[Cite as *State v. Young*, 2009-Ohio-5354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92127

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD YOUNG

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503327

BEFORE: Jones, J., Gallagher, P.J., and Rocco, J.

RELEASED: October 8, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Russell S. Bensing
1350 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Anna M. Faraglia
Katherine Mullin
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Reginald Young ("Young"), appeals the trial court's decision to exclude evidence pursuant to Ohio's rape shield statute, R.C. 2907.02(D). Finding no merit to the appeal, we affirm.

{¶ 2} In 2007, Young was charged with two counts of rape, two counts of gross sexual imposition with sexually violent predator specifications, and two counts of kidnapping with sexually violent predator specifications and sexual motivation specifications. The counts each contained a furthermore specification alleging that the victim was under ten years of age and that Young had compelled the victim to submit by the use of force. The State dismissed the kidnapping counts prior to trial and Young opted to try the sexually violent predator specification to the bench.

{¶ 3} During the pretrial process, Young subpoenaed documents regarding the victim, "C.J.," from the Cuyahoga County Department of Children and Family Services ("CCDCFS").[1] CCDCFS moved to quash the subpoena and the trial court granted the motion, ordering the documents to be produced for an in camera inspection.

{¶ 4} The matter proceeded to a jury trial. During opening statements, defense counsel made references to C.J. making allegations of sexual abuse prior to meeting Young. Before cross-examining the victim, the trial court ruled that

[1] In accordance with this court's policy, we use initials to protect the minor's identity.

evidence of C.J.'s alleged prior sexual abuse had to be excluded because it did not fall within any of the exceptions of Ohio's rape shield statute, R.C. 2907.02(D).

{¶ 5} The following pertinent evidence was adduced at trial.

{¶ 6} In 2003, C.J. was placed in a foster home. He was removed from the foster home to be reunited with his mother, but the reunification failed and C.J. returned to the foster home. At the time of his return, Young was residing in the same foster home and the two youths shared a bedroom. Young stayed in the foster home for about a year before graduating from high school and moving out. C.J. was eventually removed from the foster home and placed in residential treatment.

{¶ 7} In 2006, C.J. was placed with his great aunt. In August 2007, the aunt awoke to hear C.J. "screaming and hollering" in his sleep. She testified that she heard C.J. yell, "Stop Reggie. No Reggie. Leave me alone Reggie. Get off me, Reggie." The aunt woke C.J. up and asked him who Reggie was. She testified that C.J. disclosed that Young would lock him in a closet and "bust in the bathroom on me."

{¶ 8} The aunt took C.J. to the hospital where he claimed that Young had attempted to force C.J. to perform oral sex on him. At that time, C.J. denied oral or anal penetration. Later, he disclosed both oral and anal penetration to a nurse practitioner specially trained in sexual assault examinations and interviews.

{¶ 9} During trial, C.J. testified that Young anally raped him twice. The first incident occurred in the boys' bedroom while Young was getting dressed.

C.J. recalled being in his underwear and testified that Young took his underwear down and "started humping [me]." C.J. testified that Young's "front private part" or "D-I-C-K" touched C.J. on the inside of his buttock. He testified that it hurt and that "white stuff" came out of Young's penis and Young touched his penis.

{¶ 10} C.J. testified that the second incident occurred in the living room closet. C.J. testified that Young "started humping me again" and Young's penis touched the inside of his buttock. The third incident C.J. described occurred in the basement, where C.J. testified Young put his penis in C.J.'s mouth.

{¶ 11} After C.J.'s direct examination, the trial court called a sidebar and informed defense counsel that he would not be able to cross-examine C.J. on the issues raised during opening statement, as doing so would violate the rape shield statute. Defense counsel argued that the information was crucial to his defense because it was "essential for [the] jury to assess [C.J.'s] credibility." Defense counsel further argued that, despite the language of R.C. 2907.02(D), Young was entitled to present evidence regarding C.J.'s alleged prior sexual abuse and exposure to pornography to rebut the inference C.J. would not otherwise have knowledge of sexual activity unless Young was guilty. The trial court disagreed and ruled that "[e]ven if true" the rape shield statute "blocks this type of evidence."

{¶ 12} On cross-examination, defense counsel did ask C.J. if he had ever asked for pornography, which C.J. denied, stating he did not know what pornography was and had never asked his foster parents to see dirty pictures.

{¶ 13} A CCDCFS social worker testified that she investigated C.J.'s claim that Young sexually abused him and made the disposition that sexual abuse was "indicated," which meant that the evidence supporting the allegation was circumstantial and in need of further investigation. Another CCDCFS social worker testified that she was assigned to C.J. in May 2004 and found his placement with the foster home. The social worker confirmed that C.J. had bipolar disorder and ADHD and that C.J. had made allegations of physical abuse against both his foster parents and the staff at a residential treatment center, both of which were found to be "unsubstantiated." She also testified that she knew C.J. to be violent, threatening, street smart, and that he would say things of a sexual nature, more adult than someone his age should know.

{¶ 14} Lauren McAliley, the nurse practitioner that interviewed C.J., testified that it was common for a child to disclose different allegations to different people as disclosure was a process and a child may feel more comfortable with certain people. She also testified to her special training and experience in sexual assault examination and investigation techniques.

{¶ 15} C.J. and Young's former foster father testified on Young's behalf that C.J. was the most difficult foster child he had ever dealt with and that while he was unruly at school, he "did fine" in the home until he returned to the foster home after the failed reunification with his mother.

{¶ 16} C.J. and Young's former foster mother also testified on Young's behalf that she had been told when C.J. was placed in her home that he had

severe behavioral problems, ADHD, aggressive behaviors, and "highly sexual behaviors."

{¶ 17} The jury convicted Young of two counts of rape with the furthermore specifications and one count of gross sexual imposition. The trial court sentenced Young to a total of seventeen years in prison.

{¶ 18} Young now appeals, raising one assignment of error for our review, in which he argues that the trial court's decision to exclude probative evidence pursuant to Ohio's rape shield statute violated his constitutional right of confrontation and right to present a defense.

Ohio's Rape Shield Statute and Standard of Review

{¶ 19} Ohio's rape shield statute, R.C. 2907.02(D), provides as follows:

{¶ 20} "Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

{¶ 21} Thus, Ohio's rape shield statute "essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity," with the limited exceptions being "evidence of the origin of semen, pregnancy, or disease, or of the victim's past sexual activity with the offender." *State v. Williams* (1986), 21

Ohio St.3d 33, 34. Some of the legitimate state interests to be advanced by Ohio's rape shield law include: "guarding the victims' sexual privacy and preventing them from undue harassment; discouraging a tendency in sexual assault cases to try the victims rather than the defendant; and, by excluding inflammatory, prejudicial and only marginally probative evidence, aiding in the truthfinding process." *State v. Gardner* (1979), 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337.

{¶ 22} In this case, Young does not contend that the evidence at issue was admissible as falling within one of the exceptions to the rape shield statute; rather, he claims that the trial court's exclusion of the evidence under the rape shield statute infringed upon his right of confrontation and the ability to present a defense.

{¶ 23} Ohio courts recognize that "[t]he rape shield statute is not always applied literally, as in some instances, it might infringe upon a defendant's constitutional right to confront witnesses." *State v. Brisco* (Aug. 24, 2000), Cuyahoga App. No. 76125, citing *Gardner,* at 16-17. See, also, *State v. N.D.C.*, Franklin App. No. 06AP-790, 2007-Ohio-5088; *In re Michael* (1997), 119 Ohio App.3d 112, 118, 694 N.E.2d 538 ("[a]pplication of the rape shield law may not * * * unduly infringe upon a defendant's constitutional rights").

{¶ 24} In determining whether R.C. 2907.02(D) is unconstitutional as applied, a balancing test must be employed, whereby a court "must thus balance the state interest which the statute is designed to protect against the probative

value of the excluded evidence." *Gardner* at 17. Importantly, in order to be admissible, such evidence must involve more than a mere attack on the credibility of a witness. Id. Further, in order "[t]o assess the probative value of excluded evidence, it is necessary to examine its relevance to the issues which it is offered to prove." Id.

