[Cite as *State v. Douthat,* 2010-Ohio-2225.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-870
v.	:	(C.P.C. No. 08CR-03-1884)
Terry P. Douthat,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 20, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Samuel H. Shamansky Co., L.P.A., and *Samuel H. Shamansky*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Terry P. Douthat, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas, following a jury trial in which appellant was found guilty of five counts of gross sexual imposition.

{¶2} On March 14, 2008, appellant was indicted on six counts of gross sexual imposition, in violation of R.C. 2907.05, three counts of rape, in violation of R.C. 2907.02, one count of attempted rape, in violation of R.C. 2923.02 and 2907.02, and one count of

kidnapping, in violation of R.C. 2905.01. The matter came for trial before a jury beginning July 1, 2009.

{¶3} The first witness for the state was B.B., a 16-year-old female. For a period of time, when B.B.'s mother needed a place to reside, B.B. lived at appellant's residence with her mother and two younger sisters. Appellant's wife is B.B.'s maternal grandmother, while appellant is B.B.'s step-grandfather.

{¶4} At trial, B.B. gave the following testimony. When B.B. was nine years of age, appellant touched her on her breast and vagina "at least" five times. The first incident occurred in the living room of the house while B.B. was sleeping on the couch; B.B. was awakened when appellant touched her vagina with his finger. When B.B. was ten years of age, appellant touched her vaginal area on at least five occasions. Appellant also showed B.B. a video depicting a woman and a man having sex. While watching the video, appellant was touching B.B. on the vagina and masturbating. When B.B. was 11 years of age, appellant touched her "at least" 10 times on her breast and vagina.

{¶5} A.B. and J.B., female twins, lived across the street from B.B. during the relevant time period. The twins were several years younger than B.B., and the three children became friends. At trial, B.B. recalled an incident when she was eight or nine years of age and the twins were six or seven. The children were playing hide-and-seek in the house, and they asked appellant to also play. Appellant said "yes," but asked if they would play hide-and-seek in the dark naked, and then they did. All three children eventually were sitting on the love seat, and appellant "touched every one of us" on the vagina.

{¶6} On another occasion, A.B. and J.B. came over to B.B.'s house and looked in the bathroom under the sink, where they found pornographic magazines. The children

took the magazines to appellant, and he asked them, "Would you like to do that, what she's doing?" B.B. testified they were all giggling and said "yes, [be]cause we were young. We didn't know any better." The children got on the couch and "we had our clothes off, and we had our legs spread." Appellant then "touched us, our vaginas, with his fingers."

{¶7} When B.B. was 12, appellant asked her if she would give him "some." B.B. said "okay." B.B. had sexual relations with appellant "at least" 10 to 15 times when she was 12 years old. Appellant would buy her items such as clothes, shoes, and toys. B.B. also had sex with appellant at his mother's house in Portsmouth "at least" 10 to 15 times. Appellant bought B.B. a vibrator and inserted it inside her vagina "five to ten times." When B.B. was 12, she told her boyfriend about the conduct with appellant. B.B. later told several adults, including a detective, Melinda Hunt.

{¶8} T.S., age 11, B.B.'s step-sister, testified regarding an incident when she was four years of age. The trial court, however, upon motion of defense counsel, dismissed the counts of the indictment alleging conduct by appellant involving T.S.

{¶9} A.B., age 14, was also called as a witness by the state. A.B. resides with her twin sister, J.B. While growing up, A.B. and J.B. became friends with B.B. A.B. testified that appellant "molested" her, B.B., and J.B. A.B. was either six or seven years of age, and there were at least ten incidents. A.B., J.B., and B.B. would play hide-and-seek while naked, and appellant would search for the girls. The girls would then dance naked in the living room. Appellant touched A.B. on the breasts and vagina. A.B. testified that appellant also touched J.B. and B.B. on the breasts and vaginal area. Appellant would touch his penis while watching the girls dance. A.B. also recalled seeing pornographic magazines at appellant's house. A.B. stated that her sister J.B. was not

willing to testify because "[s]he doesn't want to be a victim. She just doesn't want to recognize what happened to her."

{¶10} A.B.'s twin sister, J.B., was called as a witness by appellant. In March 2007, when she was in the sixth grade, J.B. met with an investigator from Franklin County Children Services ("FCCS"), Lonita Harlin, at J.B.'s school. During the meeting, J.B. denied that certain things involving appellant had occurred. In 2007, J.B. met with Detective Melinda Hunt.

{¶11} During direct examination, J.B. testified that appellant touched her on the vagina on two occasions. J.B. recalled one incident in which A.B., B.B., and herself were lying on the couch with their pants at their ankles, and appellant was standing over them "like * * * examining us." On cross-examination, J.B. testified that appellant touched her, A.B., and B.B. Appellant also showed the girls pornographic magazines.

{¶12} Appellant called several witnesses who were asked about the truthfulness of B.B. Appellant testified on his own behalf, and denied all of the allegations by the witnesses.

