[Cite as *State v. Gambs* , 2016-Ohio-7860.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL GAMBS Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 2015CA00087 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CR1991
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 7, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio By: RENEE M. WATSON Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	GEORGE URBAN 116 Cleveland Avenue NW, Suite 808 Canton, Ohio 44702

Hoffman, J.

{¶1} Defendant-appellant Michael Gambs appeals his convictions and sentence entered by the Stark County Court of Common Pleas on three counts of rape, in violation of R.C. 2907.02(A)(1)(b), and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} J.B., the minor victim herein, is the sister of Appellant's girlfriend, K.F. J.B. testified at trial her date of birth is May 26, 2001.

{¶3} From May of 2011, until approximately August of 2012, Appellant lived in Tuscarawas County with K.F. K.F.'s sister, J.B., the victim herein, would visit Appellant and K.F. at their trailer home residence in Tuscarawas County. During her visits to the trailer, J.B. alleges Appellant touched her in a sexual manner, placing his finger inside her vagina. This occurred on multiple occasions according to J.B.

{¶4} In August of 2012, Appellant and K.F. moved to Canton, residing with J.B.'s mother on Harrison Avenue, Canton, Ohio.

{¶5} During this time period, J.B. alleges on one occasion, Appellant put his mouth on her vagina. He then proceeded to masturbate to ejaculation.

{¶6} J.B. also testified on Easter Sunday of 2013, while she was napping on the couch, Appellant put his privates into J.B.’s mouth, said bad words, and masturbated to ejaculation.

{¶7} J.B. further testified to incidents where Appellant made her masturbate him, and one incident of anal penetration in her bed at the Harrison Avenue residence.

{¶8} Salina DuBose, a school counselor at Early College Academy, testified J.B. was a student at the school on September 11, 2013. On that date, J.B. appeared in DuBose's office, red faced, and crying. J.B. told DuBose she was sexually assaulted by Appellant beginning in early 2011, and the last incident occurred three days prior. She stated Appellant would touch her breasts and digitally penetrate her vagina while masturbating to ejaculation. She indicated Appellant would use explicit language during the abuse. DuBose reported the matter to Children's Services and called J.B.'s mother.

{¶9} On October 1, 2013, C.J. Cross-Taylor, a forensic interviewer for Stark County Children's Network, interviewed Appellant. The recorded interview was observed by a nurse practitioner, for purposes of medical diagnosis and law enforcement. Those portions of the interview relied upon for medical diagnoses were played for the jury at trial.

{¶10} DNA evidence from sheets obtained from the Harrison Avenue home indicated a major profile for Appellant and a minor profile for J.B. Appellant provided testimony everyone in the home shared sheets, but denied ever sleeping in J.B.'s bed.

{¶11} On December 16, 2014, the Stark County Grand Jury indicted Appellant on three counts of rape, in violation of R.C. 2907.02(A)(1)(b), and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). The first count of rape is alleged to have occurred on or about May 26, 2011, through March 30, 2013. The second count of rape is alleged to have occurred on or about March 31, 2013. Count Three, Rape, is alleged to have occurred on or about April 1, 2013, through September 8, 2013. Count Four, GSI, is alleged to have occurred on or around May 26, 2011, through September 8, 2013.

{¶12} On February 26, 2016, the trial court held a hearing on a motion to determine admissibility of statements regarding the alleged victim's forensic interview,

pursuant to *State v. Arnold* (2010), 126 Ohio St. 3d 290. On March 19, 2015, the trial court conducted a hearing on a Rape Shield motion filed by the State. Prior to trial, the trial court ruled based on Ohio Rules of Evidence 401, 402 and 403 and Ohio's Rape Shield Statute (2907.02(D), but for limited exceptions, it would not permit the testimony requested to be admitted and granted the State's request for a specific jury instruction on venue. The trial court allowed parts of the forensic interview video submitted by the State.

{¶13} At the close of evidence, the Jury found Appellant guilty of all four charges. Via Judgment Entry of April 15, 2015, the trial court entered convictions, and sentenced Appellant to ten years on each count of rape and sixty months on the GSI charge. The rape counts were imposed concurrently, but ordered to run consecutively to the Appellant's sentence on gross sexual imposition. Appellant was also classified a Tier III sex offender.

{¶14} On July 24, 2015, following Appellant's notice of appeal, Appellant filed a motion for new trial, pursuant to Criminal Rule 33(B). This Court stayed the within appeal to allow the trial court to rule on the motion. On September 29, 2015, the trial court overruled the motion for new trial.

{¶15} Appellant appeals, assigning as error:

{¶16} I. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE APPELLANT'S TRIAL COUNSEL ALLOWED THE PRESENTATION OF EVIDENCE REGARDING EVENTS THAT ALLEGEDLY OCCURRED OUTSIDE OF STARK COUNTY, OHIO AND DID NOT OBJECT TO THE ADMISSION OF HEARSAY TESTIMONY.

{¶17} II. APPELLANT'S CONVICTIONS WERE AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

{¶18} III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S SUBSTANTIAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BY FAILING TO RECOGNIZE AND CORRECT THE MULTIPLE INSTANCES OF PLAIN ERROR WHICH OCCURRED DURING APPELLANT'S TRIAL.

I.

{¶19} The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Ohio adopted this standard in the case of *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373(1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

{¶20} First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and violate any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudice by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different.

{¶21} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show the motion or defense “is meritorious,” and, second, the defendant must show there is a reasonable probability the outcome would

have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986); see, also, *State v. Santana,* 90 Ohio St.3d 513, 739 N.E.2d 798 (2001), citing *State v. Lott,* 51 Ohio St.3d 160, 555 N.E.2d 293 (1990).

{¶22} Here, Appellant maintains his trial counsel was ineffective in allowing the presentation of evidence regarding incidents occurring outside of Stark County, and in cross-examining the State's witnesses regarding the acts alleged to have occurred in Tuscarawas County. In addition, Appellant asserts his counsel was ineffective in failing to object to the hearsay testimony of J.B.'s school counselor, Salina DuBose.

{¶23} At trial, the evidence as to the first count of rape relied upon events alleged to have occurred in Tuscarawas County. Appellant argues the State did not allege one of the elements of a specific occurrence of rape or GSI occurred in Tuscarawas County while other elements occurred in Stark County. Accordingly, Appellant asserts his trial counsel was ineffective in failing to object to testimony regarding Tuscarawas County allegations, and in cross-examining J.B. and other witnesses regarding the acts alleged to have occurred in Tuscarawas County, because he was indicted in and being tried in Stark County.

{¶24} The Bill of Particulars filed by the State on February 6, 2015, states Count One, Appellant committed the act of rape, as a continuous course of conduct from May 26, 2011 to March 30, 2013 at or near defendant's home in Tuscarawas County, Ohio.

{¶25} R.C. 2901.12(H) provides,

> (H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
>
> (1) The offenses involved the same victim, or victims of the same type or from the same group.
>
> * * *

{¶26} Counts One through Four of the indictment charge a continuous course of conduct against one victim, J.B., including dates wherein Appellant lived in both Tuscarawas County and Stark County, Ohio.

{¶27} Based upon the above, we find Appellant has not demonstrated error on the part of trial counsel in failing to object to the testimony or evidence, as evidence of the acts alleged to have occurred in Tuscarawas was committed as a course of continuing conduct against the same victim.

{¶28} Appellant further maintains his trial counsel was ineffective in not objecting to the admission of the hearsay testimony offered by J.B.'s school counselor, Salina DuBose. DuBose testified at trial regarding J.B.'s statements Appellant would touch her breasts and vagina, digitally penetrating her vagina while masturbating to ejaculation, and used explicit language during the abuse.

{¶29} Upon review of DuBose's testimony, J.B. came to her office visibly red faced, upset and crying. Under the facts as presented herein, we find the testimony admissible as excited utterance under Evidence Rule 803(2), which provides,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

{¶30} A statement is admissible as an excited utterance when: 1) the occurrence of an event is startling enough to produce a nervous excitement in the declarant; 2) the statement is made while still under the stress of excitement caused by the event; 3) the statement is related to the startling event; and 4) the declarant personally observed the startling event. *State v. Taylor*, 66 Ohio St.3d 295, 612 N.E.2d 316 (1993).

{¶31} In cases involving the sexual abuse of children, Ohio courts have held the exception is to be liberally applied. *State v. Boston*, 46 Ohio St.3d 108, 545 N.E. 2d 1220 (1989). Due to a child's remaining under a state of nervous excitement longer than an adult, courts have held the admission of statements of a child reporting sexual assault may be proper under the excited utterance exception even when they are made after a substantial lapse of time. *Taylor*, supra. It is within the trial court's discretion to determine whether the child is still under the stress of the event. Id.

{¶32} Here, J.B. disclosed to DuBose the last incident of abuse occurred just three days prior to their discussion. The abuse was an ongoing continuous course of conduct from May of 2011, through September of 2013. At the time J.B. made the statements to DuBose, she was twelve years of age.

{¶33} We find the trial court did not abuse its discretion in admitting DuBose's testimony under the excited utterance hearsay exception. In addition, we find DuBose's statements cumulative to the testimony presented at trial. Assuming, arguendo, it was error, such error was harmless. J.B. herself testified at trial as to the alleged acts as restated by Dubose.

{¶34} The first assignment of error is overruled.

II.

{¶35} In the second assignment of error, Appellant maintains his convictions are against the manifest weight and sufficiency of the evidence. We disagree.

{¶36} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries,* 5th Dist. Stark No. CA–5758, 1982 WL 2911 (Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). The Ohio Supreme Court has emphasized: " '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment

and the finding of facts. * * *.' " *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E.2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown,* 9th Dist. No. 21004, 2002-Ohio-3405, 2002 WL 1454025, ¶ 9, *citing State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶37} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.' " *State v. Pallai,* 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, 2008 WL 5245576, ¶ 31, *quoting State v. Woullard,* 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist.2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke,* 7th Dist. Mahoning No. 99 CA 149, 2002 WL 407847, at ¶ 13, *citing State v. Gore,* 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶38} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. *Accord, Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶39} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and to assess each witness' credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 2000 WL 297252 (Mar. 23, 2000) *citing State v. Nivens,* 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP–604, 2003-Ohio-958, 2003 WL 723225, ¶ 21, *citing State v. Antill,* 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP–1238, 2003-Ohio-2889, 2003 WL 21291042, *citing State v. Caldwell,* 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist.1992).

{¶40} Appellant argues the State failed to properly establish the exact date on which Count Two of rape occurred; merely offering evidence the incident occurred on Easter of 2013. However, the exact date and time are immaterial to the charge unless the nature of the offense requires exactness of time. *State v. Cave*, 4th Dist. No. 13CA3575, 2015-Ohio-2233. The State need only prove the offenses alleged in the indictment occurred reasonably within the time frame alleged. Id. Accordingly, we find the indictment and testimony sufficient as to the second count of rape alleging a rape occurred on March 31, 2013, Easter Sunday.

{¶41} Appellant further maintains there was insufficient evidence to support his convictions, and the convictions are against the manifest weight of the evidence.

Appellant was convicted of three counts of rape, in violation of R.C. 2907.02(A)(1)(b), which reads,

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> ***
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶42} At trial, J.B. testified her date of birth is May 26, 2011. Tr. at 147. She further testified the first time Appellant touched her was at his trailer in Tuscarawas County, where she visited her sister. She stated Appellant touched her with his fingers, and digitally penetrated her vagina. Tr. at 155-156. She testified the conduct occurred more than five times.

{¶43} J.B. then testified as to an incident occurring on March of 2013, or Easter of 2013. She testified she was napping on the couch when Appellant put his privates into her mouth, masturbating to ejaculation, while using bad language. Tr. at 160.

{¶44} J.B. testified as to an incident in her bed at the Harrison Avenue residence where Appellant digitally penetrated her. DNA evidence established two stains on J.B.'s sheets were positive matches to Appellant's DNA profile. Appellant denied ever sleeping in J.B.'s bed.

{¶45} We find the evidence presented at trial is sufficient for the trier of fact to find beyond a reasonable doubt the necessary elements to establish three counts of rape, in violation of R.C. 2907.02(A)(1)(b). The jury's verdicts were not against the manifest weight of the evidence.

{¶46} In addition, Appellant was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which reads,

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> ***
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶47} J.B. testified at trial Appellant put his mouth on her vagina, masturbating to ejaculation. She also testified to numerous incidents in which Appellant engaged in touching her vaginal area over and under her clothing.

{¶48} In addition to J.B.'s testimony, Salina DuBose testified as to the statements J.B. made to her at school. C.J. Cross-Taylor, a Forensic Interviewer for the Stark County Children's Network, also testified as to J.B.'s allegations herein.

{¶49} We find the jury had sufficient evidence to find Appellant guilty beyond a reasonable doubt of the charge of gross sexual imposition, in addition to the three counts of rape. The jury's verdict was not against the manifest weight of the evidence.

{¶50} The second assignment of error is overruled.

III.

{¶51} In the third assigned error, Appellant maintains the trial court failed to recognize multiple instances of plain error.

{¶52} Pursuant to Ohio Criminal Rule 52(B), a reviewing court may, in the absence of objection, notice plain errors or defects affecting a defendant's substantial rights. However, notice of plain error is to be taken with the utmost of caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). To rise to the level of plain error, the error must have substantially affected the outcome of trial. *State v. Slagle*, 65 Ohio St3d 597, 605 N.E.2d 916 (1992).

{¶53} Appellant has not demonstrated plain error. Appellant was charged with a continuous course of conduct involving one victim, J.B., in both Tuscarawas County and Stark County, Ohio.

{¶54} J.B. and other witnesses testified at trial as to Appellant digitally penetrating J.B. on at least three occasions, while masturbating to ejaculation. Further, DNA evidence established stains on J.B.'s sheets matching Appellant's profile. The testimony further established Appellant touched J.B. on numerous occasions over and under clothing, and put his penis in her mouth.

{¶55} Accordingly, Appellant has not demonstrated, but for any alleged error, the outcome of the trial would have been different.

{¶56} The third assignment of error is overruled.

{¶57} Appellant's convictions and sentence entered by the Stark County Court of Common Pleas are affirmed.

By: Hoffman, J.

Farmer, P.J. and

Baldwin, J. concur