[Cite as *State v. Thomas*, 2011-Ohio-705.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94492

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS L. THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED AND VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523899

BEFORE: Kilbane, A.J., Boyle, J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

ATTORNEY FOR APPELLANT

Britta M. Barthol
P.O. Box 218
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Anna M. Faraglia
Assistant County Prosecutor
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Thomas L. Thomas ("Thomas"), appeals his convictions. Finding merit to the appeal, we affirm in part, reverse and vacate in part.

{¶ 2} In May 2009, Thomas was charged in a multi-count indictment for offenses committed during August 1, 2008 to April 19, 2009. Counts 1-10 charged him with the kidnapping of Jane Doe I.[1] Counts 11-20 charged him with the rape of Jane Doe I, Counts 21-30 charged him with the sexual battery of Jane Doe I, and Count 31 charged him with the gross sexual imposition ("GSI") of Jane Doe II. Prior to trial, the State moved to amend the indictments, identifying Jane Doe I as P.M. and Jane Doe II as S.M.[2]

---

[1]Counts 1-10 each carried a sexual motivation specification.

[2]The child victims are referred to herein by their initials in accordance with this court's established policy regarding nondisclosure of identities in cases involving sexual violence.

{¶ 3} The matter proceeded to a jury trial on December 7, 2009, at which the following evidence was adduced.[3]

{¶ 4} P.M. and S.M. are siblings and the daughters of A.M. ("mother") and step-daughters of Thomas.[4] P.M. was born in 1994, and S.M. was born in 1992. Their other siblings are L.M., J.M., A.T., Z.T., P.T., and B.T. Mother married Thomas in 2000. From August 2008 to April 2009, P.M. and S.M. lived in Euclid with Thomas and their siblings.[5] P.M. testified that when she first met Thomas, he treated her like she was his own child. The family would spend time together and he would buy her clothes, shoes, and other things she wanted. P.M. testified that Thomas treated her better than he treated her siblings.

{¶ 5} Thomas began molesting P.M. when she was 12 years old. P.M. did not tell anyone about the abuse because she was scared. At that time, they lived in Maple Heights, Ohio. Thomas would vaginally rape her "almost everyday" in the "bedroom with the bed in it." When P.M. was 13, she went with her mother and A.T., J.M., Z.T., and S.M. to Alabama to take care of her great grandmother, while Thomas stayed in Maple Heights. When she returned to Ohio in August 2008, the entire family moved to Euclid. P.M. testified that when they lived in Euclid, Thomas would vaginally rape her

---

[3]The jury trial lasted four days.

[4]P.M. was 15 years old at the time of trial. S.M. was 17 at the time of trial.

[5]Mother lived in Euclid until February 2009, when she moved out because of marital problems with Thomas.

while she was asleep.[6] P.M. testified that this happened over 30 times. It happened during week nights when they were in bed. Thomas also touched P.M.'s chest three times and tried to put his penis into her mouth.

{¶ 6} P.M. further testified that when she came back from Alabama, Thomas raped her in the first room of the Euclid home. On another occasion, P.M. was sleeping in bed with Z.T. Thomas moved Z.T. to the other side of the bed, laid behind P.M., and vaginally raped her.

{¶ 7} In early April 2009, C.J., P.M.'s cousin, stayed over P.M.'s house during spring break. P.M. showed her texts from Thomas on her phone, telling P.M. to wear the short-shorts he bought her and to save him a spot in bed. One night, C.J. observed Thomas lie down next to P.M. while she was asleep and put his hand into P.M.'s pants. C.J. tried to wake P.M. up, but her attempts were unsuccessful. The next morning she confronted Thomas. She asked him, "Is it true you be touching [P.M.]?" Thomas appeared shocked and replied, "What you trying to do, get me to go to jail."

{¶ 8} On the morning of April 30, 2009, P.M. received a series of texts from Thomas stating, "Come in here and lay by me. * * * This will be the last time." "I really, really need you to do this for me. I'll never ask you again, and if you want to do anything else, you will not have to do anything for it, Okay?" "Baby, please take off your jeans and lay back. I will do the rest. You do not have to move." She was in bed when she received these texts and Thomas was in another room. P.M. did not text him

[6]P.M., S.M., A.T., Z.T., and Thomas slept together in one bed and L.M. and J.M. slept in another room.

back, so he came into the bed with her and Z.T. She was in her clothes and was wrapped up in the covers. They did not speak, so Thomas left.

{¶ 9} P.M. then texted her boyfriend, B.H., that "My daddy said dis, 'Baby, please take off the jeans and lay back. I will do the rest. You do not have to move'" and "I really really need you to do this for me. I will never ask you again. And if you want to do anything else you can."[7]

{¶ 10} That afternoon, when P.M.'s siblings came home from school, P.M. showed L.M., B.H., B.T., and P.T. the texts.[8] Her brothers suggested that she text Thomas "[s]ince I didn't do what you asked me to do this morning, did you want me to do it tonight[?]" Thomas responded, "Yes." B.H. and her brothers then decided to confront Thomas when he came home from work that night. B.T. and B.H. spoke with Thomas outside the house.

{¶ 11} B.H. testified that when they initially confronted him, Thomas said that the texts did not mean anything and that he wanted to walk B.H. home. While they were walking, B.H. showed Thomas the texts from P.M. on his phone. Thomas told B.H. that he was sorry and that it was never going to happen again. He admitted that he had sex with P.M. As Thomas walked away, B.H. called 911. The police arrived and spoke with Thomas, B.H., P.M., and her siblings.

---

[7]B.H. is friends with S.M.'s brother L.M.

[8]P.M. was home schooled.

{¶ 12} S.M. testified that she spoke to the police on May 1, 2009, and told them that when Thomas hugged her, he would rub her buttock and that made her feel weird.

{¶ 13} Detective Daniel Novitski ("Novitski") of the Euclid Police Department testified that he handled the investigation of this case. When he interviewed Thomas, Thomas admitted to sending the text messages to P.M. When asked by Novitski what he meant by the messages, Thomas replied, "Nothing. It was stupid." Thomas denied having sex with P.M.

{¶ 14} P.M.'s case was referred to Lauren Krol ("Krol"), a social worker with the Cuyahoga County Department of Children and Family Services. She provides services as referrals for families and investigates sexual abuse. She spoke individually with each of the children, including P.M. and S.M. As a result of her investigation, she determined that abuse was indicated.

{¶ 15} Vicki Leonardi ("Leonardi"), a counselor employed with Mental Health Services, testified that she received a referral from Krol regarding P.M. She diagnosed P.M. with post-traumatic stress disorder. P.M. was withdrawn, hypervigilant, and antisocial. P.M. was in treatment with Leonardi from May 2009 to November 2009.

{¶ 16} Gail McAliley ("McAliley"), a pediatric nurse practitioner, received a referral from Krol and completed a medical evaluation on P.M. P.M. told her that Thomas would put his penis in her vagina while they laid in bed. P.M. would sleep in her jeans and wrap herself up in a blanket so that Thomas would leave her alone.

{¶ 17} Thomas testified in his own defense. He admitted to sending P.M. a text message telling her to "remove her jeans, * * * lay back, and that [he] would do the rest."

He testified that when B.H. showed him the texts, he admitted to sending them. He testified that he did not have sex with P.M., and that he has not had a sexual relationship for quite some time because he is impotent. Thomas further testified that he sent the texts to P.M. as a way to release his sexual urges. On cross-examination, Thomas admitted that he was never diagnosed as impotent.

{¶ 18} The jury found Thomas guilty of rape (Counts 11 and 12), sexual battery (Counts 21-30), and GSI (Count 31). The trial court sentenced Thomas to ten years each on Counts 11 and 12, to be served consecutive to each other, four years each on Counts 21-30, with Count 21 concurrent to Count 11, Count 22 concurrent to Count 12 and Counts 23-30, consecutive to Counts 11 and 12, and eighteen months on Count 31, consecutive to Counts 11, 12 and 23-30, for an aggregate of twenty-five and a one-half years in prison.

{¶ 19} Thomas now appeals, raising six assignments of error for review, which shall be discussed together and out of order where appropriate.

ASSIGNMENT OF ERROR ONE

> **"[Thomas] was denied due process of law when his conviction was based upon multiple, identical, and undifferentiated counts of a single offense in violation of the Double Jeopardy Clause and the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution."**

ASSIGNMENT OF ERROR FIVE

> **"The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that [Thomas] was guilty of rape and sexual battery."**

ASSIGNMENT OF ERROR SIX

"[Thomas's] convictions for rape, sexual battery and gross sexual imposition were against the manifest weight of the evidence."

{¶ 20} Within these assigned errors, Thomas argues that he was denied due process and his right to be protected from double jeopardy when he was convicted of ten counts of sexual battery. He contends that there was no clarification in the indictment nor at trial to substantiate ten separate and distinguishable counts of sexual battery. Thomas further argues that there is insufficient evidence to support his rape and sexual battery convictions and that his rape, sexual battery, and GSI convictions are against the manifest weight of the evidence.

{¶ 21} As an initial matter, we note that it is well established that "specificity as to the time and date of an offense is not required in an indictment. Under R.C. 2941.03, 'an indictment or information is sufficient if it can be understood * * * (E) [t]hat the offense was committed at some time prior to the time of filing of the indictment * * *.' * * * The State's only responsibility is to present proof of offenses alleged in the indictment, reasonably within the time frame alleged." *State v. Bogan*, Cuyahoga App. No. 84468, 2005-Ohio-3412, ¶10, quoting *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632.

{¶ 22} Moreover, in cases involving sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged. *State v. Barnecut* (1988), 44 Ohio App.3d 149, 152, 542 N.E.2d 353; see, also, *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717. This is because the specific date and time

of the offense are not elements of the crimes charged. *Gus* at ¶6. Many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time. *State v. Mundy* (1994), 99 Ohio App.3d 275, 296, 650 N.E.2d 502; *Barnecut*; see, also, *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Robinette*.

{¶ 23} Here, Thomas relies on *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, in support of his assertion that the carbon copy indictment failed to provide him adequate notice because it did not connect each sexual battery count to a distinct and differentiated incident.[9]

{¶ 24} Although *Valentine* is not binding on this court, we have cited the *Valentine* decision on a number of occasions.[10] In *State v. Hemphill*, Cuyahoga App. No. 85431,

---

[9]We note that Thomas failed to object to the form of the indictment before trial as required by Crim.R. 12(C)(2). As a result, he waived any objection, and must show plain error to overcome the waiver. *State v. Green*, Cuyahoga App. No. 90473, 2008-Ohio-4452, ¶26*; State v. Salahuddin*, Cuyahoga App. No. 90874, 2009-Ohio-466, fn. 2. To prevail on a claim of plain error, Thomas must demonstrate that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

[10]In *Valentine*, the Sixth Circuit Court of Appeals held that due process is violated when a defendant is charged in a multiple-count sexual abuse indictment when there is no factual basis or distinction between the counts. Id. at 633. *Valentine* involved an indictment alleging 20 counts of child rape and 20 counts of felonious sexual penetration occurring over an 11-month period. The offenses were identically alleged, and no further information was included to differentiate one count from another.

2005-Ohio-3726, the defendant was charged with 33 counts of rape, 33 counts of kidnapping, and 33 counts of GSI. In *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010, the defendant was charged with 13 counts of rape, 13 counts of GSI, and 13 counts of kidnapping.

{¶ 25} In these cases, this court cited *Valentine* with approval, affirming some of the convictions and reversing others. We found reversal was warranted where the victims only estimated the number of times the abuse occurred and the indictments failed to connect the defendant to "individual, distinguishable incidents." In *Hemphill*, we found that the victim gave only a numerical estimate, and the evidence was lacking as to any specificity concerning separate incidents. Thus, we reversed all the convictions, except for two counts of rape and one count of GSI. In *Hilton*, we found that sufficient factual bases to differentiate between five counts of rape, five counts of GSI, and ten counts of kidnapping and affirmed the convictions on those counts.

{¶ 26} In reviewing a sufficiency of the evidence challenge, "'[t]he 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, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113.

{¶ 27} With regard to a manifest weight challenge, the "reviewing court asks whose evidence is more persuasive — the state's or the defendant's? * * * '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.' [*State v. Thompkins* (1997), 78 Ohio St.3d 380, 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." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25.

{¶ 28} 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.

{¶ 29} In the instant case, Thomas was convicted of two counts of rape under R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Thomas argues that there was no physical evidence that he used force. However, we note that:

> **"'The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other; as the relation between father and daughter under twelve years of age. With the filial obligation of obedience to the parent, the same degree of force and violence would not be required upon a person of such tender years, as would be required were the parties more nearly equal in age, size and strength.'"** ***State v. Eskridge***

(1998), 38 Ohio St.3d 56, 58, 526 N.E.2d 304, quoting *State v. Labus* (1921), 102 Ohio St. 26, 130 N.E. 161.

{¶ 30} The Ohio Supreme Court has further recognized that coercion is inherent in parental authority when a father sexually abuses his child. Id. "'* * * Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established. *State v. Martin* (1946), 77 Ohio App. 553, 68 N.E.2d 807 [33 O.O. 364].'" Id. at 58-59, quoting *State v. Fowler* (1985), 27 Ohio App.3d 149, 154, 187, 500 N.E.2d 390.

{¶ 31} P.M. testified that when she came back from Alabama, Thomas vaginally raped her in the first room of the Euclid home. On another occasion, when P.M. was sleeping in bed with Z.T., Thomas moved Z.T. to the other side of the bed and vaginally raped P.M. When Thomas raped her, P.M. stated that she could not move and that she felt scared. She knew that what he was doing was wrong, but did not want to tell on Thomas. Based on these circumstances, we find that the forcible element of rape was properly established, and the jury did not lose its way when it convicted Thomas of two counts of rape.

{¶ 32} Thomas was also convicted of ten counts of sexual battery under R.C. 2907.03(A)(5), which provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender is the other person's * * * stepparent[.]"

{¶ 33} Thomas argues that *Valentine* and *Hemphill* require that all of the convictions for the duplicate charges of sexual battery be vacated. He claims that there was no clarification in the indictment nor at trial to substantiate ten separate and distinguishable counts of sexual battery.

{¶ 34} In the instant case, P.M. testified that Thomas began molesting her when she was 12 years old. When they lived in Maple Heights, Thomas would vaginally rape her "almost everyday" in the "bedroom with the bed in it." In August 2008, she moved to Euclid, where Thomas would vaginally rape P.M. while she slept in bed. P.M. testified that this happened over 30 times. P.M. further testified that Thomas touched her chest three times. Jefferson testified that she observed Thomas lie down next to P.M., while she was asleep and put his hand into P.M.'s pants.

{¶ 35} Apart from the foregoing, no additional evidence was offered as to other distinguishable instances of sexual battery. Although we appreciate the difficulty of prosecuting a case involving a minor victim of sexual abuse, this does not lessen the State's burden of proof as to each individual offense. See *Hemphill* at ¶88.

{¶ 36} Accordingly, we find sufficient factual bases to differentiate four counts of sexual battery. For this reason, we reverse and vacate six of Thomas's sexual battery convictions (Counts 25-30).

{¶ 37} Lastly, Thomas argues that his GSI conviction is against the manifest weight of the evidence.[11] He claims that S.M.'s testimony is questionable because of her low IQ.

{¶ 38} Here, S.M. testified that when Thomas hugged her, he would rub her buttocks. S.M. further testified that this made her uncomfortable because she never thought Thomas would do that to her. She further testified that she still loves Thomas and that she calls him dad. Based on this evidence, we cannot say that the jury lost its way and created a manifest miscarriage of justice when it convicted Thomas of GSI.

{¶ 39} For these reasons, the first, fifth, and sixth assignments of error are sustained in part and overruled in part. Thomas's convictions on Counts 11 and 12 (rape), 21-24 (sexual battery), and 31 (GSI) are affirmed and Counts 25-30 (sexual battery) are reversed and vacated.

ASSIGNMENT OF ERROR TWO

> **"[Thomas] received ineffective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment[s] to the United States Constitution."**

{¶ 40} Thomas argues that defense counsel was ineffective in the following five ways: (1) failing to object to victim impact statement; (2) failing to object to a witness

---

[11]Thomas was convicted under R.C. 2907.05(A)(5), which provides that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * *[t]he ability of the other person to resist or consent * * * is substantially impaired because of a mental * * * condition * * *, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person * * * is substantially impaired because of a mental * * * condition[.]"

statement; (3) failing to read the police report provided by the State; (4) improper questioning of a State's witness; and (5) failing to object to the indictment.

{¶ 41} In order to substantiate a claim for ineffective assistance of counsel, Thomas must demonstrate "(a) deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable'). *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶30. To warrant a reversal, Thomas "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* at paragraph three of the syllabus.

Victim Impact Statement

{¶ 42} Thomas first argues that defense counsel was ineffective for failing to object to improper victim impact testimony. We note that victim-impact evidence is excluded from the guilt phase of a trial because "it is irrelevant and immaterial to the guilt or innocence of the accused; it principally serves to inflame the passion of the jury." *State v. Carlisle*, Cuyahoga App. No. 90223, 2008-Ohio-3818, ¶53, citing *State v. White* (1968), 15 Ohio St.2d 146, 239 N.E.2d 65.

{¶ 43} In the instant case, Leonardi testified that P.M. suffered from post-traumatic stress disorder and was withdrawn, hypervigilant, and antisocial. P.M. testified that she wrote a narrative about herself, about her life before her trauma or abuse, the trauma, and

life after the trauma. P.M. wrote this narrative one month before trial and read portions of it to the jury. The narrative is titled "[P.M.'s] Horrible Story of Trauma."

{¶ 44} While this testimony may have resulted in sympathy for P.M., Thomas has failed to demonstrate prejudice. Thus, defense counsel was not ineffective for failing to object to this testimony.

Witness Statement

{¶ 45} Thomas claims that defense counsel was ineffective for failing to object to the State asking L.M. if he made a statement to the police. He claims that this failure limited defense counsel's cross-examination of L.M., which potentially prejudiced him.

{¶ 46} In the instant case, the trial court reviewed L.M.'s statement when defense counsel began to cross-examine L.M. about what he said to the police. The court did not find any material inconsistencies in the statement and did not permit defense counsel to use the statement. The court noted that if defense counsel objected when the State asked L.M. about his statement, the court would not have allowed that testimony.

{¶ 47} Because there was no material inconsistencies between L.M.'s statement and L.M.'s testimony, we cannot say that the outcome of the trial would have been different had defense counsel objected. Therefore, we decline to find that defense counsel was ineffective.

Police Report

{¶ 48} After S.M.'s testimony, the State placed on the record that it had just come into possession of a police report and written statement made by one of the witnesses. The State indicated that it just shared this report with defense counsel. The trial court

then asked defense counsel if he had the opportunity to read the report. Defense counsel replied, "No, but it's okay." The trial court then recessed for lunch.

{¶ 49} Thomas argues that defense counsel was ineffective for failing to read this police report. While defense counsel has a duty to prepare for trial and review evidence, there is no evidence that trial counsel did not subsequently review the report at lunch or at a later time. Furthermore, there is no indication how Thomas was prejudiced. Thus, we decline to find that defense counsel was ineffective.

Improper Questioning of a State's Witness

{¶ 50} During the cross-examination of McAliley, a pediatric nurse practitioner, defense counsel asked, "So on your findings, you said there is [a] problem of sexual abuse?" McAliley replied, "That's correct." Defense counsel then stated, "That conclusion was based on the texting and [P.M.'s] testimony as trying to get away from [Thomas]." The State objected to this line of questioning, which the trial court sustained. The trial court then informed the jury that the last question was stricken from the record.

{¶ 51} Thomas claims that defense counsel was ineffective for questioning McAliley about a finding of sexual abuse. However, the trial court instructed the jury to disregard this line of questioning. Because the jury was informed that the questioning was improper, Thomas has failed to demonstrate how he was prejudiced. Thus, Thomas was not rendered ineffective assistance of counsel in this regard.

Indictment

{¶ 52} Lastly, Thomas argues that defense counsel was ineffective for failing to object to the indictment. Relying on his argument in the first assignment of error,

Thomas contends that the carbon copy counts should have been dismissed. However, because of our disposition of the first, fifth, and sixth assignments of error, Thomas has failed to demonstrate prejudice.

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

ASSIGNMENT OF ERROR THREE

"The trial court erred to the prejudice of [Thomas] when it declared the alleged victim competent to testify."

{¶ 54} Thomas argues that the trial court erred when it found that S.M. was competent to testify under Evid.R. 601.[12] He argues that there was no evidence that S.M had the ability to receive accurate impression, recollect the impression, and communicate what was observed.

{¶ 55} We note that Thomas failed to object to the trial court's competency determination. Thus, we review the alleged error to determine whether it constitutes plain error. *State v. Grahek*, Cuyahoga App. No. 81443, 2003-Ohio-2650, ¶13.

{¶ 56} In *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, 574 N.E.2d 483, the Ohio Supreme Court stated that the determination of witness competency "is within the sound discretion of the trial judge." "'The trial judge, who saw the [witnesses] and heard their testimony and passed on their competency, was in a far better position to judge their competency than is this court, which only reads their testimony from the record * * *.'"

---

[12]Evid.R. 601 provides in relevant part: "Every person is competent to be a witness except: (A) Those of unsound mind * * *, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

Bradley at 141, quoting *Barnett v. State* (1922), 104 Ohio St. 298, 135 N.E. 647. 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.

{¶ 57} Thomas contends that S.M. was incompetent because of her unsound mind. To support his claim, he refers to testimony revealing that S.M. has an IQ of 49, and that when she answered questions in class she would be confused as to what was being asked.

{¶ 58} The term, "unsound mind," includes all forms of mental retardation. R.C. 1.02(C). However, being of unsound mind does not automatically render a witness incompetent to testify. *Bradley* at 140. "'A person, who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind.'" Id. at 140-141, quoting *State v. Wildman* (1945), 145 Ohio St. 379, 61 N.E.2d 790.

{¶ 59} Moreover, "competency under Evid.R. 601(A) contemplates several characteristics, which can be broken down into three elements: first, the individual must have the ability to receive accurate impressions of fact; second, the individual must be able to accurately recollect those impressions; third, the individual must be able to relate those impressions truthfully." *Grahek* at ¶25, citing *State v. Said*, 71 Ohio St.3d 473, 1994-Ohio-402, 644 N.E.2d 337.

{¶ 60} A review of the record in the instant case reveals that S.M. was able to tell the difference between the truth and a lie and understood the need to tell the truth during her testimony. While S.M. has a low IQ, her trial testimony indicated that it made her feel weird when Thomas hugged her because he would rub her buttocks. This account of the incident reflects her ability to receive, recollect, and relate facts truthfully.

{¶ 61} Because the trial court was in a much better position to gauge S.M.'s understanding of the events and her capacity to testify and the record supports its determination, we find that the trial court did not abuse its discretion in allowing S.M. to testify. As we find no error, we do not reach a plain error analysis.

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

ASSIGNMENT OF ERROR FOUR

> **"The cumulative effect of the errors committed by the trial court and by [Thomas's] trial counsel combined to deny [Thomas] due process and a fair trial as guaranteed by the United States and Ohio Constitution."**

{¶ 63} Thomas contends that the cumulative errors asserted in the second and third assignments of error deprived him of his constitutional right to a fair trial.

{¶ 64} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256.

{¶ 65} However, as discussed above, Thomas did not receive ineffective assistance of counsel and S.M. was competent to testify. Because we do not find multiple instances of harmless error, Thomas was not deprived of his constitutional right to a fair trial.

{¶ 66} Therefore, the fourth assignment of error is overruled.

Judgment is affirmed in part, reversed in part and Counts 25-30 are vacated.

It is ordered that appellant recover from appellee 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 in part, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
KENNETH A. ROCCO, J., CONCUR