

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     13CA010418

Appellee

v.

ANTHONY M. AGUIRRE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     10CR081192

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 16, 2015

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CARR, Judge,

{¶1} Defendant-Appellant, Anthony Aguirre, appeals from his convictions in the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On the night of August 9, 2010, Aguirre was staying at the home of Mellisa R. and her 8-year-old daughter, K.R.D. K.R.D.’s bedroom was located on the first floor and, at some point after having sent K.R.D. to bed, Mellisa went upstairs and left Aguirre at the computer on the first floor. When Mellisa came back downstairs, she discovered Aguirre in K.R.D.’s bedroom. According to the State’s evidence at trial, Aguirre was lying down in K.R.D.’s bed and holding K.R.D. on top of him. K.R.D. was naked from the waist down, and Aguirre was trying to insert his penis into her anus. When Aguirre saw Mellisa, he pushed K.R.D. off of him, and Mellisa took K.R.D. upstairs. By the time Mellisa and the other adults in the house came back downstairs, Aguirre had fled.

{¶3} A grand jury indicted Aguirre on charges of kidnapping, in violation of R.C. 2905.01(A)(4), and rape, in violation of R.C. 2907.02(A)(1)(b). The kidnapping charge also included a sexual motivation specification. At the conclusion of his jury trial, the jury found Aguirre guilty of kidnapping a victim under the age of 13 and guilty of the sexual motivation specification underlying that charge. While the jury found Aguirre not guilty of rape, it found him guilty of the attempted rape of a victim under the age of 10. The court merged Aguirre's counts for purposes of sentencing and sentenced him to 15 years to life in prison.

{¶4} Aguirre now appeals from his convictions and raises three assignments of error for our review.

## II.

### **ASSIGNMENT OF ERROR I**

THE TRIAL COURT DEPRIVED APPELLANT OF HIS RIGHT TO CROSS-EXAMINE A WITNESS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE ONE, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶5} In his first assignment of error, Aguirre argues that the trial court erred by not allowing him to cross-examine K.R.D.'s mother, Mellisa R., about specific instances of conduct that would have drawn her character for truthfulness into question. Specifically, he argues that he ought to have been able to ask her about the allegedly false accusations of sexual misconduct that she made against her ex-husband and ex-mother-in-law in a prior custody proceeding.

{¶6} The decision to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180 (1987). Absent an issue of law, this Court, therefore, reviews the trial court's decision regarding evidentiary matters under an abuse of discretion standard of review. An abuse of discretion is more than an error of judgment; it means

that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶7} Evid.R. 608(B) provides, in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness \* \* \* may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

“As Evid.R. 608(B) plainly states, specific instances of conduct that bear on truthfulness may not be proved by extrinsic evidence and may only be inquired into on cross-examination. Such testimony cannot be heard on direct examination.” *State v. Shorter*, 9th Dist. Summit No. 16716, 1994 WL 543151, \*3 (Oct. 5, 1994). Moreover, even when evidence satisfies the strictures of Evid.R. 608(B), a court still may exclude the evidence under Evid.R. 403(B). *See, e.g., State v. Sellers*, 9th Dist. Summit No. 14147, 1990 WL 11729, \*4 (Feb. 7, 1990); *State v. Martin*, 9th Dist. Summit No. 13954, 1989 WL 117279, \*4 (Oct. 4, 1989).

{¶8} At trial, Aguirre sought to introduce evidence that Mellisa R. had falsely accused her ex-husband and ex-mother-in-law of sexual misconduct during custody proceedings that occurred between 2008 and 2010. The custody proceedings involved K.R.D.'s three half-siblings. According to Aguirre, records from the Ohio Department of Job and Family Services (“ODJFS”) showed that ODJFS had investigated Mellisa's accusations of sexual misconduct and had determined that the accusations were unsubstantiated. It was Aguirre's position, therefore,

that Mellisa had made prior, false accusations about sexual misconduct and that those false accusations bore upon her character for truthfulness.

{¶9} The State called Mellisa R. on direct examination in its case-in-chief. Directly before it began its examination, the State asked the court to exclude any evidence regarding the allegedly false accusations that Mellisa had made about her ex-husband and ex-mother-in-law. The court asked defense counsel whether he planned on introducing that evidence, and defense counsel stated that Mellisa's ex-husband and ex-mother-in-law would be testifying as to her credibility. The court noted that opinion testimony about Mellisa's reputation for truthfulness would generally be admissible, but that evidence of specific instances of conduct might not be. In response, defense counsel stated:

Understood. And we're familiar with Evidence Rule 608, and we're familiar with what we can and cannot do, and so, as I think this Court has said, whatever appropriate objections at the time, we certainly are familiar with the evidence, and we're going to, again, call, we're going to question all the witnesses in this case.

The State then began its direct examination.

{¶10} Once the State's examination of Mellisa concluded, Aguirre cross-examined her. Aguirre questioned Mellisa about the incident involving K.R.D., K.R.D.'s hygiene, and the conditions of her home. He did not ask her any questions about the accusations she had made against her ex-husband and ex-mother-in-law. Nor did he ask her whether she had ever made any false accusations of sexual misconduct. Once Aguirre finished his cross-examination, the State conducted a brief redirect and Mellisa was excused.

{¶11} After the State rested, Aguirre called Mellisa's ex-husband and ex-mother-in-law as witnesses in his case-in-chief. The court allowed Aguirre to ask each witness whether they had an opinion about Mellisa's trustworthiness, and both testified that Mellisa was not a truthful individual. Yet, the court would not allow Aguirre to ask the witnesses why they thought

Mellisa was untruthful. Aguirre proffered that each witness would have testified about the false accusations that Mellisa made about them in the custody proceedings. The court noted that Evid.R. 608 did not permit a party to cross-examine his own witness for the purpose of introducing specific instances of conduct. The court also noted that the evidence Aguirre sought to introduce was problematic because “it turns the trial into mini trials on whether those situations were true or not \* \* \*.”

{¶12} Aguirre ultimately called Mellisa as a witness in his case-in-chief. Before his examination of Mellisa began, the court informed Aguirre that he could ask leading questions of Mellisa due to her status as an adverse witness, but that “impeachment should have been covered during [his] original cross-examination.” The court ultimately refused to allow Aguirre to ask Mellisa questions about the custody arrangement she had with her ex-husband and the allegations she made against her ex-husband and ex-mother-in-law. In addition to the problem of Aguirre attempting to impeach his own witness, the court noted that it felt the evidence would be confusing and misleading to the jury under Evid.R. 403.

{¶13} Initially, we note that Aguirre’s assignment of error on appeal is limited to his examination of Mellisa R. He has not challenged the evidentiary rulings that the court made with respect to his examination of Mellisa’s ex-husband and ex-mother-in-law. As such, we confine our review to the limitations the court placed on Aguirre with respect to his examination of Mellisa.

{¶14} Aguirre argues that the trial court deprived him of his right to cross-examination. He argues that he should have been allowed to ask Mellisa about the prior, false accusations she made against her ex-husband and ex-mother-in-law because, under Evid.R. 608(B), specific instances of conduct are admissible in order to prove a “witness’s character for truthfulness or

untruthfulness.” According to Aguirre, the evidence of Mellisa’s prior, false accusations would have undermined her credibility and lent weight to his argument that she had fabricated the allegations against him.

{¶15} Apart from other limitations set forth in the rule, Evid.R. 608(B) only permits specific instances of the conduct of a witness to “be inquired into on cross-examination of the witness.” This Court has held that “[s]uch testimony cannot be heard on direct examination.” *Shorter*, 1994 WL 543151, at \*3. Yet, that is exactly the way in which Aguirre sought to introduce the evidence in this matter. Aguirre fully cross-examined Mellisa R. during the State’s case-in-chief, but did not ask her any questions related to any false accusations she might have made in the past. Instead, Aguirre waited until his case-in-chief, called Mellisa as his own witness, and sought to impeach her. Because Evid.R. 608(B) only allows for impeachment on cross-examination, the rule did not permit him to impeach Mellisa once he called her as his own witness on direct examination. *See id.* Moreover, Evid.R. 608(B) was not the only bar to the presentation of Aguirre’s evidence.

{¶16} The trial court also determined that Aguirre’s evidence was inadmissible because it would have confused or misled the jury. *See* Evid.R. 403. Mellisa’s prior accusations did not concern either the victim or the defendant in this matter. They only concerned third parties and arose in the context of a custody dispute. As the State noted in the court below, the fact that ODJFS determined that Mellisa’s accusations were unsubstantiated does not necessarily mean that the accusations were false. It was not unreasonable for the trial court to have concerns about turning the trial “into mini trials on whether [Mellisa’s accusations] were true or not true.” Mellisa was not the victim in this matter. Although her testimony corroborated K.R.D.’s testimony, K.R.D. testified on her own behalf. Accordingly, the jury was able to assess her

credibility as well as Mellisa's. Having reviewed the record, we cannot conclude that the trial court abused its discretion by refusing to allow Aguirre to question Mellisa about specific instances of her prior conduct.

{¶17} To the extent Aguirre argues that he also should have been permitted to introduce the evidence of Mellisa's prior, false accusations under Evid.R. 616(A), we decline to address his argument. The record reflects that Aguirre failed to raise Evid.R. 616(A) as a basis for admissibility in the trial court. As such, this Court will not address his argument for the first time on appeal. *See State v. Lanik*, 9th Dist. Summit Nos. 26192 & 26224, 2013-Ohio-361, ¶ 12. Aguirre's first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

THE GUILTY VERDICT FOR KIDNAPPING IS AGAINST THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶18} In his second assignment of error, Aguirre argues that his kidnapping conviction is based on insufficient evidence. Specifically, he argues that there was insufficient evidence that he either removed K.R.D. from where she was found or restrained her liberty. We disagree.

{¶19} "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 113, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

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.

*State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. “The test for sufficiency requires a determination of whether the State has met its burden of production at trial.” *State v. Edwards*, 9th Dist. Summit No. 25679, 2012-Ohio-901, ¶ 7.

{¶20} The kidnapping statute provides, in relevant part, that “[n]o 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 [for the purpose of] \* \* \* engag[ing] in sexual activity \* \* \* with the victim against the victim’s will \* \* \*.” R.C. 2905.01(A)(4). “‘Sexual activity’ means sexual conduct or sexual contact, or both.” R.C. 2907.01(C). Whoever commits the foregoing offense is guilty of kidnapping. R.C. 2905.01(C)(1).

{¶21} K.R.D.’s mother, Mellisa R., testified that she invited Aguirre over to her home for the weekend. On the second evening of Aguirre’s stay, Mellisa, K.R.D., and Aguirre watched videos on the computer in Mellisa’s first-floor dining room. Mellisa testified that K.R.D.’s bedroom was also on the first floor, but that her own bedroom was upstairs. Sometime around 11:00 p.m., Mellisa sent K.R.D. to bed. Mellisa stated that, at that point, everyone else in the house had already gone upstairs. She and Aguirre continued to watch videos on the computer for a while and then decided they would go up to Mellisa’s room to watch a movie. Mellisa testified that Aguirre sent her upstairs first, indicating that he would be along in a minute. Mellisa prepared the movie and waited for Aguirre, but he did not come upstairs. After a few minutes, Mellisa went back downstairs to check on him. Mellisa testified that it was almost completely dark when she got downstairs because all the lights were off and only the glow of the computer monitor lit the dining room. Mellisa walked over to the light switch in the dining room and turned on the light. She testified that, from her position at the light switch, she



had a clear view inside K.R.D.'s bedroom. When Mellisa turned on the light, she saw Aguirre in K.R.D.'s room.

{¶22} Mellisa testified that she saw Aguirre lying down on K.R.D.'s bed with K.R.D. straddling him. K.R.D. was naked from the waist down, and Aguirre had one of his hands on her side. Aguirre's other hand was holding his penis, and Mellisa testified that "he was trying to put [his penis] in [K.R.D.'s] butt." Mellisa testified that, when she later took K.R.D. to the Nord Center for treatment, she heard K.R.D. tell the nurse that Aguirre had "put his hand on her mouth and wouldn't let her leave." She further heard K.R.D. tell the nurse that Aguirre "tried to put his private in her butt."

