[Cite as *State v. Jordan*, 2009-Ohio-4037.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91413

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MOORIS JORDAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497993

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: August 13, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Timothy R. Sterkel
1414 South Green Road, Suite 310
Cleveland, OH 44121

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Anna M. Faraglia
Katherine Mullin
Assistant County Prosecutors
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Mooris Jordan, appeals the judgment of the Cuyahoga County Court of Common Pleas convicting him of rape of a minor and sentencing him to life in prison without parole. For the reasons stated below, we affirm.

{¶ 2} Appellant was indicted on charges of rape of a minor under the age of ten and kidnapping. Both the rape and kidnapping counts included a sexually violent specification and the rape count included a force specification. The charges alleged that appellant digitally raped his girlfriend's six-year-old daughter. Prior to the start of the jury trial, the court conducted a competency evaluation of the minor victim and found her competent to testify.

{¶ 3} The following facts were presented at trial. Appellant lived with the victim, her two-year-old sister, and their mother. The two girls slept in bunk beds in one bedroom and appellant and the victim's mother slept in another bedroom. Appellant is the biological father of the two-year-old, but not of the victim. At the time of the rape, the victim's mother was pregnant with appellant's second child.

{¶ 4} The victim considered appellant to be her father and called him "daddy." She testified that one night appellant came into her room, pulled down her underwear, and inserted his finger into her "butt." She said he did this for about two minutes and that the finger hurt going in and coming out. She said appellant told her it was a secret.

{¶ 5} The victim's mother testified that she first learned of the incident after the children's babysitter told her she had found an unusual rash on the two-year-old and questioned whether the child had been sexually molested. The mother asked her older daughter if anyone had touched her and the six-year-old replied, "That's daddy's secret." The victim told her mother that two nights earlier appellant had "touched her butt."

{¶ 6} The victim's mother took her to Fairview Hospital where she was examined by a Sexual Assault Nurse Examiner ("SANE"). The nurse examined the victim, prepared a rape kit, and collected the victim's clothes. The victim was wearing the same underwear from the night of the rape, but the shirt and pants were different. The nurse testified that the victim told her that appellant had touched her in her rectal area. The victim's physical examination revealed redness in the hymenal area, two abnormal red lines on the vagina, and yellow granulating tissue along the base of the vaginal opening known as the fossa navicularis, all consistent with a penetrating injury to the vagina.

{¶ 7} Experts from the Ohio Bureau of Criminal Identification and Investigation ("BCI") testified to tests conducted on the victim's clothing. BCI testing indicated the presence of seminal fluid on the crotch of the underpants the victim was wearing on the night of the rape. Although there was sperm present in the sample taken from the underwear, there was insufficient DNA in the sample for BCI to conclusively link the sample to any one person.

{¶ 8} BCI sent a sample from appellant and a sample from the underwear to the DNA Diagnostic Center, a private laboratory that conducts more specialized DNA testing. The laboratory conducted a Y-STR analysis, a specialized type of DNA testing used to test the DNA in the Y chromosome in males. The Y-STR test returned a partial DNA profile which excluded 99.6% of the population, but could not exclude appellant as the source of the semen on the victim's underwear. Additionally, the testing revealed a unique DNA allele, or genetic marker, in the semen which matched an identical allele within appellant's DNA.

{¶ 9} Dr. David Bar-Shain of the Alpha Clinic at Metro Hospital testified that he examined and evaluated the victim for sexual abuse approximately one month after the rape. The physical exam was normal. He offered his medical opinion that the injuries noted in the SANE report could only be caused by insertion of a penis, finger, or other object into the victim's vagina.

{¶ 10} The state also submitted into evidence two letters appellant wrote to the victim's mother after the rape. In the letters, appellant apologizes for the pain he caused her and the girls. He acknowledges that he will be going to prison and states it is exactly what he deserves. He tells the victim's mother that she is not to blame for what happened; that it is not her fault.

{¶ 11} The jury found appellant guilty of rape of a minor under the age of ten-years-old and that in committing the offense, appellant compelled the victim to submit by force or threat of force. The jury found appellant not guilty of the

kidnapping count and of the sexually violent specifications. The trial court sentenced appellant to life imprisonment without parole and classified him as a Tier III sex offender. Appellant timely appealed his conviction and raises five errors for review.

{¶ 12} In his first assignment of error, appellant asserts that the trial court erred when it allowed the victim to testify. Appellant argues that the victim was "unable to receive accurate impressions of fact and/or observe acts that she was about to testify about." He contends that the victim's trial testimony demonstrates that the victim was unsure whether she had been a victim of abuse or merely dreamed the abuse. We disagree.

{¶ 13} Ohio Rule of Evidence 601(A) provides:

{¶ 14} "Every person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶ 15} It is the duty of the trial judge to conduct a voir dire examination of a child under ten years of age to determine the child's competency to testify. *State v. Frazier* (1991), 61 Ohio St.3d 247. In *Frazier*, the court set forth the following five factors to be considered in determining whether a child under ten is competent to testify: (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate

what was observed, (4) the child's understanding of truth and falsity, and (5) the child's appreciation of his or her responsibility to be truthful. Id. at syllabus.

{¶ 16} The determination of competency of a child witness is within the sound discretion of the trial court. Id. at 251. We will not disturb the trial court's ruling absent an abuse of discretion. Abuse of discretion connotes more than an error in law or judgment; it implies an attitude on the part of the court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} "It is not the role of the trial judge to determine that everything a child will testify to is accurate, but whether the child has the intellectual capacity to accurately and truthfully recount events." *State v. Cunningham*, Cuyahoga App. No. 89043, 2008-Ohio-803, citing, *State v. Allen* (1990), 69 Ohio App.3d 366, 374.

{¶ 18} During the competency examination, the trial court had the opportunity to observe the victim's demeanor and her responses to questions on direct examination. The trial court also had the opportunity to ask the victim questions. Under questioning, the child was able to state her full name, as well as the names of her mother, sisters, and best friend. She knew the grade she was in and the names of her school and her teacher. She could say the alphabet, count to ten, and do simple arithmetic. Further questioning demonstrated that she knew the difference between real and pretend, right and wrong, and between telling the truth and lying. The defense was offered the

opportunity to cross-examine the victim but declined and stated it had no objections to competency. At the conclusion of the questioning, the trial court found the six-year-old competent.

{¶ 19} Upon review of the record in this case, we do not find that the trial court abused its discretion by finding the victim competent to testify. Accordingly, appellant's first assignment of error is overruled.

{¶ 20} In his second assignment of error, appellant asserts that his conviction is not supported by the evidence.

{¶ 21} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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. 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 22} A reviewing court may find a verdict to be against the manifest weight of the evidence even though legally sufficient evidence supports it. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In reviewing a manifest weight of the evidence claim, this court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in evidence, the factfinder clearly lost its

way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. Id.

{¶ 23} A judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent, credible evidence that goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167.

{¶ 24} Appellant contends that he and the victim were the only witnesses to the alleged offense, and he challenges the victim's recollection of events. He argues that there was no sexual abuse committed and that the victim's story is based upon dream and fiction.

{¶ 25} Appellant was convicted of rape in violation of R.C. 2907.02, which provides:

{¶ 26} "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:

{¶ 27} "* * *

{¶ 28} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶ 29} "Sexual conduct" is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). Penetration, however slight, is sufficient to complete vaginal or anal intercourse. Id.

{¶ 30} The six-year-old victim testified that appellant "stuck his finger in my butt." She described the clothes she wore to bed that night and how appellant came into her room, lifted up her shirt, and pulled down her pants and her underpants. She said she was "half wake" at the time. She said when appellant was done, he put her clothes back on her and told her that what happened was a secret. A medical examination conducted three days after the rape showed physical injuries to the victim consistent with having been caused by insertion of a penis, finger, or other object into the victim's vagina. Dr. Bar-Shain testified that in a six-year-old girl, the vaginal opening is only centimeters away from the anus. This evidence, viewed in a light favorable to the state, is legally sufficient to support appellant's rape conviction.

{¶ 31} We find no merit to appellant's contention that the entire matter is the result of the victim's dreams. The victim consistently recounted the details of the rape to her mother, the police, and a number of medical professionals. The jury heard the child's testimony and the defense thoroughly cross-examined the child victim. Additionally, the physical evidence supports the victim's account. Our review of the entire record and consideration of all of the evidence leaves us to conclude that the jury did not lose its way. Because there was sufficient evidence to take the case to the jury, and the convictions are not against the manifest weight of the evidence, appellant's second assignment of error is overruled.

{¶ 32} In the third assignment of error, appellant asserts that the trial court erred when it failed to give a jury instruction on the lesser included offense of gross sexual imposition.

{¶ 33} Crim.R. 30(A) provides, in pertinent part: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Appellant failed to object to the lack of a jury instruction and therefore waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 14. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶108. A plain error analysis should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice. *Underwood*, supra.

{¶ 34} The distinction between rape and gross sexual imposition is that rape requires proof of "sexual conduct," which was defined above, while gross sexual imposition requires proof of "sexual contact," which is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 35} "A criminal defendant is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has

denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to 'sexual conduct,' R.C. 2907.01(A), and, at the same time, consistently and reasonably believe her testimony on the contrary theory of mere 'sexual contact,' R.C. 2907.01(B). (*State v. Kidder* [1987], 32 Ohio St. 3d 279, 513 N.E. 2d 311, and *State v. Wilkins* [1980], 64 Ohio St. 2d 382, 18 O.O. 3d 528, 415 N.E. 2d 303, approved and followed.)" *State v. Johnson* (1988), 36 Ohio St.3d 224, paragraph two of the syllabus.

{¶ 36} Appellant completely denied participation in the offense, claiming it occurred only in the child's dreams. The victim's testimony and the physical evidence are consistent with that of "sexual conduct," and not mere "sexual contact." The weight of the evidence in the record precludes a finding that the trial court committed plain error by not instructing the jury on gross sexual imposition as a lesser included offense. Accordingly, appellant's third assignment of error is overruled.

{¶ 37} For his fourth assigned error, appellant asserts that the trial court erred by failing to instruct him at sentencing that he would be subject to postrelease control. He argues that because the trial court included postrelease control in the sentencing entry but did not notify him of the provision at sentencing, pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, his sentence is void.

{¶ 38} Where a rape count requires an indefinite sentence that carries a life parole tail, postrelease control is not necessary. R.C. 2967.28(F)(4); *State v. Dresser*, Cuyahoga App. No. 90305, 2009-Ohio-2888. Appellant was convicted of the rape of a minor under the age of ten and sentenced to life imprisonment without parole. Therefore, postrelease control is not a part of appellant's sentence. Accordingly, the trial court did not err by failing to notify appellant of postrelease control at the sentencing hearing. Because postrelease control is not a part of appellant's sentence, the holding in *Bezak* is not implicated, the sentence is not void, and there is no need for resentencing. However, because the trial court erroneously included a postrelease control provision in the sentencing entry, the matter must be remanded to correct the entry.

{¶ 39} In his final assignment of error, appellant asserts that he was denied the effective assistance of counsel.

{¶ 40} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668. Counsel's performance is deficient if it falls below an objective standard of reasonable representation. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. To establish prejudice "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at

paragraph three of the syllabus. The burden of proof is on appellant, since in Ohio a properly licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 290, 1999-Ohio-102.

{¶ 41} Appellant argues that trial counsel was ineffective because he failed to present any evidence in defense of the charges, failed to adequately argue for acquittal when making the Crim.R. 29 motion, and failed to request a jury instruction on gross sexual imposition as a lesser included offense. These arguments lack merit.

{¶ 42} We note first that appellant fails to offer a single example of "evidence in defense of the charges" that defense counsel had available but failed to present at trial. Regarding counsel's Crim.R. 29 motion, in the second assignment of error we found that there was sufficient evidence that appellant raped the six-year-old victim. Since the jury found appellant not guilty of the remaining charges, the record does not reflect that appellant was prejudiced by counsel's effort.

{¶ 43} Finally, the Ohio Supreme Court has held that a failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel. *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71. Furthermore, a defendant is not entitled to an instruction on a lesser included offense if participation in the charged wrongdoing is denied. *State v. Gholston*, Cuyahoga App. No. 88742, 2007-Ohio-4053, citing, *State v. Reider* (Aug. 3, 2000), Cuyahoga App. No. 76649. Appellant denied any

wrongdoing. His trial strategy was to deny that any sexual offense occurred, and claim that the allegations were the product of the child's imagination. Accordingly, an instruction on a lesser included offense was not warranted and appellant was not prejudiced by trial counsel's failure to request such an instruction. Appellant's fifth assignment of error is overruled.

{¶ 44} Having overruled all of the assignments of error, we affirm the judgment of the trial court and remand the matter to the trial court to correct the sentencing entry.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR