[Cite as *State v. Harris*, 2010-Ohio-1865.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93343 and 93344

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-520206 and CR-518114

BEFORE: Cooney, J., Gallagher, A.J., and Jones, J.

RELEASED: April 29, 2010

JOURNALIZED:
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COLLEEN CONWAY COONEY, J.:

{¶ 1} In this consolidated appeal, defendant-appellant, Michael Harris ("Harris"), appeals his convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In Case No. CR-518114, Harris was charged with two counts of rape (Counts 1-2), one count of kidnapping (Count 3), and two counts of domestic violence (Counts 4-5).[1] In Case No. CR-520206, Harris was charged with eight counts of kidnapping (Counts 1-8), eight counts of rape (Counts 9-16), one count of importuning (Count 17), and one count of disseminating matter harmful to juveniles (Count 18).[2] The State moved to join both cases for trial as each case involved the same perpetrator and victim. The trial court granted the State's motion.

{¶ 3} Case No. CR-518114 proceeded to a jury trial on the rape and kidnapping charges, with the domestic violence charges tried to the bench.

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[1]The rape counts contained a furthermore clause alleging that Harris compelled the victim by force and the victim was under the age of ten. The domestic violence charges included a furthermore specification that Harris had been convicted of domestic violence on two prior occasions. The kidnapping charge included a sexual motivation specification.

[2]Each kidnapping charge included a sexual motivation and sexually violent predator specification and a furthermore clause that Harris committed the offense with a sexual motivation and the victim was under the age of thirteen. Each rape charge contained a sexually violent predator specification and a furthermore clause that Harris compelled the victim by force and the victim was under the age of ten. The disseminating matter harmful to juveniles charge included a furthermore clause that the

Case No. CR-520206 proceeded to jury trial on all charges with the sexually violent predator specifications tried to the bench.

{¶ 4} At the close of the State's case, the State dismissed Counts 1 and 2 (rape) and Count 3 (kidnapping) in Case No. CR-518114. The State also dismissed Counts 4-8 (kidnapping) and Counts 12-16 (rape) in Case No. CR-520206. Pursuant to Harris's Crim.R. 29 motion, the court dismissed Count 3 (kidnapping) and Count 11 (rape) in Case No. CR-520206.

{¶ 5} In Case No. CR-518114, the trial court found Harris guilty of Counts 4 and 5 (domestic violence), third degree felonies. Harris was sentenced to two years in prison on each count, to be served concurrently to each other, but consecutive to his sentence in Case No. CR-520206.[3]

{¶ 6} In Case No. CR-520206, the jury found Harris guilty of Counts 1 and 2 (kidnapping with the sexual motivation specification), Counts 9 and 10 (rape), Count 17 (importuning), and Count 18 (disseminating matter harmful to juveniles). The trial court found him not guilty of the sexually violent predator specification in Counts 1, 2, 9, and 10. The trial court merged Harris's sentence on Counts 1 and 2 (kidnapping) and sentenced him to ten years in prison. Harris was also sentenced to 25 years to life on Counts 9

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victim was under the age of thirteen.

[3]Although Harris filed an appeal in Case No. CR-518114, he has not raised any

and 10 (rape), to be served concurrently, three years on Count 17 (importuning), and 18 months on Count 18 (disseminating matter harmful to juveniles). The court ordered that the kidnapping and rape charges be served concurrently with each other and consecutive to the importuning charge for an aggregate of 28 years to life in prison, making Harris's aggregate sentence in both cases 30 years to life in prison.

{¶ 7} The following evidence was adduced at trial.

{¶ 8} R.W., Harris's stepdaughter, testified that Harris did "bad things" to her.[4] The first time something bad happened was when she was six years old and lived in Euclid, Ohio. She recalled two instances where Harris put his penis in her mouth. The first incident occurred when he came into her bedroom and woke her up. He showed her his penis and then put it in her mouth. She tried to get away, but Harris held her and kept his penis in her mouth for a few minutes. The second incident also occurred in her bedroom. Harris held R.W. and put his penis in her mouth and ejaculated. R.W. testified that he threatened her with a belt prior to committing each act. R.W. further testified that Harris showed her movies of naked adults having

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error regarding this case in his appellate brief.

