[Cite as *State v. Ramallo*, 2015-Ohio-1792.]

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

State of Ohio — Court of Appeals No. L-14-1026

Appellee — Trial Court No. CR0201202995

v.

Hugo Ramallo — **DECISION AND JUDGMENT**

Appellant — Decided: May 8, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant Hugo Ramallo guilty of four counts of rape and two counts of gross sexual imposition following trial to a jury. Appellant was sentenced to terms of life without parole for each rape conviction and 54 months for each gross sexual imposition

count. For the reasons that follow, the judgment of the trial court is affirmed as to all convictions and sentences but remanded for further proceedings as to fines and costs as detailed below.

{¶ 2} The undisputed facts relevant to the issues raised on appeal are as follows. At all times relevant herein, appellant was married to victim T.'s maternal grandmother. T. lived with her mother and older brother, Ty. The extended family enjoyed a close relationship and it was not uncommon for T. and her brother to spend time at appellant's home. In August 2012, after the family spent the day at grandmother's cottage in Port Clinton, appellant asked T., then eight years old, if she wanted to go out to eat with him. T. declined and got in her mother's car. T. asked her mother if she wanted to know why T. did not want to go anywhere with appellant. When her mother responded that she did want to know, T. said it was because "he puts his pickle here and here," and pointed to her vaginal area and her buttocks. T. told her mother that the last time that happened was several days earlier when appellant watched the children after a sudden death in the family. T.'s mother then drove to her brother's house and reported the matter to the police. T. was later examined by a doctor.

{¶ 3} On November 29, 2012, appellant was indicted on four counts of rape of a victim under the age of 13, with a special finding that the victim was under the age of 10, in violation of R.C. 2907.02(A)(1)(b) and (B), all unclassified felonies, as well as two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (C), both

felonies of the third degree. Shortly thereafter, appellant was provided an interpreter for all courtroom proceedings.

{¶ 4} On June 6, 2013, after a hearing held in chambers, the trial court determined that T. was competent to testify. Appellant waived all speedy trial constraints and, after numerous continuances, the matter came to trial before a jury on January 13, 2014. The jury returned verdicts of guilty as to all counts on January 16, 2014, and the matter was scheduled for sentencing. On January 27, 2014, the trial court imposed sentences of life without possibility of parole as to all four rape convictions and 54 months as to each of the two gross sexual imposition convictions. The court ordered that the sentences for rape be served consecutively and that the sentences for gross sexual imposition be served concurrent with each other and concurrent to the sentences imposed for the four rape convictions. The court further ordered appellant to pay a fine of $25,000 as to each of the rape counts and $15,000 as to each gross sexual imposition counts.

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

> First Assignment of Error
>
> The trial court abused its discretion by improperly precluding appellant from conducting thorough cross examination of a witness thereby denying appellant's right to due process under the Fifth Amendment of the United States Constitution and Article I, Section 10, of the Ohio Constitution.

Second Assignment of Error

The trial court committed plain error to the prejudice of appellant at sentencing by imposing financial sanctions without consideration of appellant's present or future ability to pay.

Third Assignment of Error

Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Constitution of the State of Ohio.

Fourth Assignment of Error

The trial court erred in denying appellant's motion for acquittal pursuant to Crim.R. 29.

Fifth Assignment of Error

Appellant's conviction was against the manifest weight of evidence presented by the state and contrary to law.

{¶ 6} In support of his first assignment of error, appellant asserts that when he was under direct examination by defense counsel, the trial court improperly precluded counsel from asking questions related to why appellant did not flee the country when he learned of the allegations against him in this matter.

{¶ 7} In relevant part, defense counsel asked appellant whether he had a passport at the time he was indicted. Appellant responded that he did. Counsel then asked, "And you could have left?" Before appellant could respond, the court interrupted and asked

counsel to approach the bench. The court noted that appellant had been in custody since December 12, 2012, when his bond was set at a "rather high amount." The court continued: "The argument you are trying to advance now is not fairly accurate as portrayed, and you are about to open the door to the State being able to cross-examine your witness as to why he could not leave the country. * * * I stopped you before you asked the proverbial ringing of the bell that can't be unrung which will allow the State to go into regarding his custody status."

{¶ 8} Appellant now argues that by restricting counsel's questioning as described above, the court precluded appellant from exercising his constitutional right to due process.

{¶ 9} If counsel's line of questioning had been permitted to continue, the door would have been opened for the state to question appellant as to why he did not leave the country. The obvious answer to that question, of course, would have been that he was in custody. The trial court's concern was well-placed and not an abuse of discretion. Any subsequent reference by the state as to appellant's pre-trial detention status would most likely have led to a demand for a mistrial. The trial court here was essentially exercising its discretion as to the admission or exclusion of evidence and attempting to avoid any possibility of having to declare a mistrial. Appellant's first assignment of error is not well-taken.

{¶ 10} In support of his second assignment of error, appellant asserts that the trial court erred by imposing financial sanctions without considering his present or future ability to pay.

{¶ 11} As to this issue, the trial court stated at sentencing:

> Now, that fine money is to be taken from any potential proceeds that Mr. Ramallo would somehow find or make or have from any type of royalties earned from the telling of his story or any other type of financial inheritance or profiteering if ever allowable by law.
>
> That order is not to be enforced in areas where the law is already clear in prohibiting Mr. Ramallo from profiting, but only for those areas that were not addressed in any other statutory outline.
>
> Therefore the Court finds that he does have the ability to pay the amounts as restricted.

{¶ 12} Appellant does not contest the specific amounts of the fines ordered by the court—$25,000 for each of the rape convictions and $15,000 for each of the gross sexual imposition convictions. However, we note, and the state acknowledges, that the individual fines appear to be in excess of the amounts permitted by statute.

{¶ 13} R.C. 2929.18(A)(3) sets forth the maximum fine for various offenses as not more than $20,000 for a felony of the first degree and not more than $10,000 for a felony of the third degree. Additionally, R.C. 2929.18(B)(9) provides that, in addition to the foregoing, "the court imposing sentence upon an offender for a felony that is a sexually

oriented offense or a child-victim oriented offense, as those terms are defined in section 2950.01 of the Revised Code, may impose a fine of not less than fifty nor more than five hundred dollars."

{¶ 14} This court has upheld an order for fines contingent on any "potential profit" made by an appellant "from this or any other act he endeavors in the rest of his life from any which way, royalties or anything else included." *State v. French*, 6th Dist. Lucas No. L-09-1087, 2010-Ohio-6517, ¶ 21. In *French*, however, the fines imposed did not exceed the maximum amount for the specific degree of the felony as provided by statute. In the case before us, we affirm the trial court's ability to impose such fines but must reverse the order and remand for further proceedings as to the specific amount for each of the six counts, as they are in excess of the amount permitted by statute.

{¶ 15} We now address appellant's argument as to the costs assessed by the trial court. Under R.C. 2947.23, the trial court is required to assess court costs against all convicted criminal defendants in all cases. A sentencing court may waive these costs for an indigent defendant but, to preserve the issue, a motion for a waiver of costs must be made at the time of sentencing. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, paragraph two of syllabus. In the record before us, there is nothing to suggest that appellant moved to waive costs at his sentencing hearing. However, specifically as to the recovery of appointed counsel fees and costs of confinement, this court has held that the trial court must enter a finding that the offender has the ability to pay and that such determination must be supported by clear and convincing evidence of

record. See *State v. King*, 6th Dist. Lucas No. L-12-1013, 2013-Ohio-1265. In this matter, the trial court did not conduct a hearing on appellant's ability to pay either of these assessments, but did enter a finding that appellant had, or would have, the ability to pay. However, there is no clear indication in the record before us of the trial court's consideration of appellant's ability to pay. Absent a record indicating that the court considered appellant's ability to pay costs of confinement or appointed counsel fees, the imposition of those costs fails. *See King, supra*.

{¶ 16} Accordingly, to the extent that appellant's second assignment of error asserts error in the specific amount of the fines imposed as discussed above and in imposing costs of confinement and appointed counsel fees, it is well-taken.

{¶ 17} In support of his third assignment of error, appellant asserts that counsel elicited testimony during cross-examination of the victim that cast appellant in a "particularly abhorrent light" regarding the number of times the victim was sexually molested.

{¶ 18} At issue is the following cross-examination of T. by counsel:

> Q. One of the things you testified is that [appellant] and you were alone more than ten times.
>
> A. Yes.
>
> Q. Was it more than 20 times?
>
> A. Yes.

Q. What about 30 times, was it more than 30 times?

A. Yes.

Q. Okay. Okay. So it was at least – was it more than 50 times?

A. I don't think so.

Q. Okay. But it was at least more than 30 times?

A. Yes.

Q. And these 30 times he would stick his pickle inside of your private parts?

A. Yes.

Appellant argues that counsel had no reason to pose such questions to T.

{¶ 19} It is well-established that claims of ineffective assistance of counsel are reviewed under the standard set forth 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, appellant must demonstrate both that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's perceived errors, the outcome would have been different. *Id*. at 687.

{¶ 20} Applying *Strickland* to the record herein and the example cited by appellant, we are unable to find that counsel's representation fell below a standard of reasonableness or that, but for counsel's perceived error, appellant would not have been convicted. As to the line of questioning cited by appellant, we note that T. had already testified that penetration occurred on more than 30 occasions, so her testimony was not

something the jury had not heard. It is possible that counsel was attempting to use the testimony at question to cast doubt on T.'s veracity in light of the medical expert's earlier testimony that there were no physical findings of sexual abuse. Ultimately, counsel's questioning was essentially one facet of his trial strategy and a reviewing court must refrain from second-guessing trial strategy decisions. *See State v. Jones*, 6th Dist. Lucas No. L-09-1262, 2011-Ohio-2173, at ¶ 51. Based on the foregoing, appellant's third assignment of error is not well-taken.

{¶ 21} In support of his fourth assignment of error, appellant asserts that the trial court erred by denying his motion for acquittal pursuant to Crim.R. 29 because T.'s allegations were unsupported by evidence, they were vague as to time and the number of occurrences, and there were no other witnesses who had first-hand knowledge of the charges.

{¶ 22} Crim.R. 29(A) requires a trial court to order an acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." This court has recognized that the standard of review for a decision regarding a Crim.R. 29 motion for acquittal is the same as that for a decision on a sufficiency challenge, i.e.: "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. Gonzales*, 6th Dist. Wood No. WD-12-037, 2014-Ohio-545, ¶ 35. (Other citations omitted.)

{¶ 23} The record herein reflects that appellant's convictions of four counts of rape and two counts of gross sexual imposition were based upon sufficient evidence. The victim testified at length as to the physical acts perpetrated upon her by appellant.

{¶ 24} R.C. 2907.02(A)(1)(b), rape, prohibits "sexual conduct with another who is not the spouse of the offender" when the victim is "less than 13 years of age," with a special finding that the victim was under the age of ten. Here, it is undisputed that T. was not the spouse of appellant and was eight years old at the time the offenses were committed. Further, T.'s testimony as to appellant's actions were more than sufficient to show "sexual conduct" by means of putting his "pickle," as she called his penis, and his tongue into her "front and back private parts" on numerous occasions.

{¶ 25} R.C. 2907.05(A)(4), gross sexual imposition, prohibits sexual contact when the victim is less than 13 years of age. T. testified that appellant touched her "front private" twice with his hands. "The testimony of a person victimized by sexual misconduct need not be corroborated." *State v. Robinson*, 6th Dist. Lucas No. L-09-1001, 2010-Ohio-4713, ¶ 100.

{¶ 26} On consideration of the foregoing, we find that, 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 crimes proven beyond a reasonable doubt. Accordingly, the trial court did not err by denying appellant's Crim.R. 29 motion for an acquittal, and his fourth assignment of error is not well-taken.

{¶ 27} In support of his fifth assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence, again arguing that it was unsupported by any physical evidence or corroborating witness testimony.

{¶ 28} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In making this determination, the appellate court sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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 386.

{¶ 29} The fact that no other witness corroborated the victim's testimony did not render her testimony less credible. It is well-settled that the testimony of a rape victim, if believed, is sufficient to support each element of rape. *State v. Lewis*, 70 Ohio App.3d 624, 638, 591 N.E.2d 854 (1990). There is no requirement, statutory or otherwise, that a rape victim's testimony must be corroborated as a condition precedent to conviction. *State v. Sklenar*, 71 Ohio App.3d 444, 447, 594 N.E.2d 88 (1991).

{¶ 30} The victim in this case, nine years old at the time of trial, was found by the trial court to be competent to testify. At trial, she testified at length as to the times, beginning when she was seven years old, appellant took her into his house when no one else was there, laid her on the couch, pulled her pants down and "put his private into mine." She testified that during those times, appellant pulled his pants and underwear

down. T. testified that he put his "private part," or "pickle" into both her private parts and that it felt "uncomfortable" and "weird." T. did not say anything to appellant during those times because she was afraid and she did not know what to do. T. further testified that appellant did not just rub "his private" on her but actually "put it inside" and "put his tongue in both of mine, too," more than 30 times over a period of many months. T. also testified that appellant "has done it like two times with his hands." She further testified that "a couple times he would do that to me in his pool * * * put his private parts into mine." Finally, T. testified that appellant told her not to tell anybody and that she did not say anything for a while because she was "scared and embarrassed."

{¶ 31} Appellant testified, denying that he had sexually assaulted T.

{¶ 32} We have carefully reviewed the record in its entirety. Our review of the record reveals no evidence that the fact-finder lost its way or created a manifest miscarriage of justice. Based on the foregoing, appellant's fifth assignment of error is not well-taken.

{¶ 33} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to said court for a modification of sentence with respect to the amount of the fines assessed and for the vacation of improperly imposed costs of confinement and appointed counsel fees. Costs of this appeal are assessed to appellee 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.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE