brings this appeal.

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

> I. The trial court erred in overruling defendant's request to determine the competency of the alleged victim-witness, where the evidence before the trial court indicated that the alleged victim-witness suffered from psychosis and other serious mental health issues.
>
> II. The trial court erred in overruling defendant's request for a psychiatric examination of the alleged victim-witness.

III. The trial court erred in disallowing, on the basis of Ohio's rape shield law, Ohio Revised Code § 2907.02(D), cross-examination of the alleged victim concerning a prior allegation of sexual abuse by a former teacher, where the defendant offered unrebutted evidence that the prior allegation was false and involved no actual sexual activity.

IV. The trial court erred in permitting a Toledo Police Detective to testify that he had investigated numerous cases in which the defendant maintained a calm demeanor during interrogation but nonetheless was convicted by a jury.

V. The trial court erred in permitting the State of Ohio to amend its Bill of Particulars to add cunnilingus as an allegation of sexual conduct, and to present evidence purporting to show that the defendant engaged in cunnilingus with the alleged victim.

VI. The trial court erred in overruling the defendant's motion for a mistrial based on the State of Ohio's presentation of evidence purporting to show that the defendant committed rape by having oral sexual contact with the alleged victim, where the indictment and the Bill of Particulars placed the defendant on notice only of allegations of rape by object penetration, digital penetration, and penile penetration.

VII. The trial court erred in permitting the State of Ohio to elicit testimony from a police detective who interviewed the alleged juvenile

victim-witness, that it is common for juvenile victims to omit details during their interview and that such omissions of details by juveniles are not "material."

VIII. The trial court's various errors, set forth in assignments of error one through eight (sic) above, cumulatively prejudiced defendant and prevented him from having a fair trial.

I. Psychiatric Examination/Competence

{¶ 13} In his first two assignments of error, appellant asserts that the trial court erred in denying his request for a psychiatric examination and/or competency hearing for the complaining witness. Appellant relied on notes about T.R. obtained from children's services that suggested she had ADHD and mental health issues. One of the reports mentioned the word "psychotic," referring to T.R. These reports, appellant argued, suggested that T.R. might not be competent to testify. For this reason, appellant sought a psychiatric examination be performed and a competency hearing ordered.

{¶ 14} The state responded that, since she was over age ten, T.R. was presumed competent to testify. The state characterized appellant's motions as nothing more than a fishing expedition or an attempt to intimidate the witness. Moreover, the documents appellant relied upon contained nothing more than notes from caseworkers, which were, at best, hearsay opinions of others recorded perhaps inexactly.

{¶ 15} Evid.R. 601(A) provides that everyone is competent to be a witness except those of unsound mind or children under age ten who "appear incapable of receiving just

impressions of the facts and transactions respecting which they are examined, or of relating them truly." The decision of whether a witness is competent to testify rests within the sound discretion of the court. The decision will not be disturbed absent an abuse of that discretion. *State v. Clark,* 71 Ohio St.3d 466, 469, 644 N.E.2d 331 (1994). An abuse of discretion is more than a mistake of law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 16} Similarly, it is also within the court's discretion to order a psychiatric or psychological examination. *State v. Murrell*, 72 Ohio App.3d 668, 673, 595 N.E.2d 982 (12th Dist.1991). Courts are cautioned, however, that a defendant has no right to compel such an examination of an alleged child rape victim. *State v. Ross*, 2d Dist. Montgomery No. 22958, 2010-Ohio-843, ¶ 47. "A psychological examination of a child alleged to be the victim of sexual abuse is intrinsically dangerous and therefore permission to conduct the examination should not be granted lightly." *State v. Lacy,* 12th Dist. Butler No. CA95-12-221, 1996 WL 688789 (Dec. 2, 1996), citing *State v. Shoop,* 87 Ohio App.3d 462, 622 N.E.2d 665 (3d Dist.1993). Such examinations are appropriate only in exceptional circumstances and when necessary to further the ends of justice. *Ross, supra.*

{¶ 17} In this matter, the trial court concluded that references to mental illness or other infirmities in caseworker's notes was insufficient indicia of an unsound mind to warrant further examination. On review, we cannot conclude that this decision constituted an abuse of discretion. The same is true of the court's decision to refrain

from a competency hearing for appellant's accuser. Accordingly, appellant's first and second assignments of error are not well-taken.

II. Rape Shield Law

{¶ 18} Appellant, in his third assignment of error, complains that the trial court improperly applied the Ohio rape shield law to bar inquiry about a previous sexual assault accusation T.R. made about one of her teachers.

{¶ 19} Prior to trial, the state filed a motion in limine to bar witness testimony regarding T.R.'s allegations of earlier sexual abuse and her specific accusation of alleged sexual misconduct by a former teacher. The state maintained that such testimony would violate R.C. 2907.02(D), Ohio's rape shield law. Appellant responded that the proposed testimony was not about her sexual activity, but her prior false accusation of sexual assault. Appellant argued that to bar testimony on the topic infringes on his right to confront his accuser as guaranteed by the Sixth Amendment.

{¶ 20} The trial court granted the state's motion in limine. The court noted that the purpose of R.C. 2907.02(D) is to exclude evidence of rape charges or prior sexual activity by a victim or a defendant that is unrelated to the present case. Such evidence is not to be admitted unless it is material to a fact at issue and "its prejudicial nature does not outweigh its probative value."

{¶ 21} At trial, appellant proffered the testimony of the teacher who testified that, as a result of an allegation by T.R., he had been suspended from his job. After an

investigation, however, the state had declined to prosecute and the school board reinstated him.

{¶ 22} In material part, R.C. 2907.02(D) provides:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

{¶ 23} The law advances multiple state interests. It guards the complainant's sexual privacy, protects her from undue harassment and discourages the tendency in rape cases to try the victim rather than the defendant. Moreover, by excluding unduly inflammatory and prejudicial evidence that is only marginally probative, the statute is intended to aid the truth-finding process. State *v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 67, citing *State v. Gardner*, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979).

{¶ 24} In practice, the law commands the exclusion of evidence of prior sexual activity absent a finding by the court that such evidence is at once material to a fact at issue and its prejudicial nature does not outweigh its probative value. *State v. Leslie*, 14

Ohio App.3d 343, 346, 471 N.E.2d 503 (2d Dist.1984). The trial court is vested with broad discretion concerning the admission of evidence and its ruling on such matters will not be overturned absent an abuse of that discretion. *State v. Valsadi*, 6th Dist. Wood No. WD-09-064, 2010-Ohio-5030, ¶ 40.

{¶ 25} Appellant argues, and there is authority in support, *see State v. Boggs*, 63 Ohio St.3d 418, 422, 588 N.E.2d 813 (1992), that because T.R.'s allegation against her teacher was false there was no sexual activity and the rape shield statute simply does not apply. The state responds that we do not know T.R.'s allegations were false. We only know, the state insists, that the allegations were made and that no charges were brought. This does not prove innocence. The teacher, of course, denied the allegations made by T.R. in his proffered testimony.

{¶ 26} If the allegation was true, the rape shield law prohibits its introduction. *Id.* If the allegation was false, it does not necessarily mean that the victim is fabricating the present charge. "[P]rior false allegations of sexual assault do not tend to prove or disprove any of the elements of rape, nor do they relate to issues of consent. Hence, they are an entirely collateral matter which may not be proved by extrinsic evidence." *Id.*, citing *State v. Kamel*, 12 Ohio St.3d 306, 466 N.E.2d 680 (1984), paragraph two of the syllabus.

{¶ 27} *Boggs* suggests that appellant should have been able to cross-examine T.R. about whether she had made any prior false allegations of rape. *Id.* at 421. But this is not the posture of the matter before us. Appellant proffered the testimony of the purported

falsely accused teacher. Such testimony would constitute evidence of a specific instance of the conduct of a witness to attack the witness's character for truthfulness. Such conduct may not be proved by extrinsic evidence. Evid.R. 608(B). Accordingly, the trial court did not err in barring the proffered testimony. Since the validity of the prior accusation did not arise in cross-examination, the Confrontation Clause question was never properly before the court. Appellant's third assignment of error is not well-taken.

III. Police Testimony

{¶ 28} In his fourth assignment of error, appellant claims that the trial court erred when it permitted the lead detective in the investigation to testify that, in his experience, it was not unusual for a suspect who exhibited a calm and cooperative attitude during questioning to be convicted of a criminal offense. In his seventh assignment of error, appellant maintains that the trial court erred when it overruled an objection to the testimony of the same detective who stated that it was not unusual for a juvenile victim to omit details of an offense at the initial interview.

{¶ 29} The admissibility of evidence is a decision vested in the sound discretion of the court and an appellate court should not interfere absent an abuse of that discretion. *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984).

{¶ 30} In the first instance of which appellant complains, the jury had just viewed the video interview of appellant by the lead detective recorded on February 5. On cross-examination, the defense established through questioning that appellant had been calm and cooperative throughout the investigation. On redirect, the state asked the detective if,

in his experience, calm and cooperative suspects had been convicted. This was the inquiry to which appellant objected.

{¶ 31} In the second instance, the state's inquiry to the detective was to explain why, in her initial account of the rape, T.R. omitted her later allegation that appellant had licked her vagina. Over appellant's objection, the detective testified that, in his experience, it was not unusual for a juvenile to leave out details in an initial statement.

{¶ 32} With respect to the testimony concerning appellant's demeanor during the investigation, appellee opened the door on this line of inquiry and we see nothing unreasonable about the court permitting the state to follow up. *See State v. Sundermeier,* 6th Dist. Ottawa No. OT-95-061, 1996 WL 493180 (Aug. 30, 1996). Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 33} Appellant maintains that the detective's testimony about a juvenile's occasional omission of details is improper bolstering of T.R.'s testimony: in effect, vouching for the witness's veracity. *See State v. Boston,* 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), syllabus. While *Boston* prohibits expert opinion testimony as to a child's truthfulness, testimony which may assist the trier of fact in assessing the child's veracity is acceptable. *State v. Showers,* 81 Ohio St.3d 260, 263, 690 N.E.2d 881 (1998). The detective in this matter had years of experience in interviewing juvenile sexual assault victims. His testimony was helpful in assisting the jury assess the veracity of T.R.'s testimony. The trial court was within its discretion in permitting such testimony. *State v.*

Frost, 6th Dist. No. L-06-1142, 2007-Ohio-3469, ¶ 39-42. Accordingly, appellant's seventh assignment of error is not well-taken.

IV. Bill of Particulars

{¶ 34} In his fifth and sixth assignments of error, appellant asserts that the trial court erred in permitting the state to amend its bill of particulars to add cunnilingus as an allegation of sexual conduct and overruling his motion for mistrial premised on this amendment.

These assignments of error fail on many grounds. First, it is undisputed that appellant was afforded open-file discovery in this matter. No bill of particulars is required when the state allows open-file discovery. *State v. Evans*, 2d Dist. Montgomery No. 20794, 2006-Ohio-1425, ¶ 24, citing *State v. Tebcherani*, 9th Dist. Summit No. 19535, 2000 WL 1729456 (Nov. 22, 2000). Moreover, in the state's file were numerous reports containing T.R.'s allegation that appellant "lick[ed] down there." The presence of appellant's saliva in T.R.'s underwear was a key piece of forensic evidence of which appellant was aware. It is difficult to imagine how appellant would have failed to have knowledge of this evidence notwithstanding its omission from the bill of particulars.

{¶ 35} Second, Crim.R. 7(D) permits amendment of a bill of particulars "at any time before, during, or after a trial" to conform to the evidence "provided no change is made in the name or identity of the crime charged." In this matter, there was no change made in the name or identity of the crimes charged or, for that matter, the acts alleged to constitute the crimes.

{¶ 36} Appellant's reliance on *State v. Schwirzinski*, 6th Dist. Wood No. WD-09-056, 2010-Ohio-5512, is misplaced. *Schwirzinski* was not an open-file discovery case and there was no effort by the state to amend the bill of particulars at any time.

{¶ 37} The trial court was well within its discretion in permitting the state to amend its bill of particulars. Accordingly, appellant's fifth assignment of error is not well-taken. There is nothing to suggest that appellant was in any way prejudiced by the amendment, certainly nothing sufficient to support a mistrial. Accordingly, appellant's sixth assignment of error is not well-taken.

V. Cumulative Error

{¶ 38} In his remaining assignment of error, appellant asserts that if no individual error that was assigned fully operated to his prejudice and prevented him from having a fair trial, the accumulation of the various errors was prejudicial to him. Since we have found none of appellant's assignments of error had merit, this assignment of error also is not well-taken.

{¶ 39} 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE