**[Cite as *State v. Miller*, 2023-Ohio-2826.]**

# IN THE COURT OF APPEALS OF OHIO
## ELEVENTH APPELLATE DISTRICT
## ASHTABULA COUNTY

| | |
|---|---|
| STATE OF OHIO,<br><br>Plaintiff-Appellee,<br><br>- vs -<br><br>LOUIS K. MILLER,<br><br>Defendant-Appellant. | **CASE NO. 2022-A-0075**<br><br>Criminal Appeal from the Court of Common Pleas<br><br>Trial Court No. 2020 CR 00065 |

**O P I N I O N**

Decided: August 14, 2023
Judgment: Affirmed

*Colleen M. O'Toole*, Ashtabula County Prosecutor, *Christopher R. Fortunato*, Assistant Prosecutor, and *Christine Davis*, Assistant Prosecutor, Ashtabula County Prosecutor's Office, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

*Michael A. Partlow*, P.O. Box 1562, Stow, OH 44224 (For Defendant-Appellant).

JOHN J. EKLUND, P.J.

**{¶1}** Appellant, Louis Miller, appeals his convictions of two counts of Rape, first-degree felonies in violation of R.C. 2907.02(A)(1)(b), and two counts of Gross Sexual Imposition, third-degree felonies in violation of R.C. 2907.05(A)(4). For the following reasons, we affirm the judgment of the Ashtabula County Court of Common Pleas.

**{¶2}** The following facts were testified to at trial:

**{¶3}** In approximately 2016 or 2017, Mother moved with her boyfriend, Greg Miller, and her three children to live with Greg's grandfather, Kenneth Miller, and uncle, Louis Miller, on Kenneth's farm. Mother has three children: two girls, J.H and M.H. (the

victims), and one boy, D.J. J.H. and M.H. were approximately eight and seven years old, respectively.

**{¶4}** J.H. testified that the first incident occurred in 2017 when she was sitting on the floor of her bedroom playing with dolls. Appellant walked into her bedroom, put his hands inside of her clothes, and touched her vagina. She stated that Appellant had touched her in a similar manner on her vagina "more than once" and that it occurred "often." On one occasion after he had touched her, Appellant told J.H.: "Don't tell your mom or anyone." M.H. testified that in 2017, she was lying on the bed in her mother's bedroom watching a movie when Appellant walked into the room and closed the door. Appellant lifted M.H.'s dress and put his penis into her vagina. M.H. asked Appellant to stop, but he continued. M.H. stated that the exact same incident occurred "more than once." M.H. testified that the "exact same thing" happened a second time "very soon after" the first time, when she was watching YouTube while her family was playing outside. In approximately 2017 or 2018, J.H. decided "this is getting out of hand. I need to tell somebody. * * * I didn't want to be touched anymore" and she told her mom what Appellant had done to her. M.H., hearing what her sister and mother were discussing, told her mother what Appellant had also done to her. Subsequently, Mother did not allow Appellant any contact with her children, and Greg committed suicide. Mother and her children continued living at the residence for two more years. During this time, in approximately 2020, Mother told her boss what had happened. Mother's boss alerted children's services, who interviewed the children at school and began an investigation. Children's services required Mother to move her and the children out of the residence, which she did, and the investigation closed. Detective Barger, who investigated the case

in connection with children's services, testified that he contacted Appellant to discuss the allegations and Appellant denied them.

**{¶5}** On April 14, 2020, the Ashtabula County Grand Jury indicted Appellant on two counts of Rape and four counts of Gross Sexual Imposition. Appellant pled not guilty to all counts. Appellant questioned the children's competency to testify at trial and the court held a competency hearing. At the hearing, the court held that the children were competent to testify, but that "these girls have limited intellectual and emotional abilities."

**{¶6}** Before the jury trial commenced, the state dismissed two counts of Gross Sexual Imposition. A three-day jury trial commenced on July 26, 2022. During the victims' testimony, Appellant often objected to the state's questions, asserting that they were leading. The court overruled the objections, and later explained that it allowed an "unusual amount" of leading questions because of the victims' intellectual and emotional limitations. The court "recognized that the standard questioning of the witnesses was going to have to have to be - - I was going to have to give the prosecution a little bit of leeway * * *." Appellant elected not to testify. The jury found Appellant guilty on all four counts. The court sentenced Appellant to a total of thirty years to life in prison, with all terms being served consecutively.

**{¶7}** Appellant timely appeals and raises two assignments of error.

**{¶8}** First assignment of error: "The trial court committed reversible, plain error by overruling Appellant's objections to the Appellee asking the child witnesses leading questions on an ongoing basis."

**{¶9}** A leading question is "one that suggests to the witness the answer desired by the examiner." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565,

¶ 149, quoting 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. "[T]he trial court has discretion to allow leading questions on direct examination." *Id.* Thus, we review the trial court's permitting leading questions for an abuse of discretion.

**{¶10}** Abuse of discretion is a term of art. It connotes a court's exercise of judgment that neither comports with reason nor the record. *State v. Underwood*, 11th Dist. Lake No. 2008-L-113, 2009-Ohio-208, ¶ 30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 [148 N.E. 362] (1925). Stated differently, an abuse of discretion is "the trial court's 'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Raia*, 11th Dist. Portage No. 2013-P-0020, 2014-Ohio-2707, ¶ 9, quoting *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting Black's Law Dictionary 11 (8th Ed.Rev.2004). "When an appellate court is reviewing a pure issue of law, 'the mere fact that the reviewing court would decide the issue differently is enough to find error[.] * * * By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.'" *Id*., quoting *Beechler* at ¶ 67. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

**{¶11}** "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Evid.R. 611(C). "[T]rial courts have wide latitude in handling such matters, particularly in cases involving alleged child sex-abuse victims." *State v. Howard*, 2d Dist. Montgomery No. 26360, 2015-Ohio-3917, ¶ 43. "With respect to the direct examination of minor sex abuse victims, it is

well-established that '[a] prosecutor may ask leading questions of a minor victim to establish the manner in which he or she has been specifically abused * * * and to pinpoint specific details and times.'" *State v. Poling*, 11th Dist. No. 2004-P-0044, 2006-Ohio-1008, at ¶ 25, citing *State v. Rodrigues*, 10th Dist. No. 95APA06–683, at *13 (Mar. 26, 1996), citing *State v. Madden*, 15 Ohio App.3d 130, 133, 472 N.E.2d 1126 (1984).

**{¶12}** In this case, the trial court did not abuse its discretion in allowing the state to ask the victims leading questions on direct examination. The court reasoned that it was necessary to permit the state to ask leading questions because of the victims' intellectual and emotional limitations. A review of the record reveals that the leading questions asked were necessary to establish the manner in which the victims had been abused, and to pinpoint the specific details and times the abuse occurred. Especially in this case where the witnesses were victims of child abuse and had limitations, the trial court did not fail to exercise sound, reasonable, and legal decision-making when it overruled Appellant's objections to the state asking leading questions.

**{¶13}** Appellant offers *State v. Poling*, 11th Dist. No. 2004-P-0044, 2006-Ohio-1008 as support for his proposition that leading questions were impermissible at trial. However, in *Poling,* this court reversed the lower court's holding because the state asked leading questions to eight out of eleven witnesses, and the witnesses were "mature" and "experienced," such as detectives. *Id.* at ¶ 27. The instant case is distinguishable from *Poling* because here, the only alleged leading questions were asked to the victims, who, the court found, were minors with intellectual and emotional limitations.

**{¶14}** Appellant's first assignment of error is without merit.

**{¶15}** Second assignment of error: "Appellant's convictions are against the manifest weight of the evidence."

**{¶16}** When evaluating the weight of the evidence, we review whether the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other indicated clearly that the party having the burden of proof was entitled to a verdict in its favor, if, on weighing the evidence in their minds, the greater amount of credible evidence sustained the issue which is to be established before them. "Weight is not a question of mathematics but depends on its effect in inducing belief." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Whereas sufficiency relates to the evidence's adequacy, weight of the evidence relates the evidence's persuasiveness. *Id*.

**{¶17}** The trier of fact is the sole judge of the weight of the evidence and the credibility of the witnesses. *State v. Landingham*, 11th Dist. Lake No. 2020-L-103, 2021-Ohio-4258, ¶ 22, quoting *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). The trier of fact may believe or disbelieve any witness in whole or in part, considering the demeanor of the witness and the manner in which a witness testifies, the interest, if any, of the outcome of the case and the connection with the prosecution or the defendant. *Id.,* quoting *Antil* at 67. This court, engaging in the limited weighing of the evidence introduced at trial, is deferential to the weight and factual findings made by the factfinder. *State v. Brown*, 11th Dist. Trumbull No. 2002-T-0077, 2003-Ohio-7183, ¶ 52, citing *Thompkins* at 390 and *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph two of the syllabus. The reviewing court "determines whether * * * the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be

reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

**{¶18}** In the instant case, the jury found Appellant guilty of two counts of Rape, first-degree felonies in violation of R.C. 2907.02(A)(1)(b), and two counts of Gross Sexual Imposition, third-degree felonies in violation of R.C. 2907.05(A)(4).

**{¶19}** R.C. 2907.02(A)(1)(b), Rape, provides: "No person shall engage in sexual conduct with another * * * when * * * the other person is less than thirteen years of age * * *." "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

**{¶20}** R.C. 2907.05, Gross Sexual Imposition, provides: "No person shall have sexual contact with another * * * when * * * the other person, or one of the other persons, is less than thirteen years of age * * *." "'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

**{¶21}** Appellant's convictions were not against the manifest weight of the evidence. Both victims were under thirteen years old when the conduct occurred. The sole evidence presented to the jury to find Appellant guilty of Rape is founded on M.H.'s testimony that Appellant lifted her dress and engaged in vaginal intercourse with her.

M.H. alleged that Appellant engaged in this activity with her twice. The sole evidence presented to the jury to find Appellant guilty of Gross Sexual Imposition is J.H.'s testimony that Appellant had touched her vagina with his hand "often" and "more than once." While Appellant is correct that there is no physical or forensic evidence connecting him to the crimes, the jury, as factfinder, was free to believe the victims' testimony and to determine their credibility. Reviewing the weight of the evidence, we cannot find that 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.

**{¶22}** Appellant's second assignment of error is without merit.

**{¶23}** The judgments of the Ashtabula County Court of Common Pleas are affirmed.

MARY JANE TRAPP, J.,

EUGENE A. LUCCI, J.,

concur.