[Cite as *State v. Larkins*, 2017-Ohio-9369.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 JE 0032
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
FRANK LEE LARKINS, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 15 CR 110
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Jane M. Hanlin Prosecuting Attorney Atty. Frank J. Bruzzese Assistant Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant:	Atty. Aaron A. Richardson Blake, Bednar, Blake & Richardson 4110 Sunset Blvd. Steubenville, Ohio 43952

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 18, 2017

[Cite as *State v. Larkins*, 2017-Ohio-9369.]
WAITE, J.

{¶1} Appellant Frank Lee Larkins, Jr. appeals a June 1, 2016 Jefferson County Common Pleas Court decision finding him guilty of one count of rape. Appellant argues that the trial court erroneously denied his motion for a mistrial after a witness blurted out that he supposedly had intercourse with eight or nine other girls. For the reasons provided, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} At the time of the incident in question, Appellant was living with a woman whom he described as his girlfriend. Although the woman testified that they were not dating, she acknowledged that he did live with her and slept on a couch in the living room. (5/19/16 Trial Tr., p. 183.) On July 23, 2015, three other people stayed at this house. They included a twenty-year-old man and two young girls, including the victim. The victim was twelve-years-old at the time.

{¶3} On that night, Appellant's companion woman went to her bedroom and fell asleep while Appellant and the three guests watched television in the living room. According to the victim, she woke up at some point during the night and found Appellant on top of her and engaging in intercourse with her. (*Id.* at p. 194.) Her pants and underwear had been pulled down around her ankles. She testified that she tried to scream but Appellant held a pillow over her face. She also testified that she tried to force him off of her but he forced her to lie back down. After he completed the rape, the victim testified that he went to another couch to sleep. She noticed a used condom on the table, but it was gone in the morning. (*Id.* at p. 197.)

{¶4} At some point the next day, the victim informed Appellant's companion about the rape. (*Id.* at p. 199.) According to Appellant, the woman confronted him and threw him out of the house. The record shows that this woman testified she evicted Appellant before she was informed of the rape. Regardless, Appellant's friend picked him up and allowed him to stay at his house. A few days later, this friend learned from his mother that the Toronto Police Department had issued a warrant for Appellant's arrest. The friend informed Appellant, who admitted that he might be in trouble because he "slept with this little girl." (*Id.* at p. 245.)

{¶5} Appellant voluntarily reported to the police station. On his way to the station, he encountered a group of people with knowledge of the situation who allegedly threatened him. On arrival, he was told to come back later to speak with Sgt. Anthony Porreca. Appellant returned later in the day and spoke in an interview room with Sgt. Porreca and Captain Rick Parker. At first, Appellant denied the accusations. However, when told that there may be a difference in the charges if the encounter was consensual, Appellant admitted that he engaged in intercourse with the victim, but said that it was consensual. (*Id.* at p. 290.) Appellant admitted at least seven times during the videotaped interview that he had intercourse with the victim.

{¶6} According to Appellant, the victim began flirting with him and then kissed and tickled him. (*Id.* at p. 302.) He claimed that the victim told him she wanted to have intercourse and he repeatedly asked her if she was sure, because he did not want to get in trouble. He admitted that he knew she was only eleven or twelve years old and that he kept the condom wrapper. (*Id.* at pp. 302-303.)

{¶7} Appellant made several phone calls to his father while at the police station. Appellant's end of the conversation was recorded. His father told him not to speak with the officers and to get a lawyer, however, Appellant told him that he had already told police what had happened. (*Id.* at p. 297.) He also informed his father that he had intercourse with the victim and that she was underage.

{¶8} On August 5, 2015, Appellant was indicted on one count of rape, a felony of the first degree in violation of R.C. 2907.02 (A)(1)(b), (B). At trial, Sgt. Parker, Officer Porreca, Appellant's friend, Appellant's female companion, the victim, and another young girl who was present at the time of the incident testified on behalf of the state. Appellant and his father testified on his behalf. Appellant's videotaped interview and an audio recording of his calls to his father were played for the jury and were admitted into evidence. Appellant acknowledged during his testimony that he confessed, but claimed that his confession was false. He said that he wanted to go to jail because he was afraid of the people who had confronted him and he would have been homeless because he did not have a place to stay.

