

[Cite as *State v. Kenney*, 2010-Ohio-3740.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-231 (C.P.C. No. 07CR-07-4874)
Christopher M. Kenney,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 12, 2010

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

Timothy Young, Ohio Public Defender, and *Claire R. Cahoon*, for appellant.

ON APPLICATION FOR REOPENING

FRENCH, J.

{¶1} Defendant-appellant, Christopher M. Kenney ("appellant"), seeks to reopen his appeal in *State v. Kenney*, 10th Dist. No. 09AP-231, 2009-Ohio-5584, which

affirmed the judgment of the Franklin County Court of Common Pleas convicting him of disseminating matter harmful to juveniles, gross sexual imposition, and rape pursuant to a jury trial. Appellant committed the offenses against his relative and foster child, C.C., when she was five and six years old. *Id.* at ¶2, 6. He was acquitted, however, of similar offenses alleged to have occurred when C.C. was four years old. *Id.* at ¶6. Plaintiff-appellee, the state of Ohio, opposes appellant's application. We deny it for the following reasons.

{¶2} App.R. 26(B) permits applications for reopening an appeal from a judgment of conviction and sentence based on a claim of ineffective assistance of appellate counsel. An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶3} To justify reopening, an applicant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Hooks*, 92 Ohio St.3d 83, 84, 2001-Ohio-150, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704. The two-pronged analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, is the appropriate standard to assess whether an applicant has raised a genuine issue as

to the ineffectiveness of his appellate counsel. *Hooks* at 84. Under this standard, ineffective assistance of counsel exists if counsel was deficient for failing to raise the issues the applicant now presents and that, had the issues been presented, there was a reasonable probability of success. *Id.*, citing *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶4} Appellant asserts that appellate counsel was ineffective for failing to raise the following proposed assignments of error:

1. The trial court violated Mr. Kenney's constitutional rights to due process and a fair trial in admitting the trial testimony of the child victim without a sufficient competency evaluation. Evid.R. 601(A); Fifth and Fourteenth Amendments, United States Constitution; Section 16, Article I, Ohio Constitution.
2. The prosecutor's misconduct denied Mr. Kenney a fair trial and due process of law. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution.
3. Mr. Kenney was denied his constitutional rights to confront witnesses, a fair trial, and due process of law when the trial court improperly excluded evidence of prior sexual abuse of the victim. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.
4. Trial counsel provides constitutionally ineffective assistance in failing to object to a deficient child competency hearing and prosecutorial misconduct. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 688.

{¶5} In his first proposed assignment of error, appellant challenges the procedure by which the trial court found C.C. competent to testify. C.C. was under ten

years old when she testified, and Evid.R. 601(A) provides that every person is competent to testify except children under ten years old "who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." The proponent of testimony from a child under ten years old bears the burden of proving that the witness is competent to testify. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43. In determining the competence of a witness under ten years old, the court must consider whether the child is able to (1) receive accurate impressions of fact or observe acts about which the child will testify, (2) recall those impressions or observations, (3) communicate what was observed, (4) understand truth and falsity, and (5) appreciate the responsibility to be truthful. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

{¶6} Appellant argues that the competence hearing for C.C. failed to address her ability to recall and relate accurate impressions or observations of pertinent facts. Although the competence hearing need not involve questions about the alleged sex abuse, the child's ability to recall and relate events from the relevant time period must be established. *State v. Schmidt*, 10th Dist. No. 08AP-348, 2009-Ohio-1548, ¶19. Appellant committed sex offenses against C.C. when she was five and six years old, but the competence hearing involved no questions about whether C.C. could recall and relate accurate impressions or observations of past events within that time frame. Therefore, the hearing failed to establish C.C.'s competence to testify, and the prosecution, the proponent of C.C.'s testimony, did not satisfy its burden. Because appellant did not object to the trial court finding C.C. competent to testify after a

deficient competence hearing, he forfeited all but plain error. See Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights, i.e., affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.* We now examine whether the trial court committed plain error by finding C.C. competent to testify after a deficient competence hearing.

