[Cite as *State v. Knapp*, 2010-Ohio-5328.]

STATE OF OHIO COUNTY OF SUMMIT	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Appellee v. JASON B. KNAPP Appellant		C. A. No. 25063 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 12 3954

DECISION AND JOURNAL ENTRY

Dated: November 3, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Jason Knapp, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On November 28, 2008, Kira M.'s three children spent the night at the home of Kira's sister, Mindy Melton, and Melton's husband, Calvin Alexander IV. Melton and Alexander had eighteen people, eight of whom were under the age of thirteen, in their home at various points that night. Three individuals of particular interest were Kevin Miller, Nick Korach, and Knapp. Knapp had been staying with Melton and Alexander for about two years and had his own bedroom on the second floor. Miller, a friend of Melton and Alexander, sometimes stayed in Knapp's room and did so on the night in question. Korach, a neighbor from down the street, helped Alexander and Knapp deliver newspapers for the Akron Beacon Journal and frequently visited the house, which consisted of two floors and an attic. Most of the children

who stayed at the house on November 28th slept in the second-floor bedroom directly across from Knapp's bedroom.

{¶3} Kira's youngest daughter, A.M., was two years old when she spent the night at Melton and Alexander's house. Kira and Melton checked A.M. and the other sleeping children sometime between 11:00 p.m. and 12:00 a.m. Kira then left the house for the night and returned the next morning. When Kira changed A.M.'s diaper the next morning, she discovered a large amount of blood and extensive injuries to A.M.'s genitals. Kira immediately took A.M. to the emergency room where doctors had to repair lacerations and muscular tears, extending from A.M.'s hymenal tissue "through the perineal body to less than three centimeters from the anus." Doctors also noted bruising on the right side of A.M.'s head, surrounded by a ten-centimeter area of hair loss.

{¶4} Kira and Melton phoned the police after taking A.M. to the hospital. Melton and others suspected that Knapp was responsible for A.M.'s injuries because, among other things, he had spent time alone on the second floor of the house that night while most of the other adults were on the first floor. The police later found a blood-soaked sheet in Knapp's bedroom closet and obtained a confession from Knapp.

{¶5} On December 12, 2008, a grand jury indicted Knapp on the following counts: (1) rape, in violation of R.C. 2907.02(A)(1)(b), and an attendant sexually violent predator specification; (2) kidnapping, in violation of R.C. 2905.01(A)(4), and an attendant sexual motivation specification; (3) felonious assault, in violation of R.C. 2903.11(A)(1), and an attendant sexual motivation specification; (4) endangering children, in violation of R.C. 2919.22(B)(2); and (5) gross sexual imposition, in violation of R.C. 2907.05(A)(4). Knapp entered a plea of not guilty by reason of insanity. On February 11, 2009, Knapp filed a motion to

suppress any statements that he made to the police. The court held a hearing on June 3, 2009 and later denied the motion. The matter proceeded to a jury trial, and the jury found Knapp guilty on all counts, including the two sexual motivation specifications. Subsequently, the trial court conducted a hearing on Knapp's sexually violent predator specification. The psychologist who testified at the hearing opined that Knapp possessed fifteen of the seventeen indicators for recidivism and that Knapp was not amenable to treatment. Based on the evidence presented, the trial court found Knapp to be a sexually violent predator. The court merged Knapp's gross sexual imposition count with his rape count and sentenced Knapp to life in prison without the possibility of parole. The court also classified Knapp as a Tier III sexual offender/child-victim offender.

{¶6} Knapp now appeals from his convictions and raises two assignments of error for our review.

II

Assignment of Error Number One

> "APPELLANT'S CONFESSION WAS MADE INVOLUNTARY (sic) AND APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶7} In his first assignment of error, Knapp argues that the police violated his due process rights by extracting an involuntary confession from him.

{¶8} Initially, we note that Knapp has not framed his first assignment of error or the argument contained therein in terms of a redressable error. "The purpose of an assignment of error is to focus the attention of an appellate court upon a potential error that occurred at the trial level." *State v. Brown*, 9th Dist. No. 25077, 2010-Ohio-4453, at ¶9. While this Court addresses arguments that pertain to alleged deprivations of a person's substantive rights, it does so within

the context of specific, procedural frameworks. See id. Knapp's sole argument is that his confession was coerced and, therefore, was taken in violation of his Fifth Amendment rights. Knapp does not point this Court to any procedural error that may or may not have caused this alleged constitutional violation to occur or to remain unresolved. Because this Court requires a procedural framework with which to address Knapp's assignment of error, this Court looks to the substance of Knapp's argument to identify that framework. Knapp's argument is that his confession should not have been admitted. Arguments regarding the admissibility of allegedly coerced confessions are suppression-based arguments. See *State v. Patterson*, 9th Dist. No. 09CA0014-M, 2009-Ohio-6953, at ¶7 (construing a motion to suppress as the proper vehicle "to challenge evidence obtained in violation of one's Fourth, Fifth, or Sixth Amendment rights"). See, also, *State v. Feaster*, 9th Dist. No. 24367, 2009-Ohio-2558, at ¶8-21. As such, we construe Knapp's argument as an appeal from the denial of the motion to suppress he filed in the court below. See *State v. Porter*, 9th Dist. No. 24996, 2010-Ohio-3980, at ¶19-20 (construing defendant's argument that the admission of photo array violated his due process rights as one that had to be preserved through a motion to suppress).

{¶9} The Ohio Supreme Court has held that:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶10} Knapp filed a motion to suppress his oral statements on the basis that they were coerced and taken in the absence of a valid waiver of his *Miranda* rights. The trial court held a hearing on Knapp's motion. On June 29, 2009, the court issued a journal entry. The entry provides that "[f]or the reasons stated on the record [at the suppression hearing], the Court denies the motion." Knapp did not request a transcript of the suppression hearing, so it is not a part of the record on appeal. "When portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has 'no choice but to presume the validity of the [trial] court's proceedings, and affirm.'" *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "Because the transcript of the suppression hearing is necessary for a determination of [Knapp's first] assignment of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court." *State v. Price*, 9th Dist. No. 07CA0003-M, 2008-Ohio-2252, at ¶53. Knapp's first assignment of error is overruled.

<u>Assignment of Error Number Two</u>

> "THE VERDICTS IN THIS CASE WERE BASED ON INSUFFICIENT EVIDENCE AND WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AS A RESULT, APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶11} In his second assignment of error, Knapp argues that his convictions are based on insufficient evidence and against the manifest weight of the evidence. We address each argument separately.

Sufficiency

{¶12} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶13} R.C. 2907.02(A)(1)(b) provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender *** when *** [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." The phrase "sexual conduct" includes the unprivileged "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." R.C. 2907.01(A). The foregoing offense constitutes rape. R.C. 2907.02(B).

{¶14} R.C. 2905.01(A)(4) provides that:

> "No person, *** in the case of a victim under the age of thirteen ***, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person *** [t]o engage in sexual activity *** with the victim against the victim's will[.]"

"Sexual activity" includes sexual conduct, as defined above. R.C. 2907.01(C). Whoever commits the foregoing offense is guilty of kidnapping. R.C. 2905.01(C)(1).

{¶15} R.C. 2903.11(A)(1) provides that "[n]o person shall knowingly *** [c]ause serious physical harm to another[.]" "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). The foregoing offense constitutes felonious assault. R.C. 2903.11(D)(1)(a).

{¶16} Finally, R.C. 2919.22(B)(2) provides that "[n]o person shall do any of the following to a child under eighteen years of age[:] *** [t]orture or cruelly abuse the child." Such conduct amounts to child endangerment. R.C. 2919.22(E)(1).

{¶17} A.M. was two years old when she was sexually assaulted and sustained grievous injuries. Dr. Maria Ramundo examined A.M. at the emergency room. Dr. Ramundo testified that A.M. was bruised on the right side of her head and had a ten-centimeter area of her scalp exposed due to hair loss. A.M. also had lacerations from her hymen "through the perineal body to less than three centimeters from the anus." Dr. Richard Steiner, a pediatrician and expert in the area of child abuse, specified that A.M. had tears in the muscular tissue of her pelvic floor and anal canal. A.M.'s injuries were so extensive that she had to undergo surgery to have them repaired. According to Dr. Steiner, A.M.'s injuries were the result of blunt force penetrating trauma and could have stemmed from any blunt object, including a finger. Dr. Steiner estimated that A.M. sustained the foregoing injuries less than eighteen hours before her examination at the hospital. A.M.'s examination began at approximately 12:46 p.m. on November 29, 2008.

{¶18} Kira and Melton both testified that A.M. was sleeping soundly along with several other children in an upstairs bedroom when they checked on her between 11:00 p.m. and 12:00 a.m. on the night of November 28, 2008. Kira then left for the night and did not discover A.M.'s

injuries until she returned the next morning around 11:00 a.m. Accordingly, a rational trier of fact could have found that, at some point between 12:00 a.m. and 11:00 a.m., someone at Melton and Alexander's house caused A.M., a child less than thirteen years of age, serious physical harm by virtue of engaging in sexual conduct with her.

{¶19} Alexander, Melton, and Miller all testified that they were either playing or watching a videogame on the first floor of the house between 12:00 a.m. and 1:30 a.m. on the morning of November 29, 2008. Melton and Alexander's youngest son was with them and fell asleep on Miller. Knapp, however, was not with the group on the first floor. Alexander testified that Knapp went upstairs sometime after 12:00 a.m. and played his radio loudly. Both Melton and Alexander testified that, at some point, Knapp came back downstairs for a diaper, indicating that A.M. needed one. Additionally, Miller testified that he saw Knapp with A.M. when he carried Melton and Alexander's son upstairs to put him to bed. According to Miller, he saw Knapp pulling A.M. by the hand, leading her from Knapp's bedroom back across the hallway to the bedroom where the children were sleeping. Miller followed Knapp into the children's room. Miller observed that he startled Knapp when he entered the room and that Knapp left quickly. He further observed that A.M. was awake in the bed and "teary-eyed." Miller testified that he returned to the first floor and Korach arrived less than fifteen minutes later. Shortly before Korach arrived, Melton, Alexander, and Miller all heard someone turn on the shower upstairs.

{¶20} When Korach arrived, he went upstairs to the second floor to find Knapp so that they could start their newspaper delivery route. Korach observed that the second floor had a strong chemical smell that he associated with bleach. Korach testified that he looked for Knapp in the second-floor bathroom because the water was running, but found the bathroom empty. He proceeded down the hall to Knapp's bedroom, but instead found Knapp on his knees in the

children's room. Korach had a brief exchange with Knapp, the contents of which he could not recall, and returned to the first floor. Alexander, Korach, and Knapp left for their delivery route shortly thereafter.

{¶21} The police conducted a search of Melton and Alexander's house the next morning, after Kira discovered A.M.'s injuries. The police found a bloody bed sheet in Knapp's closet, which Melton later identified as Knapp's bed sheet. The police also discovered areas on the second floor that had been bleached, including an area on the floor in the children's room. Knapp later confessed to sexually assaulting A.M. with his finger. Specifically, he admitted to doing so when the police questioned him on November 29, 2008. He also admitted to sexually assaulting A.M. when the police spoke to him a few days later and when he called his mother from jail the week of his trial. Accordingly, a rational trier of fact could have found that Knapp was the individual who victimized A.M.

{¶22} Based on all of the foregoing, there was sufficient evidence to support each of Knapp's convictions. Knapp's argument that his convictions are based on insufficient evidence lacks merit.

Manifest Weight

{¶23} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review 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 trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when

reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶24} Knapp argues that his convictions are against the manifest weight of the evidence because no one testified that they ever heard A.M. screaming in pain, there was no DNA evidence implicating Knapp, and someone else in the home could have committed these crimes. We disagree that Knapp's convictions are against the manifest weight of the evidence.

{¶25} The fact that no one ever heard A.M. screaming in pain is largely irrelevant, as A.M. irrefutably incurred serious injuries and the evidence supports the conclusion that she sustained them at some point after Kira left her at Melton and Alexander's house. Even disregarding that fact, however, several witnesses stated that there was a significant amount of noise in Melton and Alexander's home in the hours between 12:00 a.m. and 2:00 a.m. In particular, there was a television playing in the children's room, a radio and television playing in Knapp's room, and a television playing on the first floor. Melton herself admitted that she would not have been able to hear one of the children if they cried. The jury could have chosen to believe that the large amount of noise in the home masked any cries A.M. might have emitted. Further, the jury could have determined that the head wound A.M. received factored into her ability to cry out at all.

{¶26} As to the lack of DNA evidence implicating Knapp, Stacy Violi, a forensic scientist from the Ohio Bureau of Criminal Identification and Investigation, confirmed that she

did not discover any of Knapp's DNA on the items collected from A.M. or on A.M.'s person. Yet, Dr. Steiner testified that A.M.'s injuries could have been inflicted by any blunt object, including a finger. When asked if a finger would leave DNA evidence in the case of a sexual assault, Violi testified that it would not be uncommon for there to be a lack such evidence in those circumstances. Given that Knapp admitted to using his finger to sexually assault A.M., the fact that there was no DNA evidence implicating him does not detract from the weight of his convictions.

{¶27} Finally, there were numerous pieces of evidence to support the conclusion that Knapp was the individual who sexually assaulted A.M. Although there were many individuals in Melton and Alexander's home, Knapp had the opportunity to be alone with A.M. between 12:00 a.m. and 2:00 a.m. when Melton, Alexander, and Miller were on the first floor. Knapp specifically came downstairs to get a diaper for A.M. during that period of time. Not long after, Miller saw Knapp leading A.M. back to the children's bedroom and noted that Knapp seemed startled when he realized Miller was there. Korach also saw Knapp in the children's room when he arrived ten to fifteen minutes later. Further, both Alexander and Korach noted that Knapp acted oddly on their newspaper delivery route. Alexander observed Knapp crying and testified that it took Knapp longer than usual to complete his deliveries. Alexander also testified that, shortly before the police arrived that day, he confronted Knapp and accused him of raping A.M. According to Alexander, Knapp acted calmly the entire time he was being accused of rape. Detective Rex Lott, who questioned Knapp later that same day, also observed that Knapp acted calmly. Detective Lott testified that it is unusual for an innocent person to maintain a calm demeanor when faced with such a serious accusation.

{¶28} Knapp's bedroom was directly across the hall from the children's bedroom, and the police discovered bloody sheets crumpled in Knapp's bedroom closet when they searched the house. The police also discovered a bleached area of carpeting in the children's bedroom in the same vicinity where Korach observed Knapp kneeling earlier that night. On the afternoon of November 29, 2008, the police questioned Knapp. Knapp admitted during questioning that he saw A.M. after midnight and went down to the first floor to get her a diaper. According to Knapp, A.M. came into his room naked and asked for a drink of water. Knapp told the police that he was drunk and did not know what he was doing, but admitted that he used his finger to assault A.M. Knapp stated that he was not trying to hurt A.M., but that he had lived a "messed up life." On September 17, 2009, Knapp also admitted to his mother in a recorded jail phone call that the incident with A.M. "happened."

{¶29} Based on all of the foregoing, we cannot conclude that the jury erred in convicting Knapp. While much of the evidence in this case was circumstantial in nature, it nonetheless supported the conclusion that Knapp sexually assaulted A.M. See *State v. Smith* (Nov. 8, 2000), 9th Dist. No. 99CA007399, at *15 ("Circumstantial evidence and direct evidence inherently possess the same probative value."), quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Further, Knapp admitted on more than one occasion that he perpetrated these crimes. Knapp's argument that his convictions are against the manifest weight of the evidence lacks merit. Knapp's second assignment of error is overruled.

III

{¶30} Knapp's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

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