[Cite as *State v. Biggs*, 2009-Ohio-6885.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JAY LEWIS BIGGS Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 2008CA00285 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CR0653
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
PAUL SCARSELLA Stark County Special Prosecutor Ohio Attorney General's Office 30 East Broad Street 14th Floor Columbus, OH 43215 JOHN D. FERRERO Prosecuting Attorney 110 Central Plaza South Suite 510 Canton, OH 44702	ANTHONY T. KAPLANIS 808 Courtyard Centre 116 Cleveland Avenue, NW Canton, OH 44702

Farmer, P.J.

{¶1} On May 28, 2008, the Stark County Grand Jury indicted appellant, Jay Lewis Biggs, on two counts of aggravated murder with death penalty specifications in violation of R.C. 2903.01, two counts of murder in violation of R.C. 2903.02, one count of rape in violation of R.C. 2907.02, and one count of endangering children in violation of R.C. 2919.22. Said charges arose from the death of appellant's four month old daughter.

{¶2} A jury trial commenced on October 1, 2008. The jury found appellant guilty as charged, and recommended that appellant serve a term of life imprisonment without the possibility of parole. By judgment entry filed December 5, 2008, the trial court sentenced appellant to life in prison without parole.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I

{¶5} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. Specifically, appellant claims the evidence was deficient because there were no actual witnesses to the event and there were conflicting findings by the experts. We disagree.

{¶6} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶7} Appellant was convicted of two counts of aggravated murder with death penalty specifications in violation of R.C. 2903.01(B) and (C), two counts of murder in violation of R.C. 2903.02(B), one count of rape in violation of R.C. 2907.02(A)(1)(b), and one count of endangering children in violation of R.C. 2919.22(B)(1) and (E)(2)(d) which state the following, respectively:

{¶8} "[R.C. 2903.01(B)] No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

{¶9} "[R.C. 2903.01(C)] No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

{¶10} "[R.C. 2903.02(B)] No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

{¶11} "[R.C. 2907.02(A)(1)(b)] 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:

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

{¶13} "[R.C. 2919.22(B)] No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

{¶14} "(1) Abuse the child;

{¶15} "[R.C. 2919.22(E)(2)(d)] If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:

{¶16} "(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree."

{¶17} Despite the seriousness of a death penalty case, the matter came down to the following issues: 1) the cause of the infant's death; 2) whether the infant had been sexually abused (vaginal penetration by another); and 3) whether appellant had committed any offenses.

{¶18} In order to understand the evidence, one must review the state's theory in prosecuting the case:

{¶19} "He [appellant] took the baby to bed that night, placed her in her bed, raped her, and when she cried out in pain, he put his hand over her mouth to make her stop, and he killed her. That is what the evidence over the past week has shown you. That is what happened that night at that house in Massillon. The Defendant caused the death of his four-month-old daughter while he was raping her." Vol. XI T. at 201.

{¶20} With this theory of the case as argued to the triers of fact in mind, we will first review the evidence relative to the vaginal penetration of the infant by another. All of the alleged actions by appellant occurred on the night of June 5 to 6, 2006.

{¶21} When the infant was examined at the Stark County Morgue by coroner P.S.S. Murthy, M.D., he first made a visual examination. Vol. IX T. at 137. When he examined the infant's genital area, Dr. Murthy observed blood in the area. Id. at 150. Dr. Murthy immediately stopped the examination and requested the assistance of Anthony Bertin, D.O., a urologist and a deputy coroner with the Stark County Morgue. Vol. IX T. at 150; Vol. VIII T. at 169. Dr. Bertin had worked on previous rape investigations for the corner's office. Vol. VIII T. at 170-171, 198. He testified that upon examination of the infant, he observed "blood coming from the vaginal opening" and "clotted blood within the vaginal vault." Id. at 176. Dr. Bertin testified the vaginal tissue looked "purplish in hue" as in a "bruised" color as opposed to the usual redder color. Id. at 183. All of these observations were made prior to the use of a nasal speculum for the internal investigation. Id. at 190.

{¶22} The internal examination revealed the infant's "hymenal area is torn apart. It's wide open." Id. at 198. The speculum was inserted into the infant "very easily" which was not natural, and clotting and fluid blood were observed in the vaginal vault where the hymen would have been. Id. at 196-200. Dr. Bertin also observed two long abrasions inside the vaginal vault which was the source of the bleeding. Id. at 202-203.

{¶23} Dr. Bertin opined the physical findings were the result of "some blunt forced trauma" caused by something penetrating the vaginal area (an animate or inanimate object). Id. at 200. When asked if the injuries could have been the "result of anything other than insertion of something into that area," Dr. Bertin replied in the negative. Id. at 201. Dr. Bertin opined the torn hymen, blood, clotting, and abrasions were caused by "some object is forced up into the area at a low velocity." Id. at 204.

{¶24} Dr. Bertin further testified there were no visible signs of infection, and the observed injuries would not have come from bathing or wiping the genital area. Id. at 239-240. Based upon the blood and the appearance of the tissue, Dr. Bertin opined the injuries had been caused within a twenty-four hour time frame. Id. at 227, 241. The infant had been deceased for approximately twelve hours at the time of the examination. Id. at 236.

{¶25} Dr. Murthy observed Dr. Bertin's examination. Vol. IX T. at 152-153. Dr. Murthy opined the vaginal injuries to the infant occurred prior to her death. Id. at 213.

{¶26} Lisa Kohler, M.D., Summit County Chief Medical Examiner and a board certified forensic pathologist, examined multiple photographs, microscopic slides, and a portion of the investigation reports regarding the infant's autopsy. XI T. at 160. Dr. Kohler testified the vaginal redness in the photographs was not consistent with infection,

occurred prior to death, and the speculum used by Dr. Bertin did not cause the injuries. Id. at 162, 164-165.

{¶27} Appellant's expert, Werner Spitz, M.D., a forensic pathologist, opined that the speculum caused the redness and injuries to the vaginal vault. Id. at 87, 90-91. He also opined the observed redness was caused by infection and not trauma, and there was no injury to the genital area. Id. at 83, 110-113.

{¶28} The triers of fact were faced with two different opinions: Drs. Bertin and Murthy versus Dr. Spitz. Clearly the jury chose to believe the physicians who actually observed the infant and performed the physical examinations as opposed to believing the physician who only reviewed reports, photographs, and microscopic slides. Id. at 22, 35. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 1997-Ohio-260.

{¶29} Based upon the jurors' prerogative to believe or disbelieve the testimony of the witnesses, they chose to believe Drs. Bertin, Murthy, and Kohler.

{¶30} Upon review, we find sufficient credible evidence beyond a reasonable doubt to support the finding that the infant was forcibly vaginally penetrated and therefore raped prior to her death.

{¶31} The second contested issue was the cause of the infant's death. The two theories argued were death by asphyxiation at the hands of another (smothering) or by

natural causes i.e., rolling on side and suffocating, SIDS, obstructed airway, unknown causes. Vol. IX T. at 162; Vol. XI T. at 79, 81.

{¶32} Dr. Murthy opined the cause of death was by asphyxia at the hands of another because of his personal observations during the autopsy. Vol. IX T. at 162. Dr. Murthy noticed pallor or blanching on the infant's face that indicated "some type of pressure" was applied on the infant's nose, lips, and chin prior to death. Id. at 141. The death occurred less than one to one and one-half hours after eating based upon the infant's stomach contents. Id. at 158-159.

{¶33} At the scene, appellant told the sanitation workers who came in to help and the police officers that a blanket had wound itself "tightly three times around the baby's neck." Vol. VI T. at 57, 118. This method of death was completely discounted by Dr. Murthy. Dr. Murthy opined if the cause of death was strangulation by a blanket, there would have been ligature marks on the infant's neck which were not present. Vol. IX at 168. Contra to appellant's theory, it is undisputed that the infant could not roll over by herself. Vol. VII T. at 32, 253. Dr. Kohler opined the pallor around the infant's face was an indication of pressure placed upon her face. Vol. XI T. at 160-161.

{¶34} Both the opinions of Drs. Murthy and Kohler stand against Dr. Spitz's opinion of no proof of death at the hands of another. Dr. Spitz's opinion was based upon signs of vomit on the blanket and the infant's face, and the fact that it was apparent that livor mortis had set in on the left side of the infant's body. Vol. XI at 50-51, 142-143. Dr. Spitz could not say that the infant's death was not as a result of the hands of person, but stated he would have expected different markings on the infant i.e., finger markings. Id. at 62.

{¶35} As with the issue of sexual assault, the triers of fact had to choose between the opinions of Drs. Murthy and Kohler versus Dr. Spitz's opinion. Dr. Murthy's opinion was made after actual observation during the autopsy of the pallor on the infant's face. It is reasonable to assume that the jury found Dr. Murthy's observations to be more credible.

{¶36} Upon review, we find sufficient credible evidence beyond a reasonable doubt to support the finding of death by asphyxia at the hands of another.

{¶37} The third issue is whether it was appellant's hands that sexually assaulted and asphyxiated the infant. As noted supra, the state's theory was that appellant smothered the infant to cover up her cries as a result of his raping her. Again, time of death was set at one to one and one-half hours after the infant had eaten. Both appellant and his wife, Diane Biggs, testified the infant was fed between 7:00 and 8:00 p.m., and was put to bed by appellant around 9:00 p.m. Vol. X T. at 16-18, 20. It is undisputed that the only person who saw the infant from the time she was carried upstairs by appellant was appellant. Mrs. Biggs never checked on the infant during the night or in the morning. Vol. VII T. at 131. Appellant was the only person in the infant's room during the night and in the early morning. Id. at 126, 131, 137-138. Although there was another person in the house, Patrick Smrekar, he was never upstairs. Id. at 72. There was the hint of another on the property, Amber Shue. Ms. Shue did not have a key to the house, was staying with a friend overnight on the evening in question, and was not seen by anyone at the property after appellant and his wife retired for the night. Vol. VII T. at 17, 26, 71-72. In fact, Ms. Shue was at the hospital with a toothache at 10:27 p.m. Id. at 27, 46-47.

{¶38} Appellant claimed the bedroom window was open all night and as a result of this claim, the police investigated for signs of illegal entry but found nothing. Vol. VI T. at 115-116, 225.

{¶39} The evidence ruled out the possibility of anyone other than appellant. Appellant had exclusive access to the infant during the hours when the rape and death occurred. The witnesses at the scene at the time of the report testified appellant was unusually calm while Mrs. Biggs was hysterical. Vol. VI T. at 39, 60, 70, 79, 87. Appellant was described as "pretty calm" and "a little bit nervous." Id. at 87, 110.

{¶40} Immediately after the investigation began, appellant's actions became questionable. Appellant called the coroner's office and said he might not be available to make funeral arrangements because he might be in jail, and told people the police think his DNA was in the infant's body. Vol. IX T. at 111-112; Vol. VIII T. at 23, 49. Appellant told his wife "not to say anything I didn't know," and told her "[i]f I went and turned against him, then he'd turn against me." Vol. VII T. at 148, 161. Appellant and his wife moved out of Stark County to his parents' home and then moved again to Columbus.

{¶41} Appellant argues the evidence is all circumstantial. We note "circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey,* 64 Ohio St.3d 353, 363, 1992-Ohio-44. Circumstantial evidence is to be given the same weight and deference as direct evidence. *Jenks,* supra.

{¶42} Upon review, we find sufficient credible evidence beyond a reasonable doubt to support the finding that appellant was the only one with access and opportunity

to cause the alleged crimes. Given the evidence in the record, we find the jury's verdicts are substantiated by the evidence beyond a reasonable doubt.

{¶43} The sole assignment of error is denied.

{¶44} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Wise, J. concur.

s/ Sheila G. Farmer_____

s/ W. Scott Gwin_____

_s/ John W. Wise_____

JUDGES

SGF/sg 1207

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAY LEWIS BIGGS	:	
Defendant-Appellant	:	CASE NO. 2008CA00285

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer_____

s/ W. Scott Gwin_____

_s/ John W. Wise_____

JUDGES