[Cite as *State v. Nelson*, 2014-Ohio-424.]

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

State of Ohio

Appellee

v.

Paul D. Nelson

Appellant

Court of Appeals Nos. S-12-037
S-12-038

Trial Court Nos. 11CR286
11CR779

DECISION AND JUDGMENT

Decided: February 7, 2014

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Geoffrey Oglesby, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Paul D. Nelson, appeals from the September 12 and 24, 2012 judgments of the Sandusky County Court of Common Pleas sentencing him following his convictions in two separate criminal actions. For the reasons which follow, we affirm.

{¶ 2} In Sandusky County Common Pleas case No. 11CR286, appellant was indicted in March 2011, in a multiple-count indictment alleging four violations of rape of a juvenile under the age of 10 and four violations of gross sexual imposition, R.C. 2907.05(A)(4), involving a juvenile under the age of 13. During trial, appellant's motion for acquittal was granted with respect to the rape charges, but he was convicted of the remaining violations. Appellant was sentenced on September 12, 2012, to three years of imprisonment on each count, to run consecutively, for an aggregate sentence of 12 years mandatory prison time.

{¶ 3} In Sandusky County Common Pleas case No. 11CR779, appellant was initially indicted in July 2011 in a multiple-count indictment alleging five counts of violations of pandering sexually oriented matter involving a minor by downloading child pornography, violations of R.C. 2907.322(A)(6). Appellant entered a no contest plea to two reduced charges of pandering, violations of R.C. 2907.322(A)(5). The trial court accepted the plea on June 15, 2015, and sentenced appellant on September 24, 2012, to one year of prison on each count, to be served concurrent with each other and concurrent with a sentence to be imposed in case No. 11CR286.

{¶ 4} Appellant appealed from both sentencing judgments asserting the following assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED STRUCTURAL ERROR BY FINDING "AS A MATTER OF LAW" THE STATE MET THEIR

BURDEN OF PROOF [ON] [sic] ONE OF THE ELEMENTS NECESSARY FOR CONVICTION.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT COMMITTED PREJUDICIAL ERR [sic] BY ALLOWING OUT OF COURT STATEMENTS BY A CHILD BASED ON THE STATEMENTS BEING MADE FOR MEDICAL DIAGNOSIS WHEN THE COURT FAILS TO CONDUCT VOIR DIRE TO DETERMINE IF THE CHILD IN FACT WAS SEEKING MEDICAL TREATMENT WHEN THE BULK OF THE INTERVIEW IS DONE BY SOCIAL WORKER AND NOT THE DOCTOR.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO CONSECUTIVE SENTENCES WITHOUT A PROPER FACTUAL OR LEGAL BASIS.

ASSIGNMENT OF ERROR NO. IV

THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS INSUFFICIENT AS A MATTER OF LAW.

{¶ 5} Appellant argues in his first assignment of error the trial court committed a structural error when, with respect to the gross sexual imposition offense, it instructed the jury as a matter of law that the victim was not the spouse of appellant. As the court instructed the jury, the judge noted that he had not yet defined "spouse" and stated that

"You may take it as a matter of law that the alleged victim was not the spouse of the Defendant."

{¶ 6} Appellant argues the trial court, in effect, granted a directed verdict on an element of the crime. Because he has a constitutional right to a jury trial and it is the jury's function to determine whether the state has presented sufficient facts to establish the elements of the offense, appellant argues the trial court's error was structural. Even though appellant did not object to the trial court's instruction, appellant argues structural error warrants an automatic reversal of his conviction.

{¶ 7} Appellee argues that this was not a structural error because there was testimony throughout the trial that the victim was appellant's five-year-old daughter and her mother testified that the daughter was not married to appellant. Therefore, appellee argues, the error was harmless.

{¶ 8} When a defendant fails to object to an error in the trial court, the general rule is that the defendant has forfeited his right to raise the issue on appeal. Crim.R. 30(A). An exception is made for plain error. Crim.R. 52(B).

{¶ 9} Crim.R. 52(B) gives the appellate court the discretion to address plain error if the error was clear on the record and the defendant demonstrated that the error prejudicially affected a substantial right. Crim.R 52(B); *State v. Steele*, ___Ohio St.3d ___ , 2013-Ohio-2470, ___ N.E.2d ___, ¶ 30-31, and *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15-17. Furthermore, appellate courts generally recognize a plain error only when it "seriously affects the basic fairness, integrity, or

public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 123, 679 N.E.2d 1099 (1997).

{¶ 10} Whenever the issue arises of extending the application of a structural-error analysis from harmless-error situations to plain-error situations, the Ohio Supreme Court cautions that a structural-error analysis should be not applied where the traditional plain-error analysis of Crim.R. 52(B) governs. *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 28; *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, ¶ 30, O'Donnell, J. dissenting; *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 55; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 23-24, and *State v. Hill*, 92 Ohio St.3d 191, 199, 749 N.E.2d 274 (2001). The rationales behind this view are that the court should avoid review of forfeited errors and defendants must be discouraged from remaining silent rather than seeking to correct the error at the trial level. *Perry* at ¶ 20 and *Wamsley* at ¶ 28.

{¶ 11} The United States Supreme Court cautioned against expanding the plain error doctrine of Fed.Crim.R. 52(b), which is identical to Ohio's rule, with application of the structural-error analysis because it would expand the errors reviewable on appeal based on the severity of the error. *Johnson v. United States*, 520 U.S. 461, 465, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). The court has considered, however, the possibility that a structural error would presumptively "affect[] substantial rights," a requirement for recognizing plain error in federal cases. *Id*. at 468-469.

{¶ 12} However, the Ohio Supreme Court has also held that the standards of structural error and plain error are separate and distinct. *Wamsley* at ¶ 27. In *Wamsley*, the court first determined that no structural error occurred and then proceeded to determine whether plain error occurred and whether the court should recognize it. The court found no structural error occurred, but reversed the appellate court decision on the ground that the appellate court did not complete its plain-error analysis. *Id*. at ¶ 24-27.

{¶ 13} Therefore, like harmless-error cases, it appears that the Ohio Supreme Court has held that there can be rare cases where a constitutional, structural error occurs resulting in a presumption of prejudice and warranting a reversal of the conviction, even in the absence of an objection. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18.

{¶ 14} While structural error must involve the deprivation of a fundamental constitutional right, not every deprivation leads automatically to a finding of structural error. *Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 18, and *Hill*, 92 Ohio St.3d at 197, 749 N.E.2d 274. For the error to be "structural," the error must ultimately result in basic unfairness by "'affecting the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.'" *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 15, quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

{¶ 15} Federal courts have found that a structural error occurs when the trial court either enters or directs the jury to enter a guilty verdict. *Sparf & Hansen v. United States*,

156 U.S. 51, 105, 15 S.Ct. 273, 39 L.Ed. 343 (1895); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed. 973 (1947); and *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

{¶ 16} However, in the case before us, the error is more limited. The judge did not give an instruction on the definition of a spouse and directed a finding on the element that the victim was not appellant's spouse. Federal courts have held that omitting an element of the offense or giving an improper jury instruction on an element does not "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder, Jr. v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (no structural error involved when the trial court determined an element of the offense instead of presenting the issue to the jury). These types of trial errors can be evaluated under a harmless error or plain error standard to determine if the error affected the outcome of the case. *Id*. and *Johnson*, 520 U.S. at 469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (the failure to submit the element of materiality to the jury, instead of having the judge determine the issue, was analyzed under a harmless error standard) and *Kentucky v. Whorton*, 441 U.S. 786, 789-790, 99 S.Ct. 2088, 860 L.Ed.2d 640 (1979) (jury instruction on the Fourteenth Amendment right to a presumption of innocence is required if requested, but the failure to do so could be harmless error if it could not have affected the outcome of the trial).

{¶ 17} Although the issue of application of structural-error analysis was not raised, the Eleventh District faced a similar jury instruction in *State v. Ryan,* 11th Dist. Ashtabula No. 1316, 1988 WL 363194, *4-5 (Jan. 22, 1988). The court held that an instruction, that the jury must find that the victim was not the spouse of the defendant if the jury found that the child was nine years old at the time of the offense, was erroneous, but it was harmless error.

{¶ 18} Applying a plain error standard of review, we find while it was error for the court to direct the jury to find an element of the offense must be found as a matter of law, the error was clear on the record and affected a substantial right, we need not recognize it because it did not "seriously affect[] the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Davidson,* 79 Ohio St.3d at 123, 679 N.E.2d 1099. There was undisputed evidence in the record that the victim was the defendant's child and not married to appellant. Therefore, the jury could not have found that they were legally married to each other. R.C. 3101.01 and Juv.R. 42(C). Appellant's first assignment of error is not well-taken.

{¶ 19} In his second assignment of error, appellant argues the trial court committed prejudicial error by allowing out-of-court statements by the victim to be admitted into evidence on the basis that they were made for medical diagnosis without conducting a voir dire examination of the victim to determine if the victim was in fact seeking medical treatment.

{¶ 20} The director of the child abuse program at Mercy St. Vincent Hospital testified that, in his capacity as a physician, he evaluates children for suspected abuse and neglect. The doctor recalled seeing the victim in this case at the Children's Advocacy Center. During the examination, the doctor was assisted by a coordinator, who is a social worker by training. The information he obtained was utilized to determine future medical testing, examinations, and referrals. His purpose was not to obtain the facts of any abusive event, but merely to determine what medical care was required. First, the child was interviewed by the doctor and coordinator. Afterward, the doctor conducted a physical examination of the child with the assistance of the coordinator. Finally, he met with the parents to discuss his findings. During the interview process, the doctor relied upon the coordinator to conduct most of the interviewing, so he could take notes and consider additional questions that he might want to ask. During his testimony, he conveyed the information the victim told to him, which included incriminating statements about how her father had sexually abused her.

{¶ 21} Appellant objected to the admission of the child's statements made during this interview and examination session on the ground that the statements were hearsay. The trial court overruled the objection finding that the information was obtained for a medical diagnostic purpose.

{¶ 22} Evid.R. 801(C) defines "hearsay" as "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." Hearsay is not admissible unless an exception to the general rule

applies. Evid.R. 802. Evid.R. 803(4) provides an exception to the general rule for statements made for purposes of medical diagnosis or treatment:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶ 23} The trial court must determine the facts necessary to determine whether certain evidence is admissible. *State v. Duncan*, 53 Ohio St.2d 215, 219, 373 N.E.2d 1234 (1978), quoting *Potter v. Baker*, 162 Ohio St. 488, 500, 124 N.E.2d 140 (1955). The trial court exercises broad discretion in determining whether a declaration should be admissible under a hearsay exception. *State v. Rohdes*, 23 Ohio St.3d 225, 229, 492 N.E.2d 430 (1986), *modified on other grounds in State v. Kidder*, 32 Ohio St.3d 279, 513 N.E.2d 311 (1987), and *Duncan*. That determination will not be overturned on appeal unless the trial court abused its discretion. *Id*. "'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.'" *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 24} In *State v. Boston*, 46 Ohio St.3d 108, 113, 545 N.E.2d 1220 (1989), the Ohio Supreme Court held that "Evid.R. 803(4) extend[ed] the common-law doctrine to admit statements made to a physician or medical attendant without regard to the purpose

of the examination or the need for the patient's history." *Id*. at 121. Therefore, after 1980, the rule permitted the admission of three types of statements made by patients for purposes of medical diagnosis or treatment. Those three statements include, "(1) medical history, (2) past or present symptoms, pain or sensations, and (3) [a] description of the inception or general character of the calls or external source of the disease or injury." *Id*. Furthermore, the statements must have been made with the motivation of obtaining medical diagnosis or treatment. *Id.* For that reason, the court concluded that the exception would rarely apply to a young child. *Id*. However, the court modified the *Boston* holding in *State v. Dever*, 64 Ohio St.3d 401, 596 N.E.2d 436 (1992).

{¶ 25} In *Dever*, the court noted that the *Boston* case involved a bitter divorce and there was a possibility of outside influences. But in the case of the abuse of a young child, the court found that a child's statements could be admissible under the exception. *Dever* at 409. The court held that the focus for evaluating the reliability of a young child must be upon the circumstances surrounding the making of the declaration. *Id*. at 410. In *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 49, the court set forth a list of considerations the trial court must evaluate:

> (1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a "bitter custody battle"; and (3) whether the child understood the need to tell the physician the truth. * * * In addition, the court may be guided by the age of the child making the statements, which

> might suggest the absence or presence of an ability to fabricate, and the consistency of her declarations. * * * In addition, the court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse. (Citations omitted.)

{¶ 26} In the case before us, the trial court determined that the statements were made for "purposes of medical diagnosis or treatment." We find the trial court did not abuse its discretion in finding that the statements were admissible pursuant to Evid.R. 803(4) as the rule has been interpreted and applied by the Ohio Supreme Court. Appellant's second assignment of error is not well-taken.

{¶ 27} In his third assignment of error, appellant argues that the trial court erred by sentencing appellant to consecutive sentences without a proper factual or legal basis as required by R.C. 2929.14(E)(4).

{¶ 28} Consecutive sentences may be imposed at the court's discretion. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, paragraph two of the syllabus. When reviewing a felony sentence, the appellate court must first examine the trial court's sentence to determine if it is clearly and convincingly contrary to law pursuant to R.C. 2953.08(G). If the appellate court finds that the trial court complied with all applicable rules and statutes, it then determines whether the trial court abused its

discretion by imposing the sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 16.

{¶ 29} Among the statutory provisions held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, were those requiring a trial judge to make certain findings prior to imposing consecutive sentences, R.C. 2929.14(E)(4), and creating presumptively concurrent terms, R.C. 2929.41(A). *Id*. at ¶ 99 and *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 2. Therefore, consecutive sentences may be imposed at the court's discretion. Because appellant's sentencing judgments were journalized on September 12 and 24, 2012, which was prior to the September 28, 2012, effective date of R.C. 2929.14(C)(4), consecutive sentences could be imposed at the court's discretion.[1]

{¶ 30} Since appellant's argument is based on the severed portion of the statute, R.C. 2929.14(E)(4), we find his third assignment of error not well-taken.

{¶ 31} In his fourth assignment of error, appellant argues that his conviction was against the manifest weight of the evidence and the evidence against him was insufficient as a matter of law.

{¶ 32} A challenge to the sufficiency of the evidence is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The standard for determining whether there is sufficient evidence to support a conviction is whether the

[1] The appellate standard of review of sentences in Ohio was addressed on March 23, 2013, when R.C. 2953.08(G)(2) became law.

evidence admitted at trial, "if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, 684 N.E.2d 668 (1997) fn. 4, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). *Accord Thompkins*. Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus. In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978), and *State v. Willard*, 144 Ohio App.3d 767, 777-778, 761 N.E.2d 688 (10th Dist.2001). But, the court must view the evidence in the light most favorable to the prosecution. *Jenks*.

{¶ 33} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *Thompkins*, at paragraph two of the syllabus. When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and

consider the credibility of the witnesses to determine if the jury clearly "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983) and *Smith* at 114.

{¶ 34} In the case before us, the prosecution was required to prove that appellant: had "sexual contact with another, not the spouse of the offender" who was "less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.05(A)(4). Appellant argues that there was insufficient evidence to convict him when his daughter could not identify his person in court as her daddy and the perpetrator.

{¶ 35} First, appellant confessed to committing the offenses. The confession was recorded by the Clyde police department and submitted into evidence. Second, although the victim could not identify appellant at trial as her father, she testified how her "daddy," whom she knew to be Paul Nelson, had sexually touched her beginning when she was four years old and lived in Kansas and continued when she moved to Ohio. Therefore, we find that there was sufficient evidence to support the verdict. Further, we find the verdict was not contrary to the manifest weight of the evidence. The child's inability to recognize appellant at trial as her father was not a significant fact because of the child's young age and the time she had been away from him. Appellant's fourth assignment of error is not well-taken.

{¶ 36} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE