[Cite as *State v. Noles*, 2013-Ohio-4088.]

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

State of Ohio — Court of Appeals No. L-12-1310

Appellee — Trial Court No. CR0201102680

v.

Billie Noles — **DECISION AND JUDGMENT**

Appellant — Decided: September 20, 2013

* * * * *

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

Nicole I. Khoury, for appellant.

* * * * *

JENSEN, J.

{¶1} Billie Noles appeals from a judgment of conviction and sentence following a jury verdict finding him guilty on four counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B). For the following reasons, we affirm the judgment of the Lucas County Court of Common Pleas.

{¶2} When G.B. was in the third grade she watched a sexual abuse video at school. After the video, G.B. approached her school counselor and reported that she had been sexually abused when she was a small child. The school counselor notified the proper authorities. The Toledo Police Department assigned the case to Detective Shelli Kilburn. Detective Kilburn interviewed G.B., G.B's mother, and G.B.'s grandmother. She also interviewed appellant, Billie Noles.

{¶3} In September 2011, the Lucas County Grand Jury indicted appellant on four counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B). When the matter was called for arraignment, appellant was referred to Court Diagnostic & Treatment Center for competency and criminal responsibility evaluations pursuant to R.C. 2945.374(G)(3) and 2945.374(G)(4), respectively.

{¶4} On November 8, 2011, appellant filed a written plea of not guilty by reason of insanity to each count of the indictment.

{¶5} On November 22, 2011, a clinical psychologist from Court Diagnostic & Treatment Center, Charlene A. Cassel, Ph.D., authored a report setting forth the results of appellant's Kaufman Brief Intelligence Test-Second Edition. According to the doctor, appellant "obtained a Full Scale IQ composite of 50. His verbal knowledge was 60 and his nonverbal was 54." The doctor indicated that appellant's scores would "classify him in the Moderate Mental Retardation range." Dr. Cassel opined, to a reasonable degree of

medical certainty, that "with modifications, Mr. Noles is able to understand the nature and objective of the proceedings against him and assist in his defense."

{¶6} The matter was recalled for arraignment on November 30, 2011. Appellant moved and was granted a second opinion relating to competency and criminal responsibility. Again, appellant was referred to Court Diagnostic & Treatment Center for evaluation.

{¶7} On February 1, 2012, the trial court received and admitted into evidence a report authored by Thomas G. Sherman, M.D. The trial court found appellant competent to stand trial.

{¶8} Appellant's trial counsel filed a motion to suppress arguing that the statements made by appellant to Detective Kilburn were obtained in violation of the rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution. Trial counsel argued that the statements were made while appellant was in custody of the Toledo Police Department without having been advised of his *Miranda* rights.

{¶9} A hearing was held on the motion to suppress. Detective Kilburn testified on behalf of the state. According to Kilburn, at the time appellant was identified as a suspect, he was staying at the Knights Inn in Rossford, Ohio. Detective Kilburn called appellant and invited him to the station for an interview. Noles informed the detective he had no means of transportation. Detective Kilburne offered to have a patrol car and its

uniformed crew transport him to and from the station for the interview. Appellant accepted the detective's offer.

{¶10} A video recording of the 48 minute interview was admitted into evidence. The video indicates that upon arrival in the interview room, Detective Kilburne informed appellant he was there on his "own free will." She further stated, "[i]f you don't want to talk to me, you don't have to. It's in your best interest for you to talk to me here today, but at any time that if you want to get up and leave you have that right to do so. * * * If you don't want to be here you don't have to be here." Appellant indicated he understood and that he had nothing to hide.

{¶11} The detective informed appellant that he was a suspect in an investigation because the then nine-year-old victim had accused appellant of having sexual contact with her when she was four or five years old. Initially, appellant denied any sexual contact with the girl. Nineteen minutes into the interview, Detective Kilburn suggested that G.B. might have "come on" to appellant; that G.B. might have initiated the sexual contact. The detective indicated that she was not suggesting that appellant forced G.B. to do anything. Rather, Detective Kilburn reminded appellant that G.B. claimed it happened and that he needed to "think about how this happened, because we know it wasn't forced." Twenty-three minutes into the interview, appellant admitted being alone in the bathroom with G.B. He also admitted that he remembered his pants being down. The detective again suggested G.B. initiated the contact. Twenty-four minutes into the

interview appellant stated, "I was on no medications at the time * * * my mind races, so I don't know if I did it to her or she did it to me. I believe now that it has come to my attention that it happened, I was on no medications at the time * * * I never really forced her that I know of on me like that." When asked if he remembered G.B. putting her mouth on his penis, appellant replied "I believe so." He claimed it happened once, that it lasted less than a minute, and that he did not ejaculate.

{¶12} Twenty-six minutes into the interview, appellant asked if he needed to get a lawyer. He indicated that he dropped out of school in the eleventh grade and that his reading level was at the third or fourth grade level. Without answering appellant's question, Detective Kilburn noted there is a difference between a forced sexual act and a sexual act that is not forced.

{¶13} Twenty-nine minutes into the interview appellant claimed that G.B. approached him and put her mouth on his penis "maybe once." He denied the allegation that it happened every time she was at his house. Appellant also denied the allegation that he gave G.B. ice cream after the alleged sexual acts occurred. Appellant insisted he would not give a child ice cream as a "reward for something like that."

{¶14} Thirty-five minutes into the interview appellant was asked if there was anything else about that day that would help the detective with her investigation, appellant replied "I noticed that she would hump her baby dolls a lot." Near the end of the interview, Detective Kilburn allowed appellant to ask her questions. Appellant asked

several questions such as, “What happens next?” And, “If they interview me again, will they come and get me?” Appellant asked, “What happens if it comes back that it was my fault?” Appellant also asked whether he would have to register as a sex offender or serve a jail sentence.

{¶15} After the interview, appellant was driven back to the Knights Inn in the patrol car by the uniformed officers.

{¶16} At the conclusion of the hearing on the motion to suppress, trial counsel referred to a report authored by Dr. Cassel. He argued that a suspect with an IQ of 50 would not have known that he was not in custody at the time he made his statements to the detective and asked that the Court Diagnostic & Treatment Center’s report be used as evidence to support his argument. Trial counsel argued:

> Your Honor, the report is part of the record, and I think the Court can take judicial notice of a person – placing a person in Mr. Nole’s [sic] place with an IQ of 50 whether they – how they would perceive the situation. If not I would ask to continue the hearing where I could bring Dr. Cassel in.

The state objected both to trial counsel’s request to take judicial notice and to the proposition that Dr. Cassel could testify to Noles’ perception at the time of the interview. The trial court denied the request to take judicial notice, but allowed appellant a continuance so that trial counsel could research whether Dr. Cassel could render an

opinion as to the issue identified. At no time thereafter, did trial counsel request to put Dr. Cassel on the stand in support of his motion to suppress.

{¶17} On September 24, 2012, the trial court orally denied appellant's motion to suppress and a jury trial commenced. At trial, G.B. testified that when she was four years old and still living with her mother, she and her brothers would be dropped off at Billy and Sue's house almost every week. At first, she and her brothers would play games and watch movies. At some point, however, Billy began taking her into the bathroom while her brothers played in the front room. Once in the bathroom, Billy would pull his pants to his knees and put her mouth on his penis. Afterward, Billy would "pull his pants back on and give [her] some ice cream." Billy instructed G.B. not to tell anyone.

{¶18} G.B. testified the sexual contact occurred "more than ten times" and that it happened "almost every time" she went to Billy's house. She never told anyone about the touching until she was in third grade. When asked why she finally told the counselor at her school, G.B. explained, "because we were talking about people touching other people and stuff like that."

{¶19} G.B.'s mother testified that she lost custody of her children in August 2006, because she was in an abusive relationship. The two oldest boys live with their father. The five youngest children now live with G.B's grandmother. In February and March of 2006, the mother would take all or some of the kids to Billie and Sue's house so that Sue could "babysit" the children. When asked how often this babysitting occurred, the

mother testified, "I can recall four or five times give or take maybe a few other times. I believe no more than ten times."

{¶20} When asked why she stopped taking her children to Billie and Sue's house, the mother explained,

> I stopped taking my daughter over there because when I would go to drop the kids off she would cry. The other kids were fine because they played video games and things like that, but she would just cry. And I didn't understand why. I asked her if something was wrong, and I just didn't – that's my baby girl. I didn't like to see her cry, so I quit taking her, and she would go with me.

{¶21} G.B.'s grandmother testified that she obtained legal custody of the younger children in 2007. In 2011, the grandmother received a telephone call from Lucas County Children Services ("CSB"). The caseworker wanted to speak with her about G.B. The grandmother explained:

> A. [G.B.] told the counselor about an episode that she had. So [CSB] wanted to talk to us about it and see if we knew.
>
> Q. Were you familiar with whom this episode involved?
>
> A. No, this was the first – brought to our attention. We were shocked.

{¶22} The grandmother testified that when she finally spoke with G.B. about the alleged sexual contact, "[G.B.] was scared. She was crying. She was ashamed. And we told her it wasn't her fault." The grandmother further testified:

Q. What did [G.B] tell you happened?

A. She said that every time she would go over to Billie and Sue's house that Billie would take her into the bathroom, and he would make her put his penis in her mouth.

Q. And did she tell you that this happened more than one time?

A. She said about every time she went over there.

* * *

Q. And you mentioned that [G.B.] was crying that she thought this was her fault. What did she say to you?

A. She was afraid to tell us because she thought we were going to be mad and angry with her and not love her.

{¶23} Dr. Cassel testified that upon her examination of appellant she found him competent to stand trial. She also found that he suffered from periodic anxiety attacks and mild to moderate mental retardation. Dr. Cassel testified that when she interviewed appellant he admitted the kind of behavior he was accused of committing was wrong, but that he denied committing the offenses.

{¶24} A verdict of guilty was returned on all four counts contained in the indictment. Appellant was sentenced to four consecutive life sentences and determined a tier III sexual offender.

{¶25} A timely appeal was filed. Appellant raises four assignments of error for our consideration:

> 1. The Trial Court erred by denying the Defendant's Motion to Suppress Statements of the Defendant as they were not knowingly, intelligently, and voluntarily made.
>
> 2. Trial counsel was ineffective and prejudiced Defendant/Appellant's right to a fair trial as guaranteed by the U.S. and Ohio Constitutions.
>
> 3. The Trial court erred by allowing the alleged victim's mother to testify as to hearsay that is not covered under the Excited Utterance exception to hearsay.
>
> 4. The conviction was not sufficiently supported by credible evidence and was against the Manifest Weight of the Evidence.

{¶26} In his first assignment of error, appellant argues that due to his developmental disabilities he did not knowingly, intelligently, and voluntarily waive his right to remain silent when questioned by Detective Kilburn. To that end, appellant contends that the trial court erred when it denied the motion to suppress.

{¶27} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Nobles*, 6th Dist. Lucas No. L-10-1172, 2011-Ohio-5041, ¶ 23. "In order for a statement made by an accused to be admitted in evidence, the prosecution must prove that the accused effected a voluntary, knowing, and intelligent waiver of his Fifth Amendment right against self-incrimination." *State v. Bays*, 2d Dist. Greene No. 95-CA-118, 1998 WL 32595, *8 (Jan. 30, 1998), citing *State v. Edwards*, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *Edwards* at paragraph two of the syllabus.

{¶28} In this case, the trial court did not articulate a particular reason for denying the motion to suppress, but instead indicated "[t]he court reviewed the submitted DVD of the statements and finds that there is no reason to suppress the statements and is going to overrule the motion and deny the same and allow the statement to be used."

{¶29} At the suppression hearing Detective Kilburn testified that the police department had determined that the then suspect was residing at the Knights Inn in

Rossford, Ohio. Detective Kilburn contacted appellant by phone and indicated to him that she was conducting an investigation and that it was in his "best interest to come and sit down and give [her] his side of the story." Appellant agreed to speak with the detective, but indicated he did not have a car and did not drive. Detective Kilburn asked appellant if she could send a uniform crew to pick him up for the interview, drive him to the station, and then take him home after the interview was complete. Appellant agreed.

{¶30} Upon his arrival at the station, appellant was placed in a small, closed-door room with Detective Kilburn. Appellant was reminded that he was there voluntarily and that if he wanted to get up and leave he could do so at any time. Appellant indicated that he understood; that he had nothing to hide. The interview lasted 48 minutes. At the time of the motion hearing, the trial court would have been aware of appellant's mild mental retardation as the court had already reviewed the reports from Court Diagnostic & Treatment Center and made the determination appellant was competent to stand trial. Our review of the videotaped interview indicates that appellant appeared coherent. There is no evidence of physical deprivation, mistreatment or coercion. Appellant appeared to understand the questions asked of him by Detective Kilburn and responded accordingly. Near the end of the interview, appellant asked numerous well-reasoned questions about the legal process and the possible consequences of his actions. There is nothing in the "totality of the circumstances" involved here, which made appellant's confession anything but voluntary.

{¶31} At one point, appellant did ask the detective if he needed a lawyer. However, when a suspect's mention of counsel does not amount to an unambiguous or unequivocal request for counsel, the questioning officer has no obligation to stop questioning the suspect. *See State v. Hatten,* 186 Ohio App.3d 286, 927 N.E.2d 632, ¶ 57 (2d Dist). The record supports the trial court's decision to deny appellant's motion to suppress. Accordingly, appellant's first assignment of error is found not well-taken.

{¶32} In his second assignment of error, appellant argues that trial counsel was ineffective and prejudiced his right to a fair trial.

{¶33} In order to prevail on a claim for ineffective assistance of counsel, appellant must show that trial counsel's performance fell below an objective standard of reasonable representation and that prejudice resulted from counsel's deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 137, 538 N.E.2d 373 (1989), paragraph two of the syllabus, following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶34} It has long been held that decisions regarding the calling of a witness are within the purview of defense counsel strategy and trial tactics. *State v. Hunt,* 20 Ohio App.3d 310, 312, 486 N.E.2d 108 (9th Dist.1984), citing *O'Malley v. United States,* 285 F.2d 733 (6th Cir.1961). Thus, defense counsel's failure to call a witness "will not automatically result in a finding of ineffective assistance of counsel." *State v. Owens*, 8th Dist. Cuyahoga No. 56577, 1990 WL 19318, *2 (Mar. 1, 1990).

{¶35} Appellant argues that trial counsel failed to call Dr. Cassel to testify at the motion hearing to support trial counsel's argument that a person with appellant's diminished mental capacity would not have understood the nature of the police interrogation. Appellant suggests that such testimony would have compelled the trial court to suppress the statements appellant made to Detective Kilburn during the interview. In response, the state argues that it would have been improper for Dr. Cassel to testify as to what appellant may or may not have understood about the voluntary nature of the police interview because such matters were not contained Dr. Cassel's report. The state further argues that even if appellant's statements to the detective were suppressed, the victim still would have testified at trial and appellant still would have been convicted of four counts of rape.

{¶36} There is no evidence before the court that appellant was prejudiced by trial counsel's decision not to call Dr. Cassel to the stand. Further, there is no evidence that there is a reasonable probability that but for trial counsel's decision a different result would have occurred. To that end, appellant's second assignment of error is found not well-taken.

{¶37} In his third assignment of error, appellant argues that the trial court erred when it allowed into evidence, over objection from trial counsel, hearsay testimony of the grandmother. The grandmother testified, in relevant part, as follows:

Q. You spoke with [G.B.] directly.

A. Yes, me and my husband did.

Q. What did [G.B] tell you happened?

A. She said that every time she would go over to Billie and Sue's house that Billie would take her into the bathroom, and he would make her put his penis in her mouth.

Q. And did she tell you that this happened more than one time?

A. She said about every time she went over there.

{¶38} "'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). Hearsay is not admissible into evidence unless permitted by constitution, statute, or rule. Evid.R. 802. One exception to the hearsay rule is the "excited utterance" of the declarant. Evid.R. 803(2). An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

{¶39} In order for testimony to be allowed into evidence under the excited utterance exception, the following elements must be met "(1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event." *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-

5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 373 N.E.2d 1234.

{¶40} Here, the state suggests that the "startling event" was not the sexual conduct but G.B's realization that what had happened between her and the appellant was wrong. While any statement made to the school counselor immediately upon the realization would likely fit into the excited utterance exception to the hearsay rule, we do not know how much time had passed between the "realization" and G.B's statement to her grandmother.

{¶41} Irrespective as to whether G.B.'s statements to her grandmother constituted excited utterances, we find that the admission of the grandmother's testimony was harmless error. The purpose of the grandmother's testimony was to explain how she obtained knowledge of the abuse and to provide chronological context into what occurred before and after the disclosure. It was not at all necessary for the grandmother to have stated the words that G.B. related to her.

{¶42} "[W]here a declarant is examined on the same matters as contained in impermissible hearsay statements and where admission is essentially cumulative, such admission is harmless." *State v. Tomlinson*, 33 Ohio App.3d 278, 281, 515 N.E.2d 963 (12th Dist.1986). In this case, G.B. testified at trial and was available for cross-examination. She testified as to the same acts that she had told her grandmother. Even if the grandmother's testimony concerning G.B's statements were hearsay, they were

merely cumulative of evidence that was before the jury. *See State v. Gutierrez*, 11th Dist. Hancock No. 5-10-14, 2011-Ohio-3126, ¶ 50. Therefore, admission of these statements is harmless error. We do not find that, but for their admission, there was a reasonable probability that the outcome of trial would have been different. To that end, appellant's third assignment of error is found not well-taken.

{¶43} In his fourth assignment of error, appellant argues the conviction was not sufficiently supported by credible evidence and was against the manifest weight of the evidence.

{¶44} "Sufficiency and manifest-weight challenges are separate and legally distinct determinations." *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 17 (2d Dist.), citing *State v. Thomkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law." *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 28, citing *Thompkins* at 387. When reviewing for the sufficiency of the evidence, an appellate court's function is to "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.*

{¶45} Appellant was charged with having violated R.C. 2907.02(A)(1)(b), which provides, in pertinent part, that "No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * the other person is less than thirteen years of age, whether or not the offender knows the age of the other person." 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 offenses proven beyond a reasonable doubt.

{¶46} "A manifest weight of the evidence challenge contests the believability of the evidence presented." *State v. Wynder*, 11th Dist. Ashtabula No. 2001-A-0063, 2003-Ohio-5978, ¶ 23. When determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences drawn from it, consider the witnesses' credibility, and decide whether in resolving any conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Prescott*, 190 Ohio App.3d 702, 943 N.E.2d 1092, ¶ 48 (6th Dist.), citing *Thompkins* at 387.

{¶47} It has long been held that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas*,

70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1992). When reviewing a manifest weight of the evidence challenge, an appellate court sits as the "thirteenth juror." *State v. Prescott*, 190 Ohio App.3d 702, 943 N.E.2d 1092 (6th Dist.), ¶ 48, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶48} After review of the entire record, we find that the evidence presented by the state coupled with appellant's own admissions outweigh appellant's position that the jury lost its way when it returned a verdict of guilty on all four counts contained within the indictment. Our review of the evidence and all reasonable inferences drawn from it lead to our conclusion that appellant's convictions were supported by the weight of the evidence. For the reasons stated above, the fourth assignment of error is found not well-taken.

{¶49} The judgment of conviction of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

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

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE