[Cite as *State v. Parsil*, 2014-Ohio-1993.]

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

State of Ohio — Court of Appeals No. L-13-1044

Appellee/Cross-Appellant — Trial Court No. CR0201202541

v.

Matthew Parsil — **DECISION AND JUDGMENT**

Appellant/Cross-Appellee — Decided: May 9, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee/
cross-appellant.

Tim A. Dugan, for appellant/cross-appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for four counts of gross sexual imposition, entered on a jury verdict in the Lucas County Court of Common Pleas. The state has filed a cross-appeal on an issue of sentencing. Because we conclude that the trial court

did not err in calling a seven-year-old gross sexual abuse victim as a court's witness and the guilty verdict was supported by the evidence, we affirm appellant's conviction. On the cross-appeal, we conclude that the trial court erred in failing to impose a mandatory sentence on a finding of corroboration and remand to make the sentence imposed mandatory.

{¶ 2} In June 2012, the mother of seven-year-old T.P. noticed a change in the child's behavior. According to T.P.'s mother, the normally well behaved T.P. began to have an attitude and do whatever she pleased. This behavior prompted the mother to inquire of T.P. if she was all right. After some equivocation, T.P. told her mother that, while babysitting, her uncle, appellant, Matthew Parsil, had touched her and made her touch him in private areas.

{¶ 3} In a subsequent interview with a caseworker from Lucas County Children's Services, T.P. reported that on at least two occasions appellant put his hand down her pants, but outside her underwear, rubbing the area. According to T.P, appellant also took her hand and put it on his "private area" and made her rub it. The caseworker's interview with T.P. was observed by police.

{¶ 4} On September 19, 2012, the Lucas County Grand Jury handed down an indictment, charging appellant with four counts of gross sexual imposition with a person under age 13, felonies of the third degree. Appellant pled not guilty and the matter proceeded to a trial before a jury.

{¶ 5} At trial, T.P. reiterated her report of appellant's behavior. Appellant testified in his own behalf, denying T.P.'s accusations. The matter was submitted to the jury which, following deliberations, found appellant guilty of all four counts. The trial court accepted the verdict and sentenced appellant to a 36-month term of imprisonment on each count, each term to be served concurrent to the others. The court also adjudicated appellant a Tier II child-victim sex offender.

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

> 1. Appellant received ineffective assistance of counsel when Trial Counsel failed to preserve an issue for appeal to the prejudice of Appellant.
>
> 2. The Trial Court committed plain error by calling the minor victim as a court's witness under Evid.R. 614(A).
>
> 3. The State of Ohio failed to provide legally sufficient evidence to sustain a conviction on four counts of Gross Sexual Imposition.
>
> 4. Appellant's convictions for Gross Sexual Imposition fell against the manifest weight of the evidence.

{¶ 7} The state has interposed a cross-appeal, setting forth a single cross-assignment of error:

> The trial court erred in not ordering defendant's incarceration to be mandatory after finding that defendant's conviction was corroborated by evidence apart from the T.P.'s [sic] testimony.

I. Court's Witness

{¶ 8} Appellant's first two assignments of error are related and will be discussed together.

{¶ 9} Prior to her testimony, the court evaluated seven-year-old T.P. to determine whether the child would be a competent witness. When the court concluded that T.P. was competent to testify, the state moved in limine for permission to employ leading questions during its direct examination of the girl. In a conference immediately preceding jury selection, the court denied the state's motion, but chose to call the girl as a court's witness under Evid.R. 614.

> I'm making that ruling now. It will not be so designated before the jury but I'm making that ruling now. [T.P] will be called as a court's witness so each side will be entitled to cross-examine her * * * and use leading questions to the extent that they feel is necessary and appropriate.

{¶ 10} In his first assignment of error, appellant maintains that the court's decision to call T.P. was an abuse of discretion and that appellant's trial counsel was ineffective for failing to object to the decision. In his second assignment of error, appellant asserts that the court's decision to call T.P. as its own witness constituted plain error.

{¶ 11} The state has an alternative view of events. According to the state, T.P. was never called as a court's witness. The ruling on the state's motion to employ leading questions and the decision to call T.P. as a court's witness were made by Judge Mandros, the judge originally assigned the case. The trial, however, was conducted by Visiting

Judge Bowman. There is nothing in the record, the state insists, to indicate that Judge Bowman ratified or followed Judge Mandros' preliminary ruling. Indeed, the state points out, the record shows that it was the state that called T.P. Moreover, the state argues, the prosecutor's use of leading questions to the seven-year-old witness was exceptionally restrained and limited to clarification of the sex acts and the number of encounters.

{¶ 12} The state's account of the record is accurate, but we believe its conclusion unwarranted. Judge Bowman was present during the conference immediately preceding the trial at which Judge Mandros ruled on the state's motion and announced the plan to call T.P. as a court's witness. The trial transcript reveals a bench conference immediately prior to T.P.'s testimony, but the conference was not captured by the court reporter. Although the court did not ask any questions of T.P., this is not dispositive of whether she was called as a court's witness. It seems as likely as not, that Judge Bowman accepted Judge Mandros' ruling and allowed T.P.'s questioning to proceed as announced at the pretrial conference. The record would look no different in that event. Accordingly, we shall consider appellant's applicable assignments of error on their merits.

{¶ 13} Evid.R. 614(A) provides "The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The rule is intended to conform to prior Ohio law which held that it is within the inherent power of the court to call witnesses in furtherance of the court's "fundamental duty to arrive at the truth." 1980 Staff Note, Evid.R. 614(A). The decision of whether to call an individual as a court's witness rests in the sound discretion of the

court and will not be reversed absent an abuse of that discretion. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980), paragraph four of the syllabus. An abuse of discretion is more than a mistake of law or an error in judgment, the term connoted that the court's attitude is arbitrary, unreasonable of unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} Appellant notes that the rule is most commonly used when a witness provides indicia that he or she will recant previously favorable statements. Citing *State v. Croom*, 2d Dist. Montgomery No. 25094, 2013-Ohio-3377, ¶ 74, and *State v. Hall*, 8th Dist. Cuyahoga No. 98615, 2013-Ohio-2900, ¶ 31, appellant maintains that the purposes of the rule are (1) to prevent a witness from testifying substantially at variance with a statement previously given police, causing the state to elicit harmful testimony out of the mouth of its own witness, and (2) to allow the proper determination of the case when a witness is reluctant or unwilling to testify. Since the application of the rule in this matter implicates neither of the established purposes of the rule, appellant argues the invocation of Evid.R. 614(A) in this matter constitutes an abuse of discretion. Moreover, according to appellant, the error was prejudicial to him because the testimony elicited by the state while using leading questions established the elements necessary to prove some of the counts against him.

{¶ 15} Our review of the cases suggests that this is an unusual application of Evid.R. 614(A). Appellant is correct, the rule is used almost exclusively in instances where the witness is unwilling to testify or is likely to provide unexpectedly damaging

testimony. The plain language of the rule, however, would seem not to preclude this use of the rule. Moreover, we are a little perplexed at the distinction the trial court draws between granting the state's request to question T.P. using leading questions and calling her as a court's witness without informing the jury. A court's witness may be cross-examined by either party. A principal benefit of cross-examination is the ability to ask leading questions. *See State v. Banks*, 8th Dist. Cuyahoga No. 97084, 2012-Ohio-2495, ¶ 27. The practical result of calling T.P. as a court's witness is to grant the prosecution the ability to ask leading questions. Since the jury was not informed that T.P. was a court's witness and the trial judge did not question the witness, there is no recognizable difference between what the state requested and what occurred.

{¶ 16} Our analysis then is the same as if the court had granted the state's motion to ask leading questions. It is well established that a trial court has broad discretion to determine whether a prosecutor may use leading questions to elicit testimony from a child witness. 1980 Staff Note, Evid.R. 611(C), *State v. Rector*, 7th Dist. Carroll No. 01 AP 758, 2002-Ohio-7442, ¶ 30, *State v. Venia,* 6th Dist. Wood No. WD-85-52, 1986 WL 2958, *3 (Mar. 7, 1986). *See also State v. Holt*, 17 Ohio St.2d 81, 83, 246 N.E.2d 365 (1969). In this matter, the trial court was well acquainted with the child and concluded, in effect, that permitting leading questions was necessary for the exposition of truth. On review, we cannot say that decision was arbitrary, unreasonable or unconscionable.

