[Cite as *State v. Dial*, 2004-Ohio-5860.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83847

STATE OF OHIO

Plaintiff-appellee

vs.

PATRICK DIAL

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	NOVEMBER 4, 2004
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court, Case No. CR-422360
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellee:	WIILIAM D. MASON, ESQ. CUYAHOGA COUNTY PROSECUTOR MICHAEL D. HORN, ESQ. THERESE M. MCKENNA, ESQ. Assistant County Prosecutors The Justice Center 1200 Ontario Street, 8th Floor Cleveland, Ohio 44113
For defendant-appellant:	GEORGE W. MACDONALD, ESQ. 848 Rockefeller Building 614 Superior Avenue, N.W. Cleveland, Ohio 44113

KARPINSKI, J.:

{¶ 1} Defendant, Patrick Dial, appeals his jury trial conviction for six counts of rape, three with the finding that the victim was under thirteen; eight counts of kidnapping; two counts of felonious assault; and three counts of child endangering, all involving his daughter. The circumstances of the crimes are as follows. Defendant and the victim's mother were married and had three of their own children. Also living with the family was the mother's son by a previous relationship. The parents' marriage was rocky, and they moved frequently. At one point, defendant began to drink and to abuse the children physically. When the victim was in the third grade, defendant began watching her shower while he masturbated. The victim did not tell anyone about his behavior. Defendant then began touching the victim inappropriately below the waist, including in her private area. Finally, when she was about ten, he actually penetrated her with his penis. Again, she did not tell anyone about his actions.

{¶ 2} After the family had moved to Las Vegas, mother abandoned the family and left all the children with defendant except her son from the prior relationship. The defendant and three remaining children stayed in Las Vegas for a very short period of time after the mother left. While they were still there, defendant raped the victim again. At this time, he threatened to kill her if she told anyone what had happened.

{¶ 3} Defendant then moved the family back to the Cleveland, Ohio area, where they lived with alternately his mother or his girlfriend. Defendant again raped the victim while they were staying at his mother's house.

{¶ 4} Defendant then became involved with another woman, whom he finally married, and he moved his family in with her. When no one else was at home, defendant again raped the victim. He forced her to strip naked at knife-point and left the knife within his reach while he raped her. He

then forced her to shower while he watched. The next time he raped her he tied her to the bedpost with plastic ties. Again, he used a knife and he threatened to kill her if she told anyone what was happening. Similar incidents continued. Additionally, defendant forced the victim to watch as he had sex with another woman. At the time he had sex with this other in front of the victim, he was still living with, and in fact would five days later marry, a woman he and his children had been living with for some time.

{¶ 5} At no point during this time did the victim tell anyone what was going on. She testified that she was afraid to tell her sister for fear her sister would repeat it and then defendant would kill her. She did not tell the woman they were living with, who became her stepmother, because that woman never defended herself against defendant's physical abuse, so the victim doubted she would defend another person. She also did not tell a family friend because she was afraid the friend would repeat it to defendant, who would then kill her, as he had threatened to do. She did not tell social workers who visited the home for other complaints because after the social workers had observed the physical abuse she had sustained at defendant's hands, they had still left her in the home. She feared that they might leave her in the home after she disclosed the sexual abuse and defendant would then kill her.

{¶ 6} Finally, the victim left home when she was thirteen. At first, she went to stay with a family friend, then with an aunt, and then with another relative.

{¶ 7} Two years later, the victim moved to California and was reunited with her mother. The victim got a boyfriend and, as she began to trust the boyfriend, eventually revealed to him what her father had done to her. Although she also told her mother about it several times, her mother did not believe her because the victim only brought it up when she and her mother were arguing. After the mother had been contacted by the children's services agency in the county where the children

were living because they were being removed from the father's home, however, the mother asked the victim whether the children were safe at the father's home. The victim again told the mother about the sexual abuse, and the mother finally realized that the victim was telling the truth. At this time, the mother took the victim back to Ohio to report the rapes to the police in the cities in which they had occurred. Mother also petitioned to obtain custody of the other two children at this time.

{¶ 8} Defendant was convicted for the rapes and the other crimes. Appealing from that conviction, he states two assignments of error, the first of which is:

{¶ 9} I. DEFENSE COUNSEL'S PERFORMANCE OF HIS DUTIES WAS DEFICIENT, IN THAT HE MADE ERRORS SO SERIOUS THAT HE FAILED TO FUNCTION AS THE "COUNSEL" GUARANTEED THE DEFENDANT BY THE SIXTH AMENDMENT; AND HIS ERRORS WERE SO SERIOUS AS TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL, A TRIAL WHICH WAS RELIABLE.

{¶ 10} Defendant argues that his counsel's representation fell far below that expected of counsel and that but for counsel's errors, he would not have been convicted. In order to demonstrate ineffective counsel, defendant must show not only that his counsel's representation fell below the standard of that of competent attorneys, but also that, but for that substandard representation, the outcome of his trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 11} Defendant argues that his counsel failed to adequately represent him in several instances. Counsel, however, steadily pursued a clear theory of his defense. All counsel's questions, for example, attempted to bolster this theory: that the only reason the victim was making the accusations of rape was that the mother wanted custody of the other two children. Counsel tried to

prove, therefore, that the victim was a liar, that the mother put her up to the accusations, and that the stories had all been carefully fabricated.

{¶ 12} Defendant claims that counsel's cross-examination of the state's witnesses was woefully inadequate. He claims that counsel should not have asked the victim about an incident in which defendant was investigated for allegedly tying up the stepson with a plastic tie similar to the ones he allegedly used when he raped her. Counsel's reason for asking the victim about the incident in which defendant was accused of tying the stepson to the crib with a plastic tie, as counsel explained in his closing argument, was to show that the allegation concerning the stepson had been determined to be unsubstantiated. It also showed that defendant had been questioned by authorities before for false accusations made by his children. Finally, it showed that the mother and the victim were familiar with using those ties in that way so they could have fabricated that detail into their story against defendant.

{¶ 13} These decisions are all questions of strategy. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy." State v. Carter (1995), 72 Ohio St.3d 545, 558.

{¶ 14} Defendant also objects to counsel's actions when he tried to bring into evidence that defendant has Hepatitis C and that the victim did not. At side-bar, defense counsel explained that he was attempting to impeach the victim's testimony concerning her sexual contact with defendant. Counsel explained that his reason for broaching the topic of defendant's alleged Hepatitis C diagnosis was to show that because the victim did not have the disease, she could not have had sex with defendant or she would have been infected. The court sustained the state's objection to this line

of questioning, and, after a warning to the jury, it was dropped. Again, defense counsel clearly stated his purpose was to show that defendant and the victim never had sexual relations. This goal was part of his strategy to show her allegations were fabricated to bolster her mother's bid for custody of the two children. A reviewing court will not second guess counsel's trial strategy. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

{¶ 15} Defendant also objects to his counsel's questioning the victim's mother about letters written by third parties attesting to her good mothering skills. These were letters the mother had asked others to write to the child services agency on her behalf in her attempt to obtain custody of her other two children. Counsel's reasons for questioning the mother about the letters written in support of her obtaining custody, he explained in closing, was to bolster his theory that the accusations were false and made to support her chances of getting custody of the other two children. He also was attempting to show the mother as being untruthful because she had testified that she was not a great mother, yet she had sent letters written by others stating the contrary to the officials here in Ohio. Again, the state's objection to the letters was upheld and the letters did not come into evidence. Nonetheless, counsel's attempt to introduce these letters does not constitute ineffective assistance of counsel. Rather, counsel's action was a logical step in bolstering his theory that the mother coerced the victim into inventing her allegations of sexual abuse so that the mother could obtain custody of the other two children. By showing that the mother solicited false letters concerning her parenting skills, counsel was trying to show the extent to which the mother would go to achieve her goal of custody. Although counsel's attempt failed in this instance because the court barred the evidence, his actions were consistent with his theory of defense and do not constitute ineffective counsel.

{¶ 16} Defendant also complains about counsel's failure to object to the qualifications of the state's expert witness and to counsel's failure to obtain a witness to contradict her. Counsel did, however, object to the expert's qualifications in a side bar conference after she had testified to her professional background. Tr. at 586.

{¶ 17} It is difficult to assess how the case was affected by the lack of an expert witness to support the defense. In his appellate brief, defendant has not named or directed the court to any expert whose testimony could have helped his case. He argues that "[t]he failure to put on favorable [expert] testimony where available" was a failure to competently represent defendant. Nowhere, however, does defendant show that such an expert would have been available to him at trial.

{¶ 18} Instead, he cites to two cases in which the defense expert's testimony was of an entirely different nature. One of those cases, *State v. Kinney* (1987), 35 Ohio App.3d 84, does not even address the issue of expert testimony; rather, it discusses the reliability of a mentally retarded witness who was under ten years old at the time of the crime. Defendant cites only two other cases, both from other states. In one, counsel failed to call a witness who would have bolstered a self-defense alibi; in the other, counsel failed to call an expert witness to discuss the victim's ability to testify following a head injury.

{¶ 19} None of these cases helps defendant. First, we note that counsel would not have presented an expert if the expert's testimony would have hurt his client's case. Defendant's argument presumes that counsel bypassed an expert who would have presented favorable testimony for him. In order to support defendant's case, the expert would have had to testify that defendant's psychological profile showed that he was unlikely to have committed the crimes. If the expert could not so testify, counsel could not have produced expert testimony to help defendant's case. Because we do not have any testimony by an expert, we can neither know nor presume what the expert would

have said. None of the cases defendant cites, therefore, addresses his claim in the case at bar: that the failure to call an expert witness to testify to defendant's psychological state constituted ineffective assistance of counsel. This argument claiming ineffective counsel is without merit.

{¶ 20} Finally, defendant vigorously argues that counsel was deficient in failing to present a defense case instead of resting following the close of the state's case. In his opening argument, defense counsel had told the jury that he would be presenting various witnesses to show that the victim was lying. At the end of the case, he conferred with defendant and decided to rest without presenting any witnesses.

{¶ 21} In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court noted:

{¶ 22} Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. * Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy**.

{¶ 23} 466 U.S. at 689. In the case at bar, defendant objects because counsel did not call the victim's younger sister to testify, although he had stated he would in opening argument. A review of the victim's testimony, however, shows that on several occasions, she challenged defense counsel to call her sister to the stand to corroborate her testimony on other incidents than the rapes. From the

victim's eagerness to have the sister testify, counsel may have decided that the chance of the sister's testimony bolstering the victim's credibility was too great to risk putting her on the stand. Also, the evidence in the case includes a complaint filed by the Ashtabula children's services alleging that defendant had begun to watch the sister while she showered and to call her the same names the victim testified that he had called her when he raped her. Defense counsel may have decided that by putting the sister on the stand, these allegations would come to light and would reinforce, rather than impeach, the victim's testimony. Clearly, the decision not to put the sister on the stand was a tactical one.

{¶ 24} Defendant also argues that counsel failed to call Anna Langley to the stand. He does not say, however, what her testimony would have contained or how it would have helped his case. Lacking this basic information, we cannot determine that counsel was deficient for failing to present her. Another witness defendant claims could have helped his case was his sister, Sharon Chambers. She had provided an affidavit for defendant which was attached to his motion for a new trial. In this affidavit, she claimed she could prove that she was present several of the times that the victim alleged defendant raped her. A review of the affidavit shows, however, that although she was in the company of either defendant or the victim at some point during the days the rapes occurred, she cannot state that she was with one or the other at every moment. The time gaps in the affidavit are more than sufficient for the rapes to have occurred without her knowledge. She also claims in her affidavit that when she was the victim's legal guardian, she had taken her to a doctor who had, upon examining her, stated that the victim had never had sexual relations. This evidence would have been hearsay in violation of Evid.R. 801(C), "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," here, that the victim had never had sexual relations.

{¶ 25} Defendant further argues that defense counsel should have subpoenaed the victim's medical records to introduce this evidence. It is impossible to know, in hindsight, however, whether counsel determined, after interviewing the aunt, that her understanding of the doctor's statement was wrong. It is also impossible to know whether the medical records even contain this information. It would not be unreasonable for a doctor examining a thirteen-year-old girl to omit any mention of sexual activity. Without these records, any argument they would have helped is empty.

{¶ 26} Defendant also criticizes counsel's closing argument. Defendant isolates one statement in which counsel said that if "there was something" that counsel "didn't deliver," they were to blame him and not take it out on defendant. Such a statement must be reviewed as rhetorical humility and no more. Viewing counsel's closing argument as a whole shows that he did an admirable job in emphasizing weaknesses in the victim's testimony. He logically and persuasively restated his theory of the case in relation to the testimony which had been presented. Counsel had a very difficult case and did a remarkable job of defending his client.

{¶ 27} Accordingly, this assignment of error is without merit.

{¶ 28} For his second assignment of error, defendant states:

{¶ 29} II. THE TRIAL COURT ERRED IN ADMITTING THE EXPERT TESTIMONY OF CYNTHIA KING, TO THE PREJUDICE OF APPELLANT.

{¶ 30} Defendant argues that his counsel erred in failing to object to the state's expert witness's qualifications to testify concerning psychological responses of the victims of sexual abuse. The admission of expert testimony is governed by Evid.R. 702, which states:

{¶ 31} A witness may testify as an expert if all of the following apply:

{¶ 32} (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 33} (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 34} (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶ 35} (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶ 36} (2) The design of the procedure, test, or experiment reliably implements the theory;

{¶ 37} (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 38} Defendant here objects only to (B), the witness's qualifications.

