[Cite as *State v. Brown*, 2003-Ohio-2959.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 2002-CA-23
vs.	:	T.C. Case No. 01-CR-247/ 02-CR-80
DANE M. BROWN	:	(Criminal Appeal from Common Pleas Court) :
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 6th day of June, 2003.

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BROGAN, J.

{¶1} Dane M. Brown appeals from his conviction and sentence in the Miami County Common Pleas Court on one count of rape of a victim under age thirteen

with a force specification and one count of sexual battery.

{¶2} The record reflects that Brown was arrested on August 17, 2001, after his long-time girlfriend's daughter accused him of repeatedly sexually molesting her over a period of approximately eighteen months. Brown originally was indicted on August 28, 2001, in trial court case number 01CR-247. That indictment charged him with rape of a victim under age thirteen with a force specification, sexual battery, and disseminating material harmful to juveniles. Brown subsequently entered an *Alford* plea to the charges of sexual battery and disseminating material harmful to juveniles and accepted a plea agreement calling for him to serve a total sentence of three years in prison. He later withdrew the plea, however, and the State re-indicted him for rape of a victim under age thirteen with a force specification in trial court case number 02CR-80. The trial court then consolidated the two cases, and Brown proceeded to trial on both indictments. At trial, the State dismissed the charge of disseminating material harmful to juveniles, and the jury convicted Brown of rape of a victim under age thirteen with force and sexual battery. At sentencing, the trial court merged the two identical rape convictions. The trial court then sentenced Brown to life for the rape conviction with parole eligibility after ten years, and an additional consecutive term of five years for the sexual battery conviction.

{¶3} On July 29, 2002, Brown's appellate counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, asserting the absence of any meritorious issues for our review and seeking permission to withdraw as counsel.[1] Thereafter,

[1]*Anders* outlines a particular format for these types of cases. Specifically, defense counsel must ask permission to withdraw and must also file a brief referring

Brown filed a pro se brief, arguing that numerous errors warrant the reversal of his convictions. Although Brown's brief generally lacks true assignments of error, we have attempted to discern the essence of his arguments. First, he contends that his convictions must be reversed because he was not served with an arrest warrant at the time of his arrest. Second, he suggests that police lacked probable cause to search his home. Third, he contends that a conflict of interest should have precluded a public defender from handling his case. Fourth, he observes that the trial court authorized funding for a defense expert but no such expert testified on his behalf at trial. Fifth, he alleges that the trial court erred in overruling his motion to have a defense expert examine the victim. Sixth, he raises a general argument regarding the credibility of the victim and the prosecutor. Seventh, he argues that defense counsel should have subpoenaed the doctor who performed a rape examination on the victim. Eighth, he questions why the victim's statements about her use of alcohol, marijuana, and synthetic morphine were used in his "sentencing and incrimination." Ninth, he questions why the victim was not tested for the use of marijuana or alcohol at the time of her rape examination. Tenth, he alleges a conflict of interest based on a claim that one of the jurors knew the judge and had worked with him for years. Eleventh, he contends that the victim should not have been given psychological tests while medicated as an inpatient at a hospital. Twelfth, he asserts that there is "no evidence" of him raping the victim. Thirteenth, he claims an

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to anything in the record that might arguably support an appeal. We then are required independently to examine the record before we may grant the motion to withdraw. If our review discloses colorable claims, we appoint new counsel to help the defendant present an argument.

expert witness should not have interpreted the results of one psychological test as being invalid when a testing company viewed the results as being valid.

{¶4} Upon review, we find that none of the foregoing arguments are even potentially meritorious, at least in the context of a direct appeal. The fact that Brown was not served with a warrant immediately upon his arrest is of no consequence. In its brief, the State cites Crim.R. 4(D)(3), which provides that a police officer need not have an arrest warrant in his possession at the time of an arrest. Under that rule, an arresting officer must only "inform the defendant of the offense charged and the fact that the warrant has been issued." Rule 4(D)(3) has no applicability in the present case, however, because it presumes that a warrant "has been issued." Herein, the warrant for Brown's arrest was not issued until eleven days after his arrest.[2] Nevertheless, when probable cause exists, an arresting officer is not required to obtain a warrant in order to apprehend a suspected felon in a public place. *State v. Piggott*, Montgomery App. No. 18962, 2002-Ohio-3810. On appeal, Brown does not even suggest that the victim's sexual abuse complaint and the resulting police investigation, which occurred largely prior to his arrest, were insufficient to provide probable cause. Consequently, we find no merit in his first argument.

{¶5} Brown's second argument is equally unpersuasive. Although Brown suggests that police lacked probable cause to search his home, we note that large portions of the home were searched with the consent of his long-time girlfriend,

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[2]The trial transcript reflects that Brown was arrested at his workplace on August 17, 2001. (Tr. Transcript, Vol. 2 at 248, 251). He was indicted on August 28,

Debra Erb, who was a resident of the home. (Tr. Transcript, Vol. 2 at 249). It is well-settled that a co-resident may give permission to search areas over which she shares control, and the prosecution may justify a warrantless search by proof of the co-resident's consent, even in the absence of the defendant's consent. See, e.g., *State v. Harris*, Montgomery App. No. 19479, 2003-Ohio-2519; *United States v. Matlock* (1974), 415 U.S. 164, 171. In addition, we note that those portions of the home accessible only to Brown were searched pursuant to warrants issued upon an officer's probable cause affidavit. (Tr. Transcript, Vol. 2 at 252-253). In the trial court, Brown did not contest the existence of probable cause to support the issuance of the warrants. As a result, we find no merit in his second argument.

{¶6} We also reject Brown's third argument, which concerns an alleged conflict of interest in the public defender's office. Specifically, Brown contends that correspondence from a representative of the public defender's office to the trial court indicated that the public defender's office did not want to be involved in his case. He also alleges that his trial counsel, public defender Steven King, told him that he should accept an offered plea bargain. According to Brown, these facts demonstrate a conflict of interest that obligated the trial court to appoint him counsel outside of the public defender's office.

{¶7} Brown's argument lacks merit. The record reflects that private counsel Andrew Pratt originally represented Brown. Pratt proceeded to negotiate a plea agreement on his client's behalf. The agreement called for Brown to plead guilty to charges of sexual battery and disseminating material harmful to juveniles in

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2001. (Doc. #2 in Tr. Ct. Case No. 01CR-247).

exchange for a joint recommendation of concurrent three-year sentences, the dismissal of the forcible rape charge, the pursuit of no other charges for conduct occurring prior to the plea, and a joint stipulation that Brown is a sexually oriented offender. Brown accepted the agreement and entered an *Alford* plea. He later moved to withdraw the plea against the advice of Pratt. On December 17, 2001, the trial court permitted Pratt to withdraw as counsel, primarily due to Brown's effort to withdraw his plea. The following day, public defender John Hemm sent the trial court a letter, indicating that attorneys in the public defender's office had reviewed the case with Pratt and had advised him that they believed the plea agreement was fair. Given that Hemm and his associates had determined that the plea agreement was in Brown's best interests, Hemm suggested that the trial court might wish to appoint an outside attorney to counsel Brown about the merits of the plea agreement before allowing him to withdraw the plea. The trial court responded with a letter dated December 19, 2001, indicating that it saw no need to appoint outside counsel to advise Brown. Public defender Steven King then assumed Brown's defense. On January 14, 2002, the trial court allowed Brown to withdraw his *Alford* plea against King's advice. The matter proceeded to trial, and a jury found Brown guilty of rape of a victim under age thirteen with a force specification and sexual battery. The trial court imposed an aggregate sentence of life with parole eligibility after fifteen years and classified Brown as a sexual predator.

{¶8} The foregoing facts do not support Brown's argument that the public defender's office "did not want anything to do with [his] case." Nor do the foregoing facts demonstrate any conflict of interest that required the trial court to appoint

outside counsel. To the contrary, representatives of the public defender's office believed, quite correctly in retrospect, that Brown's best interests would be served by his acceptance of the plea agreement. To that end, John Hemm suggested only that the trial court might wish to arrange for outside counsel to confer with Brown about the fairness of the agreement. The record does not suggest that Steven King or anyone in the public defender's office subsequently provided Brown with deficient representation or otherwise indicated any hostility toward his defense. As the record does not support Brown's allegation of an unspecified conflict of interest, we reject his third argument.

{¶9} In his fourth argument, Brown merely notes that the trial court authorized funding for a defense expert but that no such expert testified on his behalf at trial. Although this argument does not allege any specific error, Brown may be attempting to argue ineffective assistance of counsel based on his trial attorney's failure to call an expert witness to testify. Based on the present record, however, we do not know what useful testimony, if any, an expert might have provided on Brown's behalf or why defense counsel elected not to call an expert. Therefore, a finding of ineffective assistance of counsel in the context of this direct appeal would be purely speculative and inappropriate, as Brown's claim requires proof outside the record. *State v. Hartman*, 93 Ohio St.3d 274, 299, 2001-Ohio-1580. In addition, we note that whether or not to call an expert witness is a matter of trial strategy. An attorney's failure to call an expert and instead rely on cross examination ordinarily does not constitute ineffective assistance of counsel. Id. In this case, Brown presents no specific argument as to why it was necessary to call an expert to testify

on his behalf. Accordingly, we reject his fourth argument.

{¶10} In his fifth argument, Brown alleges that the trial court erred in overruling his motion to have a defense expert examine the victim. This argument appears to concern the trial court's ruling on his motion to compel the victim to undergo a psychological evaluation. (Doc. #8 in Tr. Ct. Case No. 02CR80). The trial court overruled the motion, reasoning that an evaluation by a defense expert was not necessary for him to refute the testimony of the prosecution's expert, who had conducted such an examination. In reaching this conclusion, the trial court noted that defense counsel could cross-examine the alleged victim, the State's expert, and any other witnesses. The trial court also noted that any expert hired by Brown would have a written report prepared by the State's expert. In addition, the trial court cited certain dangers inherent in ordering an alleged victim to undergo a psychological evaluation conducted by a defense expert. The trial court then noted that Brown did not have an automatic right to have the minor victim undergo a psychological evaluation merely because the State's expert had evaluated her, and that he had not offered any special justification for the requested evaluation. As a result, the trial court overruled his motion.

{¶11} We review the trial court's decision on this issue for an abuse of discretion. *State v. Ramirez* (1994), 98 Ohio App.3d 388, 391. Having reviewed the record and relevant case law, we cannot say that the trial court abused its discretion in refusing to order the victim to undergo a psychological evaluation conducted by a defense expert. In reaching this conclusion, we note that the State's expert, Dr. Lynn DiMarzio, testified almost exclusively about four standardized written tests that

she administered to the victim and about the conclusions that she drew from the test results. Brown was free to have an expert of his own review those test results and draw any conclusions from them. In short, given that DiMarzio's testimony concerned her review of written tests, we find no abuse of discretion in the trial court's refusal to require the victim to undergo similar testing by a defense expert. Accordingly, we reject Brown's fifth argument.

{¶12} Brown's sixth argument is that the prosecutor and the victim were not credible. This argument concerns the prosecutor's recitation of the factual basis for Brown's *Alford* plea and the victim's subsequent trial testimony after he withdrew the plea. At the plea hearing, the prosecutor stated, among other things, that Brown had inserted a two-foot dildo into the victim's vagina. Thereafter, the victim testified at trial that Brown had inserted the "tip of the head" of the dildo into her vagina. According to Brown, these two statements are inconsistent and they completely undermine the credibility of the prosecutor and the victim.

{¶13} Upon review, we find no merit in this argument for at least three reasons. First, credibility issues primarily are for the trier of fact to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. Second, the prosecutor's statement does not contradict the victim's trial testimony. The prosecutor did not specify what portion of the dildo Brown had inserted into the victim's vagina. Thus, although his statement was less precise than the victim's trial testimony, the prosecutor and the victim both stated that Brown had inserted the dildo into her vagina. Third, this issue simply was not crucial to Brown's conviction. At trial, the victim recalled many instances of sexual intercourse with Brown over an extended period of time. As a result, the

validity of his rape and sexual battery convictions did not turn on whether he once had abused her with a dildo. Accordingly, we reject Brown's sixth argument.

{¶14} In his seventh argument, Brown contends defense counsel should have subpoenaed the doctor who performed a rape examination on the victim. In our view, however, defense counsel reasonably could have determined that having the doctor testify was unnecessary. As the State properly notes, the results of the examination and the doctor's conclusions were admitted and discussed at trial. That evidence, which was presented to the jury, revealed no indication of sexual abuse. Given that the negative rape examination results were to be admitted into evidence and addressed at trial, Brown's attorney reasonably could have concluded that nothing would be gained by subpoenaing the examining doctor to testify. Therefore, Brown's seventh argument lacks merit.

{¶15} In his eighth argument, Brown questions why the victim's statements about her use of alcohol, marijuana, and synthetic morphine were used in his "sentencing and incrimination." Upon review, we find no error in the trial court's consideration of such testimony for purposes of sentencing. Nor do we find any error in the trial court allowing the jury to hear such testimony from the victim at trial. The victim testified that Brown used drugs and alcohol in connection with his sexual abuse. In particular, he gave her drugs and alcohol before some of the incidents, telling her that they would calm her down and put her in the mood for sex. (Tr. Transcript, Vol. 1 at 68). Likewise, as the trial court found, the statements about Brown giving the victim drugs and alcohol were relevant for purposes of sentencing and for purposes of his sexual-predator classification. Accordingly, we reject

Brown's eighth argument.

{¶16} In his ninth argument, Brown questions why the victim was not tested for the use of marijuana or alcohol at the time of her initial rape examination. Although we cannot say with certainty why the doctor who performed the rape examination did not conduct such tests, possible reasons are readily apparent. When she reported the sexual abuse and was taken to the hospital for testing, the victim likely was not under the influence of drugs or alcohol. Furthermore, it does not appear that she even informed the examining physician about prior drug and alcohol use. As a result, the physician had no reason to test for drug or alcohol use. In any event, the failure of the examining physician to test the victim to determine whether she had drugs or alcohol in her system does not warrant the reversal of Brown's conviction or the vacation of his sentence. The victim testified that Brown gave her drugs and alcohol before engaging in sexual intercourse with her. Defense counsel was free to cross examine the victim and to point out the absence of any medical tests to confirm her allegations. If anything, the lack of medical testing merely affected the weight of the victim's testimony, which the jury remained free to believe or to disbelieve. As a result, we find no merit in Brown's ninth argument.

{¶17} In his tenth argument, Brown alleges a conflict of interest based on a claim that one of the jurors knew the judge and had worked with him for years. Unfortunately, Brown fails to support this argument with any citation to the 131-page voir dire transcript. This court has reviewed the entire transcript and has not located any statement by a member of the jury pool that supports Brown's assertion. In any event, even if a member of the jury pool did know the judge, such an association

would not automatically disqualify the juror from serving on the panel. At most, the fact that a member of the jury pool knew the judge might have provided a basis for exercising a peremptory challenge. In the present case, Brown did not exercise all of his peremptory challenges. (Jury Voir Dire Tr. at 123-124). If he had a concern about an unidentified member of the jury pool, then he should have exercised a peremptory challenge and removed the individual. In light of his failure to do so, we would reject Brown's argument, even if a juror previously had worked with the trial court judge. Furthermore, on the present record Brown cannot possibly demonstrate ineffective assistance of counsel based on his attorney's failure to strike any particular juror. The record does not reveal why defense counsel elected to strike some potential jurors and not others. Therefore, a finding of ineffective assistance of counsel with respect to jury selection would be pure speculation, as such a claim necessarily depends on evidence outside the record. Accordingly, we find no merit in Brown's tenth argument.

{¶18} In his eleventh argument, Brown contends the victim should not have been given psychological tests while medicated as an inpatient at the Dettmer hospital. Although this argument is not framed as an assignment of error, Brown may be suggesting that the trial court should have declared the test results unreliable and, therefore, inadmissible. Our response is two-fold. First, defense counsel raised no such objection, and nothing in the record demonstrates that the victim's medication rendered the test results unreliable. Therefore, we find no plain error in the trial court allowing the prosecution's expert to testify about the results. Second, defense counsel was free to cross examine the prosecution's witnesses

about the fact that the victim was under the influence of medication when the tests were administered. While the fact that the victim was receiving medication may have affected the weight that the jury attached to the test results, we cannot say, on the record before us, that the results were inadmissible. As a result, we reject Brown's eleventh argument.

{¶19} In his twelfth argument, Brown insists that there is "no evidence" of him raping the victim. This assertion is belied by the record. The victim testified consistently and in detail about various instances of anal, oral, and vaginal sex with Brown over approximately an eighteen-month period of time, beginning when she was eleven years old. She testified that Brown had sexual intercourse with her "too many" times to count, and she testified about his use of force. Notably, the victim also testified that Brown typically used condoms with her, and police found condoms in the house. In fact, police found a used condom inside a beer can buried in the trash, precisely where the victim said it would be located. The presence of condoms in the house was significant, given that the only other resident female, Brown's live-in girlfriend Debra Erb, had undergone tubal ligation in 1994, and Brown did not use any contraceptives when having sexual intercourse with her. Having read the entire 333-page trial transcript, we are firmly convinced that Brown's convictions are supported by legally sufficient evidence and are not against the manifest weight of the evidence. As a result, we find no merit in his twelfth argument.