{¶ 17} The trial court's decision to permit leading questions was not an error, plain or otherwise. Accordingly, appellant's second assignment of error is not well-taken. Since the decision was not erroneous, trial counsel's failure to object did not constitute deficient performance, and an ineffective assistance of counsel claim is foreclosed. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant's first assignment of error is not well-taken.

II. Manifest Weight-Sufficiency of the Evidence

{¶ 18} In his third assignment of error, appellant maintains there was insufficient evidence to support his conviction. In his fourth assignment of error, he asserts that the jury's verdict was against the manifest weight of the evidence.

{¶ 19} In a criminal appeal, a verdict may be overturned if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id*. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime

proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 20} Appellant maintains that the evidence fails to support four counts of gross sexual imposition because T.P.'s testimony was "all over the place," including one instance where she said that appellant "only touched it once."

{¶ 21} Appellant's mother and her caseworker both testified that T.P. consistently reported two different acts on two different days. A fair reading of T.P.'s testimony reveals consistency in this allegation. There was certainly testimony from T.P. by which the jury could have found there were four instances of sexual contact. This is sufficient evidence to support the verdict. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 22} With respect to the manifest weight of the evidence, we have carefully reviewed the entirety of the proceeding and fail to find any suggestion that the jury lost its way or that appellant's conviction represents any manifest miscarriage of justice. Accordingly, appellant's remaining assignment of error is not well-taken.

III. Mandatory Sentencing

{¶ 23} In its cross-assignment of error, the state maintains that the trial court erred in failing to make appellant's sentence mandatory.

{¶ 24} Appellant was convicted on four counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (C). In material part, the statute provides:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> * * *
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶ 25} R.C. 2907.05(B)(1) categorizes the violation of R.C. 2907.05(A)(1), (2), (3), or (5) as a fourth degree felony. R.C. 2907.05(B)(2) deals with an (A)(4) offense:

> (2) Gross sexual imposition committed in violation of division (A)(4) * * * is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) * * * there is a presumption that a prison term shall be imposed for the offense. The court *shall* impose on an offender convicted of gross sexual imposition in violation of division (A)(4) * * * *a mandatory* prison term equal to one of the prison terms prescribed in [R.C. 2929.14] for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

* * * (Emphasis added.)

{¶ 26} Sentencing an offender to a mandatory prison term eliminates some possible benefits that may otherwise apply during the prison term imposed, including early release. *State v. Bevly*, 10th Dist. Franklin No. 12AP-471, 2013-Ohio-1352, ¶ 15.

{¶ 27} In this matter, at sentencing the prosecution argued that corroborating evidence of T.P.'s testimony was introduced at trial, requiring that the sentence imposed be mandatory. The trial court found that, indeed, sufficient corroborating evidence was introduced at trial. Nonetheless, the court refused to designate appellant's sentence mandatory. When asked for clarification, the court stated, "I did find that there was corroborating evidence, but I'm not ordering mandatory sentencing, I don't know how clearer to make it."

{¶ 28} On cross-appeal, the state suggests that, with a finding of corroborating evidence, the court was compelled to enter a mandatory sentence. Its failure to do so constitutes reversible error, according to the state.

{¶ 29} R.C. 2907.05(B)(2)(a) states that, if there is corroborating evidence in an R.C. 2907.05(A)(4) conviction, the court "*shall* impose * * * a mandatory prison term." When the legislature uses the word "shall," the ordinary meaning is that the court is without discretion and must perform the directive of the statute. *Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 28, citing *Dorrian v. Scioto*

Conservancy Dist., 27 Ohio St.2d 102, 108, 271 N.E.2d 834 (1971). In this matter, the trial court found there was corroborating evidence. At that point, the sentencing court had no option but to impose a mandatory sentence. Its failure to do so is in error. Accordingly, the state's cross-assignment of error is well-taken.

{¶ 30} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to the trial court to make the sentence previously imposed mandatory. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE