[Cite as *State v. Esmond*, 2002-Ohio-2360.]

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Court of Appeals No. L-01-1400

Appellee — Trial Court No. CR-01-1043

v.

Kevin Esmond — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: May 17, 2002

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Steven J. Messinger, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

SHERCK, J.

{¶1} This appeal comes to us from the Lucas County Court of Common Pleas. There, appellant was convicted and sentenced for rape of a child less than thirteen years of age. Because we conclude that there was sufficient evidence to support the jury's verdict, we affirm appellant's conviction. However, because the trial court improperly ordered appellant to pay the costs of his court-appointed attorney, we vacate that portion of the sentencing order and remand the matter for further consideration.

{¶2} Appellant is Kevin Esmond. In November 2000, appellant's eleven-year-old daughter reported to a family friend that appellant had been sexually molesting her. During the investigation that followed, the girl told police and children services workers that her father had engaged in cunnilingus with her on several occasions and once required her to attempt fellatio. She also

disclosed that her father had sexual intercourse with her multiple times. A medical examination resulted in findings consistent with sexual activity.

{¶3} In January 2001, a Lucas County Grand Jury indicted appellant on six counts of rape in violation of R.C. 2907.02(A)(1)(b), first degree felonies. The matter proceeded to a jury trial, following which appellant was found guilty on all counts. The court sentenced appellant to three consecutive six-year terms of incarceration and three additional six-year terms to be served concurrent with the others. The court also ordered appellant to make restitution, pay prosecution costs and the costs of court-appointed counsel. From this judgment, appellant now brings this appeal.

{¶4} Appellant sets forth the following three assignments of error:

{¶5} "I. DEFENDANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE

{¶6} "II. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF APPELLEE'S EXPERT WITNESSES AS THEIR TESTIMONY FAILED TO MEET EVIDENTIARY STANDARDS

{¶7} "A. Expert testimony should not have been permitted on the credibility of the victim-witness

{¶8} "B. The State failed to meet Evid.R. 705 requirements for admissibility

{¶9} "III. THE TRIAL COURT COMMITTED PLAIN ERROR BY ORDERING DEFENDANT TO PAY COURT-APPOINTED ATTORNEY FEES AND COSTS"

I.

{¶10} Appellant challenges the sufficiency of the evidence which resulted in his conviction. Considering such a challenge, the court must determine whether the evidence submitted at trial is

legally sufficient to support all of the elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390 (Cook, J. concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

{¶11} Appellant selectively points to the victim's testimony that appellant had sexual intercourse with her "[a]bout four or five" times to argue that there was insufficient evidence to support one or, perhaps, two of the counts of which he was convicted. Appellant neglects to consider the child's further testimony that appellant performed cunnilingus "[l]ike ten, nine, ten times," attempted fellatio and on one occasion inserted his thumb into her vagina.

{¶12} R.C. 2907.02(A) provides:

{¶13} "(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:

{¶14} "***

{¶15} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶16} R.C. 2907.01 defines "sexual conduct":

{¶17} "(A) 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do

so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶18} While penetration inferentially is necessary to complete anal or vaginal intercourse, no such requirement is set for cunnilingus or fellatio. Accordingly, the victim's testimony concerning these acts, if believed, was sufficient to support conviction on all six counts.

{¶19} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶20} In his second assignment of error, appellant insists that trial court made erroneous evidentiary rulings which operated to his prejudice.

{¶21} Decisions concerning the admissibility of evidence are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265. An abuse of discretion is more than just an error of law or of judgment, the term implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Keenan* (1998), 81 Ohio St.3d 133, 137.

{¶22} Appellant claims the court erred when it permitted an examining physician to testify that his medical findings were consistent with the victim's report. According to appellant, the court further erred when it allowed the physician's assistant to testify that when a child has a "flat affect," like the victim, there is a "*** very high likelihood that something has happened to that child." Both instances, appellant insists, constitute experts vouching for the credibility of a child accuser, an improper use of such testimony. *State v. Boston* (1989), 46 Ohio St.3d 108, syllabus.

{¶23} A *Boston* problem arises when an expert witness attempts to invade the jury's factfinding province by offering an opinion as to another witness's credibility. *State v. Yarber*

(1995), 102 Ohio App.3d 185, 195. We do not, however, perceive any such incursion when an expert voices his or her opinion that observable data is consistent with a reported cause. Here, the physician testified that his examination of the victim revealed physical characteristics consistent with a blunt object being repeatedly inserted into her vagina, which was what the victim said had occurred. This is a clinical observation, not a comment on the victim's veracity.

{¶24} The testimony of the physician's assistant is somewhat closer to the admissibility line. Following withdrawal of an awkward question about the child victim's "flat affect," the prosecutor began again:

{¶25} "Q. (By the state) When you interview a child who seems emotionless, mechanical, or has a flat affect, how do you assess that in determining whether or not you believe the child to be telling the truth?

{¶26} "[Defense:] I object. I mean, believing the child can be telling the truth is exactly what's precluded by Boston and its progeny.

{¶27} "THE COURT: The credibility of every witness is for the jury to determine. She's talking about the -- her testimony is to what impact, if any, a flat affect has on her job and how she performs it. I'm satisfied she can testify to that.

{¶28} "Q. (By the state) Do you understand the question?

{¶29} "A. You want me to describe when I see a child in the office when they have a flat affect when I'm talking to them how I interpret that?

{¶30} "THE COURT: What if anything does that mean to you when you're interviewing a child with a flat affect? What if anything does that mean to you?

{¶31} "A. It means to me that they --

{¶32} "THE COURT: Objection is noted, preserved for the record and overruled. Go ahead.

{¶33} "A. It means to me that quite possibly they are uncomfortable in talking about it, and it also means to me that it's a very high likelihood that something has happened to that child.

{¶34} "[Defense] I object.

{¶35} "THE COURT: Objection overruled. Go ahead. Next question?

{¶36} "(By the state) When you see a child with a flat affect, does that tell you whether or not that child is telling the truth in and of itself?

{¶37} "No."

{¶38} Portions of this testimony, detached from the rest, might give the impression that this witness was vouching for the victim's credibility. However, taken as a whole and in context with the court's interspersed admonitions, we cannot say that there is any reasonable probability that the jury would have interpreted this testimony as expert opinion on the child's veracity. Similarly, we perceive no abuse of discretion in the admission of this testimony.

{¶39} Accordingly, appellant's second assignment of error is not well-taken.

III.

{¶40} Finally, appellant asserts in his third assignment of error that the trial court erred in ordering him to pay his court-appointed lawyer's fee and prosecution costs, absent a determination that he has, or may reasonably be expected to have, the means to pay these costs.

{¶41} This court has held that such a means determination must be had before counsel fees or prosecution costs may be assessed. *State v. Brown* (Nov. 19, 1999), Lucas App. No. L-97-1332; *State v. Groom* (Oct. 19, 2001), Lucas App. No. L-00-1104; *State v. Hill* (Mar. 2, 2001), Lucas App.

No. L-00-1211; *State v. Willis* (Mar. 2, 2001), Lucas App. No. L-00-1041. Since no such determination appears of record, appellant's third assignment of error is well-taken.

{¶42} On consideration whereof, the judgment of the Lucas County Court of Common Pleas with respect to appellant's conviction is affirmed. However, we vacate the imposition of prosecution costs and court-appointed attorney fees and remand this matter to the trial court for further consideration consistent with this decision. Costs to appellee.

JUDGMENT AFFIRMED, IN PART.
AND VACATED, IN PART.

Peter M. Handwork, J. _____
JUDGE

Melvin L. Resnick, J. _____
JUDGE

James R. Sherck, J.
CONCUR. _____
JUDGE