{¶ 25} A trial judge has discretion to determine the relevance of evidence and to apply R.C. 2907.02(D) "in the first instance, and we therefore review a judge's action for abuse of discretion." *Brisco*, supra.

{¶ 26} It is also within the sound discretion of the trial court to apply the rape shield law to best meet the purposes behind the statute. *In re Michael*, citing *State v. Leslie* (1984), 14 Ohio App.3d 343, 346, 471 N.E.2d 503. See, also, *State v. Hart* (1996), 112 Ohio App.3d 327, 331, 678 N.E.2d 952, 954, *State v. Davis*, (Aug. 16, 1990), Cuyahoga App. No. 57404, unreported. "While the right to confrontation is flexible enough to allow the trial court to exercise discretion in admitting evidence, our review of the constitutional question is de novo." *State v. Ziepfel* (1995), 107 Ohio App.3d 646, 652, 669 N.E.2d 299. A defendant has no Sixth Amendment right to confront a witness with irrelevant evidence. *In re Michael*, citing *Leslie*.

{¶ 27} Accordingly, while the trial court retains the discretion to determine whether the relevance of C.J.'s past sexual knowledge and history are relevant and probative, we review de novo whether the exclusion of such evidence violated Young's constitutional rights.

Application of Ohio's Rape Shield Statute

{¶ 28} R.C. 2907.02(E) and (F) permit the trial court to determine the admissibility of evidence of any sexual activity of the victim after a hearing on the matter in chambers prior to, or for good cause shown, during trial. It must first be observed that Young made no effort to comply with the requirements of R.C. 2907.02(E). See *State v. Hightower* (Sep. 14, 2000), Cuyahoga App. No. 76847, *7. Instead, defense counsel mentioned during opening statements that C.J. had "been exposed to improper sexual activity long before he met the defendant or the [foster parents]. You'll know that he had made accusations against a man for [making] him hold his penis * * * that he was precocious and provocative when he came to the [foster home]. * * * ."[2]

{¶ 29} When the State finished its direct examination of C.J., the trial court stated that counsel raised "some issues in his opening statement that [if] brought up on cross of this victim, would violate the rape shield statute. I don't know how you're going to have any ability to get in evidence of his past sexual conduct."

{¶ 30} Even though Young did not comply with R.C. 2907.02(E), he now proposes that his conviction be vacated because the trial court did not employ the "*Gardner* balancing test." But the Ohio Supreme Court has found that trial courts do not have a duty to sua sponte hold a R.C. 2907.02(E) hearing. *State v. Acre*

[2] The record reflects that defense counsel knew about allegations of past sexual abuse by his mother's boyfriend prior to trial because the trial court ordered an in camera review of C.J.'s CCDCFS file during the pretrial process and defense counsel stated that he had an opportunity to review the file.

(1983), 6 Ohio St.3d 140, 144, 451 N.E.2d 802. See, also, *State v. Evans*, Cuyahoga App. No. 85396, 2005-Ohio-3847. A defendant may waive his statutorily granted right to such a hearing by failing to make a timely request for it. *Evans* at ¶74, citing *Acre* at 144.

{¶ 31} Young failed to ask for a hearing before or during trial, he simply argued that he should have been allowed to cross-examine the victim as to the allegation of prior sexual abuse and the victim's history of viewing pornography. We find that because the Revised Code provides a vehicle by which a defendant may request a hearing on admission of evidence that may be barred by R.C. 2907.02(D) and because Young knew of the allegation prior to trial, Young has waived his right to challenge the trial court's decision not to hold a hearing. See *State v. Bugg* (Sep. 30, 1999), Cuyahoga App. No. 74847. We also find no error with the trial court's failure to expressly state on the record that it was employing the *Gardner* balancing test.

{¶ 32} In addition, although our review of relevant Ohio case law shows that appellate courts have not dealt extensively with this issue, other states have found that the probative value as to prior acts protected by the rape shield statute are dependent on clear proof that they had occurred. In *State v. Budis* (N.J. 1991), 593 A.2d 784, 790, the court found that:

{¶ 33} "[t]he probative value of the prior acts depends on clear proof that they occurred, that the acts are relevant to a material issue in the case, and that they are necessary to the defense. * * * When evidence is offered to show a child's knowledge of sexual acts, its relevance also depends on whether the prior abuse closely resembles the acts in question. * * * The reason for requiring similarity between the acts is that prior acts are more likely to affect the child's ability to describe the acts in question if they closely resemble the previous ones." (Internal citations omitted.)

{¶ 34} In *State v. Pulizzano* (1990), 155 Wis.2d 633, 655-56, 456 N.W.2d 325, 335, the Wisconsin Supreme Court found the defendant must make an offer of proof prior to trial in order to "establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge." That offer of proof must show: "(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect." Id.

{¶ 35} In *N.D.C.*, supra, the Tenth Appellate District cited *Budis* for the proposition that the probative value as to any prior sexual abuse was dependent upon clear proof that the abuse had occurred.

{¶ 36} In this case, there was no evidence that the prior sexual abuse occurred. The allegation that C.J. had been abused by his mother's boyfriend

was noted in the child's CCDCFS case file, which was reviewed *in camera* by the court and counsels. According to the case file, it was the mother who, in 2004, reported that her boyfriend was abusing crack cocaine, hit her in the head with a bottle, and made C.J. touch his penis. CCDCFS investigated the mother's claim that her boyfriend sexually assaulted C.J. and concluded the allegation was "unsubstantiated." We find that because there is no evidence that the abuse ever occurred, any testimony regarding the allegation would not be probative.

{¶ 37} Additionally, we find that the allegation of past abuse was dissimilar to the allegations C.J. made against Young; therefore, we find that the allegation was also not relevant. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Cf. *In re Michael*, supra (holding that evidence that victim had been sexually abused in the past was essential to defense particularly where victim had been sexually abused in the identical manner as the allegations against the defendant).

{¶ 38} Next, Young argues that he should have been allowed to confront C.J. regarding whether the child had previously viewed pornography. During his argument to the court, counsel stated that the record was "replete with C.J. seeing pornography, viewing pornography, asking to see pornography." But a careful review of both C.J.'s case file and the lower court record show little evidence that C.J. ever saw or viewed pornography. There is no mention of pornography in

C.J.'s case file. In fact, the only mention of pornography in the lower court record is in the trial transcript. During Young's case in chief, the foster father testified that a social worker informed him that the then five-year-old C.J. asked a social worker if she had any "X-rated" videos. During cross- examination, defense counsel began to question C.J. about pornography and the State objected. The trial court overruled the objection and for whatever reason defense counsel chose not to ask any additional questions regarding the subject. Thus, the trial court did not fail to allow counsel to confront C.J. regarding his exposure to pornography nor do we find that any alleged failure prejudiced Young's defense.

{¶ 39} Next, Young claims that it is necessary to refute the inference that C.J.'s sexual awareness could have resulted only from anything Young did to him.[3] But we fail to see how that inference was delivered to the jury through witness testimony. On the contrary, the social worker testified that C.J. had highly sexualized behavior before ever being placed in foster care and his foster mother testified that his behavior was sexually inappropriate, C.J. had been exposed to inappropriate "adult things" prior to coming into her care, and that he came to the foster home with "highly sexual behaviors."

{¶ 40} Therefore, we find that the trial court did not abuse its discretion or violate Young's constitutional rights. The sole assignment of error is overruled.

{¶ 41} Accordingly, judgment is affirmed.

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[3]For a thorough discussion on the sexual innocence inference theory see Reid, The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child

It is ordered that appellee recover of appellant 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 common pleas court 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY;
KENNETH A. ROCCO, J., CONCURS

Molestation Victim's Prior Sexual Conduct (1993), 91 Mich.L.Rev. 827.