

NO. 07-0809

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 87984

STATE OF OHIO,

Plaintiff-Appellee

-vs-

GORDON MALLETTE,

Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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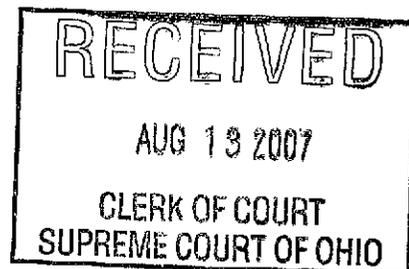
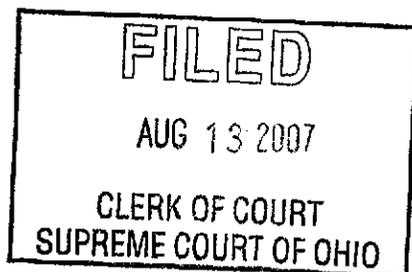


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WHY THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

Appellant fails to demonstrate he was denied a fair and impartial adjudication. The first two propositions of law that Appellant now raises to this Court were raised below on appeal to the Eighth District. Notably, this case was the first case in which the Eighth District rejected a claim that this Court's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violated the *ex post facto* clause of the Constitution. *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715. These propositions of law were properly adjudicated by the court below and involve the application of well-settled law to the facts of this case. No complex issues are presented herein. Finally, the case is of no great public interest. Finally, there is no need for this Court to exercise jurisdiction over Appellant's ineffective assistance of counsel claim in light of the fact that Appellate failed to raise the issue in an App.R. 26 (B) motion with the appellate court. Accordingly, the State of Ohio, appellee herein, respectfully requests that this Honorable Court deny leave to appeal.

STATEMENT OF FACTS

In affirming this case on direct appeal, the court below stated the facts of this case as follows:

{¶ 2} In 2005, Mallette was charged with twelve counts of rape and twelve counts of kidnapping. All charges specified that the victim was under the age of ten. The rape charges additionally specified that Mallette used force or the threat of force, and the kidnapping charges specified that the crimes were committed with a sexual motivation.

{¶ 3} The following evidence was adduced at Mallette's jury trial.

{¶ 4} The victim, L.M., was born in 1994. From kindergarten through third grade, he lived with his mother ("mother") and stepfather on the second floor of his grandmother's home. L.M.'s grandmother lived with Mallette, but the couple had separate bedrooms.

{¶ 5} In July 2005, mother received a call from a neighbor complaining that eleven-year-old L.M. had pulled down a girl's bathing suit and made a sexual remark to the girl. The next day, L.M. went to his father's house for a scheduled visit. L.M.'s father discussed the incident with his son. When pressed by his father about his actions and asked where he had learned that type of behavior, L.M. replied that he learned it from Mallette. L.M. then revealed that Mallette had repeatedly molested him.

{¶ 6} L.M.'s parents notified the police. L.M. was interviewed by a sex-crimes detective and a caseworker at the Medina County Department of Children and Family Services. L.M. also met with a counselor and underwent a physical examination, which revealed no physical signs of sexual abuse.

{¶ 7} L.M. testified that when he was in the first grade, he and Mallette began touching each other's genitals and buttocks. L.M. testified that, by the second grade, the conduct had escalated to oral sex.^{FN1} He estimated that the oral sex occurred twenty to thirty times. L.M. also testified that Mallette attempted anal intercourse ten to fifteen times, and Mallette also tried to force L.M. to perform anal sex on him, but L.M. refused. He testified that all these acts occurred at his grandmother's residence, either in the living room or in Mallette's bedroom. L.M. testified that the sexual activity became less frequent when he was in the third grade and then stopped entirely when his family moved away.

FN1. The indictment specified acts that occurred only when L.M. was in the second grade.

{¶ 8} Mallette testified on his own behalf and denied any sexual contact with L.M.

{¶ 9} The jury convicted Mallette of all counts and specifications. The trial court designated Mallette a sexual predator and sentenced him to twelve consecutive life sentences.

State v. Mallette, 2007-Ohio-715. at paragraphs 2 – 9.

LAW AND ARGUMENT

PROPOSITION OF LAW I: A DEFENDANT IS DENIED HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND DUE PROCESS WHEN THE TRIAL COURT ALLOWS TESTIMONY FROM MULTIPLE WITNESSES THAT REPEATS IN DETAIL THE ALLEGED VICTIM'S STATEMENTS TO THE WITNESSES REGARDING THE ALLEGED CRIME.

In his first proposition of law, appellant asks this Court to exercise jurisdiction over the Eighth District's rejection of his hearsay argument. The State respectfully disagrees. The Eighth District rejected this argument and stated as follows:

{¶ 10} In the first assignment of error, Mallette argues that the trial court erred by permitting hearsay testimony.

{¶ 11} Mallette claims that the trial court erred when it permitted prosecution witnesses to testify to inadmissible hearsay statements. Mallette argues that the trial court, over defense objection, allowed witnesses to testify to hearsay statements solely to bolster L.M.'s credibility.

{¶ 12} The trial court has broad discretion in the admission of evidence and, unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere. State v. Cooper, Cuyahoga App. No. 86437, 2006-Ohio-817, citing State v. Hymore (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. Moreover, if trial counsel fails to object to the admission of certain evidence or testimony, the objection is waived unless there is plain error in the admission. To prevail under a plain error analysis, a defendant bears the burden of demonstrating that, but for the error, the outcome of the trial clearly would have been different. State v. Alexander, Cuyahoga App. No. 87109, 2006-Ohio-4760; see Crim.R. 52(B). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, citing State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶ 13} Mallette cites various transcript pages in the table of contents of his brief which refer to the testimony of L.M.'s mother, stepmother, father, and social worker. He fails, however, to even mention the testimony of the mother, stepmother, or social worker within the argument for the assigned error or to cite that part of the record. In fact, Mallette refers to only the father's testimony in his argument. Mallette has failed to support or demonstrate that any witness other than the father provided hearsay testimony, and we decline to make his arguments for him, because it is not our duty to root out all possible arguments. See Cardone v. Cardone (May 6, 1998), Summit App. Nos. 18349 and 18673; see App.R. 12(A)(2) and App.R. 16(A). Therefore, we will review only the father's testimony, to which he has referred. Further, and contrary to Mallette's assertions, trial counsel did not object to the father's testimony at trial; thus, we review the father's testimony solely for plain error.

{¶ 14} "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). L.M.'s father testified that L.M. disclosed to him where the abuse occurred, that Mallette had touched L.M.'s penis and buttocks, masturbated in his presence, performed oral sex, and attempted anal intercourse.

{¶ 15} We find that this testimony was part of a line of questioning to show how the father learned of the alleged abuse, his actions subsequent to the disclosure,

and to describe the events that led to police involvement and eventually criminal charges against Mallette.

{¶ 16} In *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401, the Court, in discussing similar testimony, found that:

“The testimony at issue was offered to explain the subsequent investigative activities of the witnesses. It was not offered to prove the truth of the matter asserted. It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. * * * The testimony was properly admitted for this purpose.”

{¶ 17} See also, *State v. Byrd*, Cuyahoga App. No. 82145, 2003-Ohio-3958.

{¶ 18} We find that the father's statements about the sexual abuse did not constitute impermissible hearsay. The testimony regarding this information was not offered to prove the truth of the matter asserted, that is, to show that the abuse occurred, but to show how the witness proceeded with the information provided by the child. We therefore conclude that the trial court did not commit error, plain or otherwise, in allowing the father's testimony.

{¶ 19} However, even if it was error to allow this testimony, we find that it was not so prejudicial as to constitute reversible error. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and will not be grounds for reversal. *State v. Lyle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds, *Lyle v. Ohio* (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; see also, *Crim.R. 52(A)* (any error will be deemed harmless if it does not affect the defendant's substantial rights).

{¶ 20} In this case, ample evidence existed to convict Mallette, even excluding the father's testimony. L.M. testified about the abuse as well as the events leading to his disclosure to his father. Therefore, the first assignment of error is overruled.

State v. Mallette, 2007-Ohio-715. at paragraphs 2 – 9.

Herein, the Eighth District's rejection of this claim was a correct application of the applicable law to the facts of this case. Indeed, the court below applied precedent from this Court, *State v. Thomas* (1980), 61 Ohio St.2d 223. *Thomas* is on point with the facts of this Court and there is no need for this Court to revisit the holding of *Thomas*. Accordingly, appellant's argument does not warrant a grant of this Court's jurisdiction.

PROPOSITION OF LAW II: A DEFENDANT IS ENTITLED TO MINIMUM SENTENCE WHEN NO JURY HAS FOIUND THE FACTS NEEDED TO SUPPORT A HIGHTER SENTENCE AND THE OFFENSES OCCURRED PRIOR TO THE COURT'S DECISION IN STATE V. FOSTER, 109 OHIO ST.3d 1, 2006-OHIO-865.

In the second proposition of law, appellant argues that this Court's remedy in Foster violated the *ex post facto* clause of the Constitution. Herein, a grant of jurisdiction is not warranted. First, this Court already rejected the *ex post facto* argument which was presented in the motion for reconsideration filed in Foster. Second, all the appellate districts in the state of Ohio have reached the same conclusion. See *State v. Bruce*, 1st Dist. No. C-060456, 2007-Ohio175; *State v. Durbin*, 2d Dist. No.2005-CA-134; *State v. McGhee*, 3d Dist. No. 17-06-05, 2006-Ohio-5162; *State v. Courtney*, 4th Dist. No. 06CA18, 2007-Ohio-1165; *State v. Paynter*, 5th Dist. No. CT2006-0034, 2006-Ohio-5542; *State v. Friess*, 6th Dist. No. L-05-1307, 2007-Ohio-2030; *State v. Haschenburger*, 7 th Dist. No. 05MA192, 2007-Ohio-1562; *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082; *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899; *State v. Elswick*, 11th Dist. No.2006-L-075, 2006-Ohio-7011; and *State v. Andrews*, 12th Dist. No. CA2006-06-142, 2007-Ohio-223. Finally, it is worth noting that, post-Booker, the federal circuit courts have consistently rejected the argument that being resentenced after the Booker remedy violates *ex post facto* clause. *United States v. Duncan* (11th Cir. 2005), 400 F.3d 1297, cert. denied, --- U.S. ----, 126 S.Ct. 432, 163 L.Ed.2d 329 (2005). See also, *United States v. Austi* (5th Cir. 2005), 432 F.3d 598; *United States v. Scroggins* (5th Cir. 2005), 411 F.3d 572, 576; *United States v. Dupas* (9th Cir. 2005), 419 F.3d 916 *United States v. Jamison* (7th Cir. 2005), 416 F.3d 538; *United States v. Lata* (1st Cir. 2005), 415 F.3d 107. *United States v. Duncan*, 400 F.3d 1297 (11th Cir.) (same), cert. denied, --- U.S. ----, 126 S.Ct. 432, 163 L.Ed.2d 329 (2005).

**PROPOSITION OF LAW III: A DEFENDANT IS DENIED
EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN
COUNSEL'S FAILURE TO FOLLOW THE APPELLATE RULES
FORTEITS REVIEW OF REVERSIBLE ERROR.**

Lastly, there is no need for this Court to exercise jurisdiction over Appellant's third proposition which raises a claim of ineffective assistance of counsel. Herein Appellant was unsuccessful on direct appeal because his claims lacked merit; not because his counsel was ineffective. Appellant's ex post facto claim has been rejected throughout the State and his hearsay claim was rejected based on an application of *State v. Thomas* (1980), 61 Ohio St.2d 223 to the facts of this case.

CONCLUSION

Appellant's memorandum in support of jurisdiction is without merit and should be denied. Appellant's arguments on appeal have been demonstrated to be meritless. Accordingly, the State of Ohio respectfully asks that this Court to decline jurisdiction over this case.

Respectfully submitted,

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SERVICE

A copy of the foregoing Brief of Appellee has been mailed this 10th day of August, 2007, to Theresa G. Haire, Assistant State Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215.

A handwritten signature in black ink, appearing to be the initials 'J O' with a long, sweeping horizontal stroke extending to the right.

Assistant Prosecuting Attorney