

[Cite as *State v. Curran*, 2016-Ohio-4797.]

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO)	
)	
PLAINTIFF-APPELLEE)	
)	CASE NO. 14 CO 0025
VS.)	
)	OPINION
BRIAN CURRAN)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2013 CR 78
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JUDGMENT:	Affirmed.
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APPEARANCES: For Plaintiff-Appellee	Attorney Robert Herron Columbiana County Prosecutor Attorney Timothy McNicol Assistant Prosecutor 105 South Market Street Lisbon, Ohio 44432
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For Defendant-Appellant	Attorney Coleen Dailey 323 West Main Street Alliance, Ohio 44601
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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 29, 2016

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DeGENARO, J.

{¶1} Defendant-Appellant, Brian Curran, appeals the judgment of the Columbiana County Court of Common Pleas convicting him of one count of gross sexual imposition and sentencing him accordingly. On appeal, he asserts the trial court committed plain error by permitting the State to present the testimony of the child victim by way of video deposition and that trial counsel was constitutionally ineffective for stipulating the admission of that video deposition. He also asserts that the trial court erred by permitting the victim's doctor to testify naming Curran as the perpetrator as it was hearsay that did not fall under any exception. Finally, he contends it was error for a different trial court judge to determine the victim's competency to testify instead of the judge that presided over the trial. For the following reasons, Curran's assignments of error are meritless, and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} Curran was secretly indicted on one count of gross sexual imposition, R.C. 2907.05(A)(4), a third-degree felony. He was accused of having sexual contact with his girlfriend's daughter HK by touching her vaginal area with his penis while they were living in an East Liverpool apartment. The offense was alleged to have occurred when the victim was four years old.

{¶3} The case was assigned to Judge Scott Washam. A hearing to determine the victim's competency to testify was held, but for reasons unclear from the record, it was held before Judge Ashley Pike. To that end, an entry states: "[a]lthough the case is venued before the Hon. Scott Washam, counsel agreed to the undersigned presiding over this closed courtroom proceeding." The victim was questioned by the trial court, the prosecutor and defense counsel, and Judge Pike determined HK was competent to testify.

{¶4} The State filed a motion to take the videotaped deposition of HK pursuant to R.C. 2945.481, and gave notice of its intention to use it as evidence at trial pursuant to R.C. 2945.481(B)(1), instead of presenting HK's live testimony. The State further agreed to make all necessary technical arrangements for the

videotaping of the child's deposition, including the required video monitors for both the defendant and the victim pursuant to R.C. 2945.481(A)(3). Curran failed to oppose this motion. Following a status conference and "upon consideration of R.C. 2945.481," the trial court granted the motion. HK's video deposition was taken and used as evidence by the State at a jury trial four days later.

{¶15} At the beginning of trial, defense counsel stipulated to the admission of HK's video deposition in lieu of her testimony at trial, explaining that following an extensive interview with the child's counselor and consultation with Curran, they agreed to stipulate, as it would cause HK emotional trauma to testify in court.

{¶16} The following evidence was adduced at trial. Four-year-old HK was living with her mother, Mallory, her younger brother, and Curran in East Liverpool, Ohio. Mallory had a drug problem and was not always available for her children, according to her mother, Alice. Thus, the children would often spend time at their maternal grandparents' home in West Virginia.

{¶17} During this time, Alice began to have concerns about HK's well-being after HK began exhibiting certain habits that seemed unusual: wetting the bed at night, chewing on her hair, biting her nails, and making unusual humming and clicking sounds. Alice also noticed HK had soreness and redness in her vaginal and anal areas. She also observed HK acting out in a sexual manner, humping the arm of a couch or stuffed animals and pillows. Alice also observed HK with her hand in her pants when she was watching television.

{¶18} Alice recounted two specific disclosures made to her by the victim. First, she noticed HK making a "grimacing face" while using the toilet. When asked by Alice: "Does it hurt when you pee?" HK responded, "yes." Because of the other observed behavior of HK, Alice questioned her: "Does anybody ever hurt you when you're at Daddy's house with mommy, staying overnight?" The child responded, "No, only Daddy." According to Alice, HK sometimes referred to Curran as Daddy, though he is not the child's biological father. Alice went on to explain that HK called her vaginal area her "bird" and referred to a penis as a "wing." HK further revealed to her

grandmother that Curran applied medication to her "bird" by using his "wing." HK defended Curran by saying, "That's the only way he knows how to do it."

