[Cite as *State v. Wade*, 2016-Ohio-8546.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 14 JE 0036
VS.	)	
	)	OPINION
ANDRE WADE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 13 CR 68
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee	Attorney Jane Hanlin Jefferson County Prosecutor Attorney Edward Littlejohn, Jr. Assistant Prosecutor 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant	Attorney Bernard Battistel 2021 Sunset Boulevard Steubenville, Ohio 43952

JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: December 22, 2016

[Cite as *State v. Wade*, 2016-Ohio-8546.]
DeGENARO, J.

{¶1} Defendant-Appellant, Andre Wade, appeals the trial court judgment convicting him of rape, drug possession and assault, and sentencing him accordingly. On appeal, Wade asserts that trial counsel was constitutionally ineffective; that the trial court erred in permitting the expert to testify about statements Wade made during the sanity evaluation; and that his rape conviction is against the sufficiency and manifest weight of the evidence.

{¶2} Upon review, Wade's rape conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The psychologist's testimony did not violate R.C. 2945.371(J) as it was offered to show Wade's mental condition at the time of the offenses. Although there were multiple errors by defense counsel that fall below an objective standard of reasonable representation, there was no prejudice as there was strong evidence in favor of the jury's verdicts. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} Wade was indicted by a grand jury on one count of rape, R.C. 2907.02(A)(2), a first-degree felony; one count of possession of drugs, R.C. 2925.11(A) and (C)(4)(a), a fifth-degree felony; and one count of assault, R.C. 2903.13(A), a first-degree misdemeanor. Following final testing results from the Ohio Bureau of Criminal Investigation, the drug charge was amended to state a violation of subsection (C)(6)(a), also a fifth-degree felony. These charges stemmed from an incident involving Wade and two juveniles in the woods near Indian Creek High School in Wintersville. Wade retained counsel, was arraigned and entered pleas of not guilty and not guilty by reason of insanity (NGRI).

{¶4} Following a defense request for competency and sanity evaluations, the trial court found Wade was incompetent to stand trial and issued an order to restore competency but Wade subsequently stipulated to his restoration to competency. Wade also waived his speedy trial rights.

{¶5} The matter proceeded to a jury trial where the following pertinent evidence was adduced. CD testified that in the afternoon he went for a walk in the

woods near Indian Creek High School with his girlfriend, KS. Both were 17 years old at the time. While in the woods, the teenagers had sex. While this was occurring, Wade came upon them and claimed they were on his property and threatened to call police. CD apologized and offered to leave. Wade responded: "you're not going anywhere until she sucks my dick." CD responded: "no and she's only 17," and Wade hit him, knocking him to the ground. CD protested again, and Wade hit him a second time, again knocking him to the ground. Although CD weighs 305 pounds, much more than Wade did at the time, CD has a heart condition, which requires an implanted heart monitor.

{¶6} Because Wade was beating CD, KS said that she would do what Wade demanded: give Wade oral sex. Soon after KS began doing this, however, Wade demanded that he "wanted pussy." CD said no, and Wade knocked him down again. CD then pleaded with Wade by offering his phone, class ring, necklace or whatever he wanted. However, Wade wanted to have sex with KS. CD said he tried to defend KS without success. He testified Wade "said that he would kill me if she didn't do what he said and * * * he said that if we told anyone he would kill us too."

{¶7} Wade then engaged in vaginal intercourse with KS, ejaculating inside of her. Afterwards, Wade blew smoke in CD's face, and walked away; as he did so, CD called him "the N word."

{¶8} CD had bruising on his face, a black eye, and scratches on his neck as a result of the incident. Originally, CD thought the scratches might have come from a knife, but he admitted he never saw Wade with a knife.

{¶9} CD readily admitted at the beginning of his testimony that he lied during the preliminary hearing when he denied that he and KS were having sex in the woods that day when Wade came upon them. He explained he was trying to protect KS.

{¶10} KS testified; she confirmed CD's account of the incident, though her testimony was initially less definite about the precise nature of Wade's threats and the sequence of events. KS said she was giving CD oral sex in the woods when

Wade found them and said they were on his property and threatened to call police unless she "did what he said." She said she did not remember anything else Wade said after that; and said she could not remember if Wade made other types of threats. She recalled that Wade hit CD, then Wade fingered her and she gave Wade "a blow job." After that Wade hit CD again; while KS was "sitting there in shock." She eventually also had vaginal sex with Wade.

{¶11} KS's statement to police was presented to her by the prosecutor to help refresh her recollection of events, but was not admitted into evidence. KS confirmed she was concerned that Wade was hitting CD because CD has a heart condition. She said she was afraid of leaving CD in the woods with Wade and therefore did not try to flee. She confirmed she did not consent to sexual activity with Wade.

{¶12} After he finished having sex with KS, Wade blew smoke in CD's face and tried to clean off KS and her pants by dipping them in water. When Wade left, CD and KS immediately ran to the high school, and reported the incident to a teacher, Lucinda Phillippi, who called 911 and the victims' parents. Phillippi testified CD appeared "stunned," and his face was swollen, red and bleeding. She said CD became more and more upset as he explained what happened, finally exclaiming: "Oh, my God, I just saw my girlfriend get raped in front of my very eyes[,]" after which time CD began kicking chairs and the bleachers. Phillippi said she did not talk much to KS as a group of girls had circled around her.

{¶13} Officer Anthony Moores testified he responded to the 911 call from the high school, spoke to CD and obtained a description of the suspect, which he radioed to Officer Shawn Gegick, who apprehended Wade in a cul-de-sac area near the woods were the assault took place. Gegick noticed blood on Wade's ear. Moores arrived soon thereafter to assist Gegick; during this time, Gegick obtained from Wade a folded-up dollar bill with a white powder inside. Camera footage taken from Moores' cruiser was played for the jury. On the video, Wade admits that he fought with CD. Wade's father Alfred Wade came upon the scene as Wade was being arrested. Gegick testified he overheard Wade tell his father "he was walking through

the woods, saw a guy and a girl having sex," and that the male called him a racial slur, so Wade walked over and knocked him out.

{¶14} On cross-examination of Gegick, as part of a line of questioning to try to cast doubt into KS's identification of Wade, defense counsel asked Gegick to read from his preliminary hearing testimony. Gegick read what KS had reported to him about the crimes.

{¶15} A video of Wade while he was in a holding cell was also played for the jury. On this video, Wade is seen stripping off all of his clothing.

{¶16} Lieutenant Jesse Kosegi testified that he tested the white powder found on the dollar bill confiscated from Wade during his arrest. The results of this preliminary field test were read to indicate the powder was cocaine. The powder was subsequently sent to BCI and was evaluated by forensic scientist Shervonne Bufford who testified that more conclusive laboratory tests revealed the powder was heroin.

{¶17} Meanwhile, CD and KS were transported to the hospital where an exam and rape kit was performed on KS by the sexual assault nurse examiner Marla Rockey. Without objection by the defense, Rockey testified about statements KS made to her about the offenses, reading from her emergency room report. The report itself was also admitted into evidence.

{¶18} On cross, Rockney testified that there were no injuries to KS's genital or anal areas, and that KS's hair and clothing appeared neat. She noted that KS was "calm at first," but became "teary-eyed" after her family arrived at the hospital. She also testified that KS reported consensual sexual activity within 96 hours of the exam, listing the time as 16:45, which was the same time listed for the alleged rape.

{¶19} The rape kit was transported to the BCI office. BCI forensic scientist Christopher Smith testified that analysis performed on the rape kit evidence, confirmed Wade's DNA located inside K.S.'s vagina.

{¶20} CD and KS positively identified Wade as their assailant in a photographic "six-pack" line-up.

{¶21} CD and KS were not positive in their courtroom identifications of Wade,

explaining he looked different in that he had shaved his beard and gained weight. However, Captain Louis Vandeborne of the Wintersville Police Department testified he had the six-pack line-up made for a blind administrator to give to the victims and that the person identified by KS and CD was in fact Wade. Vandeborne was able to positively identify Wade as the defendant in the courtroom.

{¶22} Because Wade had entered an NGRI plea, the State presented expert testimony to rebut Wade's assertions that he was legally insane at the time of the incident, specifically that of Dr. Howard A. Beazel, a forensic psychologist who performed competency and sanity evaluations on Wade. Dr. Beazel said he explained to Wade at the beginning of the sanity evaluation that Wade's participation was voluntary; that the evaluation was not confidential; and that a report would be provided to the court and counsel.

{¶23} Dr. Beazel explained that in order to determine whether someone meets the legal criteria for insanity at the time of the offense—that the defendant was suffering from a severe mental disease or defect at the time of the alleged offenses such that he was unable to know the wrongfulness of his actions—he needed to obtain a defendant's psychiatric records and interview the defendant to learn his account of the incident. Dr. Beazel testified that Wade initially told him he did not remember what happened in the woods that day, but eventually provided details. Over objections, Dr. Beazel said Wade admitted he hit CD, but claimed the sex with KS was consensual.

{¶24} Ultimately, based in part on Wade's account of the incident, and the fact that Wade made no mention of experiencing any psychotic symptoms at the time of the offenses, Dr. Beazel opined that although Wade suffered from chronic mental illness that could be severe at times, Wade was not legally insane at the time the offenses were committed.

{¶25} After the State rested, Wade moved for acquittal, which was overruled by the trial court. Via counsel, Wade also withdrew his NGRI plea. The trial court engaged in a brief colloquy with Wade about his decision.

{¶26} The defense first called Wintersville Police Chief Edward Laman to testify. He confirmed that while in a holding cell, Wade removed all of this clothing and was acting "disoriented." He said that as a result, per protocol, Wade was transported to the hospital for an assessment; a physician later released him for transport to the county jail. Laman was also questioned about the photo line-up and confirmed it was presented to the victims by Angela Household, who is his secretary and clerk of courts for the Wintersville Magistrate's Court. On cross, Laman explained that Householder qualifies as a blind administrator for the line-up because she had no knowledge of the suspect placed in the line-up.

{¶27} The defense also presented the testimony of Wade's father, Alfred Wade. He explained he had been trying for years to help manage his son's mental illness. Alfred lived nearby Indian Creek High School; Wade had been staying with him. He described some of the bizarre behavior that Wade exhibited while off of his medications during the time the offenses took place. On the day of the incident, Wade had gone to a job interview, then out with his cousin, and finally returned to Alfred's home. Unbeknownst to his father, Wade left the house for about 30 minutes. A neighbor came over to tell Alfred that Wade was being questioned by police nearby. Alfred asked Wade what happened and Wade said he had seen a male and female in the woods, told them to get off his property and that the "boy called him a n*gger," and as a result, Wade "started beating him up."

{¶28} Wade elected not to take the stand. The trial court had a brief discussion with him to ensure he understood his right to remain silent as well as his right to testify.

{¶29} After considering all of the evidence, the jury found Wade guilty of all of the indicted charges. Following a hearing, the trial court sentenced Wade to an aggregate prison term of 12 years, with five years of mandatory post-release control; Wade was also classified as a Tier III sex offender.

Rape: Sufficiency and Manifest Weight

{¶30} Wade's third and fourth assignments of error involve identical testimony

and evidence; thus, for clarity of analysis they will be discussed together and out of order. They assert, respectively:

> The State presented insufficient evidence to support a conviction for rape by force or threat of force.
>
> The Defendant-Appellant's conviction was against the manifest weight of the evidence.

{¶31} A challenge to the sufficiency of the evidence tests whether the state has properly discharged its burden to produce competent, probative, evidence on each element of the offense charged." *State v. Petefish*, 7th Dist. No. 10 MA 78, 2011–Ohio–6367, ¶ 16. Thus, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. In reviewing the record for sufficiency, 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. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997).

{¶32} Conversely, "[w]eight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id*. This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶33} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences 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. *Thompkins* at 387. However, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight and should be affirmed.

{¶34} Wade challenges only his rape conviction under R.C. 2907.02(A)(2), which provides: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶35} " 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶36} The Revised Code defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). "R.C. 2907.02 only requires that minimal force or threat of force be used in the commission of a rape." *State v. Taylor*, 7th Dist. No. 15 JE 0009, 2016-Ohio-2927, ¶ 13, citing *State v. Eskridge*, 38 Ohio St.3d 56, 58, 526 N.E.2d 304 (1988). " 'Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.' " *Eskridge*, 38 Ohio St.3d at 58–59, quoting *State v. Fowler*, 27 Ohio App.3d 149, 154, 500 N.E.2d 390 (8th Dist.1985).

{¶37} CD testified that Wade hit him repeatedly and threatened to kill both KS and CD unless KS had sex with Wade. CD further testified that Wade engaged in oral

and vaginal intercourse with KS, ejaculating inside of her. KS testified she was scared of Wade and did not want to leave CD alone with him in the woods. She confirmed she did not consent to sex with Wade. When analysis was performed on the rape kit evidence obtained from KS, it was confirmed that Wade's DNA was present inside K.S.'s vagina. Thus, there was sufficient evidence to support a conviction of rape in violation of R.C. 2907.02(A)(2).

{¶38} With regard to manifest weight, the evidence overall, including the witness testimony, DNA evidence and the photographs of injuries to CD, strongly supports the State's version of events that: Wade came upon the two teenagers in a compromising position in the woods; Wade punched CD and threatened both of them, in order to engage in oral and vaginal sex with KS; and KS only complied out of fear. By contrast, the defense's theory of the case was that Wade beat CD only after CD yelled racial slurs at Wade; and that KS consented to sex with Wade, a stranger who happened upon the couple in the woods. It was up to the jury, based upon the evidence presented, to determine which version of events was more plausible, and in doing so to resolve matters of credibility. Based upon the record, the jury did not lose its way so as to create a manifest miscarriage of justice.

{¶39} For all of these reasons, the jury's verdict on the rape count is supported by sufficient evidence and not against the weight of the evidence. Accordingly, Wade's third and fourth assignments of error are meritless.

R.C. 2945.371(J)

{¶40} In his second of four assignments of error, Wade asserts:

> The trial court erred by allowing testimony contrary to O.R.C. §2945.371(J).

{¶41} Wade asserts that the trial court erred by permitting Dr. Beazel to testify about statements the defendant made to him about the alleged crimes during a sanity evaluation.

{¶42} As background, "NGRI is an affirmative defense that must be proven by

a preponderance of the evidence." *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 17, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 35; R.C. 2901.05(A). A person is not guilty by reason of insanity only if he proves "that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." R.C. 2901.01(A)(14).

{¶43} R.C. 2945.371 governs the procedure for sanity evaluations when a defendant enters an NGRI plea. "* * *[I]f a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of * * * the defendant's mental condition at the time of the offense charged. An examiner shall conduct the evaluation." R.C. 2945.371(A). "In conducting an evaluation of a defendant's mental condition at the time of the offense charged, the examiner shall consider all relevant evidence." R.C. 2945.371(F). "The examiner shall file a written report with the court within thirty days after entry of a court order for evaluation, and the court shall provide copies of the report to the prosecutor and defense counsel. * * * " R.C. 2945.371(F).

{¶44} Here, Wade entered a NGRI plea and the trial court ordered an evaluation by Dr. Beazel, pursuant to R.C. 2945.371(A). Dr. Beazel's report was available to both sides for review prior to trial. Dr. Beazel testified at trial for the State. Importantly, Wade did not withdraw his NGRI plea until after the State completed its case-in-chief at trial.

{¶45} Wade asserts that the trial court erred by permitting Dr. Beazel to testify about statements Wade made regarding the offenses during the court-ordered evaluation, in violation of R.C. 2945.371(J), which provides, in pertinent part:

> No statement that a defendant makes in an evaluation * * * relating to the defendant's mental condition at the time of the offense charged shall be used against the defendant *on the issue of guilt* in any criminal action or proceeding, but, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person

> who evaluated the defendant or prepared a report pursuant to a referral under this section.

(Emphasis added.)