{¶20} In his thirteenth argument, Brown claims an expert witness should not have interpreted the results of a psychological test as being invalid when the testing

company interpreted the results as being valid. Once again, this argument is not framed as an assignment of error. Nevertheless, we construe Brown's argument as an assertion that the trial court should not have allowed the expert witness to testify as to her belief that the results were invalid. This argument concerns psychological tests given to the victim by Lynn DiMarzio, the psychologist who testified as an expert for the State. The record reveals that she administered several written tests to the victim. According to DiMarzio, all but one of the tests indicated that the victim had psychological problems, including post-traumatic stress disorder. One test, however, suggested that "everything was okay" and "that her life was wonderful." (Tr. Transcript, Vol. 1 at 171). According to the test publisher, which scored this test, the results were valid. (Id. at 211). Nevertheless, DiMarzio explained that she tended to discredit the anomalous test results for a number of reasons, which she explained to the jury. Defense counsel then cross examined her on the issue, suggesting that she was selectively viewing the test results to support her predetermined diagnosis. (Id. at 211-213). Upon review, we find no error in the trial court allowing DiMarzio to testify about her interpretation of the various test results and her belief that the anomalous results should be discounted. We find nothing improper about the testimony, and the jury was entitled to give it whatever weight it deemed appropriate. Accordingly, we reject Brown's thirteenth argument.

{¶21} Finally, we have fulfilled our obligation to conduct an independent review of the record, including all transcripts, and have found no meritorious issues for direct appeal. We have located two issues, however, that warrant a brief discussion. The first issue concerns the prosecutor's closing argument. At one

point, the prosecutor stated, "I submit to you, Ladies and Gentlemen, that the testimony of this young girl was credible." One could argue that this statement, viewed in isolation, constituted improper vouching for the victim's credibility. When read in context, however, it is apparent that the remark does not constitute improper vouching. Although a prosecutor may not offer a personal opinion about whether a witness was truthful, a prosecutor may argue that the evidence suggests a witness was truthful. *State v. Herring*, 94 Ohio St.3d 246, 261, 2002-Ohio-796. In the present case, the prosecutor immediately followed his statement about the victim's credibility by tying it to the evidence presented at trial. (Tr. Transcript, Vol. 2 at 289-290). As a result, the prosecutor acted appropriately.

{¶22} The second issue concerns defense counsel's failure to exercise his final peremptory challenge to strike Carolyn Stovell, who was seated as a member of Brown's jury. During voir dire, the prosecutor asked whether anyone would have trouble serving on a jury in a case involving allegations of child rape. Stovell and several others raised their hands. The prosecutor then discussed the issue with those prospective jurors. When the prosecutor spoke with Stovell, the following exchange occurred:

{¶23} "Mr. Kendell: Okay. Tell me what problems you're gonna have with that type of case, if you feel comfortable talking about it.

{¶24} "Mrs. Stovell: It's just so dreadful. I just find it hard to deal with.

{¶25} "Mr. Kendell: Okay. Well –

{¶26} "Mrs. Stovell: I can't imagine such a thing happening to a child.

{¶27} "Mr. Kendell: Right. But will you be able to listen to the evidence that's

presented during the trial and look at it impartially and give both sides a fair shake on that?

{¶28} "Mrs. Stovell: I would hope so.

{¶29} "Mr. Kendell: Okay. So you would be able to look at whatever the evidence is that's presented and apply it to the law that the Judge gives you?

{¶30} "Mrs. Stovell: I hope so.

{¶31} "Mr. Kendell: Do you believe you can do that?

{¶32} "Mrs. Stovell: I don't know. I've never done this before." (Voir Dire Transcript at 22-23).

{¶33} Defense counsel subsequently questioned Stovell and the other prospective jurors about a different issue. In particular, he questioned whether they "would attach more weight to the testimony of a police officer or assume that they're gonna be more credible than . . . another witness just because it's a law enforcement officer[.]" Stovell responded that she would give more credence to the testimony of a police officer than other witnesses. (Id. at 51).

{¶34} Despite the foregoing responses, defense counsel did not exercise a peremptory challenge to strike Stovell, and she served as a juror in the case. Based on the present record, however, we do not know why defense counsel elected not to strike Stovell. Therefore, a finding of ineffective assistance of counsel in the context of this direct appeal would be purely speculative. Such a claim certainly would require the presentation of evidence outside the record. As a result, this issue is not even potentially meritorious in the present context.

{¶35} Based on the reasoning and citation of authority set forth above, none

of Brown's arguments warrant the reversal of his conviction, and we find no potentially meritorious claims for him to assert on direct appeal. Accordingly, defense counsel's motion to withdraw as counsel is sustained, and the judgment of the Miami County Common Pleas Court is hereby affirmed.

Judgment affirmed.

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GRADY, J., and YOUNG, J., concur.

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