{¶7} A deficiency in a competence hearing may be cured if the witness's subsequent trial testimony established competence. *Schmidt* at ¶23. In *Schmidt*, a competence hearing failed to establish whether a child witness could recall and relate events that occurred within the time frame of sex abuse. *Id.* at ¶22. This court examined whether the child's testimony established her competence and cured the deficient competence hearing. *Id.* at ¶22-26. We noted that the child contradicted herself during her trial testimony and that her testimony differed from her interview at the Center for Child and Family Advocacy ("Advocacy Center"). *Id.* at ¶24-25. Given these "significant" conflicts, the child's trial testimony did not cure the deficient competence hearing and, therefore, did not establish her competence to testify. *Id.* at ¶26-27.

{¶8} Here, there were significant conflicts between C.C.'s testimony and her interview at the Advocacy Center. Specifically, C.C. said at the Advocacy Center that appellant started to sexually abuse her when she was four years old and that cunnilingus was part of the sex abuse. *Kenney* at ¶4. But at trial, C.C. testified that

cunnilingus was not part of the sex abuse and that she did not remember if the sex abuse happened when she was four years old. *Id.* at ¶3. Thus, pursuant to *Schmidt*, C.C.'s trial testimony did not cure the deficient competence hearing and, therefore, did not establish her competence to testify. Consequently, the trial court improperly allowed her testimony. In any event, during the Advocacy Center interview, C.C. unequivocally implicated appellant in the sex offenses, and, in fact, her statements in the interview "bolstered her sex abuse claims." *Kenney* at ¶17. We consider the Advocacy Center interview because it was admitted into evidence, and the issue of C.C.'s competence to testify has no impact on the admissibility of the interview. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶46. Accord *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶52. Given this other compelling incriminating evidence, appellant was not prejudiced by C.C.'s improperly admitted trial testimony. See *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶26 (concluding, under a plain error analysis, that improperly admitted evidence did not affect the outcome of a trial because the prosecution presented other ample evidence to support a defendant's conviction); *Douglas* at ¶44-46 (declining to disturb a defendant's conviction, despite a deficient competence hearing, because a child's testimony was cumulative to other evidence implicating the defendant, including the child's interview at the Advocacy Center).

{¶9} Accordingly, we conclude that the trial court did not commit plain error by finding C.C. competent to testify after a deficient competence hearing. Thus, appellant's first proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise the competency issue.

{¶10} In his second proposed assignment of error, appellant asserts that the prosecutor committed misconduct during opening and closing statements. We disagree.

{¶11} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363; *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶66. The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405. In considering prejudice, we must consider the following factors: (1) the nature of the remarks; (2) whether counsel objected; (3) whether the court gave corrective instructions; and (4) the strength of the evidence against the defendant. *Saleh* at ¶66. Appellant did not raise prosecutorial misconduct at trial and, therefore, forfeited all but plain error. See *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407 (applying the plain error standard to a forfeited prosecutorial misconduct claim). Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in the absence of the improper conduct. *Saleh* at ¶68.

{¶12} Appellant first argues that the prosecutor improperly vouched for C.C.'s credibility during opening statements by claiming that she was not lying. To be sure, prosecutors are not permitted to express their personal beliefs about the credibility of witnesses. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶117. A prosecutor is permitted, however, to make a fair comment on the credibility of witnesses when the

comment is rooted in evidence. *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶15. Here, the prosecutor explained that the jury would hear "details" that support the allegations. (Tr. 89.) And, the prosecutor indicated that C.C. is "very clear about who" abused her. *Id.* Similarly, the prosecutor noted that C.C. is "here to tell you what happened and who did it to her. She said that two years ago. She'll say it again now." (Tr. 90.) Thus, the prosecutor did not improperly vouch for C.C.'s credibility.