{¶13} Following the presentation of evidence, the jury returned verdicts finding appellant guilty of Counts 1 (gross sexual imposition involving B.B.), 2 (gross sexual imposition involving B.B.), 7 (gross sexual imposition involving J.B.), 8 (gross sexual imposition involving A.B.), and 9 (gross sexual imposition involving A.B.). The jury returned verdicts finding appellant not guilty of the remaining counts. The trial court sentenced appellant by judgment entry filed November 2, 2009.

{¶14} On appeal, appellant sets forth the following single assignment of error for this court's review:

> Defense counsel's decision to call [J.B.] on behalf of Appellant constituted ineffective assistance of counsel which deprived Appellant of his rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the Ohio Constitution.

{¶15} The sole issue raised by appellant on appeal is whether trial counsel's decision to call J.B. as a witness constituted ineffective assistance of counsel. In *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42, the Supreme Court of Ohio discussed the proper analysis in considering a claim of ineffective assistance of counsel as follows:

> "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668.
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> After much discussion, the *Strickland* court set forth the standards to be used in judging whether counsel has been ineffective and whether a criminal defendant has been prejudiced thereby. As for ineffectiveness, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, *supra*, at 687-688. The court recognized that there are "* * * countless ways to provide effective assistance in any given case. * * *" *Id*. at 689. Therefore, the court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential. * * *" *Id*. In addition, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Id*. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of

> reasonable representation and, in addition, prejudice arises from counsel's performance.
>
> Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 (1981)." *Strickland, supra*, at 691. To warrant reversal, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, at 694. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice.

(Footnote omitted.)

{¶16} Appellant maintains that his trial counsel's performance was clearly deficient in the instant case. At trial, J.B. testified that her previous statements to law enforcement officials disavowing abuse were untrue, and that she had in fact been molested by appellant. Appellant argues that the decision to call J.B. as a witness only served to reinforce the testimony of appellant's other alleged victims. Appellant also argues that, after this revelation, defense counsel continued to question J.B., eliciting further damaging testimony.

{¶17} In general, a decision by counsel "whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. See also *State v. Mays* (Sept. 13, 2001), 8th Dist. No. 78619 (counsel's decision to call witness who knew of defendant's drug addiction constituted a tactical decision that fell within the range of professionally reasonable judgment).

{¶18} In the present case, the record is silent as to why appellant's counsel called J.B. as a witness. However, the record suggests a possible tactical reason existed for calling J.B. J.B. had earlier denied that appellant had sexually abused her. J.B. testified that, in March 2007, she denied any abuse to FCCS investigator Lonita Harlin, and in the summer of 2007, she denied any abuse to police Detective Melinda Hunt. J.B. also testified she never talked to anyone besides her twin sister about the abuse. Thus, given these earlier denials and J.B.'s prior silence as to the abuse, appellant's counsel could have called J.B. as a witness believing that she would continue to deny appellant ever sexually abused her. The fact that the state never called J.B. as a witness could have also encouraged appellant's counsel to call J.B., signaling that the state questioned whether J.B.'s testimony would be in its favor. Although other attorneys may not have chosen to call J.B. as a witness, given the risk that she would give unfavorable testimony, even debatable trial tactics do not constitute a denial of effective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶146. See also *State v. Thompkins*, 10th Dist. No. 06AP-310, 2006-Ohio-6148, ¶9 (although the decision whether to call the witness for a limited purpose, while risking damage resulting from the entirety of the testimony, could be classified as a debatable trial tactic with a debatable chance of success, trial counsel's strategy was not unreasonable). Furthermore, once J.B. had testified that the abuse did, in fact, occur, appellant's counsel had little choice but to pursue further questioning in an attempt to find inconsistencies and discredit her testimony based upon her previous denials. Thus, in light of the extremely wide latitude legal counselors are given in the selection of witnesses, because appellant's trial counsel had at least a plausible reason for calling J.B. and conducting further questioning even

after she gave damaging testimony, we cannot find the representation by appellant's counsel was deficient.

{¶19} In addition, appellant raises in his reply brief that his trial counsel was ineffective on the ground that his counsel did not interview J.B. in advance. The record does not reflect whether counsel interviewed the witness prior to her testimony and, if so, whether the witness may have indicated she was going to provide exculpatory testimony if called. Thus, any evidence related to such actions, or inactions, by trial counsel would be outside the record. Where a claim of ineffective assistance of counsel is dependent upon facts outside the record, the appropriate remedy is for the defendant to file a petition for post-conviction relief. *State v. Tackett,* 11th Dist. No. 2003-A-0091, 2004-Ohio-6705, ¶19 ("a postconviction relief petition is the only mechanism whereby a defendant can present evidence outside the original trial record"). Therefore, as the current record does not indicate whether appellant's counsel interviewed J.B. prior to trial, such an argument would be more appropriately raised in a petition for post-conviction relief. For the foregoing reasons, appellant failed to establish that his counsel was defective in calling J.B. as a witness, and his sole assignment of error is overruled.

{¶20} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

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