

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
VAN WERT COUNTY**

**STATE OF OHIO**

**PLAINTIFF-APPELLEE**

**CASE NUMBER 15-2000-07**

**v.**

**LEE ALLEN RUSSELL**

**O P I N I O N**

**DEFENDANT-APPELLANT**

---

---

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: November 15, 2000.**

---

---

**ATTORNEYS:**

**SCOTT R. GORDON**  
Attorney at Law  
Reg. #0040506  
116 West Main Street  
Van Wert, OH 45891  
For Appellant.

**KEVIN TAYLOR**  
Assistant Prosecuting Attorney  
120 West Main Street  
Van Wert, OH 45891  
For Appellee.

**SHAW, J.** On October 1, 1999, the Van Wert County Grand Jury indicted defendant-appellant, Lee Allen Russell, was indicted on one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). The alleged victim was a boy under the age of thirteen. At his arraignment, defendant entered a plea of not guilty to this offense. Following a jury trial, defendant was found guilty of the offense. The trial court denied defendant's post-trial motion for a new trial and for acquittal and sentenced defendant to five years incarceration. The trial court further determined that defendant was a sexual predator.

Defendant now appeals from his conviction and sentence and raises four assignments of error for our review. For his first assignment of error, defendant asserts:

**The trial court erred to the prejudice of the defendant when it instructed the Bailiff to go to a local restaurant and select potential jurors from which the alternate juror was selected.**

Defendant argues that the method utilized by the trial court in selecting the alternate juror violated the random selection process set forth in R.C. 2313.08. Defendant also argues that the alternate was not properly determined to be a qualified juror to be on the jury because he was not questioned with respect to some of the causes for dismissal under Crim.R. 24(B).

However, defendant never objected to the errors in the summons and selection of the alternate juror that he raises now on appeal. An appellate court

need not consider any error that was not called to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.

*State v. Awan* (1986), 22 Ohio St.3d 120, 122. As a result, such error is thereby waived absent plain error. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62. Plain error does not exist unless, but for the error, the outcome of the trial clearly would have been otherwise. *Id.*

The record reveals that the pool of jurors was exhausted once twelve jurors had been selected from the panel. Following a discussion with counsel with respect to whether they ought to proceed with an alternate juror, the trial court then ordered the court bailiff to summon additional persons from the public. R.C. 2313.38, summoning of talesmen, provides as follows:

**When, by reason of challenge or other cause, enough jurors to make up the panel, either of the grand or petit jury, are not present, or if the array is set aside, the sheriff shall summon talesmen until the deficiency is made up. \*\*\***

We note that "talesmen" are jurors returned from bystanders or the body of the county to complete a panel when, because of challenge or other cause, the pool of prospective jurors is exhausted before the requisite number of jurors has been selected. *State v. Stukey* (1973), 40 Ohio App.2d 512, 519. Under the circumstances of this case, we perceive no plain error in the trial court's action in summoning of talesmen.

Furthermore, regarding the voir dire examination of the prospective alternate juror, Crim.R. 24(A) provides in pertinent part that "[t]he court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination." Here, the trial court did ask several questions during voir dire for which the alternate juror could have been challenged for cause, see Crim.R. 24(B). Both the State and defendant's counsel then questioned this potential alternate juror. Since the trial court's alleged errors do not constitute plain error, defendant's first assignment of error is overruled.

For his second assignment of error, defendant asserts:

**The trial court erred to the prejudice of the defendant by failing to properly determine the qualifications of the alleged juvenile victim's competency to testify as a witness.**

Defendant challenges the child victim's competency to testify. Evid.R. 601 provides that "[e]very person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Presumptively, children ten years of age or older, such as this alleged child victim (age 11), are competent to testify under Evid.R. 601(A). *State v. Clark* (1994), 71 Ohio St.3d 466, 469. However, if a trial court has reason to question the child's competency, it may, in its discretion,

conduct a voir-dire examination of that child. *Id.* at paragraph two of the syllabus. Indeed, the record indicates in this case that the trial court did conduct a hearing to address the issue of the child's competency. Absent an abuse of discretion, a determination of the trial court as to competency will not be disturbed on appeal. *Id.* at 469.

Using the factors set out in *State v. Frazier* (1991), 61 Ohio St.3d 247, syllabus, for determining competency of child witnesses, defendant argues that the last factor listed in *Frazier* was not satisfied because the child was unable to demonstrate that he understood the consequences of telling a lie.<sup>1</sup> Our review of the transcript of the trial court's voir-dire examination of the child reveals that he appreciated his responsibility to tell the truth. He responded negatively to the question "Is it good to tell a lie?" He also testified that he would have to write an essay if he did not tell the truth to his teacher and if he did not tell the truth to his mom, he would get "grounded." It was equally clear that he could identify the difference between the truth and a lie. Therefore, the trial court did not abuse its discretion in finding the child victim to be a competent witness. Furthermore, as it relates to the child's ability to recollect accurate impressions of fact, defendant's counsel was given an opportunity to cross-examine the child in order to challenge

---

<sup>1</sup> The factors set out in *Frazier*, at syllabus, are the child's ability to receive accurate impressions of fact, the child's ability to recollect, the child's ability to communicate what is observed, the child's understanding of truth and falsity, and the child's appreciation of his or her responsibility to tell the truth.

the accuracy with which his testimony was given at trial. Defendant's second assignment of error is overruled.

For his third assignment of error, defendant asserts:

**The trial court erred to the prejudice of defendant in failing to exclude the results of the polygraph examination.**

Defendant asserts that the trial court should not have admitted the polygraph examination results because such examination was not conducted under proper testing conditions. As defendant acknowledges, the results of a polygraph examination are admissible when there is a written stipulation between the parties providing for such admission. *State v. Souel* (1978), 53 Ohio St.2d 123, 132-133. In this case, the parties did enter into a written stipulation providing that defendant would submit to a polygraph examination and that evidence of the test results would be admissible.

Notwithstanding the stipulation, the trial court may exercise its discretion to exclude the test results if it is not convinced that the polygraph examiner was qualified or that the test was conducted under proper conditions. *Souel, supra*, at paragraph two of the syllabus. Defendant argues that since his counsel was not allowed to be present during the pre-examination process, then the testing procedure was suspect when he was subjected to questioning in the presence of the State's detective. Prior to the examination, defendant understood that he would be interviewed in his counsel's absence. The polygraph examiner, in his testimony at

a hearing held on the matter, testified that this was the practice because having counsel present would be disruptive to the examination. He indicated that the detective was part of the pretest procedure to verify the facts of the case and to clear up any issues before the examination itself. Notably, the detective was not present in the examination room when defendant took the actual polygraph examination. Defendant's argument is unpersuasive.

Defendant also argues that he was unsuitable for examination because the pretest questions regarding masturbation and sexual orientation caused him to become angry and remain angry for the actual polygraph examination. The examiner opined that the defendant was fit to be tested. He stated that the defendant appeared relaxed and normal. The detective testified similarly. Although defendant testified that the examiner could have seen he was angry, defendant admitted he never told the examiner he did not want to take the examination. Upon reviewing the record, we cannot say the trial court abused its discretion.

In short, since a stipulation existed between the parties to allow for the use of the polygraph results and in light of the evidence during the hearing, we find the trial court did not abuse its discretion in admitting the results of defendant's polygraph examination. Moreover, we note that defendant's counsel freely cross-

examined the polygraph examiner at trial regarding the testing procedures and his opinions. Accordingly, defendant's third assignment of error is overruled.

For his last assignment of error, defendant asserts:

**The defendant was denied effective representation by competent counsel.**

Defendant alleges ineffective assistance of counsel or a breakdown in the relationship because of his counsel's failure to "file[] the motions requested; he doesn't present things and attack it" and counsel's assertion at the time of addressing the alternate juror problem that he had enough of a problem with defendant to not want to have to try the case twice.

In order to demonstrate ineffective assistance of counsel sufficient to warrant reversal of a conviction, a defendant must show both that his counsel's performance fell below an objective standard of reasonable representation and that prejudice resulted from counsel's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

A review of the entire record of proceedings in the case before us, however, convinces us that defendant's assertions of ineffective assistance of counsel or a breakdown of communication to the level of constitutionally ineffective assistance are without merit. To the contrary, the record demonstrates that defendant's counsel did file four new motions that defendant had wished to have filed at the point in the proceedings where a hearing was conducted on counsel's motion for

leave to withdraw from the case. His counsel filed motions to prohibit the State's use of the polygraph, for a jury view, to prohibit the introduction of defendant's prior criminal record, and for the grand jury transcript. The record reveals there had already been filed motions for a bill of particulars, to require the disclosure of the victim's juvenile court and medical records and to have the victim testify other than by videotape deposition, for change of venue, to void the polygraph stipulation and prohibit the admission of the polygraph test results, and a motion to modify bond. The record before us consists of many filed motions on behalf of defendant and suggests that counsel effectively represented defendant at the various motion hearings as well as at trial.

Accordingly, we overrule defendant's fourth assignment of error. The judgment and sentence of the trial court is affirmed.

*Judgment affirmed.*

**HADLEY, P.J., and WALTERS, J., concur.**

**r**