[4]R.W. was eight years old at the time of trial. Her brother, J.S., was thirteen at the time of trial.

sex. R.W. did not tell her mother, Robin Harris ("Robin"), about the abuse until they moved to Cleveland Heights.

{¶ 9} Robin testified that she married Harris in August 2004. Harris has a daughter, D.H., who lives in Dayton, but would spend weekends and holidays with them. Robin testified that Harris was required to have supervised visits with D.H. because some evidence of sexual abuse had been noted. Robin further testified that on two occasions she found Harris in R.W.'s bedroom. The first time, Harris said R.W. was screaming because she had a nightmare. The second time, he claimed that he was trying to open a painted-shut window in R.W.'s room.

{¶ 10} On November 14, 2008, Robin and her son, J.S., were talking in her bedroom when he told her that Harris had raped R.W. He also told her about an incident when R.W. asked Harris for a boiled egg. Harris showed R.W. his penis and told her that she had to "lick his thing." When Robin questioned R.W., the child told her that she did not want to tell her because she did not want her mother to get a divorce and Harris to go to jail. Harris then came into the bedroom, and Robin questioned him about the incidents. He became upset and started screaming. He lunged toward the children, but Robin blocked his way. Harris then threw Robin into the dresser, breaking the mirror. Robin threatened to call 911, but Harris continued to hit her.

She tried to get to the kitchen phone, but he grabbed her and choked her. He then threw her into a door and left the house.

{¶ 11} After this incident, Robin testified that Harris would call her from jail, suggesting that she not appear for trial. In another call, he admitted that R.W. was in the room when he watched pornographic movies, after initially denying anything had happened.

{¶ 12} J.S. testified about an incident when he observed a scared look on R.W.'s face. R.W. told J.S. "that she asked for a boiled egg and [Harris] said, you can get it if you * * * [l]ick his thing." J.S. told his mother and the social worker about this "egg incident." He further testified that one night he heard R.W. crying. When he went to her room, Harris was already there and claimed that R.W. had a nightmare. J.S. also admitted that he had kissed R.W. on the lips, and his mother then punished him.

{¶ 13} Sally McHugh, a licensed social worker for the Cuyahoga County Department of Children and Family Services, testified that she interviewed R.W., who told her that Harris had performed oral sex on her. He also put his penis in R.W.'s mouth on different occasions. One time, "stuff" came into R.W.'s mouth and she spit it out on her comforter. R.W. also told her about the "egg incident" and that she watched pornographic movies with Harris.

{¶ 14} Harris testified in his own defense. He denied ever doing anything to R.W. or watching any pornographic movies. He testified that on November 14, 2008, Robin came downstairs screaming at him. He claimed that she stabbed him in the back with a knife. He got away from her and headed upstairs to gather some clothing to leave, but Robin grabbed him and they fell into the dresser, breaking the mirror. He then ran downstairs, and Robin chased after him. He tried to explain that he did not do anything to R.W., but Robin pushed him into the door, causing the glass to break. Harris then left the house. He testified that he was bleeding from the stab wound and told police about the wound.

{¶ 15} Harris further testified that he did not have custody of D.H. because she told her grandmother that J.S. had laid on top of R.W. and kissed her. He also testified that while he was in county jail, he noticed that he might have herpes. He claimed that a doctor examined him and told him he had herpes. He spoke to his sister to investigate whether herpes was contagious. He wanted to determine whether R.W. might have it because she claimed he raped her.

{¶ 16} Harris now appeals, raising three assignments of error.

Witness Competency

{¶ 17} In the first assignment of error, Harris argues that the trial court abused its discretion in finding that R.W. was competent to testify under Evid. R. 601. He argues that R.W.'s reluctance to answer questions necessitated a finding that she was incompetent to testify, and as a result, the trial court should have granted his motion for a mistrial.[5]

{¶ 18} In *State v. Frazier* (1991), 61 Ohio St.3d 247, 250-251, 574 N.E.2d 483, the Ohio Supreme Court stated that: "[i]t 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. Such determination of competency is within the sound discretion of the trial judge." Accordingly, we review the trial court's decision for an abuse of discretion, which "'implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 19} Evid.R. 601 provides in relevant part:

{¶ 20} "Every person is competent to be a witness except:

[5]We note that defense counsel consented to R.W.'s competency after her voir dire examination. Defense counsel then objected to R.W.'s competency after she testified.

> "(A) * * * 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."

{¶ 21} "In determining whether a child under ten is competent to testify, the trial court must take into consideration (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." *Frazier* at 251.

{¶ 22} In the instant case, the trial court properly found R.W. competent to testify. She demonstrated that she possessed the ability to communicate and to receive and recollect impressions of fact, and also knew the difference between truth and falsity. R.W. was able to recall specific gifts she received for her last birthday and Christmas. She knew the name of her school and her teacher. R.W. knew the difference between the truth and a lie and stated that lying was a "bad thing" because you could get in trouble.

{¶ 23} Harris further argues that the trial court should have determined whether R.W. had the ability to relate facts and circumstances regarding the nature of her testimony at trial. He concedes that R.W. was able to answer simple question during the voir dire, but he argues her trial testimony

demonstrated that she should have been declared incompetent to testify because she was unable to give any facts without the State's use of leading questions.

{¶ 24} Evid.R. 611(C) provides that leading questions cannot be used on direct examination of a witness "except as may be necessary to develop his testimony." This exception "'is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court.'" *State v. DeBlasis*, Cuyahoga App. No. 81126, 2004-Ohio-2843, ¶43, quoting *State v. Lewis* (1982), 4 Ohio App.3d 275, 278, 448 N.E.2d 487. "Courts have continued to emphasize the latitude given the trial court in such matters, especially in cases involving children who are the alleged victims of sexual offenses." *DeBlasis* at ¶44, citing *State v. Miller* (1988), 44 Ohio App.3d 42, 541 N.E.2d 105.

{¶ 25} Here, R.W. was six years old when the incidents occurred and was eight years old at the time of trial. The State's questions were framed in a leading manner in an effort to overcome her nervousness to testify. Furthermore, the trial court acknowledged that prior to R.W. testifying, "she was communicating and she was able to answer all the questions. [W]hen she came in and saw the jury, she was hesitant in her answers and it obviously made her nervous. * * * [B]ut I think as to her competence, I

believe she's competent to testify." Therefore, we conclude that the State's use of leading questions did not demonstrate R.W.'s incompetence to testify.

{¶ 26} Thus, the trial court did not abuse its discretion when it determined R.W. was competent to testify.

{¶ 27} Accordingly, the first assignment of error is overruled.

Hearsay Evidence and Ineffective Assistance of Counsel

{¶ 28} In the second assignment of error, Harris argues that he was prejudiced by the admission of improper hearsay evidence and that defense counsel was ineffective for failing to object to some of the impermissible hearsay testimony given by Robin and J.S.

{¶ 29} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.3d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 30} To determine whether counsel was ineffective, Harris must demonstrate that: (1) "counsel's performance was deficient," in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's "deficient

performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*.

{¶ 31} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. When making that evaluation, a court must determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client" and "whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623; *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. To demonstrate that a defendant has been prejudiced, 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." *Bradley,* paragraph three of the syllabus.

{¶ 32} Harris first argues that defense counsel should have objected to Robin's testimony that the guardian ad litem told her that Harris agreed to have supervised visits with D.H. because "some sexual abuse was noted."

{¶ 33} In the instant case, part of Harris's defense strategy was to portray J.S. as the abuser, and to suggest that J.S. told R.W. to lie about Harris so Harris

would have to leave the house. Defense counsel cross-examined R.W., Robin, and J.S. about J.S. kissing R.W., suggesting that J.S. "acted out" in sexually inappropriate ways. Thus, it was the defense strategy to portray J.S. as the abuser. "This court will not second-guess what could be considered to be a matter of trial strategy." *State v. Hall*, Cuyahoga App. No. 88476, 2007-Ohio-3531, ¶34, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. "Decisions about the use of objections at trial are matters of strategy." *State v. Brady*, Cuyahoga App. No. 92510, 2010-Ohio-242, ¶34. Thus, we cannot say that defense counsel was ineffective for choosing not to object to this testimony, nor would exclusion of this testimony have changed the outcome of the trial.

{¶ 34} Harris next argues that Robin's testimony regarding what J.S. told her about Harris's sexual abuse of R.W. was double hearsay. He refers to Robin's testimony that J.S. told her that Harris had raped R.W. After J.S. told Robin what R.W. told him about the "egg incident," Robin testified that she called R.W. upstairs and asked her what happened with Harris.

{¶ 35} However, Harris has failed to demonstrate how the result of trial would have been different had defense counsel objected to this testimony. "It is axiomatic that, for an appellant to succeed on a claim of ineffective assistance of counsel, he must be able to prove that there is a reasonable probability that he would have been found not guilty had it not been for trial counsel's actions or

failure to act." *State v. Milton*, Cuyahoga App. No. 92914, 2009-Ohio-6312, ¶24. This hearsay testimony did not affect the result of his trial because J.S. testified about the "egg incident" and was subject to cross-examination. The third instance Harris refers to is J.S.'s testimony regarding what R.W. told him after she asked Harris for a boiled egg. Defense counsel initially objected to the State's question about what R.W. told J.S. The trial court sustained the objection until the State "develop[ed] a little bit with [R.W.]" J.S. then testified that R.W. had a scared look on her face and her voice was low. The State obtained the court's permission to inquire what R.W. told J.S. about Harris, and J.S. testified that R.W. "said that she asked for a boiled egg and [Harris] said, you can get it if you * * * [l]ick his thing."

{¶ 36} In the instant case, the trial court initially sustained defense counsel's objection, requiring the State to develop R.W.'s excited utterance prior to permitting J.S.'s testimony. An excited utterance is an exception to the hearsay rule and is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). Because R.W.'s statement qualifies as an excited utterance made shortly after the incident, we cannot say defense counsel was ineffective for choosing not to object to this testimony again.

{¶ 37} Harris further argues that defense counsel was unable to effectively cross-examine R.W. because she was unable to give any details of the offenses.

He cites *State v. Gray*, Butler App. No. CA 2008-12-294, 2009-Ohio-4821, claiming that he was deprived of any meaningful opportunity to confront his accuser. He argues that the State's use of hearsay to bolster R.W.'s "scant testimony" prejudiced him and his ability to confront R.W.

{¶ 38} However, Harris concedes that *Gray* is distinguishable because the victim in *Gray* did not testify, whereas R.W. did testify in the instant case. In *Crawford v. Washington* (2004), 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177, the U.S. Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant [had] a prior opportunity for cross-examination." Here, R.W. and J.S. testified, and Harris had the opportunity to cross-examine them. Therefore, he was not deprived of the opportunity to confront his accusers.

{¶ 39} Accordingly, the second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 40} In the third assignment of error, Harris argues that his rape, kidnapping, importuning, and disseminating material harmful to juveniles convictions are against the manifest weight of the evidence.

{¶ 41} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25, the Ohio Supreme Court restated the standard of review for a criminal manifest weight challenge as follows:

> "The criminal manifest-weight-of-the-evidence standard was explained in [*Thompkins*, in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 42} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720.

{¶ 43} Harris claims that the evidence presented essentially consisted of R.W.'s testimony, and all the other testimony against him was hearsay. He

further claims that R.W.'s testimony was not credible due to the State's use of leading questions. We disagree.

{¶ 44} Here, the evidence demonstrated that Harris restrained R.W. when he put his penis in her mouth on two occasions. When R.W. asked for a boiled egg, he told her she could have one if she "licked his thing." Furthermore, R.W. testified and Harris admitted to Robin that R.W. was in the room when he watched pornographic movies. Although Harris denies these incidents, his credibility was discredited when he was cross-examined by the State. He admitted on cross-examination that he had no medical records to substantiate his claim that he had herpes, and he surmised that the children must have "snuck" into the room when he was watching movies. Harris also testified there was blood dripping down his arm from his stab wound, yet there was no evidence of a tear or stains on his clothing.

{¶ 45} "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. Therefore, based on the evidence presented, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Harris.

{¶ 46} Accordingly, the third assignment of error is overruled.

{¶ 47} Judgment is affirmed.

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.

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COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR