[Cite as *State v. Rosa*, 2010-Ohio-2215.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93108

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DIANA ROSA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517590

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED: May 20, 2010

JOURNALIZED:

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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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Diana Rosa, appeals her convictions on five counts of unlawful sexual conduct with a minor. She claims she was denied a fair trial when the trial court refused to dismiss a prospective juror for cause, that her convictions are against the manifest weight of the evidence, that her trial counsel was constitutionally ineffective, and that the trial court erred when sentencing her to consecutive sentences without making any findings to support such a sentence. After a thorough review of the record and based on the following apposite law, we affirm appellant's convictions.

{¶ 2} During the summer of 2008, appellant and her husband, Alfredo Rosa, began a sexual relationship with a then 15-year-old family friend, "K.G."[1] The Rosa family and K.G.'s family had become acquainted while attending the same church. K.G.'s mother ("Mother") assisted with the youth church, where appellant and Alfredo also volunteered. K.G. had spent time playing at appellant's house with Alfredo's niece and would often go there to get away from the burdens of helping to raise two younger half-siblings. In the summer of 2008, after the death of K.G.'s grandmother, she began spending more time at the Rosa household. She often stayed

[1] Pursuant to this court's established policy, the identity of the victim is shielded; therefore, she and her family members are referred to only by their initials.

overnight on the weekends, playing with the Rosas' children and spending time talking with appellant and Alfredo.

{¶ 3} K.G. testified that early in August 2008, she told Alfredo that she had a "crush" on him. After a few days, Alfredo and K.G. engaged in sexual activity on two occasions. After these two incidents, K.G., Alfredo, and appellant were seated at the kitchen table at the Rosa house when they began discussing K.G.'s feelings for Alfredo. The three often communicated by writing in a notebook and passing it between themselves. K.G. testified that appellant handed her a list of questions asking her if she would like to have a sexual relationship with Alfredo and appellant. This list, entitled "Random ?'s" was then orally discussed between the three. K.G. circled or placed a check mark next to questions she would agree to discuss with the other two. K.G. testified that by the end of the discussion, she had agreed to engage in a sexual relationship with Alfredo and appellant.

{¶ 4} The following weekend, K.G. spent the night at the Rosas' house. K.G., appellant, and Alfredo engaged in sexual activities in the couple's bedroom. Appellant engaged in various sexual acts with K.G. as well as observed Alfredo engage in various sexual acts with K.G. K.G. also observed appellant engage in sexual acts with Alfredo.

{¶ 5} On September 26, 2008, the trio engaged in another sexual encounter in the living room of the Rosas' home. On this occasion, appellant

observed various sexual acts being performed on K.G. by Alfredo, and K.G. observed sexual acts being performed on appellant by Alfredo.

{¶ 6} K.G. had kept the list of questions appellant had presented to her entitled "Random ?'s" as well as other notes between the trio. K.G. testified that she usually kept them in a box in her closet, but on the morning of October 3, 2008, she had forgotten them on the counter in the bathroom. K.G.'s mother discovered these notes. K.G. testified that, upon realizing that the notes were missing, she called her mother and verified that she had the notes, then she called appellant and Alfredo to advise them the notes had been found. Alfredo instructed K.G. to minimize any relationship they had and say it was only "kissing and touching."

{¶ 7} K.G.'s mother testified that she took the notes to work and read them. Although the notes did not contain any names or descriptions of the activities the three had engaged in, they were enough to deeply disturb Mother. She was unable to finish work and called her ex-boyfriend to pick her up. Mother, along with her husband, her ex-boyfriend, and K.G. went to appellant's home to confront her and Alfredo about the notes. The two were not at home, and the group left to return later that day.

{¶ 8} When the group returned, they discussed the notes with appellant and Alfredo on the front lawn of the Rosas' home so that appellant's children would not hear. K.G.'s mother and her husband both testified that,

upon confrontation, Alfredo was apologetic and stated there had only been "kissing and touching" and that appellant stated "they had agreed to wait until [K.G.] was 18 before they had sex with her." K.G. corroborated this statement at the time. Mother testified that the group parted amicably, but that she still had questions. A few days later, she called the police and made a report.

{¶ 9} Detective Pamela Berg of the Cleveland Police Sex Crimes and Child Abuse Unit testified that she followed up with K.G. and her mother. Det. Berg testified that she took a statement from K.G. that detailed various sexual activities that took place between K.G., appellant, and Alfredo. Prior to giving this written statement, K.G. had only stated there had been some "kissing and touching."

{¶ 10} Appellant and Alfredo were indicted on November 7, 2008 and charged with 12 counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), with only six counts applicable to appellant. Trial began on March 24, 2009 and resulted in a guilty verdict on all charges. Appellant was sentenced to three years incarceration on two counts, to be served consecutive to each other but concurrent to four two-year sentences on the remaining charges. Appellant was also classified as a Tier II sex offender. She timely filed a notice of appeal.

Law and Analysis

Juror Bias

{¶ 11} Appellant presents four assignments of error for our review, which will be addressed out of order. In her first claimed error, she argues "[t]he trial court erred by overruling a defense motion to dismiss a prospective juror for cause where the totality of the questioning revealed a strong bias against the appellant."

{¶ 12} A fair and impartial jury is fundamental to this nation's judicial process. In order to ensure that an accused is provided with such a jury, the General Assembly, among other things, enacted R.C. 2945.25, which provides a mechanism for the court to weed out jurors who cannot disregard their prejudices and biases or otherwise provide an accused with a fair trial.

{¶ 13} The decision to disqualify a juror for cause for one of the enumerated reasons in R.C. 2945.25 is left to the sound discretion of the trial court. *State v. Smith*, 80 Ohio St.3d 89, 105, 1997-Ohio-355, 684 N.E.2d 668. An abuse of that discretion must have occurred before this court may reverse a conviction. Id. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385,

94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 14} Appellant argues that potential juror No. 4 evidenced an inability to disbelieve a child alleging sexual abuse. Appellant claims juror No. 4 could not assure the court that she could set aside her bias when all her responses to questions were analyzed. Appellant asserts that the failure of the trial court to dismiss this juror prejudiced her; however, this court is unable to determine how appellant was prejudiced, even if the trial court abused its discretion.

{¶ 15} Criminal defendants would only be prejudiced when a trial court refused to dismiss a prospective juror for cause if it forced defendants to exhaust their peremptory challenges. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶86-87. The present case is very similar to *Hale*, where the trial court refused to dismiss juror No. 33 for cause after she indicated she thought one who committed murder should be sentenced to death, and she could not consider a life sentence. This position was taken early in her voir dire process and was eventually completely retracted before any objection was made to her presence on the jury. The trial court refused

to excuse that juror for cause, but the defense used a peremptory challenge to dismiss her.

{¶ 16} The *Hale* court determined, "[t]hus '[i]f the trial court erroneously overrules a challenge for cause, the error is prejudicial only if the accused eliminates the challenged venireman with a peremptory challenge *and* exhausts his peremptory challenges before the full jury is seated.'" (Emphasis sic.) Id. at ¶87, quoting *State v. Tyler* (1990), 50 Ohio St.3d 24, 30-31, 553 N.E.2d 576. The Court went on to hold, "Hale did expend a peremptory challenge on juror No. 33, but he used only five of his allotted six peremptories. Thus, the trial court did not force Hale to exhaust his peremptories when it overruled his challenge to juror No. 33. That ruling was therefore nonprejudicial." Id. at ¶88.

{¶ 17} In the present case, appellant did not exhaust her peremptory challenges, and, therefore, she was not prejudiced by her use of a peremptory challenge to excuse juror No. 4. Appellant's first assignment of error is overruled.

Consecutive Sentences

{¶ 18} In her fourth assigned error, appellant argues, contrary to the holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that the trial court was required to make findings of facts necessary to impose consecutive sentences. She argues that the Supreme Court's decision in

Oregon v. Ice (2009), _____ U.S. _____, 129 S.Ct. 711, 172 L.Ed.2d 517, abrogates the holding in *Foster* and leads to the conclusion that Ohio's sentencing statutes that required the trial court to make findings in order to impose maximum or consecutive sentences are constitutional.

{¶ 19} This court has rejected similar arguments stating "[we] will continue to follow [our] own precedent, along with the precedent set forth by other Ohio districts [sic] courts of appeals, which have determined that, until the Ohio Supreme Court states otherwise, *Foster* remains binding." *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564, ¶25.[2] Appellant's fourth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 20} Appellant claims that her trial counsel was so deficient as to violate the Constitution's Sixth Amendment guarantee to assistance of counsel. She argues that "[t]he failure to object to improper testimony thus allowing the jury to consider unfairly prejudicial evidence deprived the appellant her right to effective assistance of counsel."

{¶ 21} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of

[2]This argument is currently pending before the Ohio Supreme Court in *State v. Hodge*, Ohio Supreme Court No. 2009-1997.

appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 22} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 23} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *."

{¶ 24} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland*, supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland*, supra, at 694, 104 S.Ct. at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley* at 142.

{¶ 25} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, 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 143.

{¶ 26} In appellant's first argument relating to ineffective assistance of counsel, she claims that her counsel failed to object to Det. Berg's testimony involving the veracity of two witnesses. Specifically, the state asked Detective Berg if she obtained written statements from K.G. and her mother.

Detective Berg testified that she had. The state next asked Det. Berg if their respective statements were "consistent with [their] testimony that you saw in court?" She replied, "[i]t was." The state then asked, "[d]id you find any material inconsistencies?" To which, Det. Berg responded, "I did not."

{¶ 27} In the seminal case on this issue, *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, the Ohio Supreme Court held that it was impermissible for an expert to testify about the veracity of a child victim who was not subject to cross-examination. This holding has been limited in the Twelfth District in *State v. Proffitt* (1991), 72 Ohio App.3d 807, 596 N.E.2d 527, stating that the testimony of the victim in court, and the appellant's ability to cross-examine the victim, distinguish the case from *Boston*.

{¶ 28} This court has cited *Proffitt* in holding the admission of credibility evidence to be harmless error where the defendant testified in his own defense and the jury was able to gauge credibility for themselves. *State v. Allen*, Cuyahoga App. No. 92482, 2010-Ohio-9, ¶52. Another appellate court has gone even further, finding that "[a]lthough having a witness testify that the victim is telling the truth is an error, it is harmless error if the victim testifies and is subject to cross-examination. [*State v. Thompson*, 5th Dist. No. 06CA28, 2007-Ohio-5419, ¶51] (citing *State v. Morrison*, 9th Dist. No. 21687, 2004-Ohio-2669). When the victim testifies, the jury is able to hear the victim's answers, witness her demeanor, and judge her credibility

completely independent of the other's testimony concerning the veracity of the victim. [*State v. Amankwah*, Cuyahoga App. No. 89937, 2008-Ohio-2191,] ¶ 44." *State v. Hupp*, Allen App. No. 1-08-21, 2009-Ohio-1912, ¶20.

{¶ 29} Appellant points to *State v. Huff* (2001), 145 Ohio App.3d 555, 763 N.E.2d 695, where a police officer testified that "he 'absolutely' found the victims credible and that they were telling the truth." Id. at 561, 763 N.E.2d 695. This is a far cry from the testimony of Det. Berg, who stated that she found no material inconsistences between trial testimony and prior statements.

{¶ 30} The state argues that the testimony was admissible under Evid.R. 801(D)(1)(b). This rule declares a statement not hearsay if the statement is "consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of *recent* fabrication * * *." (Emphasis added.) In this case, appellant argued that K.G. had made statements prior to the written statement that contradicted her testimony in court, and thus the prior consistent statement is not admissible to rehabilitate K.G. because the accusation was not of a recent fabrication.

{¶ 31} Generally, Evid.R. 801(D)(1)(b) includes "only those prior consistent statements which were made before the prior inconsistent statements or before the existence of any motive to falsify testimony." (Internal citations omitted.) *State v. Nichols* (1993), 85 Ohio App.3d 65, 71,

619 N.E.2d 80. The *Nichols* court held that "any rehabilitative testimony given by [the police officer] does not escape classification as 'hearsay' under Evid.R. 801(D)(1)(b). The transcript reveals that the inconsistent tape-recorded statement by the minor child was given on September 20, 1991, whereas the interview with [the police officer] was conducted the following November. Thus, any consistent statements made to that witness occurred after, not before, the prior inconsistent statements used to impeach the child's testimony. The testimony of this witness could not be classified as 'non-hearsay' under Evid.R. 801(D)(1)(b) and should have been excluded * * *." Id. at 71, 619 N.E.2d 80.

{¶ 32} Under the above parameters, the prior statements were not admissible under Evid.R. 801(D)(1)(b) as the state claims. Therefore, trial counsel's failure to object to its admission was error. However, the jurors heard the testimony of the witnesses and were able to judge credibility for themselves. While it was error to allow the brief testimony of Det. Berg as to the prior statements, that testimony did not alter the outcome of the trial, which would require this court to reverse appellant's conviction. Other evidence, including the testimony of Mother, mother's husband, the notes, and the admissions by appellant and Alfredo, provide support for K.G.'s testimony without the brief improper testimony of Det. Berg. Therefore, appellant has not demonstrated that "there exists a reasonable probability

that, were it not for counsel's errors, the result of the trial would have been different." *Bradley*, supra, at 142.

{¶ 33} Appellant also claims in her fourth assignment of error that her counsel's failure to object to consecutive sentences in light of *Oregon v. Ice* constitutes ineffective assistance of counsel. As explained above, the law in this district, even after *Ice*, holds that judicial fact-finding is not necessary to impose maximum or consecutive sentences. *Eatmon*, supra, at ¶25. Therefore, appellant's counsel did not err when he failed to object to the imposition of consecutive sentences. Appellant's second assignment of error is overruled.

Manifest Weight

{¶ 34} In her third assignment of error, appellant argues that her convictions for sexual conduct with a minor are against the manifest weight of the evidence.

{¶ 35} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 36} R.C. 2907.04(A) provides that "[n]o person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶ 37} K.G. testified that appellant knew her age to be 15 at the time sexual activities took place because appellant had attended K.G.'s birthday parties. K.G. further testified that appellant performed cunnilingus on her on one occasion and that appellant engaged in oral and anal sex with Alfredo on two separate occasions while K.G. watched. Finally, K.G. testified that she engaged in anal and oral sex with Alfredo while appellant watched. The "Random ?'s" note, which was submitted to the jury, asked questions that K.G. testified were a proposition for a three-way sexual relationship. The note was written by appellant, and K.G. testified it was given to her by appellant. Also, when confronted about the incident, appellant stated that "they had agreed to wait until [K.G.] was 18 before they had sex with her."

{¶ 38} Appellant argues that there is no physical evidence to corroborate K.G.'s testimony, no writings that state she engaged in sexual activity with

K.G., and no witnesses to the sexual acts other than K.G. Appellant also points to the fact that K.G. originally told her mother and the police that there had been only "kissing and touching."

{¶ 39} The notes in this case evidence an intent to engage in a three-way sexual relationship with K.G. Appellant tried to explain away this evidence with the testimony of Charlene Gerhart. Gerhart testified that the note titled "Random ?'s" was actually written to her in 2007. However, Gerhart's husband testified that he called appellant's husband and instructed him to stop offering his wife money to testify on behalf of the Rosas. Faced with this damaging evidence regarding Gerhart's credibility as a witness, the jury could properly discount her testimony.

{¶ 40} Appellant argues that this case is based almost entirely on the testimony of K.G.; however, the notes and appellant's statements made after being confronted with them provide corroboration of K.G.'s testimony. The jury did not lose its way in convicting appellant of sexual conduct with a minor. Therefore, appellant's third assignment of error is overruled.

Conclusion

{¶ 41} Appellant has failed to demonstrate how using a peremptory challenge to excuse a juror prejudiced her when she waived her remaining peremptory challenges in voir dire. Appellant has also failed to demonstrate that there was any probability that the result of her trial would have been different had her trial counsel objected to the testimony of Det. Berg in regard to the prior statements of K.G. and her mother. Appellant's counsel was also not deficient for failing to object to the imposition of consecutive sentences when the court did not engage in the fact-finding appellant claims is required. Appellant's convictions for sexual conduct with a minor are supported by competent, credible evidence in the record. They are therefore affirmed.

Judgment affirmed.

It is ordered that appellee recover from 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY JANE BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR