[Cite as *State v. Robledo*, 2020-Ohio-5342.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JOSE ROBLEDO Defendant-Appellant	JUDGES: Hon. John W. Wise, P.J. Hon. Craig R. Baldwin, J. Hon. Earle E. Wise, Jr., J. Case No. 2020 CA 00003 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2019 CR 1741
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 6, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY KATHLEEN O. TATARSKY ASSISTANT PROSECUTOR 110 Central Plaza South, Suite 510 Canton, Ohio 44702-1413	ANTHONY KOUKOUTAS 116 Cleveland Avenue, NW Suite 808 Canton, Ohio 44702

Wise, John, P. J.

{¶1} Appellant Jose Robledo appeals the judgment entered by the Stark County Court of Common Pleas convicting him of violating R.C. 2907.02(A)(1)(b) rape of a child under the age of thirteen. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 22, 2019, Appellant was indicted on one count of rape of a child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b), a felony in the first degree. This charge stemmed from the sexual conduct engaged in by Appellant with a female child who was his de facto stepdaughter, JL, at their home.

{¶3} On November 1, 2019, Appellant plead not guilty at his arraignment. As Appellant was originally a citizen of Mexico, an interpreter certified to interpret in the Spanish language was provided at every stage in the court proceedings.

{¶4} On November 19, 2019, Appellant's jury trial began.

{¶5} At trial, ML, mother of twelve-year-old JL, testified she took JL to the Pediatric Center in Canton, Ohio to be treated for a sore throat and a cough. While at the appointment, JL took a pregnancy test which came back as positive for pregnancy.

{¶6} JL testified that Appellant, her forty-six-year-old "stepfather," had sex with her while her mother was in the hospital giving birth to her brother in June of 2019. She further testified that his private parts touched her private parts both on the outside and on the inside. JL disclosed that Appellant had been engaging in this behavior for the past three years.

{¶7} Detective Mongold testified that he was contacted by Stark County Job & Family Services. He was advised that ML was at Children's Network. ML disclosed that her twelve-year-old daughter was pregnant, and Appellant was the father. A warrant was issued for the arrest of Appellant on a charge of rape. Detective Mongold spoke to family members of Appellant who advised the Detective that Appellant was able to speak English very well. Before Appellant's interview, Appellant was given a *Miranda* warning and he agreed to speak with Detective Mongold. During Appellant's interview, he confessed to having sex with JL but did not believe it was rape because it was consensual.

{¶8} At the close of deliberations, the jury returned a verdict of guilty to the charge of rape.

{¶9} The trial court sentenced Robledo to the mandatory sentence of ten years to life in prison. He was declared a Tier III sex offender.

ASSIGNMENTS OF ERROR

{¶10} On January 2, 2020, Appellant filed a notice of appeal. He herein raises the following four Assignments of Error:

{¶11} "I. APPELLANT'S CONVICTIONS WERE AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} "II. THE COURT ERRED BY ADMITTING HEARSAY TESTIMONY AND BY PERMITTING THE STATE TO REFER TO SAID TESTIMONY IN CLOSING ARGUMENT AS TRUTH OF THE MATTER ASSERTED.

{¶13} "III. THE COURT ERRED TO THE PREJUDICE OF APPELLANT'S SUBSTANTIAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW BY ALLOWING WITNESS TESTIMONY INDICATING THAT HE WAS INCARCERATED.

{¶14} "IV. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶15} In Appellant's First Assignment of Error, Appellant argues the jury's guilty verdict is against the manifest weight of the evidence and is not supported by sufficient evidence. We disagree.

{¶16} Sufficiency of the evidence and manifest weight of the evidence are separate and distinct legal standards. *State v. Thompkins*, 78 Ohio St.3d 380. Essentially, sufficiency is a test of adequacy. *Id*. A sufficiency of the evidence standard requires the appellate court to examine the evidence admitted at trial, in the light most favorable to the prosecution, to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259.

{¶17} In contrast to the sufficiency of the evidence analysis, when reviewing a weight of the evidence argument, the appellate court reviews the entire record, weighing the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts of evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380.

{¶18} Under a weight of the evidence argument, the appellate court will consider the same evidence as when analyzing the Appellant's sufficiency of evidence argument. Appellant argues the jury clearly lost its way as their conviction of Appellant based on the total weight of the evidence was a manifest miscarriage of justice.

{¶19} The State indicted Appellant on one count of rape of a child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b).

{¶20} R.C. 2907.02(A)(1) states in pertinent part:

> (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.

{¶21} "Sexual conduct" is defined in R.C. 2907.01 as:

> "Sexual conduct" means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons 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 opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

{¶22} At trial the state produced evidence that Appellant confessed to Detective Mongold that he had sexual conduct with JL. JL testified she was pregnant, and it is

undisputed that she became pregnant through vaginal penetration. JL testified that Appellant had sex with her around the time her brother was born, when she was twelve years old. We find the State presented sufficient evidence, if believed by a jury, that Appellant engaged in sexual conduct with JL when JL was under thirteen years old. Our review of the entire record fails to persuade us that the jury lost its way and created a manifest miscarriage of justice. Appellant was not convicted against the manifest weight of the evidence.

{¶23} Appellant's First Assignment of Error is overruled.

II.

{¶24} In Appellant's Second Assignment of Error, Appellant argues the trial court erred by admitting hearsay testimony and by permitting the State to refer to that testimony in closing argument as truth of the matter asserted. We disagree.

a. Factual Background

{¶25} At trial, the State called the victim's mother, ML. The following exchange took place:

STATE: Have you spoken to Jose since these allegations came forward?

ML: Yes, I have been in contact with him.

STATE: And has he spoken to you specifically with regard to these allegations?

ML: No, I haven't talked to him about this. We talk about other things, things about the house.

…

STATE: Again, you remember having a meeting with myself and Maricela Lopez?

ML: Yes.

STATE: And in our meeting, did you discuss with us things that Jose had spoken with you about?

ML: What do you mean, the things that he tells me when he calls me from jail, or the things that he said when he was with me?

STATE: The things—the first, when he called you from jail.

ML: Well, we always don't talk about this thing. We talk about other things, household things. The only thing that he mentioned is that there – something happened between them, but he really doesn't give me any details.

TR. 1, pp. 133-139

{¶26} During Appellant's cross-examination the following exchange took place:

DEFENSE: So, it's fair to say that you know, as you sit today, the only thing pointing to the truth of these allegations is your daughter's statement?

ML: Yes.

Tr. 1, pg. 143.

{¶27} After ML's testimony, attorneys for the State and Appellant approached the bench, where the State indicated that ML had testified dishonestly and that it intended to call Maricela Ortez Gomes, who was an interpreter present when the State interviewed Ms. Lopez prior to trial. Appellant objected to the witness being called, but the trial court overruled the objection.

{¶28} Gomes testified that ML had told the prosecutor that Appellant stated his sexual conduct with JL did not take place as long as it was reported – it had only started when ML was having the baby, not two or three years ago. Appellant also told ML that he didn't think it was rape because the sexual conduct was not forced.

{¶29} Appellant objected to this testimony as hearsay. The trial court overruled the hearsay objection, noting the translation of the interpreter is not hearsay.

b. Application of Evid.R. 607(A)

{¶30} Appellant argues the trial court should have analyzed the admissibility of Gomes testimony under Evid.R. 607(A) as a prior inconsistent statement to impeach the witness.

{¶31} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake City*, 58 Ohio St.3d 269, 271 (1991). The appellate court must limit its review of the trial court's admission or exclusion of evidence to whether the trial court abused its discretion. *Id*. The abuse of discretion standard is more than an error of judgment; it implies the court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶32} Generally, an interpreter is merely a language conduit and interpreter's translation is not inadmissible hearsay. *State v. Rivera-Carrillo*, 12th Dist. Butler No. CA2001-03-054, 2002-Ohio-1013. However, prior inconsistent statements are hearsay, admissible only for impeachment purposes. *State v. McKelton,* 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶128.

{¶33} Evid.R. 607(A) provides:

> **(A) Who may impeach.** The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage.

{¶34} "Surprise" occurs when a witness's testimony materially differs from a prior statement and counsel had no reason to believe that the witness's testimony would change. *State v. Fox*, 5th Dist. Knox No. 17 CA 000012, 2018-Ohio-1995, ¶44.

{¶35} "Affirmative damage" is met if, a party's own witness testifies in a manner that contradicts, denies, or harm's that party's trial position. *Id*. at ¶45.

{¶36} In *State v. Fox*, the witness, A.F., told police the defendant hit the victim which is why the victim's tooth was loose. *Id*. at ¶10. However, at trial, A.F. changed her testimony saying the defendant did not hit the victim and bust the victim's lip. *Id*. at ¶41. This Court found it was reasonable for the trial court to find this testimony affirmatively damaged the state's case. *Id*. at ¶46.

{¶37} In the case *sub judice*, the trial court admitted Gomes's testimony, ruling it was not hearsay. However, the State offers the translation as ML's prior inconsistent statement making the testimony hearsay, admissible for impeachment purposes only. Therefore, we must analyze who may admit the evidence under Evid.R. 607(A). Appellant concedes the State was surprised by ML's testimony. The State proved affirmative damages through ML changing her testimony not to include the details she and Appellant discussed pertaining to the rape allegations and testifying that the only information she has pointing to the truth of the allegations is her daughter's testimony. As such, the trial

court did not abuse its discretion by allowing the prosecutor to impeach ML with her prior inconsistent statement.

c. Gomes Statement as Evidence of Appellant's Guilt

{¶38} Finally, Appellant argues that the trial court erred by allowing to refer to Gomes testimony as substantive evidence and by not instructing the jury that Gomes testimony should only be considered for the purpose of impeaching ML's testimony.

{¶39} " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ohio Evid.R. 801. "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Ohio Evid.R. R. 802.

{¶40} Again, prior inconsistent statements are generally considered hearsay evidence and are admissible only for the purpose of impeachment. *McKelton* at ¶128. Therefore, unless an exception to the hearsay exception applies, a party may not interrogate his own witness about a prior inconsistent statement as substantive evidence. *Id*. "Further, the prosecutor must not refer to such statements for their truth during closing argument." *Id*.

{¶41} During closing argument, the prosecutor did cite Gomes's prior statement as substantive evidence of Appellant's guilt. But because Appellant did not request a limiting instruction or otherwise object, plain-error review applies. *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶91.

{¶42} Plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91. Plain Error will only be invoked if, but for the error, the outcome of the trial would have been different. *Id*.

{¶43} In *McKelton*, the prosecutor also referred to prior inconsistent statements of the defendant's confession as substantive evidence without objection or request for limiting instructions from the defendant. *McKelton* at ¶129. The Supreme Court of Ohio found that since other witnesses also testified to the confession as well, the error was not outcome determinative. *Id*. at ¶130. As such, the Supreme Court found no plain error existed. *Id*.

{¶44} In this case, the prosecutor cited Ms. Gomes's testimony on what ML told the prosecutor what Appellant said to her, that "he didn't force anyone" and "it only happened once." Tr. 2, pp. 67-68. However, Appellant also told Detective Mongold that it only happened once, and he did not force JL into sexual conduct with him. Similar to *McKelton*, Appellant has not established that this testimony and reference are outcome determinative as Appellant made the same remarks to Detective Mongold who also testified at trial.

{¶45} Appellant's Second Assignment of Error is overruled.

III.

{¶46} In Appellant's Third Assignment of Error, he argues the trial court erred by allowing witness testimony indicating that Appellant was incarcerated. We disagree.

{¶47} Crim.R. 52(B) states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Again, plain

error must be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *Long* at 91. Plain error will only be invoked if, but for the error, the outcome of the trial would have been different. *Id*.

{¶48} Appellant argues testimony referencing Appellant's pretrial incarceration suggested to the jury he must be guilty because he had already been incarcerated for the offenses eroding his presumption of innocence. Appellant compares this isolated reference to his pretrial incarceration to *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48, L.Ed.2d 126 (1976), where the United States Supreme Court determined that a juror's judgment might be affected by a defendant's appearance in prison clothing. The defendant in prison clothing is a constant reminder that the accused is in custody, and wearing prison clothing furthers no essential state policy. Appellant further argues that words themselves are much more than a mere reminder, but a distinct acknowledgement that Appellant was incarcerated prior to his trial.

{¶49} In *State v. Gaona*, 5th Dist. Licking No. 11 CA 61, 2012-Ohio-3622, the prosecutor's cross-examination of a witness, who talked to the defendant while the two men were held in the same jail, made reference to the deputies in his testimony. This Court held that a "single isolated comment about the presence of deputies falls well short of the type of "constant reminder" of a defendant's custodial status as discussed in *Estelle*." *Id*. at ¶38.

{¶50} In this case, a witness and the prosecutor made reference to Appellant's pretrial incarceration. During the testimony of ML, when asked what Appellant spoke to her about, she inquired, "What do you mean, the things that he tells me when he calls from jail, or the things that he said when he was with me." Tr. 1, pg. 138. The prosecutor

responded, "The things – the first, when he called you from jail." Tr. 1, pg. 138. This exchange mentioning Appellant's calls from jail was an isolated exchange and also falls well short of the type of "constant reminder" of a defendant's custodial status as discussed in *Estelle*. Because we have found no evidence of prejudice to Appellant's substantial right to a fair trial and due process of law, it follows that the trial court did not commit plain error.

{¶51} Appellant's Third Assignment of Error is overruled.

IV.

{¶52} In Appellant's Fourth Assignment of Error, he argues he received ineffective assistance of counsel because trial counsel did not object to the state's hearsay reference during closing argument and by failing to object to witness testimony that indicated Appellant was incarcerated. We disagree.

{¶53} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id*. Trial counsel is entitled to a strong

presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶54} Appellant raises the following areas of alleged ineffective assistance: (1) counsel was ineffective due to not objecting to the state's reference to hearsay evidence during closing arguments and (2) counsel was ineffective due to failing to object to witness testimony that indicated Appellant was incarcerated.

{¶55} We note misconduct of a prosecutor at trial will not be considered grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987) 33 Ohio St.3d 19, 24, 514 N.E.2d 394. In regards to counsel not objecting to the state's reference to hearsay evidence during closing arguments, we found in Appellant's Second Assignment of Error the hearsay evidence referenced by prosecutor during closing arguments was not outcome determinative, as Detective Mongold testified to the same comments made by Appellant. Appellant has not shown that he was actually prejudiced by the statements. In regards to counsel failing to object to witness testimony that indicated Appellant was incarcerated, we found in Appellant's Third Assignment of Error the witness and prosecutor's reference to Appellant's pretrial incarceration fell well short of the "constant reminder" of defendant's incarceration discussed in *Estelle*. We found the defendant was not prejudiced by this reference. Upon review of the complete record, we are unpersuaded that trial counsel failed to provide reasonable representation on the above two points.

{¶56} Appellant's Fourth Assignment of Error is overruled.

{¶57} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is hereby affirmed.

By: Wise, John, P. J.

Baldwin, J., and

Wise, Earle, J., concur.

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