{¶ 39} He cites her lack of a doctorate or medical degree as evidence of her lack of qualification to testify as an expert on the responses of child victims of sexual abuse.

> **While Evid. R. 702 permits expert testimony, a threshold determination must first be made under Evid. R. 104(A) concerning the qualification of an individual to testify as an expert witness. Accordingly, all preliminary questions concerning the qualifications of persons to be witnesses are to be determined by the trial court. *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 19 OBR 71, 482 N.E.2d 955, paragraph fifteen of the syllabus. Thus, the initial qualification or competency of a witness to testify as an expert or to give his opinions on a particular subject rests with the trial court. *Fulton v. Aszman* (1982), 4 Ohio**

> **App.3d 64, 4 OBR 114, 446 N.E.2d 803, paragraph one of the syllabus; *Shackelford v. Cortec, Inc.* (1982), 8 Ohio App.3d 418, 419, 8 OBR 542, 542-543, 457 N.E.2d 876, 877; *South Union, Ltd. v. George Parker & Assoc.*, supra; *Wagenheim v.. Alexander Grant & Co.*, supra. On appeal, the trial court's ruling with respect to a witness's qualifications as an expert will not ordinarily be reversed unless there is a clear showing that the court abused its discretion. Id.**

{¶ 40} *Kitchens v. McKay*, (1987), 38 Ohio App.3d 165, 168-169.

{¶ 41} This court cannot reverse the trial court's decision to admit the social worker's testimony, therefore, absent an abuse of discretion.

{¶ 42} Defendant cites in his brief only one case in which a social worker's expert testimony was ruled not admissible concerning child sexual abuse, *State v. Whitman* (1984), 16 Ohio App.3d 246. *Whitman* is not similar to the case at bar because the social worker in *Whitman* had been involved in only one case of child sexual abuse. Not only had the expert in the case at bar interviewed over 700 children in cases of alleged sexual abuse and consulted on another 150 cases of sexual child abuse, she had also written the training programs for the states of Ohio and Pennsylvania for social workers learning to interview children concerning sexual abuse. She had provided expert witness testimony, moreover, in other child sex abuse cases in Ohio, West Virginia, and Pennsylvania. She has a Master's degree in social work and completed between 30 to 60 hours of continuing education on the subject for each license renewal.

{¶ 43} [Evid.R. 702] provides that a witness qualified as an expert by knowledge, skill, experience, training or education may have her testimony presented in

the form of an opinion or otherwise and it need not be just scientific or technical knowledge. The rule includes more. The phrase "other specialized knowledge" is found in the rule and, accordingly, if a person has information which has been acquired by experience, training or education which would assist the trier of fact in understanding the evidence or a fact in issue and the information is beyond common experience, such person may testify. In testifying as to an opinion or inference, the expert may use facts or data perceived by her or admitted in evidence. Evid. R. 703. Even if the expert's testimony provides an opinion on an ultimate issue in a case, it is not objectionable. Evid. R. 704. After there has been a disclosure of the underlying facts or data upon which the expert bases her opinion, the expert may give her reasons for the opinion or inference drawn by responding to a hypothetical question or otherwise. Evid. R. 705. Of course, all the foregoing is subject to the relevancy requirements of Evid. R. 402 and 403.

{¶ 44} *State v. Boston* (1989),46 Ohio St.3d 108, 118-119.

{¶ 45} This holding was followed in *State v. McMillan* (1990), 69 Ohio App.3d 36, where the appellate court upheld admitting the testimony of an experienced detective regarding the behavior of a victim of sexual abuse. Although the court in *McMillan* noted that it was preferable that such testimony come from an expert in the mental health field, it still found that the trial court did not abuse its discretion in determining that the detective had the experience necessary to present his observations concerning sexual abuse victims. Id. at 48.

{¶ 46} The *McMillan* court also stated:

{¶ 47} Ohio recognizes the use of expert testimony to bolster the credibility of sexually abused children. * This court has on occasion permitted expert testimony in**

sexual abuse cases when it is offered * to rehabilitate a victim's credibility *** [t]o explain why the victim delayed in reporting the incident**.

{¶ 48} *State v. McMillan* at 48, citations omitted. See also, *State v. Stowers* (1998), 81 Ohio St.3d 260.

{¶ 49} The state's expert witness was substantially qualified to testify concerning the behavior of victims of child sexual abuse. Her lack of a doctorate had no bearing on her ability to enlighten the jury on this issue. Accordingly, this assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, J., CONCURS.

ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).