[Cite as *State v. Gross*, 2012-Ohio-3020.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-073**
- vs -	:	
MIGEL MANUEL GROSS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000728.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Jay F. Crook, Shryock, Crook & Associates, LLP, 30601 Euclid Avenue, Wickliffe, OH 44092 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Migel Manuel Gross, appeals the judgment of the trial court after a jury found him guilty of kidnapping, a felony of the second degree, in violation of R.C. 2905.01(A)(4), with a special finding that Gross did release the minor female victim in a safe place, unharmed; rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); gross sexual imposition, a felony of the fourth degree, in violation of R.C. 2907.05(A)(1); and unlawful sexual conduct with a minor, a felony of the third degree, in

violation of R.C. 2907.04(A), with a special finding that Gross is ten or more years older than the minor. For the following reasons, we affirm the judgment of the trial court.

{¶2} Late in the evening on February 12, 2008, M.W., the victim, was at home with her mother; her siblings; her eldest sister, Brenda Williams; and Brenda's two children. Brenda was 18 years of age; M.W. was 14 years of age. M.W.'s two youngest siblings were asleep with their mother upstairs. Brenda was cleaning; M.W's older brother and his friend, Charlie, were watching television on the first floor of the home.

{¶3} Gross called and requested to come over to the home to see Brenda. Gross, who was 33 years of age and approximately 5'8" and 310 pounds, went by the nickname, "Meat." Brenda did not want to see Gross and instructed M.W. to tell Gross that she was not home. M.W. did as instructed. Contrary to the instructions of M.W., Gross came to the home; Brenda allowed Gross to enter the home.

{¶4} Gross followed Brenda into her bedroom that was occupied by her two children. Brenda testified that Gross took off his boots and began to make sexual advances toward her. As a result of Brenda refusing Gross's advances, he became angry. Thus, he sat in a chair outside of the bedroom, close to the door.

{¶5} Approximately five to ten minutes later, Brenda testified that she opened her bedroom door and noticed all of the lights off in the home. Further, her brother and his friend were no longer watching television on the couch. Brenda stated that she began to walk through the first floor of the home, where M.W's room was located. Brenda attempted to open M.W's bedroom door, but Gross's body was blocking the entrance. Struggling to get inside the room, Brenda stated that she observed Gross

performing oral sex on M.W. Brenda testified that despite yelling and hitting Gross, he continued to perform oral sex on M.W.

{¶6} After the incident, Gross incessantly telephoned the home—at times, calling every 30 seconds for several hours. Brenda testified that Gross offered to pay M.W. $500 if she would not report the incident to the police. These telephone calls were documented through phone records. All of the telephone calls were initiated by Gross.

{¶7} M.W. also testified at trial. She stated that she was talking on the telephone when Gross "peeked in" her bedroom. Feeling uncomfortable, M.W. then sat by her bedroom door to prevent Gross from coming into her bedroom. Gross pushed the door in to gain access to her bedroom. M.W. testified that Gross pulled her shorts down, put his head between her legs, and put his mouth on her vagina. M.W. stated that she tried to push Gross off of her to no avail.

{¶8} Detective Levicki of the Painesville Police Department testified that in 2008, he was informed of a situation where sexual abuse occurred. Detective Levicki stated that during his initial interview with M.W., she did not make eye contact, she was very embarrassed, and he did not learn of any details of the incident except that "something did happen to her, that she did not want it to happen." Detective Levicki stated that after speaking with Brenda and learning new information about the incident, he found it necessary to interview M.W. again. A follow-up interview was scheduled, and Detective Levicki testified that M.W. was more "willing and able to tell her side of the story."

{¶9} The jury also heard an audio tape of Gross's version of the events; this interview with the police took place while Gross was incarcerated on separate charges. During this interview, Gross initially admitted to having consensual oral sex with M.W.; however, he recanted this statement and stated that he was about to give oral sex to M.W., and M.W. informed him that she was 18 years of age.

{¶10} Gross was found guilty of kidnapping, rape, gross sexual imposition, and unlawful sexual conduct with a minor. Gross was sentenced to a total term of 15 years in prison.

{¶11} Gross appealed and, as his first assignment of error, states:

{¶12} [The trial] [c]ourt committed reversible error by failing to follow procedure defined by [Crim.R.] 37 in allowing jury questions to be asked of Brenda Williams without allowing counsel for Appellant opportunity to review the written questions, opportunity to object to the written questions, and by asking follow up questions based on the original juror questions without providing them in writing to counsel for Appellant and allowing them the opportunity to object.

{¶13} At the outset, we note that Gross is assigning error to the trial court's failure to follow the methods outlined in the criminal rules when allowing jurors to question witnesses. Although Gross cites to Crim.R. 37, the proper rule is Rule 24(J) of the Ohio Rules of Criminal Procedure, which sets forth procedures to "minimize the risk of prejudice" when a trial court permits jury questions.

{¶14} Crim.R. 24(J), juror questions to the witnesses, states:

{¶15} The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

{¶16} Require jurors to propose any questions to the court in writing;

{¶17} Retain a copy of each proposed question for the record;

{¶18} Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

{¶19} Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

{¶20} Read the question, either as proposed or rephrased, to the witness;

{¶21} Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

{¶22} If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

{¶23} Gross contends the trial court erred in two respects. First, the trial court failed to provide counsel with an opportunity to review and object to questions submitted by the jury. Second, the trial court erred when it asked a follow-up question to the jury, which was not an issue in evidence.

{¶24} Gross did not object to either the trial court's failure to present the jury questions to counsel or to any of the questions of the trial court. Accordingly, he has

waived all but plain error, pursuant to Crim.R. 52(B). "Plain error is present only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different." *State v. Turner*, 11th Dist. No. 2010-A-0060, 2011-Ohio-5098, ¶34, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶108.

{¶25} The transcript reveals the trial court collected the three written questions from the jurors and then immediately read them to the witness, Brenda. The trial court did err by failing to first "provide counsel with an opportunity to object to each question on the record outside the hearing of the jury[.]" Further, the record reveals that one juror asked Brenda the following question: "Did she ever tell Miguel her age? At that time 18?" The following then occurred:

{¶26} [TRIAL COURT]: Alright. And do you know if your sister ever told Miguel Gross her age?

{¶27} BRENDA WILLIAMS: I'm not sure. I'm not sure.

{¶28} [TRIAL COURT]: Do you know if she ever told him any age?

{¶29} BRENDA WILLIAMS: No, I don't.

{¶30} [TRIAL COURT]: Follow up questions?

{¶31} [PROSECUTOR]: Brenda, did you ever tell the Defendant how old your sister was?

{¶32} BRENDA WILLIAMS: That night, I do believe like when he was grabbing me, he did ask that, how old my sister was. That's why like, I kinda knew. I shoulda told you guys that, but like I kinda like knew that he was in there with my sister. Because he asked me.

{¶33} [PROSECUTOR]: And what did you tell him?

{¶34} BRENDA WILLIAMS: I told him that she was 14.

{¶35} Gross is correct that the trial court did not ask Brenda the question as specifically written by the juror; however, the trial court may, in an impartial manner, interrogate a witness, whether called by itself or by a party. Evid.R. 614(B).

{¶36} We do not find plain error. Gross claims that the question was improper "due to the lack of need for clarification." However, there is no such limitation on the scope of questions to be posed by jurors or the trial court. The question, if otherwise proper, is not improper simply because it is not asked to clarify some fact. Gross submits no basis for this court to hold that the question was improper.

{¶37} Although the trial court erred in failing to allow counsel an opportunity to object to the juror questions, the outcome of the trial would not have been different. There is ample evidence in the record to convict Gross on the counts charged in the indictment, as detailed in his third assignment of error.

{¶38} Gross's first assignment of error is without merit.

{¶39} As his second assignment of error, Gross alleges:

{¶40} "[The trial] [c]ourt committed reversible error by failing to dismiss jury and allowing statements/evidence regarding Appellant's incarceration and status as 'admitted drug dealer' to be introduced during opening by the Prosecution and during the playing of the un-redacted interview of the Appellant."

{¶41} Under this assigned error, Gross argues it was prejudicial to allow the jury to hear that he was both an incarcerated felon and an admitted drug dealer. As Gross failed to object at the trial court, we review his second assignment of error for plain error.

{¶42} During his interview with Detective Levicki, Gross was incarcerated on a separate offense. Further, during this interview, Gross admitted that he was a drug dealer. This issue was first presented during voir dire when the state informed the potential jurors that Gross "was in prison at the time he was questioned. He was serving an unrelated sentence[.]" The state then asked the potential jurors if there was anyone that had "strong feelings about that fact, that he was questioned in prison? Is the fact he was in prison when he was interviewed on this case that you would feel that would affect your ability to be fair and impartial?"

{¶43} Although defense counsel did not object, he requested a curative instruction. The trial court then stated:

> **{¶44}** Ladies and gentlemen, you're gonna hear about some references about the commission of crimes or wrongs other than the offenses that are charged in this case, that the Defendant's charged with in this case. Some of that is being brought up because we can't disentangle the context in which some statements were made from the statements. So it's going to come out. And I want to caution you that the Defendant is on trial on the charges that I introduced this case about, not about using drugs or any other wrong or act that may come up in the testimony. So you understand that you can only consider the evidence that is necessary to prove the elements of the offenses charged, and not any of this extra stuff. That has nothing to do with it. I'll give you more instruction on that when I see what kind of evidence comes up during trial. But

sufficed to say, for purposes of jury selection that has nothing to do with the Defendant's guilt or innocence in this case. Go ahead and continue.

{¶45} Then, during the playing of the interview, the jury was provided a transcript of the interview. The exhibit of the transcribed recording indicates that portions were redacted; further, the trial court redacted approximately ten seconds of the tape. The trial court stated:

> **{¶46}** The parties and the Court have been going over a redaction in an audio file, and the parties have agreed that we would redact from 8:14 to 8:24. And the substance of that redaction is a question, are you a warm fuzzy drug dealer, or something like that. And so we're gonna manually redact those 10 seconds. And then also on the accompanying transcript, those will be blackened out and redacted [s]o it can't be read.

{¶47} A second curative instruction was given to the jury during the trial court's final instructions. The trial court stated the jury must not consider evidence about the commission of other crimes, wrongs, or acts to "prove the character of the Defendant in order to show that he acted in conformity or accordance with that character."

{¶48} Again, we do not find plain error. The trial court issued two curative instructions; the audiotape of Gross's interview was redacted; and the jury read a redacted version of Gross's interview.

{¶49} Gross's second assignment of error is without merit.

{¶50} Gross's third assignment of error alleges:

{¶51} "The trial court committed reversible error in upholding a verdict clearly against the manifest weight of the evidence."

{¶52} Although Gross's assignment of error relates only to the manifest weight of the evidence, a reading of Gross's argument reveals that appellate counsel conflates manifest weight of the evidence with sufficiency of the evidence. Therefore, in the interest of justice, we review both the manifest weight and the sufficiency of the evidence.

{¶53} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, the jury could have found all of the elements of the crime proven beyond a reasonable doubt. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13 (Dec. 23, 1994); *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring). "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* at 386.

{¶54} In contrast, to determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine whether the jury "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 387.

{¶55} Further, "[n]o conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the appeal." (Citations omitted.) *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, ¶6.

{¶56} With respect to the sufficiency of the argument, Gross maintains that "at trial, no definition was given for force in the instructions presented to the jury for either rape, gross sexual imposition or kidnapping." The record demonstrates otherwise. In instructing the jury, the trial court stated: "[f]orce means any violence, compulsion or constraint physically exerted by any means upon or against a person or thing," which is the definition of force used in the Revised Code. *See* R.C. 2901.01(A)(1).

{¶57} Force is an element of kidnapping, where the jury must find that the defendant did by force, threat, or deception restrain the victim; rape, where the jury must find that the defendant engaged in sexual conduct with the victim and that the defendant purposely compelled the other person to submit by force or threat of force; and gross sexual imposition, where the jury must find that the defendant had sexual contact with the victim and the defendant purposely compelled the other person to submit by force or threat of force. *See* R.C. 2905.01, 2907.02, and 2907.05.

{¶58} The evidence presented at trial reveals that Gross, according to the Bureau of Motor Vehicle records, was approximately 300 pounds and 33 years of age. M.W. testified that although she was blocking the entrance into her bedroom, Gross pushed in the bedroom door. M.W. further testified that Gross pulled her off the bed and, despite her attempts to push him away, got on top of her. When he was on top of

M.W., she continued to push Gross. Therefore, there was sufficient evidence to demonstrate the state satisfied the element of force.

{¶59} Gross next challenges the legal sufficiency of the evidence to sustain his conviction of unlawful sexual contact with a minor, in violation of R.C. 2907.04(A), with a special finding that the defendant is ten or more years older than the minor.

{¶60} R.C. 2907.04(A) states:

{¶61} No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

{¶62} Gross argues there was insufficient evidence that he knew the disparity in ages between himself and M.W. Under R.C. 2907.04(B)(3), unlawful sexual conduct with a minor is a fourth-degree felony, but "if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree." Therefore, appellee must have produced evidence of M.W.'s age at trial and, more specifically, that appellant was ten years older than M.W., as age is an element of the offense.

{¶63} We note that R.C. 2907.04(A) includes a "reckless" standard with respect to a defendant's knowledge of the juvenile's age.

{¶64} A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a

> certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist. R.C. 2901.22(C).

{¶65} As previously stated, Gross was 33 years of age at the time of the incident. There was testimony that Gross had been acquainted with Brenda, M.W.'s older sister. Evidence was adduced that Gross was familiar with Brenda when she served time at a juvenile detention facility; in 2008, Brenda was 18 years of age. Also, there is testimony from Brenda that she had informed Gross of M.W's age prior to his conduct on February 12, 2008. We find sufficient evidence was presented to demonstrate Gross's conviction for unlawful sexual contact with a minor.

{¶66} Gross also argues there is conflicting testimony regarding when Gross was informed of M.W.'s age. Gross cites to Brenda's testimony that she informed Gross before the night of the incident that M.W. was only 14. Conversely, Gross maintains, without citing to any portion of the transcript, that M.W. "was clear that the statement was made only upon entrance to her room, and directed at her (you're only 14)." Nonetheless, from the testimony of both Brenda and M.W., it is evident that Gross knew the age of M.W. before the incident took place. Further, this court is mindful that in weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶67} Gross's third assignment of error is without merit.

{¶68} Gross's fourth assignment of error alleges:

{¶69} "The Trial Court committed reversible error by allowing opinion/expert opinion testimony by both Brenda Williams and Detective Levicki as it related to the emotional state and reasons for inconsistencies and delay in statements by the alleged victim."

{¶70} Gross alleges that both Detective Levicki and Brenda's testimony was prejudicial, as they were allowed to make "repeated references and offer opinion as to the psychological reasons for the delay in M.W. coming forward." Despite this contention, the record demonstrates otherwise.

{¶71} In his brief, Gross cites to the Ohio Supreme Court's decisions in *State v. Boston*, 46 Ohio St.3d 108 (1989) and *State v. Stowers*, 81 Ohio St.3d 260 (1998). Gross attempts to distinguish these cases, stating that both *Boston* and *Stowers* involved the testimony of an expert witness; conversely, in the instant case, neither Brenda nor Detective Levicki, despite testifying to the veracity of M.W., qualified as an expert witness.

{¶72} In *Boston*, the Supreme Court held that "the use of expert testimony is perfectly proper [in cases involving alleged child abuse] and such experts are not limited to just persons with scientific or technical knowledge but also include other persons with 'specialized knowledge' gained through experience, training or education." *Id.* at 126. "[A]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." *Id*. at 128. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Id.* at syllabus.

{¶73} The expert in *Boston* testified "that [the victim] had not fantasized her abuse and that [the victim] had not been programmed to make accusations against her father." *Id.* at 128. The *Boston* Court noted, "the admission of [such] testimony was not only improper – it was egregious, prejudicial and constitutes reversible error." *Id.* at 128.

{¶74} In *Stower*, the Ohio Supreme Court held, "[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." *Stower*, *supra*, at 261.

{¶75} During Detective Levicki's direct examination, a side bar occurred whereby the state and defense counsel discussed whether he was permitted to testify regarding "what other kids do or don't do in these situations." The trial court noted that Detective Levicki was permitted to testify regarding his actions and why he chose to re-interview M.W. Thereafter, Detective Levicki explained the reasoning as to why he interviewed M.W. a second time. Detective Levicki testified that after speaking with Brenda, he "learned that there was information that [he] had not gotten in the initial interview * * * and [he] felt that it was necessary to bring [M.W.] back in to give her the opportunity to tell the rest of the story." Detective Levicki then testified, based on his experience, that a victim, during the second interview, is "usually more comfortable with the officer" and "they're more able to give those details at first were harder to give because they don't normally talk about their sexual orientation or their sex acts in front of strangers."

{¶76} Contrary to Gross's assertion, Detective Levicki was not testifying as to whether he believed M.W.'s account of the events at issue. The above testimony, with respect to a second interview of a witness being "more comfortable" is within the common knowledge of one who investigates crimes. In this case, Detective Levicki was testifying based on his experiences as an investigator, as he was a part of the Detective Bureau of the Painesville Police Department.

{¶77} Gross also complains of Brenda's testimony, stating that her testimony was damaging. As Gross has failed to cite to any specific testimony, we are unable to review this portion of his argument.

{¶78} Under his fifth assignment of error, Gross states:

> **{¶79}** Appellant was subject to ineffective assistance of counsel for their failure to file a motion in limine regarding Appellant's status as an incarcerated felon during his interview by the Painesville police and Appellant's statements regarding his status as an 'admitted drug dealer' during the interview, failing to move for a mistrial based upon the Court's allowance of inadmissible evidence prejudicial to Defendant, failure to object or move for a mistrial based upon the Court's failure to voir dire and/or remove the juror whose spouse was present during proffer, and failure to object to the Court's violation of the procedures for asking of jury questions and/or failing to object to the questions themselves.

{¶80} In order to prevail on an ineffective assistance of counsel claim, Gross must demonstrate that trial counsel's performance fell below an objective standard of

reasonable representation, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id.* at 142, citing *Strickland* at 695-696. There is a general presumption that trial counsel's conduct is within the broad range of professional assistance. *Id.* at 142-143.

{¶81} Gross maintains that his defense counsel should have filed a motion in limine to address other acts evidence. The record makes clear that defense counsel considered this evidence and requested a curative instruction, as discussed in the first assignment of error. The failure to file a motion in limine did not rise to the level of ineffective assistance of counsel.

{¶82} Similarly, we do not find ineffective assistance of counsel for "the Court's failure to voir dire a juror, Mrs. Brickner after her husband was allowed to witness a contentious proffer outside of the presence of the jury." The record reveals that a juror's husband was in the courtroom during the initial portion of a proffer that centered on Brenda's prior conduct of lying about her children's father. Specifically, Brenda falsely accused her children's father of threatening physical harm to her and her family. After being made aware of the situation, the trial court instructed the gentleman to not speak with his wife about the case. This proffer was damaging to the state's case; Brenda was a state witness and the proffer related solely to her untruthfulness in a separate legal matter. Gross did not suffer prejudice.

{¶83} Additionally, Gross argues his counsel was ineffective for failing to request a jury instruction for force; however, as previously noted in his third assignment of error and again addressed in the sixth assignment of error, the jury was instructed as to force.

{¶84} Having reviewed the record before us, we cannot conclude Gross's trial counsel's performance fell below an objective standard of reasonable representation, or that there is a reasonable probability that, but for the alleged deficient performance, the outcome of the trial would have been different.

{¶85} Gross's sixth assignment of error alleges:

{¶86} "The trial court committed prejudicial error in failing to consider and issue a jury instruction regarding the definition of 'force.'"

{¶87} Gross argues the trial court erred by not instructing the jury on the definition of force. However, as we stated under Gross's third assignment of error, the trial court instructed the jury, pursuant to R.C. 2901.01(A)(1), on the element of force. Therefore, Gross's assigned error is without merit.

{¶88} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.