[Cite as *State v. Mahon*, 2019-Ohio-3897.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
JEFFREY MAHON	:	Case No. CT2018-0060
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. CR2018-0147

JUDGMENT: Affirmed in Part, Reversed in Part and Remanded

DATE OF JUDGMENT: September 13, 2019

APPEARANCES:

For Plaintiff-Appellee

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Wise, Earle, J.

{¶ 1} Defendant-Appellant, Jeffery Mahon appeals the September 19, 2018 judgment of conviction and sentence of the Court of Common Pleas of Muskingum County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} The following evidence is adduced from the record of Mahon's jury trial.

{¶ 3} On December 27, 2017, Mahon called the 9-year old child victim's mother to invite child victim (herein C.V.) and his younger brother to stay the night at his home and play with his two grandchildren. C.V's mother dropped C.V and his brother off with Mahon late that afternoon. The families had been friends for several years. C.V.'s mother worked with Mahon's daughter, A.S.M. C.V and his family lived with A.S.M. for a short period of time, and C.V and his brother periodically stayed overnight with Mahon.

{¶ 4} On the evening of December 27, the children watched a movie that ended around 10:00 p.m. They then all fell asleep in the living room. C.V. fell asleep in a recliner by himself wearing just boxer briefs. The other three boys were on the floor or the sofa.

{¶ 5} C.V. woke sometime later to find himself in Mahon's lap, on his back lying across Mahon's legs. One leg of C.V's boxers had been pulled up, and Mahon had his hand on C.V's penis "making it go in circles," and "stretch[ing] it out." At first, C.V. laid still hoping Mahon would stop. When he didn't, C.V. acted as if he were rolling over in his sleep and turned away from Mahon.

{¶ 6} Mahon pulled his hand back when C.V. rolled over, waited a few minutes, then turned C.V. back towards him and continued fondling C.V's penis. C.V. was

frightened, and hoped Mahon would stop. But he continued until C.V. acted as if he were waking up.

{¶ 7} The next day, Mahon dropped C.V and his brother back off to their mother between noon and 1:00. That evening, C.V told his mother what happened. Mother called police.

{¶ 8} Officers did not question C.V. Rather, C.V. was seen at Nationwide Children's Hospital in Columbus, Ohio where he spoke to a forensic interviewer and underwent a physical examination. C.V.'s exam was normal and his statement to the interviewer was clear, appropriate, and consistent for his age and development. C.V. also provided the interviewer contextual and sensorimotor details of the abuse.

{¶ 9} Muskingum County Sheriff's Office Detective Steve Welker received the case on December 29, 2017. Six weeks after the incident, and after Mahon was aware Welker would obtain a DNA standard from him, Mahon voluntarily provided Welker with a written statement. In it, Mahon stated C.V. fell asleep beside him in the recliner and later kicked over Mahon's chewing tobacco "spit bottle" in his sleep, spilling the contents onto C.V’s left leg. Mahon stated he wiped up the spill with a rag, and was unsure as to whether it had spilled anywhere else besides C.V's left thigh.

{¶ 10} Logan Schepeler, a DNA scientist at the Bureau of Criminal Investigations tested items submitted in this matter for Y-STR DNA, a DNA type specific to males. The interior front panel of C.V.'s boxers were tested and revealed a mixture of DNA. C.V. was included as an expected contributor. However, there was not enough DNA from the second person to make any comparison. Penile swabs from C.V. did not reveal any DNA foreign to C.V.

{¶ 11} As a result of these events, on March 14, 2018, the Muskingum County Grand Jury returned an indictment charging Mahon as follows:

{¶ 12} Count one and two, gross sexual imposition (GSI), felonies of the third degree Each count included a sexually violent predator specification;

{¶ 13} Count three, kidnapping, a felony of the first degree. This count included a sexual motivation specification and a sexually violent predator specification;

{¶ 14} Count four, kidnapping by force, treat, or deception, and creating a substantial risk of serious physical harm, a felony of the first degree. This count included a sexual motivation specification and a sexually violent predator specification and;

{¶ 15} Count five, endangering children, a felony of the third degree.

{¶ 16} Mahon pled not guilty to the charges and elected to proceed to a jury trial which began on July 24, 2018.

{¶ 17} Mahon opted to try the specifications to the court. Before trial began, the state dismissed count four of the indictment and its specifications. Mahon stipulated to his prior 2003 conviction for GSI.

{¶ 18} At trial, Mahon's son A.M. testified on his father's behalf. On direct examination A.M. testified the allegations against his father surprised him as he never saw anything about his father that would cause him concern over leaving his own children with Mahon. On cross exam, following a bench conference, the state asked A.M. if he was aware of his father's 2003 conviction for GSI. A.M. testified he had been made aware of the prior conviction as an adult.

{¶ 19} Mahon testified on his own behalf. He denied the 2003 GSI ever happened. He further testified his son A.M. and his daughter A.S.M. came over around midnight on

the night in question to help him with a kitchen drywall project. He testified they applied mud and sanded until dawn.

{¶ 20} Mahon's 9-year-old grandson also testified on his grandfather's behalf. He testified that around midnight, he woke up and went to the bathroom. When he returned to the living room, he noticed Mahon and C.V. were both asleep in the recliner. The grandson further testified that he did not go back to sleep, and that no one else came over that night. A.S.M. and A.M. testified that they helped their father with the drywall project between midnight and dawn.

{¶ 21} After hearing the evidence and deliberating, the jury convicted Mahon of the remaining four counts of the indictment. The trial court ordered a pre-sentence investigation and the matter was set for sentencing on September 10, 2018.

{¶ 22} At sentencing, the state requested the trial court run the sentence for each GSI conviction consecutive to each other and consecutive to a 15 years to life sentence for kidnapping. Counsel for Mahon argued the two GSI convictions should merge with each other, and that the kidnapping, child endangerment and the two GSI conviction should also merge. The state agreed only to the merger of child endangerment and kidnapping.

{¶ 23} The trial court found kidnapping was not part and parcel of the two GSI convictions, and that because there was a brief pause in between the two GSI incidents, none of three counts merged. The trial court sentenced Mahon to 15 years to life for kidnapping, and 2 years to life for each GSI. The court ordered Mahon to serve the sentences for each GSI concurrently with each other, but consecutive to the sentence for kidnapping. Mahon was further classified as a Tier III sex offender.

{¶ 24} Mahon filed an appeal and the matter is now before this court for consideration. He raises seven assignments of error as follow:

I

{¶ 25} "THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO ASK [A.M.] AND JEFFREY MAHON ABOUTJEFFERY MAHON'S PRIOR GROSS SEXUAL IMPOSITION CONVICTION, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION SIXTEEN, ARTICLE ONE OF THE OHIO CONSTITUTION."

II

{¶ 26} "THE TRIAL COURT ERRED BY BARRING JEFFREY MAHON FROM INTRODUCING EVIDENCE MATERIAL TO HIS DEFENSE, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 1 & 16, ARTICLE I OF THE OHIO CONSTITUTION, AND HIS RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

III

{¶ 27} "JEFFREY MAHON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

IV

{¶ 28} "JEFFREY MAHON'S CONVICTIONS ARE BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITES STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION."

V

{¶ 29} "JEFFREY MAHON'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION."

VI

{¶ 30} "THE TRIAL COURT ERRONEOUSLY FAILED TO MERGE JEFFREY MAHON'S GROSS SEXUAL IMPOSITION OFFENSES, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OT THE UNITED STATES CONSTITUTION."

VII

{¶ 31} "THE TRIAL COURT ERRONEOUSLY FAILED TO MERGE JEFFREY MAHON'S GROSS SEXUAL IMPOSITION OFFENSES WITH THE KIDNAPPING OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OT THE UNITED STATES CONSTITUTION."

I

{¶ 32} In his first assignment of error, Mahon argues his convictions must be reversed because the trial court erred by allowing the state to question A.M. about Mahon's prior conviction for GSI. We disagree.

{¶ 33} The admission or exclusion of a prior conviction for impeachment purposes is within the trial court's discretion. *State v. Smith*, 5th Dist. No. 98-CA-6, 1999 WL 668801, (Aug. 20, 1999) at 4, citing State v. Wright, 48 Ohio St.3d 5, 548 N.E.2d 923 (1990). An appellate court therefore applies an abuse of discretion standard in reviewing the trial court's decision to admit or exclude such evidence. *Smith*, supra, citing *State v. Lane*, 118 Ohio App.3d 230, 692 N.E.2d 634 (1997). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 34} Evid.R. 609 states in relevant part:

> (A) General Rule. For the purpose of attacking the credibility of a witness:
>
> * * *
>
> (2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> (3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted

> of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.
>
> (B) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

{¶ 35} First, although Mahon argues here his prior GSI conviction was 15 years old at the time of trial, during trial, the trial court noted Mahon had not been released from sanctions on that conviction until 2009, bringing the conviction within 10 years of the date of Mahon's trial. Mahon did not dispute the trial court's observation. T.459-460. We therefore find the conviction was properly within the time limit set forth in Evid.R. 609(B).

{¶ 36} Next, on direct examination, counsel for Mahon asked A.M. about his reaction to the charges against his father:

> [Counsel for Mahone]: Okay. What was your reaction when you heard about it?
>
> [A.M]: I was surprised. I mean - - because, I mean I send my kids up there all the time, you know. So I wouldn't think anything of it, you know.
>
> [Counsel for Mahon]: Nothing to cause you to have any suspicion?
>
> [A.M]: Not at all.
>
> [Counsel for Mahon]: Ever?
>
> [A.M]: No.

{¶ 37} T. 433-434.

{¶ 38} Before cross-examination, the state asked to approach and an unrecorded bench conference took place. Thereafter, the state questioned A.M. regarding his knowledge of Mahon's prior conviction for GSI. A.M. testified he was made aware of the conviction as an adult. T. 435.

{¶ 39} What was discussed during the side bar was never placed on the record. At the close of defendant's evidence, however, counsel for Mahon lodged an objection regarding the state's use of Mahon's prior conviction which gives us some insight:

> [Counsel for Mahon]: Your Honor, I'm objecting to the asking of [A.M] of his father's prior criminal history. I believe it is highly inflammatory for it to be asked. The State saying that it had to do with credibility in terms of how he would know about whether or not his father had a prior conviction. The defense witness said he was too young to remember anything back then. He would have had no knowledge.
> * * *

{¶ 40} The state responded to the objection:

> Your Honor, the witness testified that he had no reason to have any concerns about taking his children to the defendant's house. The State believes that it is an appropriate inquiry by the State of Ohio to point out the fact that the Defendant's [sic] representing in front of the jury he has no concerns. It goes to his credibility for the jury for him to be able to acknowledge whether or not he knew or didn't know of the Defendant's prior conviction.
>
> If he had said he wasn't aware of it, then the State has no issue with the Defendant [sic] saying I had no concerns because I was unaware. However, being aware, and not changing his opinion as to whether or not to take his children there, does impact his credibility in front of the jury.

> Additionally, [counsel for Mahon] regarding his client testifying, has -- had represented through trial, had represented to me at break, that his client was going to testify. His client clearly falls within the appropriate time frame for asking about a conviction, which is 10 years from the time that he is removed from any sanctions, which would include post-release control, which would have been 2009. The present date being 2018, that conviction comes well within the purview of the state to ask about that question. [sic]
>
> Additionally, the facts of the other case helped establish an MO for this particular defendant in how he commits his offenses.

{¶ 41} T. 459-461.

{¶ 42} The trial court overruled Mahon's objection.

{¶ 43} Mahon argues in part that the state introduced this evidence in order to prove a behavioral fingerprint, i.e, a modus operandi for committing sex offenses against minors. It appears the state initially sought to use the prior conviction for impeachment purposes, and that establishing a modus operandi was an afterthought when counsel for Mahon raised his objection. While we agree with Mahon that the use of a prior conviction to prove a modus operandi is improper under the facts of this case, because there was no question as to identity, the conviction could still be used to impeach credibility after A.M. stated he had no concerns about leaving his children with his father.

{¶ 44} Moreover, by taking the stand, Mahon put his own credibility at issue. *State v. Canada* 10th Dist. No. 14AP-523, 2015-Ohio-2167 ¶ 64, citing *State v. Mayes* 12th

Dist. No. CA99-01-002, 1999WL1270987 (Dec. 30, 1999). On direct examination Mahon stated the 2003 GSI never happened, that the charge involved one of his daughter's friends, and that he only pled because he was scared and could not afford to fight the charge. T. 440-441. On cross-exam, the state confronted Mahon with his written statement in that matter in which he partially confessed. Mahon alleged the investigating officers told him what to write. T. 446-447.

{¶ 45} Mahon argues the probative value of this evidence was outweighed by the danger of unfair prejudice as it allowed the jury to conclude that because he had been convicted of GSI in the past, he must be guilty of GSI in the instant matter. But here, A.M testified there was no reason for there to be any concern about Mahon's behavior in the company of children, and Mahon himself testified he had never engaged in such behavior. Evidence of the prior conviction therefore became admissible to impeach the credibility of both A.M and Mahon. The trial court did not therefore abuse its discretion in admitting evidence of Mahon's prior conviction.

{¶ 46} The first assignment of error is overruled.

II

{¶ 47} In his second assignment of error, Mahon argues the trial court erred by preventing him from introducing evidence material to his defense. Specifically, Mahon sought to introduce evidence that C.V. is a drug addict and that his drug use clouded his perception of events during the sleepover. We disagree.

{¶ 48} The decision to admit or exclude relevant evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. See, *State v. Combs*, 62 Ohio St.3d 278, 581 N.E.2d 1071(1991); *State v. Sage*, 31 Ohio St.3d

173, 510 N.E.2d 343 (1987). An abuse of discretion implies more than an error of law or judgment; instead, the term suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. See, *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992); *State v. Montgomery*, 61 Ohio St.3d 410, 575 N.E.2d 167 (1991). In addition, when applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *In re Jane Doe I*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991).

{¶ 49} Before trial, the state made a motion in limine to prevent counsel for Mahon from asking any questions regarding C.V.'s medications. Counsel for Mahon argued the information was relevant as C.V.'s drug use could have "affected his perception and memory of the event." T. 9-10. The trial court found:

> The Court: My reading of the [Children's Services] record was the boy's being treated for anxiety and was given sleeping pills, which they recently upped, the dosage, from one-and-a-half to two. He had taken two, a little bit later he took another one, for a total of three. That's all there is. I don't think that's evidence of the boy having a drug problem.
>
> [Counsel for Mahon]: so you have more information than I do. What I've been disclosed to (sic) in the report is that he has a prior ingestion of three pills and the he informed his mother that he took those three pills.

The Court: He took three pills, that's what I just said. He started with two, took another one later.

[Counsel for Mahon]: Was it his prescription?

The Court: His prescription for anxiety.

[Counsel for Mahon]: So he didn't seek it out?

The Court: He didn't take anybody else's drugs.

{¶ 50} T. 10-11. The trial court then granted the state's motion in limine and counsel for Mahon objected to the same. Here Mahon argues the trial court's ruling impinged upon his constitutional right to due process by preventing him from presenting a complete defense. We agree with the trial court, however, that there is simply no evidence that C.V. was drug addicted.

{¶ 51} The second assignment of error is overruled.

IV, V

{¶ 52} We address appellant's fourth and fifth assignments of error out of order and together. In his fourth assignment of error, appellant argues his convictions are based on insufficient evidence. In his fifth assignment of error, he argues his convictions are against the manifest weight of the evidence. We disagree.

{¶ 53} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "The 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."

Jenks at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether 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." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 54} Mahon specifically challenges his convictions for gross sexual imposition arguing that the state failed to establish that he engaged in the charged conduct in order to sexually arouse himself or the victim.

{¶ 55} Mahon was convicted of two counts of gross sexual imposition pursuant to R.C. 2907.05(A)(4) which provides:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> * * *

> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶ 56} "Sexual contact" is " 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).

{¶ 57} In *State v. Cobb* (1991), 81 Ohio App.3d 179, 610 N.E.2d 1009 (1991) and *State v. Uhler*, 80 Ohio App.3d 113, 608 N.E.2d 1091 (1992) the Ninth District Court of Appeals considered the same challenge raised by Mahon. The court discussed the factfinder's role in determining whether sexual contact had occurred:

> Thus, the proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01. In making its decision the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts the trier of facts may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines, that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may

conclude that the object of the defendant's motivation was achieved." *Cobb*, 81 Ohio App.3d at 185, 610 N.E.2d at 1012-1013.

{¶ 58} The state presented testimony from C.V. who stated he fell asleep alone in the recliner, but woke up in the recliner in Mahon's lap. Mahon had pulled the right leg of C.V.'s boxer shorts up, and "stretched" C.V.'s penis and "made it go in circles." C.V. demonstrated these hand motions during his testimony. C.V. testified that Mahon continued the assault until he pretended he was waking up. T. 258-263. Many details of C.V.'s account were corroborated by Mahon's grandson who testified on behalf of Mahon. T. 406-410. Additionally, C.V. provided a consistent statement to the forensic interviewer at Nationwide Children's Hospital and the jurors viewed this interview. T. 355. There was no testimony from any witness that Mahon had any legitimate reason to have his hand on C.V.'s penis, and the jury could certainly infer from the circumstances the object of Mahon's motivation. We therefore find the state produced sufficient evidence to prove Mahon touched C.V.'s penis for the purpose of sexually arousing or gratifying himself or C.V.

{¶ 59} Further, under the same facts outlined above, we find Mahon's conviction is not against the manifest weight of the evidence. Mahon argues C.V.'s testimony is not credible, however the jury as the finder of fact and sole judge of the credibility of the witnesses was free to believe all, part, or none of C.V.'s testimony, and clearly found him credible. We find the jury did not lose its way in so finding.

{¶ 60} The fourth and fifth assignments of error are overruled.

III

{¶ 61} In his third assignment of error, appellant argues his trial counsel rendered ineffective assistance. We disagree.

{¶ 62} The standard this issue must be measured against is set out in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. 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.

{¶ 63} This court must accord deference to defense counsel's strategic choices made during trial and "requires us to eliminate the distorting effect of hindsight." *State v. Post*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754 (1987).

{¶ 64} Mahon makes two arguments under this assignment of error. In the first he argues counsel rendered ineffective assistance when he failed to seek removal of Juror S. who stated he would place considerable weight on a child's accusation against an adult.

{¶ 65} The state began this conversation with prospective jurors by asking "What is your mind set as to how to weigh the word of a child versus the word of an adult?" Initially Juror S. stated "I don't know. I think in my case, I think a child - - depending on the age and upbringing of the child, sometimes knowing right from wrong, and truth and not being true, I'd probably weigh heavier with the child actually." T. 120. The state proceeded to discuss the subject with several other jurors who stated they would start with the child and adult "level" and then determine what happened by hearing all the facts. The state then asked Juror S. if S. could do the same. S. responded "Probably." The state advised S. that a definitive answer was required and asked again if he could weigh the testimony of an adult and a child equally to which S. responded "Yes." T. 121.

{¶ 66} We find Mahon has failed to meet either Strickland prong in and reject his argument that counsel was ineffective for failing to remove Juror S.

{¶ 67} Second, Mahon argues counsel rendered ineffective assistance for failing to request a limiting jury instruction that evidence of Mahon's prior conviction could not be used to conclude he had a propensity to commit crimes.

{¶ 68} While we find a request for a limiting instruction would have been appropriate, we find appellant was not prejudiced by the lack of a limiting instruction. Based upon the evidence presented at trial, and as discussed in Mahon's fourth and fifth assignments of error above, there is not a reasonable probability that but for counsel's

error, the outcome of the trial would have been different. Moreover, it is within the realm of reasonable trial strategy not to request a limiting instruction so as to avoid drawing further attention to Mahon's prior conviction. *State v. Kinney*, 4th Dist. App. No. 07CA2996, 2008-Ohio-4612 ¶ 20, citing *State v. Jovanovic*, 8th Dist. App. No. 89180, 2007-Ohio-6196 ¶ 30

{¶ 69} The third assignment of error is overruled.

VI, VII

{¶ 70} We address appellant's final two assignments of error together. In these assignments of error, appellant argues the trial court erred in failing to merge the GSI convictions with each other and both GSI convictions with the kidnapping conviction. We agree.

{¶ 71} R.C. 2941.25, addressing multiple counts provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 72} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.2d 892, the Ohio Supreme Court found:

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors-the conduct, the animus, and the import.
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

{¶ 73} *Ruff*, at syllabus. The Court further explained,

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses

> were committed separately, and (3) the offenses were committed with separate animus or motivation.
>
> * * *
>
> An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶ 74} *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶25.

{¶ 75} When determining whether two offenses are allied offenses of similar import, we apply a de novo standard of review. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶ 76} R.C. 2905.01(A)(4) sets forth the elements of kidnapping as: "[n]o person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity * * * with the victim against the victim's will."

{¶ 77} Gross sexual imposition pursuant to R.C. 2907.05(A)(4) provides that "[n]o person shall have sexual contact with another * * * when * * * [t]he other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 78} Applying the first two *Ruff* questions to the GSI and kidnapping in the instant case, there was a single victim, and the resulting harm from each offense was the same. As for whether the offenses of kidnapping and GSI were committed separately, In *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), the Ohio Supreme Court held:

> In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

{¶ 79} *Id*. at syllabus.

{¶ 80} Here, the restraint was not prolonged, nor was there any secretive confinement or substantial movement. Mahon held C.V. on his lap while touching C.V's penis. He pulled C.V. back towards himself when C.V. rolled over and continued the assault. The touching lasted for a few minutes. There was no risk of harm separate and apart from the GSI. The offenses of kidnapping and GSI are therefore of similar import

and were not committed separately. See *State v. Robertson*, 8th Dist. Cuyahoga No. 105562, 2018-Ohio-1640 at ¶ 58.

{¶ 81} As for the two GSI counts, again, these counts involved the same victim and the same harm. They also both took place on the same day, at the same time, at the same location, and within a matter of minutes. There is no separate animus or motivation evidenced in the record. We therefore find both counts of GSI are also allied offenses.

{¶ 82} The sixth and seventh assignments of error are well taken.

{¶ 83} Finding merit to Mahon's sixth and seventh assignments of error, we affirm in part, reverse in part, and remand for resentencing consistent with this opinion.

By Wise, Earle, J.

Wise, John, P.J. and

Baldwin, J. concur.

EEW/rw