{¶9} On May 19, 2016, the jury found Appellant guilty of the sole charge of the indictment. A sentencing hearing was held on the same date and the trial court sentenced Appellant to life in prison without parole eligibility for ten years. Appellant is also required by law to report as a tier three sex offender.

{¶10} Appellant's appeal was initially dismissed as untimely. Appellant filed a second notice of appeal and we granted his motion for a delayed appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT APPELLANT A MISTRIAL WHEN A STATE'S WITNESS ALLEGED THAT APPELLANT HAD COMMITTED SEVERAL OTHER RAPES.

{¶11} Appellant argues that the trial court erroneously denied his motion for a mistrial after a witness blurted out that Appellant allegedly had intercourse with eight or nine other girls. Appellant urges that the testimony was prejudicial, because the jury could not possibility have ignored the comment that he had intercourse with eight or nine girls while he was on trial for the rape of a twelve-year-old.

{¶12} In response, the state argues that the witness' comment was in response to an innocent question. As such, the state argues that the remedy was for the court to provide a curative instruction, not a mistrial. See *State v. Howard-Ross,* 7th Dist. No. 13 MA 168, 2015-Ohio-4810, 44 N.E.3d 304. Even so, the state argues that there is no prejudice, as Appellant confessed to the crime several times and evidence of these confessions was admitted into evidence.

{¶13} The state also argues that the witness was called by the defense. However, the law in this regard remains the same no matter which party called the witness. A trial court is entitled to broad discretion in considering a motion for a mistrial and the standard of review on appeal is whether the trial court abused that discretion. *State v. Love*, 7th Dist. No. 02 CA 245, 2006-Ohio-1762, ¶ 95, citing *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54, (1990) paragraph one of the syllabus. The decision to grant a mistrial "is an extreme remedy only warranted in circumstances where a fair trial is no longer possible and it is required to meet the

ends of justice." *State v. Bigsby*, 7th Dist. No. 12 MA 74, 2013-Ohio-5641, ¶ 58, citing *State v. Jones*, 83 Ohio App.3d 723, 615 N.E.2d 713 (2d Dist.1992). Accordingly, a mistrial will not be granted "merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *Bigsby* at ¶ 58, citing *State v. Lukens*, 66 Ohio App.3d 794, 809, 586 N.E.2d 1099 (10th Dist.1990).

{¶14} Here, the state asked the witness: "did [Appellant] make any statements to you about whether or not he, [Appellant], thought he was going to be in trouble?" The witness responded:

> Okay. Well, it was two days after I picked him up and I found out from my mom that he had like -- there was a warrant out for him in Toronto and I told him to go down to the Toronto Police Department and find out what the warrant was for and then he said that he might be in trouble because he slept with this little girl and he named -- and he didn't name the other eight or nine little girls that he supposedly slept with.

(5/19/16 Trial Tr., pp. 245-246.) Trial counsel objected and a side bar was held outside of the jury's presence. Counsel moved for a mistrial based on an argument that the jurors would not likely be able to ignore the comment, considering Appellant was charged with the rape of a twelve-year-old. The trial court denied the motion and decided a curative instruction was appropriate.

{¶15} When the trial resumed, the trial court stated:

> Okay. The Jury is instructed to disregard the witness' last response as nonresponsive. You will not consider it for any purpose. It is to be not considered for any purposes as -- as if you never heard that statement. It is to be struck. Do you understand that? Okay. All right.

(*Id.* at 250.)

{¶16} An analysis of this issue begins with the general rule that evidence of prior bad acts is inadmissible. See Evid.R. 402. The Ohio Supreme Court has held that "the introduction of evidence tending to show that a defendant has committed another crime wholly independent of the offense for which he is on trial is prohibited." *State v. Breedlove*, 26 Ohio St.2d 178, 183, 271 N.E.2d 238 (1971), citing *State v. Hector*, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969), paragraph one of the syllabus. However, an exception exists "where the prior offense, if shown to be part of a common plan or scheme and evidence thereof, is admitted to prove the elements of intent, motive, knowledge or identity." *Breedlove* at 183.

{¶17} If evidence of a prior bad act is inadvertently offered by a witness in response to an innocent question, the appropriate remedy is to grant a curative instruction, not a mistrial. *Howard-Ross, supra,* at ¶ 21, citing *State v. Mobley*, 2d Dist. No. 18878, 2002 WL 506626, *2 (April 5, 2002); *State v. Maddox*, 2d Dist. No. 18389, 2001 WL 726778 (June 29, 2001).

{¶18} Here, the witness blurted out testimony that Appellant allegedly engaged in sexual relations with at least eight or nine other girls. There is no question that this testimony is inadmissible as evidence of a prior bad act. It is

equally clear from this record that the testimony at issue does not tend to show intent, motive, knowledge, or identity, and so does not appear to fall within the exception that would permit its admission.

{¶19} The state's question to the witness was limited to whether Appellant made any kind of statement that he was in trouble. The state did not inquire about whether there may be other victims. The witness, on his own volition, offered this information. The comment was clearly made in response to an innocent question. Thus, the trial court properly provided a curative instruction rather than granting a mistrial.

{¶20} Even so, "[w]here there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal." *Howard-Ross, supra* at ¶ 22, citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, vacated on other grounds in *Lytle v. Ohio,* 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

{¶21} Here, although the testimony was improper, it does not appear to have contributed to Appellant's conviction. During Appellant's testimony, he admitted that he had confessed to the police.

Q You say you had sex with [the victim]; right?

A I did.

* * *

Q That she was kissing on you and tickling you and doing all sorts of things.

A I did say that.

Q That you kept asking [the victim] "Are you okay with this? Are you okay?" Because I, [Appellant], "don't want to get in trouble for this?" Right?

A I told the cops that, yes.

Q You also told the cops that you knew that she was 11 or 12 years old --

A I did.

(5/19/16 Trial Tr., pp. 302-303.)

{¶22} The videotaped interview was shown to the jury and admitted into evidence. Similarly, an audio recording of a confessional telephone call Appellant made to this father was also played for the jury and admitted into evidence. At trial, Appellant attempted to explain that he only confessed because he was afraid for his safety because he was homeless. However, Appellant did not inform either the police or his father that he feared for his safety. Appellant also admittedly told his father that he had a place to stay.

{¶23} In support of his argument, Appellant cites to a Third District case where a witness testified that the appellant had the ability to bribe people in court and

had molested other women. See *State v. Talbert,* 33 Ohio App.3d 282, 515 N.E.2d 968 (3d Dist.1986.) Although the trial court declined to declare a mistrial, the Third District reversed the trial court's decision. However, *Talbert* is readily distinguishable from this matter as the Third District emphasized that the appellant was

> a former municipal court judge from their own city, one well associated with the inner workings of the very court in which he was on trial, [who] had been accused of being able to obtain a favorable verdict through bribery. * * * Whereas the nature of the statements complained of would be severe in any case, the prejudicial implication is clearly heightened in this case. (Emphasis deleted.)

Id. at 286.

{¶24} In light of the evidence presented at the instant trial, there is no reasonable probability that the witness' comment contributed to Appellant's conviction. As such, Appellant's argument is without merit and his sole assignment of error is overruled.

Conclusion

{¶25} Appellant argues that the trial court erroneously denied his motion for a mistrial after a witness blurted out that he had supposedly had intercourse with eight or nine other girls. As the witness' comment was made in response to an innocent question, the trial court properly provided a curative instruction rather than granting a mistrial. As such, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.