{¶46} As other Ohio appellate courts have explained, "[t]he prohibition in the statute is necessary because although the statements made to an examiner by the defendant are hearsay, damaging statements would otherwise be admissible under Evid.R. 804(B)(3), statement against interest, if the statute did not exist. * * *" *State v. Armstrong*, 152 Ohio App.3d 579, 2003-Ohio-2154, 789 N.E.2d 657, ¶ 51 (9th Dist.), quoting *State v. Reed*, 2d Dist. Nos. 18417 and 18448, 2001 WL 815026, *6 (July 20, 2001).

{¶47} Thus, "[p]ursuant to R.C. 2945.371(J), the only statements made by a defendant to an examiner which are admissible are those statements used to help form the examiner's opinion of the defendant's sanity or competency to stand trial." *Armstrong* at ¶ 52, citing *State v. Mathes*, 9th Dist. No. 20225, 2001 WL 651527 (June 13, 2011); and *State v. Cooey*, 46 Ohio St.3d 20, 32, 544 N.E.2d 895 (1989) (holding under prior but similar version of statute that the defendant's statements made during an evaluation were admissible because they went solely to the defendant's mental state at the time of the criminal act).

{¶48} For example, in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032:

> Dr. Lehrer, who conducted a court-ordered mental examination pursuant to R.C. 2945.371, testified in rebuttal to Hancock's insanity defense. During Lehrer's direct examination at trial, the prosecutor asked: "Did [Hancock] tell you specifically how he caused the death of Jason Wagner, what he did?" Lehrer testified: "He told me that he tied him up and strangled him."
>
> In his 15th proposition of law, Hancock contends that this testimony violated R.C. 2945.371(J), which provides: "No statement

that a defendant makes in an evaluation * * * under divisions (A) to (H) of this section relating to the defendant's * * * mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding * * *." This provision permits a defendant's statements during a court-ordered mental evaluation to be used against him on the issue of the defendant's mental condition (e.g., insanity), but prohibits their use to prove the defendant's factual guilt. See *State v. Cooey* (1989), 46 Ohio St.3d 20, 31–32, 544 N.E.2d 895 (construing predecessor statute, former R.C. 2945.39(D)). Hancock argues that his admission to Lehrer that he had tied Wagner up and strangled him must have been "used against [him] on the issue of guilt" in violation of R.C. 2945.371(J) because it was irrelevant to the insanity defense.

We disagree. Hancock's admission to Lehrer *was* relevant to the insanity defense. Shortly before the testimony at issue, Lehrer had testified that Hancock was not suffering from a serious mental disease or defect when he killed Wagner. In reaching that conclusion, Lehrer had considered "statements made to me or others that indicate his capacity to know the gravity of his situation and the potential wrongfulness of the acts in question." Hancock's admission to Lehrer was relevant to "his capacity to know the wrongfulness of" killing Wagner: the admission indicated that, when he strangled Wagner, he knew what he was doing.

Moreover, the admission was not used against Hancock on the issue of factual guilt. Before Lehrer gave the testimony at issue, the trial judge expressly instructed the jury not to consider Hancock's admission to Lehrer for that purpose

"Should the doctor in the course of his narrative or response to the prosecutor's question reveal any information that you feel would be

> incriminating regarding the Defendant's conduct [on] November 13 of 2000, please bear in mind that the information the doctor receives is only given for purposes of his evaluation of Mr. Hancock as to whether or not he was suffering a severe mental disease or defect at the time of the incident and whether or not he knew the wrongfulness of his act; however, it's not offered on the issue of guilt or innocence.
>
> "And you're not to accept any comment or statements that Mr. Hancock might have given to the doctor and the doctor may repeat to you as [a]ffecting any determination as to whether or not Mr. Hancock is guilty or innocent."
>
> It is presumed that the jury obeys the instructions of the trial court. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 147. Given the above instruction, we must assume that the jury did not consider Hancock's admission to Lehrer with respect to the issue of factual guilt. Nor did the prosecution argue that Hancock's admission was probative of guilt.
>
> Finally, there was no possible prejudice. Dr. Lehrer repeated Hancock's admission that "he tied [Wagner] up and strangled him." But other evidence overwhelmingly proved that Hancock did just that, and the defense expressly conceded the point at trial. Thus, we overrule Hancock's 15th proposition of law.

Hancock at ¶ 48-55 (emphasis sic).

{¶49} More recently, in *Harris*, *supra*, 142 Ohio St.3d 211, the Ohio Supreme Court provided a detailed historical overview of R.C. 2945.371(J), along with the Fifth Amendment implications surrounding information garnered through a court-ordered psychiatric evaluation of the accused. *Id*. at ¶ 19-29. However, the issue presented in *Harris* was a fairly narrow one: whether a psychologist's testimony regarding the defendant's feigning of mental illness during competency and sanity evaluations is admissible in the state's case-in-chief pursuant to R.C. 2945.371(J) where the

defendant had *wholly abandoned his NGRI defense prior to trial*. *Id*. at ¶ 1-2. The Court concluded it was inadmissible under those circumstances and that the trial court's error in admitting it was not harmless, applying the more stringent, constitutional harmless-error standard. *Id*. at ¶ 30-45.

{¶50} A key fact in *Harris*, however, was that the defendant had "wholly abandoned" his NGRI defense prior to trial:

> [T]he record demonstrates that Harris had abandoned his NGRI defense after Dreyer's [the expert's] report. Harris filed a notice of alibi on May 12, 2011, almost a month before trial began, signaling the abandonment of the defense of NGRI in pursuit of another defense. An alibi defense, which proclaims that the defendant could not have been the perpetrator, is incompatible with an NGRI defense, which admits that he was the perpetrator of the offense, but disclaims legal responsibility.
>
> Moreover, at trial, Harris objected to Dreyer's testimony, acknowledging to the court that he did not meet the criteria for legal insanity, that he had no intention of proceeding with the defense, and that he would withdraw the NGRI plea at that time.
>
> Accordingly, the record demonstrates that Harris had abandoned his NGRI plea and would not be introducing psychiatric evidence at trial. Therefore, Dreyer's testimony regarding Harris's feigning of mental illness was inadmissible during the state's case-in-chief pursuant to R.C. 2945.371(J).

Harris at ¶ 31-33.

{¶51} Dr. Beazel testified during the State's case-in-chief about Wade's mental condition at the time of the offense, including statements Wade made to him about the incident. At that point in the trial, Wade had not yet abandoned his NGRI defense; he did so after the State rested. This makes the case factually

distinguishable from *Harris*.

{¶52} The question remains whether Wade's statements to Dr. Beazel were offered to help form the doctor's opinion of Wade's sanity or were impermissibly offered as evidence of his factual guilt in violation of R.C. 2945.371(J). *Hancock, supra*. Prior to recounting Wade's statements about the offenses, Dr. Beazel was asked what information he would need to know to determine whether someone meets the legal criteria for insanity at the time of an offense. He explained:

> Well, I would need some indication that he was so mentally deranged that he – at the time of the alleged offense that he did not know right from wrong. Part of that involves records, whatever records can be obtained, like psychiatric records, the closest to that event and the Defendant's account.

{¶53} Dr. Beazel went on to explain that at first Wade told him that he could not recall the event, but that "lack of memory is not one of the criteria for his [psychiatric] disorder." Eventually, however, Wade "essentially provided an accounting of his actions, none of which included any reference to any psychotic symptoms or any hallucination, delusions or any indication that at that time his mental illness was having much effect on him and certainly by his report to me he knew right from wrong at the time."

{¶54} It was only then, after defense counsel objected and the objection was argued outside of the presence of the jury and overruled by the trial court, that Dr. Beazel recounted Wade's statements to him about what happened that day:

> Well, [Wade] told me he came upon the two alleged victims and he said they were engaged in some sexual activity. He said if she performs fellatio on him that he wouldn't report them to police, at which point the male victim reportedly called him the N word and said to leave his girlfriend alone * * * and Mr. Wade said it was at that point the fight

started because the young male had been offensive to him.

* * *

[Wade] told me that while he was in the altercation with the male victim that the female victim said "Stop, I'll do what you want if you stop fighting," and that she then performed oral sex on him and he said he asked her to have intercourse, vaginal intercourse and he said she did not say no and so he felt that it was consensual.

{¶55} Wade went on to tell Dr. Beazel he was "joking" when he told KS and CD that he would call police unless KS had sex with him. Wade blamed his unstable mental condition for putting him in the situation.

{¶56} Wade's statements were offered to help form the doctor's opinion of Wade's sanity and not as evidence of his factual guilt. Dr. Beazel explained that Wade's account of the incident was an integral part in his evaluation of Wade's mental condition. Like in *Hancock*, Wade's admissions were "relevant to 'his capacity to know the wrongfulness of' [committing the offense]: the admission[s] indicated that, when he [committed the offense], he knew what he was doing." *Hancock* at ¶ 50. Therefore, Dr. Beazel's testimony does not violate R.C. 2945.371(J). Accordingly, Wade's second assignment of error is meritless.

Ineffective Assistance of Counsel

{¶57} In his first assignment of error, Wade asserts:

The failure of defense counsel to object timely, properly impeach witnesses, as well as other deficiencies resulted in prejudicial error and ineffective assistance of counsel.

{¶58} To prove ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *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, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id*., paragraph three of the syllabus. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to prove otherwise. *State v. Hamblin*, 37 Ohio St.3d 153, 155, 524 N.E.2d 476 (1988).

{¶59} Wade asserts trial counsel's representation was deficient in three areas: during opening statements, cross-examination of witnesses, and in her questioning of the State's expert. Each will be discussed in turn, and discussion of overall prejudice will be reserved until the end.

{¶60} First, the prosecutor referred to Wade as a "sexual predator" eight times during his opening statement, despite the fact that Wade had never been previously convicted of any sex crimes. Defense counsel failed to object to the use of this term and did not bring it to the trial court's attention until after the conclusion of the opening statement, when, during a side-bar, outside of the presence of the jury, she requested a mistrial based upon the prosecutor's use of the term. The trial court then asked counsel why she failed to object after the first time the term was used, to which she replied she was unaware that one could object during an opening statement. The trial court stated he would have sustained her objection "in a second," had she made it at the appropriate time; and went on to explain: "There is no time that you're not allowed to object." However, counsel did request a curative instruction be given to the jury, which the trial court granted, telling jurors: "to the extent that the term sexual predator implies a prior sexual conviction, that is not the case here. So, we don’t want anyone confused or mislead. [sic]."

{¶61} "Sexual predator" is a legal term of art that was used in a prior version of Ohio's sex offender statute, known as Meghan's Law, and was defined as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." *State v. Cook*, 83 Ohio St.3d 404, 407, 700 N.E.2d 570 (1998), quoting

former R.C. 2950.01(E).

{¶62} This label does not apply to Wade as he had no prior sex offense convictions, and thus defense counsel should have objected when those statements were made, instead of waiting until the end of the prosecutor's opening statement to move for a mistrial. Counsel's confusion about basic aspects of trial procedure falls below an objective standard of reasonable representation.

{¶63} Second, there are a number of instances where defense counsel attempted to impeach the victim, KS, improperly. First, the trial court had to instruct defense counsel, in the presence of the jury, on how to use a prior inconsistent statement:

> THE COURT: Here's what you can do. You can ask her what happened. If what she said is different than a prior statement, then you can ask her about the prior statement but you don't start out with the prior statement. You start out with just asking her the question straight up.

{¶64} Despite this instruction, defense counsel resumed questioning the victim improperly:

> Q. You're saying that he made you perform oral sex on him, the blow job thing.
>
> A. Yes, with his threats.
>
> Q. At one point you say as soon as you had the - -
>
> [PROSECUTOR]: Your Honor, I'm going to object again on the grounds that she's reading this from the doctor's report and the doctor's not here.

{¶65} The trial court then had the attorneys approach the bench and had to instruct defense counsel a second time about how to properly impeach using prior inconsistent statements:

THE COURT [to defense counsel]: What are you doing?

DEFENSE COUNSEL: I am trying to establish that she has given us a lot of stories that have indicated - -

THE COURT: Okay. Here's how you do that and it's in the rules of evidence and you are going to follow them. You ask a question. "Did this happen?" She says "No." She said yes some other time. You say "Well, didn't you tell the doctor that that's what happened?" That's how you do it. You don't start "Did you tell the doctor this and did you tell the doctor that?" We are going to follow the rules. We are going to do it right.

DEFENSE COUNSEL: Okay.

THE COURT: Okay. Now, I've told you once and I told you nicely the first time. Now I'm telling you less nicely.

DEFENSE COUNSEL: Okay. Let me see if I understand what you are saying.

THE COURT: It's called a prior inconsistent statement. There's a rule on that. The rule says you ask the question, then if you get an answer that's different than the prior statement, then you ask about the prior statement and that's what we are going to do and we're not going to go line by line.

DEFENSE COUNSEL: Okay. Okay. I will try - - I will try to - -

THE COURT: Huh?

DEFENSE COUNSEL: I will try to see if I can get my head around that. I understand what you are saying. I need to figure out how to do that.

THE COURT: This is something you should already know before you get here. I might need to remind you but I shouldn't have to explain it to you. You should know that before you get here.

DEFENSE COUNSEL: I thought I had it but I apparently don't.

So, I appreciate what you are saying.

THE COURT: Do we understand how we are going to do this?

DEFENSE COUNSEL: Yes, sir.

THE COURT: And I think you're digging yourself a hole with this Jury but that's your business.

DEFENSE COUNSEL: Okay.

{¶66} Third, the trial court had to explain to defense counsel how to question an expert witness, including the proper use of a hypothetical question. On one occasion, out of the hearing of the jury, the trial court stated:

> You get two choices. You get to stick to the record of whatever is in there you can ask him about or you can ask hypothetical questions. You can say "If this was going on or if that was going on" but what you're not going to do is stand at the podium and tell him [the expert, Dr. Beazel] that he [Wade] was taking off his clothes and he was doing this and he was doing that, you know, because you say so. That is not what we're going to do.

{¶67} Even after this instruction, the trial court had to help counsel correctly formulate the questions, step by step.

> DEFENSE COUNSEL [to Dr. Beazel]: You observed him on that day. That's the day 4-5-2013. At that time he tells me that he had been off his meds for some years. His brother was in the process of dying. He had been in a verbally-abusive relationship with a woman and he was not getting to see his kids, all compounded together.
>
> PROSECUTOR: Your honor, I'm not sure where these facts are coming from.
>
> THE COURT: Right. Where are you getting all this? I don't know that any of this is in the record.

DEFENSE COUNSEL: He tells me.

THE COURT: Excuse me?

DEFENSE COUNSEL: Hypothetically.

THE COURT: All right. Hypothetical question. Go ahead.

DEFENSE COUNSEL: Given that hypothetical - -

THE COURT: Assuming those facts to be true.

DR. BEAZEL: Yes, sir.

DEFENSE COUNSEL: - - what is your opinion?

{¶68} Thus, there were three instances where trial counsel's performance was subpar, meeting the first prong of the *Strickland* test. Next, we must decide whether there was prejudice. Here we find none.

{¶69} The evidence against Wade, as set forth in detail above—the victims' testimony, Wade's DNA evidence found inside of KS, the injuries to CD and the victims' behavior testified to by witnesses who encountered them immediately after the incident, statements Wade made to his father—strongly support the jury's guilty verdicts. For example, during sentencing, the trial court noted how afraid KS appeared on the stand, stating: "I watched for a hour with her on the stand shaking and quivering and obviously greatly affected. * * * It's horrible. She shook for an hour on the stand."

{¶70} That counsel's missteps permeated the trial gives us pause. It is troubling that counsel lacked the ability to properly cross-examine and impeach the victim and expert witness, and that she failed to grasp basic aspects of trial procedure. While ineffectiveness at this level could result in prejudice in another case where—mindful that the State's burden of proof is beyond a reasonable doubt—the evidence is not as strong, we find no prejudice here given the overwhelming evidence against Wade.

{¶71} In sum, Wade's rape conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The psychologist's testimony did not violate R.C. 2945.371(J) as it was offered to show Wade's mental state at the

time of the offenses. Although there were several errors made by defense counsel throughout the trial that fall below an objective standard of reasonable representation, no prejudice resulted. Accordingly, the judgment of the trial court is affirmed.

Waite, J., concurs.

Robb, J., concurs.