{¶13} Next, appellant claims the prosecutor committed misconduct when she evoked the biblical story of David and Goliath during opening and closing statements and compared C.C. to the former and appellant to the latter. Pursuant to *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶106, 115, the prosecution enjoys wide latitude during opening and closing statements, and we conclude that the prosecutor did not exceed that leeway here. For instance, the prosecutor used the story to emphasize appellant's opportunity to abuse C.C. by taking advantage of his position of authority as an adult parental figure and that, in the end, justice will prevail for C.C. because the evidence supports her allegations. Accordingly, the prosecutor did not commit misconduct by using the David and Goliath analogy.

{¶14} Appellant also challenges the prosecutor's closing statement that it was a "tactic" for the defense to concede that C.C. had been abused by someone in her life. (Tr. 618.) Appellant does not establish how that statement was inflammatory, however, and we find nothing improper about it. Instead, the statement about the concession provided background for the prosecutor's argument that C.C.'s allegation of sex abuse "is undeniable." *Id.*

{¶15} Additionally, appellant contends that the prosecutor pandered to the jury's emotions by referring to C.C.'s foster care history, but the prosecutor was highlighting that C.C. had "no biological parents looking out for her" to protect her from harm. (Tr. 90.) Lastly, appellant claims that the prosecutor improperly stated that C.C. was relying on the jurors to believe her when no one else would. The prosecutor did not say that no one believed C.C., however, and, instead, asserted that the jury had reason to believe her because, based on the evidence, appellant "is guilty beyond a reasonable doubt." *Id.*

{¶16} Accordingly, under the plain error standard, we conclude that the prosecutor did not commit misconduct during opening and closing statements. Therefore, appellant's second proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise prosecutorial misconduct.

{¶17} In his third proposed assignment of error, appellant contends that the trial court abused its discretion by excluding evidence that C.C. suffered sex abuse from other perpetrators. We disagree.

{¶18} Ohio's rape shield laws prohibit the introduction of evidence pertaining to a victim's sexual activity except to prove the victim's past sexual activity with the offender or the origin of semen, pregnancy or disease. See R.C. 2907.02(D) (applying to rape prosecutions) and R.C. 2907.05(E) (applying to gross sexual imposition prosecutions). Although those exceptions do not apply here, the rape shield laws cannot be applied to infringe on appellant's constitutional right to present a defense. See *State v. Gardner* (1979), 59 Ohio St.2d 14, 16-17. Accord *State v. N.D.C.*, 10th Dist. No. 06AP-790,

2007-Ohio-5088, ¶21 ("*N.D.C. I*"). To determine whether the rape shield laws are unconstitutional as applied, a court must balance the state's interest in their application against the probative value of the defendant's proposed evidence. *Gardner* at 17. Legitimate state interests advanced by the rape shield laws include the following: guarding the victim's sexual privacy; preventing the victim from undue harassment; and excluding inflammatory, prejudicial, and marginally probative evidence. *N.D.C. I* at ¶23.

{¶19} Appellant objected to the trial court's decision to exclude evidence of C.C.'s prior sex abuse, and, therefore, we consider whether the trial court abused its discretion. See *State v. N.D.C.*, 10th Dist. No. 08AP-217, 2008-Ohio-6120, ¶9 ("*N.D.C. II*") (noting that it is within the sound discretion of the trial court to determine whether to apply rape shield laws). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶20} Despite the rape shield laws, evidence of a child's prior sex abuse may be admissible to dissuade a jury from concluding that a defendant must be guilty of sex offenses being prosecuted, given the extraordinary sexual knowledge of a child victim of tender years. See *N.D.C. I* at ¶35, citing *In re Michael* (1997), 119 Ohio App.3d 112, 121. Through the evidence of a child's prior sex abuse, the defendant attempts to exonerate himself by showing that the child's sexual knowledge was attributable to another person's misconduct. *Id.* There must be " 'clear proof' " that the prior acts occurred, however. *Id.* at ¶34, quoting *State v. Budis* (N.J.1991), 593 A.2d 784, 790.

{¶21} Appellant first challenges the trial court's decision to bar him from eliciting testimony from Linda Reardon, an earlier foster parent, that C.C. accused her older brother, T.C., of gross sexual imposition. But appellant was not prejudiced from this decision because C.C. made the accusation in the Advocacy Center interview, and the prosecutor conceded this fact to the jury during closing argument. Furthermore, during opening statement, appellant's trial counsel was permitted to assert that C.C.'s sexual knowledge stemmed from T.C.'s inappropriate sexual contact with her.

{¶22} Next, appellant argues that the trial court improperly excluded proffered testimony from T.C. that he was forced to watch pornography while living with C.C. in their parents' home. But T.C. did not indicate that C.C. also saw the pornography. Therefore, the proffered testimony had no probative value to appellant's defense, and the trial court did not abuse its discretion by excluding it.

{¶23} Lastly, appellant challenges the trial court's decision to exclude T.C.'s proffered testimony that, while he and C.C. were living with Reardon, C.C. had nightmares about being molested, and when she woke up from one nightmare she told her brother that a "bad man" raped her. (Tr. 452.) Appellant claims that the trial court did not balance the competing parties' interests, as required in *Gardner*, when it excluded the testimony. The court engaged in this analysis, however, by noting that the evidence would have confused the jury and that its prejudicial nature outweighed any relevance. The court's analysis was correct because the proffered testimony did not provide clear proof that someone other than appellant raped her. For instance, appellant attempted to draw an inference that C.C.'s uncle, Timothy Earles, raped her

because that man had raped T.C., but C.C. did not mention Earles in her statement to T.C. and, instead, made a vague reference about a "bad man." The record also weighs against appellant's claim that C.C.'s sexual knowledge about rape is not attributable to him. C.C. actually bled and felt pain from appellant raping her. *Kenney* at ¶17. Likewise, appellant engaged in furtive conduct reflective of a consciousness of guilt by telling C.C. to keep the abuse a secret. *Id.* Thus, the trial court did not abuse its discretion by excluding proffered testimony about C.C.'s nightmares and statement to T.C. about being raped by a "bad man."

{¶24} Consequently, appellant's third proposed assignment of error is not well-taken. Therefore, appellate counsel was not ineffective for failing to challenge the trial court's decision to exclude evidence that C.C. suffered sex abuse from other perpetrators.

{¶25} In his fourth proposed assignment of error, appellant argues that his trial counsel was ineffective for not asserting prosecutorial misconduct. But we have found no prosecutorial misconduct, and, therefore, trial counsel was not ineffective for failing to raise the issue. *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶72 (noting that counsel is not ineffective for failing to raise non-meritorious claims).

{¶26} Next, appellant argues that his trial counsel was ineffective for not objecting to the trial court allowing C.C. to testify after a deficient competence hearing. But we have concluded that appellant was not prejudiced by this factor because C.C.'s trial testimony was cumulative of other evidence. Thus, trial counsel was not ineffective for failing to raise the competency issue. See *Strickland* at 687, 104 S.Ct. at 2064

(stating that a defendant claiming ineffective assistance of counsel must show that his defense was prejudiced). Accordingly, appellant's fourth proposed assignment of error is not well-taken, and appellate counsel was not ineffective for failing to raise the claims of ineffective assistance of trial counsel that appellant now asserts.

{¶27} In conclusion, because appellant's proposed assignments of error are not well-taken, he has failed to meet his burden to demonstrate that there is a genuine issue as to whether he was deprived the effective assistance of appellate counsel. Consequently, we deny appellant's App.R. 26(B) application to reopen.

Application to reopen denied.

KLATT and McGRATH, JJ., concur.