{¶9} Alice told Mallory about the young girl's disclosure, but Mallory laughed and refused to believe it. Mallory immediately called Curran to tell him.

{¶10} Several days later, HK made a second disclosure to Alice about additional sexual contact with Curran. According to Alice this disclosure was different from the prior disclosure; it was some other form of sexual activity. However, she was not questioned as to the specifics by the prosecutor at trial.

{¶11} This second disclosure prompted Alice to report the matter to the Hancock County West Virginia Sheriff's Department and then to the East Liverpool Police Department. The Hancock County Department of Child Protective Services became involved since Alice and her husband lived in Hancock County, and a forensic interview of HK was conducted, following which, an emergency custody order from the Hancock County Domestic Relations Court was obtained, placing custody of HK and her brother with Alice and her husband.

{¶12} Shortly thereafter, HK was examined by Dr. Lisa Noble, a pediatrician. Dr. Noble was qualified as an expert in the field of pediatric child abuse. After obtaining the necessary history as disclosed by the child in the forensic interview, HK was physically examined from head to toe. Dr. Noble testified that, upon examination of the child's vaginal area, she observed evidence of sexual abuse. Specifically, Dr. Noble testified that the hymenal folds, which cover the vaginal opening in a child, were thickened and redundant. Further, there was a central opening, a tear and some scarring of the hymen, which all signified trauma had occurred. Dr. Noble testified that the thickening of the hymenal fold on HK suggested that the trauma occurred "more frequently than once or twice." A photograph of the child's injuries was displayed for the jury. Ultimately Dr. Noble testified that HK's injuries were consistent with some form of sexual abuse, stating, "[t]hey're consistent with a traumatic event to that area, certainly sexual activity into that area would qualify."

{¶13} Four months after the disclosures, HK began receiving counseling from

Lynne Manalac-Stanley. Manalac-Stanley testified that HK presented with symptoms such as bed-wetting, aggression, rages, temper tantrums, nightmares, and a significant startle reflex. Manalac-Stanley also reported that HK suffered symptoms of disassociation, which is consistent with having experienced traumatic events. During the therapy sessions with Manalac-Stanley, HK disclosed sexual abuse and was diagnosed with, "Post-traumatic Stress Disorder in Preschool Children." HK never identified anyone except Curran as her abuser. Manalac-Stanley testified she saw no indications that HK was making false allegations or that someone had directed HK to make these allegations about Curran.

{¶14} HK testified that she recalled living with Curran, but that she no longer lived with him because "Brian [Curran] was bad." When asked how Brian was bad, HK responded "because he'd tell me to kiss, kiss his wing." HK used an anatomical drawing of a male during her testimony to indicate that she used the term "wing" for a penis. She also indicated by way of circling parts on an anatomical drawing of a female that she uses the term "bird" for female genitalia.

{¶15} HK went on to testify that Curran made her kiss his "wing," on his skin, beneath his clothes. She further stated that Curran touched her vaginal area with his penis, again using the terms "bird" and "wing". This touching also occurred on the skin when no one else was present, and Curran told HK not to tell anyone.

{¶16} Curran chose not to testify or present any evidence at trial.

{¶17} However, during the State's case in chief, an audio recording of his statement to police was played for the jury. Therein, Curran denied the allegations, but agreed that, from what police were telling him, HK had likely been abused by someone. He continually referred to HK as his daughter during the interview. He agreed that HK used the terms "bird" and "wing" to refer to female and male genitalia. It was not until the end of the interview that Curran—after being questioned many times about HK's potential motivations for stating he had abused her—blamed Mallory's parents, stating they were "out to get him."

{¶18} After considering all of the evidence, the jury found Curran guilty of one

count of gross sexual imposition, as indicted, R.C. 2907.05(A)(4), a third-degree felony. Following a sentencing hearing, the trial court sentenced Curran to a 54 month term of incarceration with five years of mandatory post-release control and designated him a Tier II sex offender pursuant to R.C. Chapter 2950.

Permitting Child Victim to Testify by Video Deposition

{¶19} In his first of four assignments of error, Curran asserts:

The court erred in allowing the state to present the testimony of the alleged victim by video deposition without first following all the requirements of O.R.C. 2945.481 prior to the taking of the deposition.

{¶20} Curran argues that the video deposition of the victim should not have been admitted at trial because the trial court did not—prior to the taking of the deposition—make a finding that serious emotional trauma would result if the victim were to testify at trial. Curran also argues that the deposition itself was not filed with the court as required by R.C. 2945.481(A)(2).

{¶21} Curran failed to raise these objections in the trial court. Where no objection is made the issue on appeal is waived absent plain error. Crim.R. 52(B). *State v. Altman*, 7th Dist. No. 12 CO 42, 2013–Ohio–5883, ¶ 22. Plain error exists when but for the error the trial outcome would have been different. *State v. Issa*, 93 Ohio St.3d 49, 56, 752 N.E.2d 904 (2001). Plain error "is a wholly discretionary doctrine whereby the appellate court may, but need not, take notice of errors which are obvious and which affect substantial rights that are outcome determinative. * * * This elective tool is to be used with the utmost of care by the appellate court in only the most exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice." (Internal citations omitted.) *State v. Jones*, 7th Dist. No. 06 MA 109, 2008–Ohio–1541, ¶ 65.

{¶22} R.C. 2945.481 permits the testimony of an alleged victim of a violation of R.C. 2907.05 who is under thirteen years old, to be taken by deposition, and videotaped, where the defendant is present, the prosecutor and defense conduct full

direct and cross-examination, and the trial court presides over the deposition in order to rule on objections immediately. R.C. 2945.481(A)(2). Subpart (B)(1) of the statute goes on to provide:

* * * the deposition or a part of it is admissible in evidence upon motion of the prosecution if the testimony in the deposition or the part to be admitted is not excluded by the hearsay rule and if the deposition or the part to be admitted otherwise is admissible under the Rules of Evidence. For purposes of this division, testimony is not excluded by the hearsay rule if the testimony is not hearsay under Evidence Rule 801; if the testimony is within an exception to the hearsay rule set forth in Evidence Rule 803; if the child victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that rule; or if both of the following apply:

(a) The defendant had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination.

(b) The judge determines that there is reasonable cause to believe that, if the child victim who gave the testimony in the deposition were to testify in person at the proceeding, the child victim would experience serious emotional trauma as a result of the child victim's participation at the proceeding.

{¶23} Here, only subsection (b) is challenged on appeal. However at the beginning of trial, before the video was played for the jury, Curran stipulated to a finding of emotional harm:

THE COURT: During the recess before lunch I did have an opportunity to discuss with counsel certain matters off the record. One of those matters was a stipulation by the defense that testifying live in

court would cause emotional upset to the alleged victim.

I think that's a necessary thing to put on the record before you play that videotape. Mr. McNicol, anything further on behalf of the State?

ATTY. McNICOL: No. It's my understanding that there's stipulations that the statutory criteria has been met for the admissibility of the deposition in lieu of the child's live testimony.

THE COURT: All right. Attorney Gorby?

ATTY. GORBY: Thank you, Your Honor. Your Honor, having off-the-record discussions with the child's counselor in this matter, I did have the opportunity to interview her extensively. And after having discussion with her, and after having discussed that with my client, we would be stipulating to the playing of the video and the fact that it would cause the child emotional trauma to testify live in court. Thank you.

{¶24} The video deposition was then played for the jury along with a transcript of the deposition to follow during the playback. This was done without objection by the defense. Further, the defense stated it had an opportunity to review the transcript provided by the court reporter prior to trial. The State did not seek admission of the transcript, which had been provided as an "accommodation" for the jurors viewing the video; the trial court instructed the jury that the transcript was not evidence. The video of the deposition was admitted as evidence without objection by Curran.

{¶25} Curran argues that the trial court should have made a finding of emotional trauma before the deposition was taken; that waiting to make a finding or a stipulation by the parties at trial was erroneous.

{¶26} Prior to taking the deposition, all that R.C. 2945.481(A)(2) requires is that the charge be a violation of a specified subsection, which includes R.C. 2907.05, gross sexual imposition, and that the alleged victim was a child less than thirteen years of age when "the complaint, indictment, or information was filed, whichever occurred earlier." HK was five when Curran was indicted. The statute continues that

under those circumstances, upon the State's motion, the trial court "shall order that the testimony of the child victim be taken by deposition." R.C. 2945.481(A)(2). There is no requirement that the finding of serious emotional trauma be made prior to the taking of the deposition, only prior to its admission at trial, which occurred here.

{¶27} Regarding filing the deposition, the statute does provide that if it will be offered into evidence it shall be filed. R.C. 2945.481(A)(2). The DVD of HK's deposition does not appear to have been filed with the trial court prior to trial; thus this requirement was not technically satisfied. However, there was no objection made with the trial court when the video was admitted into evidence and the issue could have been corrected. Moreover, the lack of filing was not in any way prejudicial; defense counsel had an opportunity to review the deposition transcript prior to trial to verify its contents. Thus, Curran cannot show that but for this procedural error the outcome would have been any different; the video would still have been admitted into evidence. Accordingly, Curran's first assignment of error is meritless.

Ineffective Assistance of Counsel

{¶28} In his second of four assignments of error, Curran asserts:

Defendant received ineffective assistance of counsel as counsel stipulated to the admission of the videotaped deposition of the child based on off the record discussions with the child's counsellor. [sic]

{¶29} To establish ineffective assistance, a criminal defendant must show that counsel's performance was deficient and prejudiced the defense, thereby depriving him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. The defendant bears the burden of proving counsel's alleged ineffectiveness, since a licensed attorney's competence is

presumed. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). If a defendant cannot show counsel's errors undermined the reliability of the outcome, there can be no finding that his right to counsel was violated. *State v. Hancock*, 108 Ohio St.3d 57, 2006–Ohio–160, 840 N.E.2d 1032, ¶ 109; *Strickland* at 693.

{¶30} It was not improper for defense counsel to stipulate to the finding of serious emotional harm and therefore to the admission of HK's deposition at trial. As explained above, there was nothing improper about the timing of the stipulation. Further, counsel reasonably relied on conversations with the child's counselor that HK suffered from post-traumatic stress disorder and other psychological problems as a result of the abuse, in making the stipulation. Contrary to Curran's contentions in his brief, counsel states she had the opportunity to "extensively" interview the counselor. Counsel's decision to stipulate appears to be sound trial strategy and was professionally reasonable; thus, counsel was constitutionally effective. Accordingly, Curran's second assignment of error is meritless.

Hearsay

{¶31} In his third of four assignments of error, Curran asserts:

The court erred in allowing the doctor to testify naming the defendant as the perpetrator of the alleged crime as the testimony was hearsay in violation of Evidence Rule 803(4).

{¶32} Evidentiary rulings are typically reviewed for an abuse of discretion. See *State v. Beshara*, 7th Dist. No. 07 MA 37, 2009–Ohio–6529, ¶ 55, citing *State v. Bey*, 85 Ohio St.3d 487, 490, 709 N.E.2d 484 (1999). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶33} Hearsay is defined as "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). Pursuant to Evid.R. 802, hearsay is

inadmissible unless it falls within an exception provided by the rules of evidence. Should hearsay statements be admitted improperly, however, such error does not necessarily require reversal of the outcome of the trial if it was harmless. See *Arizona v. Fulminante*, 499 U.S. 279, 306–309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

{¶34} Evid.R. 803(4) allows "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.* The Staff Notes state in relevant part:

The circumstantial guaranty of trustworthiness of this exception is derived from the assumption that a person will be truthful about his physical condition to a physician because of the risk of harmful treatment resulting from untruthful statements. * * * The exception is limited to those statements made *by the patient* which are reasonably pertinent to an accurate diagnosis.

(emphasis added).

{¶35} "[E]ven the identity of the perpetrator of sexual abuse may be pertinent to diagnosis and treatment because it may assist medical personnel with assessing the emotional and psychological impact of the abuse on a child and in formulating a treatment plan." *State v. Pyles*, 7th Dist. No. 13 MA 22, 2015-Ohio-5594, ¶ 93, citing *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶6 (1st Dist.). However, in order to be admissible under Evid.R. 803(4), the medical context must not be for the purpose of gathering information against the accused. *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009–Ohio–2897, ¶ 81–82.

{¶36} Curran challenges the following exchange from Dr. Noble's testimony:

Q. Well, let's talk about [HK's] exam. Now, before you began a physical exam, I suppose in any case you get some background or

history as to the suspected problem; is that right?

A. Correct.

Q. Okay. And what was the history you received in this case?

A. The history that I received was that the child was there for evaluation after disclosing that Brian Curran had touched her perineal area with - -

{¶37} Defense counsel objected that this was hearsay and did not fall under the medical treatment exception, which the trial court overruled. Dr. Noble then began to detail more specific conduct reported to her by the caseworker and Alice, to which defense counsel objected and the trial court sustained.

{¶38} Curran takes issue with the fact that in naming Curran as the perpetrator, Dr. Noble did not testify about what HK told her, but rather, what the grandmother and caseworker told her. Curran argues that "statements made" under Evid.R. 803(4) must be made by the *patient* to the doctor, not by a third party.

{¶39} Had Dr. Noble testified about what HK told her *directly*, this would fall under the Evid.R. 803(4) exception. Dr. Noble conceded she never interviewed HK about the facts of what happened; she received that information from Alice and the caseworker, not from the child-patient directly. Thus, Dr. Noble's statement about the identity of the perpetrator should not have been admitted under this exception.

{¶40} However, Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." See *also State v. Groves*, 7th Dist. No. 853, 2002-Ohio-5245, ¶ 32 (improperly admitted hearsay identifying perpetrator was cumulative to the child's testimony and therefore harmless error.)

{¶41} Here, HK herself testified via video deposition that Curran had sexually molested her. Further, the child's counselor, Ms. Manalac-Stanley, testified HK disclosed to her that Curran had abused her and had never named anyone but Curran as the abuser. Thus, the error was harmless as the doctor's identification of Curran as the perpetrator was cumulative to other testimony and not prejudicial.

Moreover, when Dr. Noble began to go into more detail about Curran's alleged conduct as reported to her by the caseworker and Alice, the trial court sustained defense counsel's objection to that testimony. Accordingly, Curran's third assignment of error is meritless.

Competency Hearing by Judge other than Trial Judge

{¶42} In his fourth and final assignment of error, Curran asserts:

The trial judge did not determine the competency of the child witness but rather a different judge of the court determined the child's competency and error was committed when the trial judge did not determine the competency of the child.

{¶43} Curran cites no law that supports his assertion that it was improper for a different trial court judge to make the competency determination. The *Frazier* case he cites merely sets out factors a trial court should consider when determining the competency of a witness who is under the age of ten. *State v. Frazier*, 61 Ohio St.3d 247, 251, 574 N.E.2d 483 (1991). *Frazier* held the trial court must consider: "(1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." *Frazier*, at 251. And a competency determination will not be reversed absent an abuse of discretion. *Id.* at 250-251. *Frazier* does not hold that the same judge who determines competency must also preside over the trial.

{¶44} Further, any asserted error in having Judge Pike preside over the competency hearing was invited by Curran. Judge Pike's entry determining competency indicates that "[a]lthough the case is venued before the Hon. Scott Washam, *counsel agreed* to the undersigned presiding over this closed courtroom proceeding." (Emphasis added.) Further, we cannot conclude that Judge Pike presiding over the competency proceeding was prejudicial. A transcript of the hearing

was filed for inclusion in the appellate record. The trial court tested the victim's ability to recall and describe events, dates, and people. The trial court discussed with HK the difference between the truth and a lie and HK demonstrated her understanding that lying was bad and that there were consequences for lying. The prosecutor and defense counsel both had the opportunity to ask additional questions of the victim. Accordingly, Curran's fourth and final assignment of error is meritless.

{¶45} In sum, all of Curran's assignments of error are meritless. The child-victim properly testified by way of video deposition. Defense counsel was not ineffective for stipulating that requiring the victim to testify live in court would cause her emotional trauma. The trial court erred by permitting Dr. Noble to testify that Curran was the alleged perpetrator because this information did not come directly from the patient-victim and therefore the Evid.R. 803(4) exception does not apply. However, any error is harmless since that testimony was cumulative. Finally, it is not erroneous that the competency hearing was presided over by a judge other than the judge who conducted the trial. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.