[Cite as *State v. Hogan*, 2009-Ohio-4728.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-33
LOY DOUGLAS HOGAN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2007-CR-510H
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 8, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Loy Hogan, appeals from his trial and conviction of one count of rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(c). The State of Ohio is Plaintiff-Appellee.

{¶2} On May 14, 2007, the victim, a 54 year old, mildly mentally retarded woman, P.B., was sitting outside of her apartment complex when she was approached by Appellant, who engaged her in conversation and asked her for a hug. He then asked P.B. to come with him to his apartment, which was above P.B.'s apartment. P.B. stated that she did not want to go, but that he begged her to go, and so she went with him.

{¶3} Once upstairs, Appellant laid down a blanket on the floor and told P.B. to take off her pants so that they could "make love." Appellant then pulled down P.B.'s pants when she did not comply and had sexual intercourse with her. P.B. stated that she told him "no", but did not know how to make him stop.

{¶4} P.B. was scheduled to be taken to a doctor's appointment by her cousin, Thelma O'Neil, who began knocking on P.B.'s apartment door while P.B. was in Appellant's apartment. Thelma found out from a neighbor that P.B. was in Appellant's apartment and started up the stairs to find P.B. On her way up the stairs, Thelma observed P.B. exit the front door of the apartment. She did not see Appellant, but saw his arm, which she described as being heavily tattooed, as he closed the door.

{¶5} According to Thelma, P.B. appeared disheveled, her shorts were twisted, and she was acting quiet and nervous. P.B. told Thelma that she and Appellant were "just talking", but Thelma did not believe her.

{¶6} After taking P.B. to her doctor's appointment, Thelma called P.B.'s brother, Thomas Hicks, who routinely looked out for P.B.'s safety, and told him that she found P.B. in the apartment of a man that she did not know and told him about her concern for P.B.'s safety.

{¶7} Mr. Hicks became extremely concerned and immediately went to P.B.'s apartment and asked her what happened. According to Mr. Hicks, at first, P.B. refused to tell him what happened, but she eventually told him that Appellant had raped her. Upon her disclosure to her brother, he immediately called the police to report the rape and then took her to the hospital for a sexual assault examination.

{¶8} Officer Dennis Kiner, who responded to P.B.'s apartment, stated that he was only able to get "bits and pieces" of information out of P.B. and that she was "protective of herself, didn't want to give out much information." He observed that she "reminded me of a 9 or 10 year old child by her actions."

{¶9} Upon first arriving at the hospital for the sexual assault examination, P.B. was combative and refused to cooperate with the SANE ("sexual assault nurse examiner") nurse, Sandra Abouhassan. According to Nurse Abouhassan, P.B. actually tried to hit her with her arm when she attempted to examine her. Once she gave P.B. a children's magic wand toy to play with, though, P.B. let her conduct a full sexual assault examination.

{¶10} During the examination, P.B. disclosed to Nurse Abouhassan that "this guy told me to come up to his apartment anytime. He told me to get up the stairs. We were sitting at the kitchen table. He asked me can I get a hug."

{¶11} P.B. continued to state, “I didn’t say anything. He rolled out a mattress, pulled my pants down. I told him not to and he did anyway. * * * He put his penis in me.” She also stated, “He put his penis in my petey.”

{¶12} According to Nurse Abouhassan, P.B. had not changed clothes since the assault and she did not appear well kept and in fact appeared to be dirty. She observed that P.B. was very short tempered and that it was noted in her chart that she has mild mental retardation.

{¶13} During the physical examination, Nurse Abouhassan noted injury to P.B.’s vaginal area, stating that she had an abrasion in the posterior fourchette region, which would be consistent with penetration. Nurse Abouhassan also conducted a vaginal wash and extracted DNA samples from P.B.’s vaginal area for a DNA test.

{¶14} The rape kit was then sent to the Mansfield Police Crime Laboratory for testing, along with a buccal swab from Appellant. The lab compared the DNA obtained from the vaginal wash with Appellant’s DNA from the buccal swab and found that Appellant was the source of semen recovered from the vaginal wash done on P.B.