{¶23} K.R.D. testified that Aguirre came into her room sometime after her mother sent her to bed. She testified that Aguirre used his hand to cover her mouth, told her to "shut up," and made her take off her clothes. He then climbed into her bed and "scouted [her] on top of him." K.R.D. testified that Aguirre kissed her on the mouth, bit her ear, and "stuck his penis in [her] butt." According to K.R.D., she did not feel like she could leave because she "felt like he was literally holding me on." She also testified that she was scared and did not know what was happening. At the time of the incident, K.R.D. was 8 years old.

{¶24} Aguirre argues that his kidnapping conviction is based on insufficient evidence because the State failed to prove that he either removed K.R.D. from her bedroom or restrained her liberty. *See* R.C. 2905.01(A)(4). He argues that "[a]ny restraint was incidental to the attempted rape, and did not rise to the level of restraint required for a charge of kidnapping."

{¶25} The question of whether a victim's restraint is merely incidental to some underlying charge, such as rape, is one posed to determine animus for purposes of an allied offense analysis. *See State v. Logan*, 60 Ohio St.2d 126 (1979), syllabus. It is not relevant to a

sufficiency analysis, which only concerns itself with the question of whether the State has met its burden of production. *See State v. Taylor*, 9th Dist. Summit No. 27273, 2015-Ohio-403, ¶ 6, citing *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). To uphold Aguirre’s kidnapping conviction under a sufficiency analysis, we need only be able to conclude that the State met its burden of production on the element of restraint, the only element that Aguirre has challenged on appeal.

{¶26} Viewing the evidence in a light most favorable to the State, we must conclude that the State presented evidence from which a rational trier of fact could have concluded that the State proved the element of restraint beyond a reasonable doubt. *See Jenks*, 61 Ohio St.3d 259 at paragraph two of the syllabus. When a victim is under the age of 13, the kidnapping statute prohibits the restraint of the victim “by any means.” R.C. 2905.01(A)(4). At the time of this incident, Aguirre was a fully grown adult and K.R.D. was only 8 years old. K.R.D. testified that Aguirre came into her room, placed his hand over her mouth, told her to shut up, and made her take off her clothes. She also testified that he pulled her on top of him and that she did not feel that she could leave because she was afraid and it “felt like he was literally holding [her] on.” K.R.D.’s mother testified that she saw Aguirre holding K.R.D.’s waist with one hand while he used his other to try to insert his penis into her anus. Based on all the foregoing evidence, we must conclude that the State set forth sufficient evidence of restraint. Therefore, Aguirre’s kidnapping conviction is not based on insufficient evidence. His second assignment of error is overruled.

### **ASSIGNMENT OF ERROR III**

THE GUILTY VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF APPELLANT’S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶27} In his third assignment of error, Aguirre argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶28} A conviction that is supported by sufficient evidence may still be found to be against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387.

In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must 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*, 33 Ohio App.3d 339, 340 (9th Dist.1986). “When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘thirteenth juror’ and disagrees with the fact[-]finder’s resolution of the conflicting testimony.” *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387. *Accord Otten* at 340.

{¶29} This Court outlined the elements of kidnapping in Aguirre’s second assignment of error. The jury also found Aguirre guilty of attempted rape. R.C. 2923.02(A) prohibits the attempt of an offense, and provides that “[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.” The rape statute provides, in relevant part, that “[n]o person shall engage in sexual conduct with another \* \* \* when \* \* \* [t]he other person is less than thirteen years of age, whether or not the offender knows the age of

the other person.” R.C. 2907.02(A)(1)(b). “Sexual conduct” includes anal intercourse. R.C. 2907.01(A).

{¶30} Mellisa R. testified that Aguirre was not able to drive at the time that she invited him over to her house, so she picked him up. On the night of the incident, Mellisa’s sister, her teenage niece, and her brother-in-law were also staying at her house. As previously set forth, Mellisa testified that she sent K.R.D. to bed sometime before going upstairs to start a movie. She then came back downstairs to find Aguirre because he had not joined her. Mellisa testified that, as soon as she turned the dining room light on and Aguirre realized she was there, he pushed K.R.D. off of his hips, sat on the edge of the bed, and put his face in his hands. Mellisa then told K.R.D. to put her pants on and walked her upstairs. Mellisa knocked on her sister’s bedroom door and told her sister and brother-in-law what had just happened. Although her brother-in-law ran straight downstairs to confront Aguirre, Aguirre had already left the house. Mellisa testified that Aguirre left without his shoes, his cell phone, and the bag of clothes that he had brought over her house.

{¶31} Directly after the incident occurred, the police came to Mellisa’s house and took her statement. Mellisa told the police that she had found Aguirre lying on his back with K.R.D. on top of him. She also told the police that Aguirre’s hand was on K.R.D.’s waist and that K.R.D. was partially naked. Mellisa admitted that she did not tell the police that she saw Aguirre’s other hand on his penis or that she saw him try to insert his penis into K.R.D.’s anus. She explained, however, that she failed to tell the police certain details when she first spoke to them because she was “an emotional and a mental mess.”

{¶32} As previously set forth, K.R.D. testified that Aguirre came into her room, put his hand over her mouth, told her to shut up, made her take off her clothes, and pulled her on top of

him. K.R.D. also testified that Aguirre kissed her on the mouth, bit her on the ear, and inserted his penis into her anus. Nevertheless, K.R.D. could not remember how it felt when Aguirre put his penis into her anus or whether it hurt.

{¶33} Melinda Kuebler, a certified sexual assault nurse examiner at the Nord Center, examined K.R.D. shortly after this incident occurred. Nurse Kuebler testified that K.R.D. told her Aguirre had come into her room, covered her mouth, taken off her clothes, and “tried to put his wiener in her butt.” She further testified that K.R.D. told her Aguirre bit her ear and put his tongue in her mouth. According to Nurse Kuebler, she observed redness around K.R.D.’s anus that resembled an abrasion. While Nurse Kuebler admitted that the redness could have been the result of dermatitis, she testified that, in her opinion, the redness was not consistent with dermatitis. She stated that the observations she made, coupled with K.R.D.’s statement and the recency of the events alleged to have happened, led her to conclude that the findings she observed on K.R.D. were consistent with sexual abuse.

{¶34} Two different forensic scientists from the Bureau of Criminal Identification and Investigation (“BCI”) testified at trial. Brittani Farinacci, a forensic scientist in BCI’s biology unit, testified that she tested K.R.D.’s rape kit for the presence of bodily fluids. Although Farinacci was unable to detect any semen on K.R.D.’s vaginal and anal swabs, she testified that the swab from K.R.D.’s ear tested positive for amylase, a component of saliva. Farinacci then forwarded the swabs of K.R.D.’s ear to the DNA unit for further testing. Stacy Violi, a forensic scientist in BCI’s DNA unit, extracted the DNA that she found on K.R.D.’s ear swabs and compared it to the DNA standards she had for K.R.D. and Aguirre. Violi testified that two DNA profiles emerged from the ear swab extract. According to Violi, Aguirre could not be excluded as the source of the major profile she uncovered.

{¶35} Renee Powers, Mellisa R.'s sister and K.R.D.'s aunt, testified that she and her husband were staying at Mellisa's house when this incident occurred. Powers testified that, at some point after she went upstairs to go to bed, she heard footsteps on the stairs and thought Mellisa had gone into her bedroom. About ten minutes later, she heard someone go down the stairs. Then, within another few minutes, she heard two people coming up the stairs and a knock on her door. Powers opened the door after she heard Mellisa say "I need you to come out here right now."

{¶36} Powers stated that Melissa looked terrified and said that she had just found K.R.D. on top of Aguirre in K.R.D.'s bedroom. Powers testified that she and her husband ran downstairs to find Aguirre, but that he had left without any of his personal possessions. According to Powers, both Mellisa and K.R.D. were very upset immediately after the incident and K.R.D. thought that she had done something wrong. When Powers asked K.R.D. to explain what had happened, she said that Aguirre came into her room, lay on her bed, put her on top of him, and "put his penis in her behind." When Powers asked K.R.D. why she did not yell for help, K.R.D. told Powers that it was because Aguirre had covered her mouth.

{¶37} Autumn Powers, K.R.D.'s cousin, testified that she was also in one of the upstairs bedrooms of Mellisa's house at the time of the incident. Autumn testified that K.R.D. came into her room crying at the same time that Autumn heard her mother and father head downstairs. She testified that K.R.D. told her that Aguirre had held her down, kissed her, bit her ear, and "tried to stick his private parts inside of her." Autumn stated that it took time to calm down K.R.D. because she was "frantic and crying" and thought she was in trouble.

{¶38} Aguirre called Mellisa's ex-husband and ex-mother-in-law to testify in his defense. Both testified that Mellisa did not ensure that her children had sanitary living

conditions. They both described Mellisa's house as being dirty due, in large part, to the many cats and dogs that Mellisa kept at the house. According to Mellisa's ex-mother-in-law, her three grandchildren (K.R.D.'s half-siblings) and K.R.D. often wore dirty clothes and ended up having head lice for a period of several months. Both Mellisa's ex-husband and ex-mother-in-law also testified that Mellisa was not a truthful person.

{¶39} Aguirre also presented expert testimony in his defense. Gary Rini, an independent forensic scientist consultant, testified as to the ways in which amylase can be transferred through routine day-to-day contact and circumstances. He ultimately opined that it was possible for Aguirre's amylase to have been transferred to K.R.D.'s ear without Aguirre having bitten it. Jeanne Morgan, a legal nurse consultant, testified that she reviewed the photographs from K.R.D.'s examination at the Nord Center and was also aware that K.R.D. suffered from atopic dermatitis. According to Nurse Morgan, the redness she observed on K.R.D.'s photographs appeared to be consistent with either poor hygiene or her dermatitis, not injury. Nevertheless, she agreed that it was possible the redness was due to Aguirre's penis rubbing on K.R.D.

{¶40} Finally, Aguirre presented evidence about certain text messages that he received on his cell phone during the time period that he was staying at Mellisa's house. David Wozniak, the records custodian at Revol Wireless, testified that Aguirre received messages from a contact labeled "Punk Girl" on the night of the incident. It was Aguirre's position that Mellisa saw the messages on his phone and fabricated the allegations against him due to jealousy. Even so, Mellisa testified that she did not look at Aguirre's phone until after the incident with K.R.D. occurred. Further, Powers denied having heard any arguing in the house on the night in question.

{¶41} Having reviewed the record, we cannot conclude that Aguirre’s convictions for kidnapping and attempted rape are against the manifest weight of the evidence. Both Mellisa and K.R.D. testified that Aguirre held K.R.D. on top of him while he tried to insert his penis into her anus. To the extent that either Mellisa’s or K.R.D.’s version of the events varied slightly from telling to telling, “[t]he jury was in the best position to observe their demeanor and ascertain their credibility.” *State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 28. The jury heard evidence that Aguirre’s DNA was found on K.R.D.’s ear, which K.R.D. told multiple people that Aguirre had bitten during the incident. Moreover, the jury heard testimony that, immediately after the incident, Aguirre fled from Mellisa’s house on foot in the middle of the night without his shoes, his bag of clothing, or his cell phone. *See State v. Nichols*, 9th Dist. Summit No. 24900, 2010-Ohio-5737, ¶ 11, quoting *State v. Taylor*, 78 Ohio St.3d 15, 27 (1997) (“It is an established principle of law that ‘[f]light from justice \* \* \* may be indicative of a consciousness of guilt.’”). This Court has carefully reviewed the record and it is our conclusion that this is not the exceptional case where the jury lost its way in reaching a guilty verdict. *See Thompkins*, 78 Ohio St.3d at 387; *Otten*, 33 Ohio App.3d at 340. As such, Aguirre’s third assignment of error is overruled.

### III.

{¶42} Aguirre’s assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Lorain, 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(C). 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.

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DONNA J. CARR  
FOR THE COURT

HENSAL, P. J.  
MOORE, J.  
CONCUR.

APPEARANCES:

MATTHEW H. KISHMAN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.