[Cite as *State v. Hovatter*, 2022-Ohio-33.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-21-006

Appellee — Trial Court No. 20 CR 498

v.

Martin A. Hovatter — **DECISION AND JUDGMENT**

Appellant — Decided: January 7, 2022

* * * * *

Beth A. Tischler, Sandusky County Prosecuting Attorney, and
Alexis M. Otero, Assistant Prosecuting Attorney, for appellee.

Autumn D. Adams, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Martin A. Hovatter, appeals the judgment entered by the Sandusky County Court of Common Pleas, sentencing him to serve an aggregate term of imprisonment of from 68 to 70 years, after a jury found him guilty of three counts of complicity to rape, six counts of endangering children, and one count of complicity to

gross sexual imposition. For the reasons that follow, we affirm the judgment of the trial court.

Statement of the Case

{¶ 2} On June 26, 2020, appellant was indicted in a twelve-count indictment that charged him with three counts of complicity to rape, all felonies of the first degree, in violation of R.C. 2923.03(A)(1) and R.C. 2907(A)(1)(a); six counts of endangering children, all felonies of the second degree, in violation of R.C. 2919.22(B)(5); two counts of sexual battery, both felonies of the third degree, in violation of R.C. 2907.03(A)(5); and one count of complicity to gross sexual imposition, a felony of the third degree, in violation of R.C. 2923.03(A)(1) and R.C. 2907.05(A)(4).

{¶ 3} The matter proceeded to a two-day jury trial, beginning on March 9 and ending on March 10, 2021. At trial, the jury heard testimony from five witnesses that were put on by the state. After the state rested its case in chief, defense counsel moved for acquittal, pursuant to Crim.R. 29, on all twelve counts. The trial court granted the motion as to the two counts for sexual battery, but denied the motion as to the remaining counts. After the defense rested, defense counsel renewed its previous motion for acquittal. The motion was denied, and the remaining ten counts were submitted to the jury. The jury returned a verdict of guilty on all ten counts. Appellant was sentenced serve to a term of imprisonment as to each count, with all of the terms ordered to be served consecutively, resulting in an aggregate term of 68 to 73 years in prison. In addition, appellant was ordered to register as a Tier III sex offender.

Statement of the Facts

{¶ 4} Appellant was indicted as the result of several incidents that occurred in his home during the time period from October 1, 2018, to February 29, 2020. At all relevant times, appellant was the primary caregiver for his two children, M.H., born in 2004, and E.H., born in 2012, and also for his former step-daughter, M.S., born in 2001. M.S. and E.H. have the same mother. Over the course of several years, appellant would provide alcohol to M.H. and M.S., and he would encourage the two teenagers to drink with him. After they consumed the alcohol, appellant would encourage and prompt M.H. and M.S. to engage in sexual conduct, including sexual intercourse. Appellant would participate in the sexual encounters by watching and, while sitting next to M.S., directing the actions of M.H. and M.S. Appellant would also engage by touching M.S. and by "sexually complimenting" her. During the time period in question, appellant also encouraged his seven-year-old daughter, E.H., to engage in sexual conduct with her sister, M.S. Specifically, appellant encouraged E.H. to touch M.S.'s vagina.

{¶ 5} M.H., M.S., and E.H., all testified as to physical and psychological abuse that occurred in appellant's home and contributed to their compliance with appellant's direction. During the trial, all three young witnesses testified that appellant would alternately threaten to kill the older children, to kill himself, or to throw M.S. out of the house. M.S. testified as to her fear of appellant being physical with her, because he would, in fact, hit her. Corroborating M.S.'s description of the abuse, E.H. testified that she had witnessed appellant both hit M.S. and order her to pack up and get out of the

house. Finally, M.H. specified that appellant would threaten to "put [him] on the ground" and kill him.

Assignments of Error

{¶ 6} On appeal, appellant asserts the following assignments of error:

I. The convictions for Complicity to Rape were not supported by the sufficiency of the evidence. Evidence showed M.H. either did not drink alcohol or voluntarily consumed it, Hovatter did not have any sexual contact with M.H., and M.H. was not substantially impaired when he did consume alcohol.

II. The convictions for Endangering children were not supported by the sufficiency of the evidence as the evidence failed to show M.H., M.S., and E.H. participate[d] in any production/presentation/dissemination/advertisement of any material or performance.

III. The State failed to present sufficient evidence of when [the crime of gross sexual imposition] occurred, and based upon M.H.'s motives to distract the authorities away from his [own] criminal behavior, there was not sufficient evidence that gross sexual imposition occurred.

IV. Hovatter was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Analysis

{¶ 7} In his first assignment of error, appellant argues that the evidence presented at trial was insufficient to support his convictions for complicity to rape, in violation of R.C. 2923.03(A)(1) and R.C. 2907.02(A)(1)(a). In reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Worley*, 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶ 57. When reviewing for sufficiency, an appellate court "will not weigh the evidence or assess the credibility of witnesses." *State v. Tucker*, 6th Dist. Wood No. WD-16-063, 2018-Ohio-1869, ¶ 23, citing *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 8} The statute that governs the offense of complicity, R.C. 2923.03, relevantly provides: "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense." The statute that governs the offense of rape, R.C. 2907.02, relevantly states:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by

administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

{¶ 9} It is the state's position that "[a]ppellant was complicit to rape because he did solicit or procure M.S. to engage in sexual conduct with M.H. by providing alcohol and by threat of force [a]ppellant made them drink the alcohol and made them engage in sexual intercourse."

{¶ 10} M.H. testified as to three specific encounters that gave rise to the charges of complicity to rape. The first encounter took place on or about October 1, 2018, when M.H. was 14-years-old and M.S. was 17-years-old, and was the first time M.H. had ever had sexual intercourse. The second encounter took place on or about July 4, 2019. And the third encounter took place on M.H.'s fifteenth birthday, later in July 2019.

{¶ 11} During the first encounter, M.H. testified that he was invited to come downstairs to have a drink with appellant and M.S. M.H. testified that appellant provided him with two shots of vodka, and that this was the first time he ever drank alcohol. M.H. testified that he felt "intoxicated, not quite drunk, but inebriated enough." He stated that appellant was sitting on the couch in the living room, wearing only his underwear, when M.S. "stripped and started to masturbate." M.H. testified that M.S. asked M.H. if he wanted to "help her." M.H. responded affirmatively. Thereafter, he and M.S. had sexual intercourse on the middle of the couch, while appellant, who was seated on the end of the couch, provided instructions to the two minors on how to perform correctly.

{¶ 12} M.H. testified that the second encounter took place on July 4, 2019, and "was kind of like a repeat" of the first. M.H. testified that appellant provided him with 40

percent vodka, after previously having provided M.S. with alcohol. M.S. led M.H. to her bedroom, where appellant was also present. M.H. testified that, while in the bedroom, appellant was sitting on the bed, next to M.S., touching her breasts and kissing her, as she was engaging in sexual intercourse with M.H.

{¶ 13} M.H. testified that the third encounter occurred on his fifteenth birthday. This time, appellant "came in with a full bottle of Jack Daniels and [M.S.] was sitting naked when [M.H.] walked in the door." M.H. testified that appellant began to finger M.S. while the three were seated on the couch, and that M.S. began to "jerk[] [M.H.] off." Thereafter, they all went into M.S.'s bedroom, where appellant fondled and kissed M.S., while she had sexual intercourse with M.H. M.H. testified that, once again, appellant sat beside M.S., giving the teens directions on how to touch one another and sexually complimenting M.S.

{¶ 14} M.S. also testified as to these encounters. She testified that appellant provided her and M.H. with Smirnoff vodka and then "made" her and M.H. have sex. M.S. further testified that appellant told them to do it, and that she did not have much of a choice not to, because appellant would threaten her. She testified that after she and M.H. had consumed the alcohol, appellant told them to go into the bedroom, to begin touching each other, and then to have sex. She stated that while the sexual intercourse was occurring, appellant laid next to her on the bed, told the teens what to do, and then would touch or kiss her. M.S. testified that this would happen regularly, "every month, a couple times a month," and that appellant was involved in every encounter. M.S. testified that she and M.H. would not engage in sexual intercourse outside the presence of appellant.

She further testified that appellant would ask her to engage in sexual intercourse with M.H., and that M.H. would not ask her.

{¶ 15} Here, the evidence clearly demonstrated that appellant provided alcohol, influenced and invited M.H. and M.S. to drink the alcohol, and used their intoxication, together with their fear of retaliation if they should disobey him, as a means to get the two to engage in sexual intercourse while he watched.

{¶ 16} Appellant argues that the state failed to prove that appellant used force to get M.H. to consume alcohol. We disagree. As indicated above, there was ample evidence that M.H. was fearful of appellant as a result of the physical and psychological abuse that occurred in the home. In addition, M.H. specifically testified that "there were times where I have refused things from Martin before, and he would threaten violence not just to me, but to the other kids as well." M.H. also testified that he never drank outside the presence of appellant and only drank when appellant gave him alcohol. It is the conclusion of this court that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt, based on appellant's position of authority over M.H. and his past threats of violence, together with M.H.'s testimony that he never drank outside the presence of appellant, that appellant did by threat of force cause M.H. to drink alcohol.

{¶ 17} Appellant also argues that there was insufficient evidence to prove that M.H. was "substantially impaired." Because the phrase "substantially impaired" is not defined in the Ohio Criminal Code, we adopt the Ohio Supreme Court holding that "substantial impairment must be established by demonstrating a present reduction,

diminution or decrease in the victim's ability, either to appraise the nature of [his or her] conduct or to control [his or her] conduct." *State v. Zeh*, 31 Ohio St.3d 99, 104, 509 N.E.2d 414 (1987); *see also State v. McNeal*, 2d Dist. Montgomery No. 28885, 2021-Ohio-1520, ¶ 31; *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶21 (2d Dist.). "It is sufficient for the state to establish substantial impairment by establishing a reduction or decrease in the victim's ability to act or think." *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, ¶ 15, citing *Zeh*, at 103-04. Substantial impairment may be proven by the victim's own testimony. *State v. Franklin*, 9th Dist. Summit No. 29071, 2019-Ohio-1513, ¶ 8.

{¶ 18} In the instant case, M.H. testified that he had never drunk alcohol before the first encounter, and that, during that first encounter, after he drank the vodka that appellant offered him, he felt "intoxicated, not quite drunk, but inebriated enough." M.H. testified that the second encounter was a "repeat" of the first encounter, and that vodka was served. M.S. also testified specifically as to the first encounter and stated that vodka was provided. Regarding the third encounter, M.H. testified that appellant provided him with a bottle of Jack Daniels. According to M.H.'s testimony, M.H. did not consume alcohol outside the presence of appellant, and, further, would only engage in sexual intercourse with M.S. after having consumed alcohol and after having been pressured and encouraged by appellant to do so. We find that, after viewing the evidence in a light most favorable to the prosecution, a reasonable trier of fact could have found that M.H., after drinking the alcohol provided by appellant, had a reduced ability to think, sufficient to establish beyond a reasonable doubt that he was substantially impaired.

{¶ 19} Appellant additionally argues that there was not sufficient evidence to prove that appellant administered alcohol for the purpose of preventing resistance. Here, the evidence showed that appellant provided the alcohol, and encouraged and allowed M.H. to drink the alcohol, which resulted in the substantial impairment of M.H.'s judgment, which, in turn, allowed appellant to successfully encourage M.H. to participate in sexual intercourse with M.S. Again, there was testimony that M.H. would not drink alcohol outside the presence and encouragement of appellant. Further M.H. and M.S. both testified that they would not engage in sexual intercourse with one another outside the presence, direction, and control of appellant. Viewing the evidence in a light most favorable to the prosecution, a reasonable trier of fact could have found, beyond a reasonable doubt, that but for appellant providing M.H. alcohol and encouraging him to drink, M.H. would not have engaged in sexual intercourse with M.S.

{¶ 20} Finally, appellant argues that the state, in order to establish its case, had to prove that appellant engaged in sexual conduct with M.H. We disagree. Appellant was charged with complicity to rape. As indicated above, the offense of complicity relevantly provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [s]olicit or procure another to commit the offense." R.C. 2923.03. As noted by the Eighth District Court of Appeals:

> The term 'solicit' is defined as 'to seek, to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear.' Ohio Jury Instructions, Section 523.03(6)-(7) (applicable to offenses committed on or after July 1, 1996). Black's Law Dictionary defines 'solicit' as 'to

command, authorize, urge, incite, request or advise another to commit a crime.' Black's Law Dictionary, Sixth Ed.1990.

State v. Moore, 8th Dist. Cuyahoga No. 83692, 2004-Ohio-5732, ¶ 18. By the statute's own terms, appellant was not required to have engaged in sexual conduct with M.H. *See also, Moore*, *supra,* (complicity to rape was established where appellant called the victim, advised the co-defendant that the victim wanted to have sex with him, encouraged the co-defendant to "go for it," and accompanied the co-defendant to the victim's house, where he waited outside while the co-defendant engaged in sexual intercourse with the victim); *see also, State v. Stites,* 1st Dist. Nos. C-190247, C-190255, 2020-Ohio-4281 (complicity to rape was established where appellant knew that the co-defendant was engaging in sexual conduct with her daughters and step-daughter within the home, allowed the abuse to occur, was present for the abuse, and encouraged the victims to engage in the abuse). Evidence establishing that appellant provided the alcohol, encouraged M.H. and M.S. to consume the alcohol, and then encouraged them to engage in sexual conduct while he was present in the room, watching and participating, was sufficient to support the convictions for complicity to rape. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 21} Appellant argues in his second assignment of error his convictions for endangering children were not supported by sufficient evidence. R.C. 2919.22(B)(5), the provision under which appellant was charged for this offense, states:

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

* * *

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter[.]

{¶ 22} The facts of this case are similar to those set forth in *State v. McClain*, 2d Dist. Champaign No. 2019-CA-12, 2020-Ohio-952, wherein McClain, was convicted of child endangering in violation of R.C. 2919.22(B)(5), after he provided juveniles with a vibrator and encouraged them to use the vibrator while he watched. On appeal, McClain challenged the sufficiency of the evidence as to this conviction. The appellate court denied the assignment of error and found that "[t]he evidence supports a conclusion that McClain enticed, permitted, encouraged, and allowed [the victim] to participate in the presentation of a masturbation performance with the aid of his massager for McClain's benefit." *Id.* at ¶ 25.

{¶ 23} Employing the same rationale that was used in *McClain*, we find that there was sufficient evidence presented to support a finding that appellant enticed, permitted, encouraged, and allowed M.H., M.S., and E.H. to participate in the presentation of a

masturbation and sexual intercourse performance for his own benefit. As indicated above, testimony was presented that sexual intercourse between M.H. and M.S. did not occur unless encouraged by appellant, who was present, watching, and participating. Specifically, appellant, during the sexual encounters, would sit next to M.S. and would watch, direct, and instruct M.H. and M.S. on what to do, and, further, he would talk to, sexually compliment, and touch M.S. In connection with the incident involving E.H., appellant was also present and encouraged E.H. to touch M.S.'s vagina. After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of endangering children were proven beyond a reasonable doubt. Therefore, appellant's second assignment of error is found not well-taken.

{¶ 24} Appellant argues in his third assignment of error that his conviction for complicity to gross sexual imposition was not supported by sufficient evidence. Specifically, appellant argues that there was insufficient evidence presented to support a finding that appellant forced E.H. to have sexual contact with M.S. on or between February 1 and February 29, 2020.

{¶ 25} As indicated above, the statute governing the offense of complicity provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [s]olicit or procure another to commit the offense. R.C. 2923.03. The statute governing the offense of gross sexual imposition in violation of R.C. 2907.05(A)(4) states:

(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.

{¶ 26} During the trial, eight-year-old E.H. testified that when she was seven-years-old and living in appellant's home, she had sexual contact with M.S. Specifically, E.H. testified that one day, when she got home from school, she saw M.S. naked and lying on the couch in the living room. E.H. testified that touching a private part is an unsafe touch and, further, identified a vagina and a butt as private parts. E.H. described in detail M.S.'s private area, and testified that she touched M.S.'s private parts one time after appellant gave her permission. E.H. testified that appellant told E.H. it was okay for her to touch M.S.'s private parts.

{¶ 27} M.H. also testified as to this incident. M.H. testified that for the last year and a half, multiple instances of sexual abuse occurred in appellant's home. During his testimony, M.H. recalled that at some time "very late" in 2019, he witnessed an incident that occurred in the living room of appellant's home, when his youngest sister, E.H. was seven. He testified that he walked downstairs into the living room and observed appellant "sitting on the left side of the couch, [M.S] in the middle, and [E.H.] on the floor on her knees touching [M.S.'s] vagina." M.H. testified that M.S. told him "that they

were only teaching [E.H.] about the parts of the vagina, even though [M.S.] was fully naked, had alcohol in her hand, and was clearly lubricated." Additionally, M.H.'s testimony was supported by the testimony from a Bellevue police officer who testified that he received a call on April 26, 2020, during which M.H. disclosed an allegation of sexual abuse that had occurred in appellant's home and involved M.H.'s seven-year-old sister.

{¶ 28} Appellant argues only that there was insufficient evidence as to the date of this incident and that such failure calls into question whether the incident actually occurred. Regarding the level of specificity required to establish the date of an offense, this court has stated:

> '[W]here the exact date and time of an offense are not material elements of a crime nor essential to the validity of a conviction, the failure to prove such is of no consequence and it is sufficient to prove that the alleged offense occurred at or about the time charged.' *State v. Fentress*, 8th Dist. Cuyahoga No. 85835, 2005-Ohio-5851, ¶ 21. * * *
>
> This principle applies with particular force in cases involving sexual offenses committed against minors, because '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. Schee*, 6th Dist. Erie No. E-15-048, 2017-Ohio-212, ¶ 46, citing *State v. Mundy*, 99 Ohio App.3d 275, 296, 650 N.E.2d 502 (2d Dist.1994). '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.' *State v. Robinette*, 5th Dist. Morrow No. CA-652, 1987 WL 7153, *3, 1987 Ohio App. LEXIS 5996, *8 (Feb. 27, 1987). '[A]n allowance for reasonableness and inexactitude must be made for such cases considering the circumstances. *Id.*

State v. Gomez, 6th Dist. Lucas No. L-17-1130, 2019-Ohio-576, ¶ 78-79, *appeal not allowed*, 157 Ohio St.3d 1443, 2019-Ohio-4211, 132 N.E.3d 717.

{¶ 29} As to gross sexual imposition offenses, this court has held that "the precise date and time sexual contact occurs is not an essential element of the crime." *State v. Rossbach*, 6th Dist. Lucas No. L-09-1300, 2011-Ohio-281, ¶ 78. Appellant was convicted of complicity to gross sexual imposition, an offense for which the exact time and date is not an essential element. In addition, the facts of this case involve child victims who are related to, and who lived in the same household as, appellant. Under the circumstances, we find that an allowance for reasonableness and inexactitude is appropriately made.

{¶ 30} Viewing the state's evidence in a light most favorable to the prosecution, a rational trier of fact could have found all of the evidence of gross sexual imposition of E.H. proven beyond a reasonable doubt. Appellant's third assignment of error is, therefore, found not well-taken.

{¶ 31} Appellant argues in his fourth, and final, assignment of error that he was denied effective assistance of counsel. In Ohio, a properly licensed attorney is presumed competent and the burden is on the petitioner to show counsel's ineffectiveness. *State v.*

Hamblin, 37 Ohio St.3d 153, 155-56, 524 N.E.2d 476 (1988). This burden has been set forth by the Supreme Court of Ohio in *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, as follows:

> In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must prove that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance. Thus, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at ¶ 10 (citations omitted).

{¶ 32} In reviewing a claim of ineffective assistance of counsel, an appellate court "must be 'highly deferential' and 'indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'" *State v. Ryan*, 6th Dist. Wood No. WD-05-064, 2006-Ohio-5120, ¶22, citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 33} Here, appellant argues that trial counsel's performance, in moving for acquittal under Crim.R. 29, was deficient, because she failed to make certain arguments suggested by appellate counsel as to each count. Review of the record reveals that trial counsel articulated her own thorough and well-reasoned arguments in support of the Crim.R. 29 motion for acquittal, and that she, too, made specific arguments as to each

count. Thus, appellant fails to demonstrate that trial counsel's performance fell short of reasonable professional assistance. Further, for the reasons stated above, appellant's convictions were, in fact, supported by sufficient evidence. Thus, even if there was a failure not to articulate the specific arguments set forth by appellant on appeal, this failure did not prejudice appellant. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 34} For all of the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Myron C. Duhart, P.J. _____
CONCUR.
JUDGE