{¶15} Several days after the rape, while walking with P.B., Mr. Hicks saw Appellant in the parking lot of P.B.’s apartment complex. At that time, P.B. identified Appellant as the man who raped her. Mr. Hicks approached Appellant and told him to “stay away” from P.B. He told Appellant, “you know how she is.” Appellant replied “I know, I’m sorry sir. I won’t talk to her again.”

{¶16} Shortly afterwards, Mr. Hicks applied for and was granted guardianship over P.B.

{¶17} Appellant was subsequently indicted by the Richland County Grand Jury on one count of rape, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(c). Prior to trial, Appellant filed a motion to determine P.B.'s competency and filed a motion in limine to prohibit the State's witnesses from referring to the fact that he had previously been incarcerated, and to prohibit Shannon Mahoney, an investigator from the Richland County Board of Mental Retardation from testifying as to statements made to her by P.B. The trial court overruled the motion in limine and stated that it would determine competency at the time of trial.

{¶18} Prior to trial, on May 5, 2008, the court held a competency hearing in order to determine if P.B. was competent to testify. After questioning P.B., the court determined that she was competent to testify as a witness. The jury presented testimony from P.B., Thelma O'Neil, Thomas Hicks, Mansfield Police Officer Dennis Kiner and Detective Ronald Packer, SANE nurse Sandra Abouhassan, Crime Lab Director Anthony Tambasco, and Shannon Mahoney, an investigator for the Richland County Board of Mental Retardation and Developmentally Disabled.

{¶19} The jury found Appellant guilty as charged. Appellant was sentenced to six years in prison, which was to be run consecutively to a sentence he was already serving for a parole violation on a separate case.

{¶20} Appellant raises three Assignments of Error:

{¶21} "I. APPELLANT'S CONVICTION FOR RAPE IS CONTRARY TO THE MANIFEST WEIGHT AND SUFFICIENCY OF EVIDENCE PRESENTED AT TRIAL, THUS DENYING APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW UNDER

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶22} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN VARIOUS EVIDENTIARY RULINGS REGARDING THE ADMISSION OF TESTIMONY REGARDING THE VICTIM'S IQ, AND A 1968 PSYCHOLOGICAL REPORT, ALL OF WHICH WERE IRRELEVANT, MISLEADING, AND CONFUSING TO THE JURY, THUS DEPRIVING APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶23} "III. R.C. 2907.02(A)(1)(c) IS UNCONSTITUTIONALLY VAGUE AND THEREFORE VOID, AND THEREFORE IT IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED, THUS VIOLATING THE FIFTH AND FOURTEENTH AMENDMENTS GUARANTEE OF DUE PROCESS OF THE LAW."

I.

{¶24} In his first assignment of error, Appellant challenges the sufficiency of the evidence and claims that his conviction was against the manifest weight of the evidence. We disagree.

{¶25} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does

not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶26} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶27} In order to convict Appellant of rape, the State needed to prove that Appellant engaged in sexual conduct with P.B. when her "ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of mental or physical condition or because of advanced age." R.C. 2907.02(A)(1)(c).

{¶28} The phrase "substantially impaired" is not defined in the Ohio Revised Code; therefore it must be given the meaning generally understood in common usage. See *State v. Zeh* (1987), 31 Ohio St.3d 99, 509 N.E.2d 414. As stated by the Court in *Zeh*, "substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct

or to control his conduct. This is distinguishable from a general deficit in ability to cope, which condition might be inferred from or evidenced by a general intelligence or I.Q. report." Id. at 103-104. In *Zeh*, the alleged "substantial impairment" of the victim's ability to reason and control his own conduct was not based upon the use of alcohol, drugs, or other stimulation to the emotional system. Instead, the impairment was the result of an asserted mental retardation with which the victim "had been afflicted for a good number of years. Therefore, the state's case was essentially that the defendant acted with knowledge of the victim's unfortunate condition, which condition was obvious to the defendant, and that he took advantage of such condition."

{¶29} "'Substantial impairment' need not be proven by expert medical testimony; it may be proven by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct." *State v. Hillock*, 7th Dist. No. 02-538-CA, 2002-Ohio-6897, ¶21, citing *State v. Tate* (Oct. 26, 2000), 8th Dist. No. 77462.

{¶30} The evidence, as presented at trial, was sufficient to support Appellant's convictions.

{¶31} Primarily, the victim testified at trial, and the jury was able to assess P.B.'s mental ability and impairment for themselves. P.B. testified that she was 55 years old at the time of trial. When she was asked questions about her personal life, she gave contradictory answers and did not remember significant events, such as when her father died or when she was married to her two husbands.

{¶32} At trial, P.B. testified that her father, who had taken care of her up until two weeks prior to the rape, had died in 1986. In actuality, he died two weeks prior to May

14, 2007, the date of the offense in question. Additionally, when P.B. was asked if anybody ever came to visit her or help her at her residence, she initially stated "no." Upon further questioning, she stated that nurses came to help her and that her brother did also.

{¶33} She could not remember which of her husbands she had been married to first, and stated that she divorced one of her husbands because he took her to the wrong church. Her brother testified that she had actually divorced that husband because he was abusive towards her.

{¶34} When questioned about the interactions between herself and Appellant on May 14, 2007, the prosecutor had to ask incredibly simple questions to get P.B. to explain the events of the day. At first, she was unable to give a chronological accounting of the events as they occurred and when she was finally able to describe what happened in Appellant's apartment, she became confused when describing what happened. She eventually testified that Appellant told her to lay down on the floor and that he pulled her pants down and that he told her that he was going to "make love" to her. When asked what that meant, she stated that he put his "dick" into her "penis."

{¶35} She testified that she told him no when he "put his thing in me", but that he kept "doing it" and "he was heaving."

{¶36} When questioned as to basic information regarding things such as the alphabet, P.B. could not accurately recite the alphabet. She stopped at the letter "P" and skipped the letter "N" in her recitation. She was asked about who her favorite teacher was at school and she stated, "Hal McCune." When the prosecutor then

followed up on that question, she stated that the teacher did not like her and that she did not like him.

{¶37} Next, P.B.'s cousin, Thelma O'Neil testified. She stated that she has always known that P.B. is mentally retarded. Though P.B. has lived on her own for a while, Thelma stated that it has always been with the assistance of family, nurses, and social workers who visit her regularly. Thelma testified that she would take P.B. to doctors' appointments, and that P.B.'s brother takes her to the store and handles her money.

{¶38} When asked about P.B's I.Q., Thelma responded that she knew that it was low and understood it to be around 45. The defense did not object to this statement.

{¶39} Thelma testified that on May 14, 2007, she arrived at P.B.'s apartment to take her to a doctor's appointment, but that P.B. was not in her apartment. After asking around, Thelma was able to ascertain that P.B. was in Appellant's apartment. As she walked up the stairs to Appellant's apartment, P.B. exited the apartment looking nervous and she was very quiet. Thelma contacted P.B.'s brother to express her concern that something was wrong.

{¶40} Thomas Hicks, P.B.'s brother, next testified that P.B. was sent to a special school for mentally handicapped children when she was in the first grade. He also stated that up until their father's death on April 28, 2007, their father took care of P.B. even though she lived in her own apartment.

{¶41} He recalled that P.B. married her first husband when she was approximately twenty or twenty-one years of age and that she divorced him because he was abusive towards her. He testified that P.B. married her second husband when she

was approximately twenty-nine or thirty years old and that her second husband was in his early 40s when they married. P.B. had testified that her second husband was in his seventies when they married and that he was approximately ten years older than her.

{¶42} Thomas testified that P.B.'s I.Q. is somewhere around 45 and that "sometimes it's like looking at a 5 year old child and talking to her. Other times she's fine." Thomas testified that he handles P.B.'s money and that she cannot add or subtract.

{¶43} Thomas testified that on May 14, 2007, after he received the call from Thelma O'Neil that she was concerned that something had happened, Thomas went to P.B.'s apartment and asked her what happened. She was recalcitrant at first to tell him, but eventually told him that Appellant raped her.

{¶44} Thomas contacted the police and Officer Dennis Kiner responded to P.B.'s apartment. Officer Kiner stated that P.B. "reminded me of a 9 or 10 year old child by her actions." He stated that he was only able to get "bits and pieces" of information out of her about what happened and that she was "very protective of herself, didn't want to give out much information." He stated that it appeared that P.B. was going through what looked like "shock." He testified that he was able to get out of her that she told Appellant "no" when he had sex with her.

{¶45} After Officer Kiner left, Thomas took P.B. to the hospital for a medical assessment. Sandra Abouhassan was the Sexual Assault Nurse Examiner ("SANE" nurse) who examined P.B. when Thomas took her to the hospital following the incident. Nurse Abouhassan testified that P.B. was combative at first and that P.B. tried to strike her by swinging her arm at Nurse Abouhassan. Nurse Abouhassan noted, without

objection, that P.B.'s chart stated that she has "mild MR," meaning mild mental retardation. Eventually, Nurse Abouhassan was able to get P.B. to calm down by giving her a child's toy wand to play with so that she could examine her.

{¶46} Nurse Abouhassan noted an abrasion on the posterior fourchette region of P.B.'s vagina, which she testified was consistent with penetration. During the examination, Nurse Abouhassan was able to ascertain a DNA sample from P.B. as well as complete a vaginal wash, where she was extracted DNA specimens for analysis.

{¶47} In conducting a limited interview with P.B., P.B. told Nurse Abouhassan that "this guy told me to come up to his apartment anytime. He told me to get up the stairs. We were sitting at the kitchen table. He asked me can I get a hug." P.B. continued to disclose, "I didn't say anything. He rolled out a mattress, pulled my pants down. I told him not to and he did anyway. * * * He put his penis in me." She also stated, "He put it in me, my petey."

{¶48} Nurse Abouhassan testified that P.B. had not changed clothing since the incident and that she did not appear to be well kept and was dirty.

{¶49} Several days after the incident, Thomas was walking around P.B.'s apartment complex with her when she pointed Appellant out to him. Thomas approached Appellant and told him to "stay the hell away from her." He further stated to Appellant, "you know how she is, just leave her alone." He testified that Appellant responded, "I know, I'm sorry, sir, I won't talk to her again."

{¶50} Detective Ronald Packer, who was with the Mansfield Police Department, testified that he secured a search warrant for Appellant's DNA. That DNA sample was submitted to the Mansfield Police Laboratory, where Anthony Tambasco was able to run

a comparison between Appellant's DNA profile obtained as a result of the search warrant and the DNA extracted from the vaginal wash conducted on P.B. on May 14, 2007. He was able to determine that Appellant was the source of semen found in the vaginal wash done on P.B.

{¶51} Finally, Shannon Mahoney, an investigator with the Richland County Board of Mental Retardation (MRDD), also known as the "Richland Newhope Center", testified that Richland MRDD provides services and resources to citizens in Richland County who suffer from mental retardation and developmental disabilities. In order to qualify for services, a person has to have an I.Q. of 70 or below and the disability had to occur prior to age 18. Additionally, those who receive services from MRDD have to have needs in certain areas, such as self care. She testified that P.B. meets the criteria and receives services from Richland MRDD.

{¶52} Over objection, Mahoney testified that in P.B.'s file was a psychological evaluation from 1968 wherein her I.Q. was reported to be 45. Mahoney testified that such an I.Q. would be consistent with her interaction with P.B. and her review of P.B.'s other records. She also testified that P.B. did not understand complex questions asked of her and that in order to communicate with P.B., she had to ask simple questions "on the level of . . . an 8 and a 12 year old."

{¶53} Appellant argues that Appellee failed to prove the victim was substantially impaired because the evidence showed that she was permitted to make her own sexual choices while her parents were alive, that she consented to sex with her current boyfriend, that she lived (somewhat) on her own, and that she chose to marry twice. At the same time, Appellant discounts the evidence presented by P.B.'s family, who

testified as to her history of cognitive impairment, and discounts P.B.'s own testimony, which clearly demonstrated a lack of ability to make informed decisions and to answer basic questions.

{¶54} We find that the testimony presented, that being the personal observations of P.B.'s family members, the officers and medical personnel who interacted with her, P.B.'s interaction with Richland MRDD, and P.B.'s own testimony provided the jury with sufficient information in which they could determine that she was substantially impaired. Moreover, Appellant's concession that he "knew" how P.B. was and that he would leave her alone is sufficient to prove that he knew of her impairment.

{¶55} We find Appellant's assignment of error to be not well taken. Appellant's first assignment of error is overruled.

II.

{¶56} In his second assignment of error, Appellant argues that the admission of testimony and evidence regarding the victim's I.Q. from a 1968 psychological report was irrelevant and misleading.

{¶57} Trial courts are granted broad discretion with respect to the admission or exclusion of evidence at trial. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343, 348. Thus, an appellate court will not reverse a trial court's ruling absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 348, 2002-Ohio-6658, ¶75. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial

court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126.

{¶58} Appellant first objects to the admission of P.B.'s I.Q. through the testimony of P.B.'s brother and cousin. Appellant did not object to the complained about testimony at trial, and therefore we review this claim under a plain error standard of review. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule places several limitations on a reviewing court's determination to correct an error despite the absence of a timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," that is, an error that constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that " the trial court's error must have affected the outcome of the trial." *State v. Morales*, 10th Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶19, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Gross*, 97 Ohio St.3d 121, 776 N.E.2d 1061, 2002-Ohio-5524, ¶ 45. The decision to correct a plain error is discretionary and should be made "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes*, supra, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶59} As we previously stated, "'[s]ubstantial impairment' need not be proven by expert medical testimony; it may be proven by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct." *State v.*

Hillock, 7th Dist. No. 02-538-CA, 2002-Ohio-6897, ¶21, citing *State v. Tate* (Oct. 26, 2000), 8th Dist. No. 77462.

{¶60} As Appellant has provided no legal support that it was error, plain or otherwise, to admit testimony by those who were closest to P.B. regarding her impairment or her I.Q., we find this argument to be without merit.[1]

{¶61} Appellant next claims that it was error for the trial court to admit testimony from Shannon Mahoney regarding P.B.'s I.Q. through the psychological report that was contained within P.B.'s Richland County MRDD file. On appeal, Appellant argues that the evidence was irrelevant and misleading to the jury. At trial, however, trial counsel objected to the report as being hearsay. Evid.R. 103(A) provides that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. "If the ruling admits evidence, a timely objection or motion to strike must appear of record stating the specific ground of objection, if the specific ground was not apparent. When a party makes a specific objection to the admission of evidence on one ground, he waives all other objections on appeal." *State v. Nichols*, 7th Dist. No. 07 JE 50, 2009-Ohio-1027, ¶15, citing *Walton v. Bengala* (September 10, 2001), 7th Dist. No. 00-CA-8; see also *State v. Hale*, 119 Ohio St.3d 118, 892 N.E.2d 864, 2008-Ohio-3426, (holding that a failure to state the specific ground of objection, waives a claim on appeal pursuant to Evid. R. 103); *State v. O'Connor*, 12th Dist. No. CA2007-01-005, 2008-Ohio-2415. Therefore, we find that Appellant has waived all but plain error in regards to arguing relevancy and misleading the jury.

[1] We find analogies to mental retardation death penalty cases such as *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011, 2002-Ohio-6625, to be inapposite to the present case. As we are dealing with a claim of substantial impairment, and not a defense of mental retardation to avoid the death penalty, the standards and burdens of proof are separate and distinct.

{¶62} The state did not seek to admit the psychological report as evidence that P.B. was mentally retarded.[2] It was offered to show why Richland County MRDD approved P.B. as being eligible for services from MRDD, and thus was not hearsay as it was not offered for its truth. As Mahoney testified, a person is only eligible for services through MRDD if they have an I.Q. below 70 and the disability occurred prior to age 18. In order to determine P.B.'s eligibility, the agency relied on the 1968 psychological report to determine onset of disability prior to age 18. The report also indicated that P.B. had needs in certain areas, such as self-care and making responsible decisions regarding her personal life.

{¶63} Moreover, the evidence contained in the report, while relevant, is largely cumulative to what the witnesses testified to at trial regarding P.B.'s substantial impairment. P.B.'s brother and cousin confirmed that P.B. needed assistance in caring for herself and that she had been sterilized as a teenager due to concerns about P.B.'s ability to make decisions regarding her sexual health. Witnesses testified that speaking to P.B. was like speaking to a child and that questions posed to her had to be phrased in a simplistic format so that P.B. could understand and respond to those questions. Moreover, the jury had the opportunity to view P.B. testify during trial and to assess her demeanor and listen to her responses to questions asked by the attorneys. As such, Appellant was not prejudiced by the admission of evidence concerning P.B.'s I.Q. from the 1968 psychological evaluation or testimony regarding P.B.'s I.Q. Given the other

[2] We also find unpersuasive Appellant's argument that the State sought to introduce evidence of P.B.'s I.Q. as expert testimony. Nothing in the record indicates that the State attempted to declare Shannon Mahoney as an expert or to establish that she had specialized skill, knowledge, experience or training regarding psychological testing and I.Q. evaluations. Questions were asked to Ms. Mahoney in the context of her review of P.B.'s file, interview with P.B. and whether her personal perceptions of P.B. were consistent with the information contained within MRDD's file.

evidence presented regarding P.B.'s substantial impairment, Appellant has not proven that but for the admission of testimony regarding P.B's I.Q., the outcome of the trial would have been different.

{¶64} Appellant's second assignment of error is overruled.

III.

{¶65} In his third assignment of error, Appellant claims that R.C. 2907.02(A)(1)(c) is unconstitutionally void for vagueness. Appellant failed to raise this argument in the trial court below and is now presenting it for the first time on appeal.

{¶66} It is well established that failure to raise an alleged error in the trial court, even an error of constitutional magnitude, results in the waiver of such issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 117.

{¶67} "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545 paragraph three of the syllabus; *State v. Glaros* (1960), 170 Ohio St. 471, 166 N.E.2d 379 [11 O.O.2d 215], paragraph one of the syllabus; *State v. Lancaster* (1971), 25 Ohio St.2d 83, 267 N.E.2d 291 [54 O.O.2d 222], paragraph one of the syllabus; *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 [5 O.O.3d 98]. Likewise, '[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time.' *State v. Childs*, supra, 14 Ohio St.2d at 62, 236 N.E.2d 545, citing *State v. Davis* (1964), 1 Ohio St.2d 28, 203 N.E.2d 357 [30 O.O.2d 16]; *State, ex rel. Specht, v. Bd. of Edn*. (1981), 66 Ohio St.2d 178, 182, 420 N.E.2d 1004

[20 O.O.3d 191], citing *Clarington v. Althar* (1930), 122 Ohio St. 608, 174 N.E. 251, and *Toledo v. Gfell* (1958), 107 Ohio App. 93, 95, 156 N.E.2d 752 [7 O.O.2d 437].FN1 Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See *State v. Woodards* (1966), 6 Ohio St.2d 14, 215 N.E.2d 568 [35 O.O.2d 8]. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally vague. Both claims were apparent but yet not made at the trial court level." *State v. Awan* (1986), 22 Ohio St.3d 120, 122, 489 N.E.2d 277.

{¶68} The Supreme Court, in *Awan*, determined that although R.C. 2505.21 gives appellate courts discretion to review a claimed denial of constitutional rights not raised below, "that discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial." *Awan*, supra, at 123, citing *State v. Woodards*, supra, at 21, 215 N.E.2d 568. The *Awan* court determined that the appellate court did not abuse its discretion in refusing to review Awan's claim of unconstitutionality, finding "[t]he legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones." Id., citing *State v. Childs*, supra, 14 Ohio St.2d at 62, 236 N.E.2d 545, citing *Douglas v. Alabama* (1965), 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, and *Henry v. Mississippi* (1965), 379 U.S. 443, 855, Ct. 564, 13 L.Ed.2d 408.

{¶69} As such, we decline to address Appellant's third assignment of error, finding it to be waived.

{¶70} For the foregoing reasons, we overrule Appellant's assignments of error and affirm the decision of the Richland County Court of Common Pleas.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

[Cite as *State v. Hogan*, 2009-Ohio-4728.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LOY DOUGLAS HOGAN	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-33
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN