[Cite as *State v. Higdon*, 2015-Ohio-1592.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO	C.A. No. 14CA0014-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 12 CR 0731
THEODORE W. HIGDON	
Appellant	

DECISION AND JOURNAL ENTRY

Dated: April 27, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant Theodore W. Higdon appeals from his conviction in the Medina County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} In 2010, Candice Higdon and her husband, Theodore W. Higdon, separated and began formal divorce proceedings. During the course of their marriage, the Higdons had twin children, a son and a daughter.

{¶3} On Sunday, December 2, 2012, Mr. Higdon was exercising his companionship time with both of his children at his home. On that date, son and daughter were both 10 years old. Daughter and son went to bed in their respective bedrooms at around 9:30 p.m. Daughter testified that she had trouble falling asleep and asked her father if she could sleep with him. Mr. Higdon agreed. Daughter testified that Mr. Higdon smelled of alcohol and that his face looked pale that night.

{¶4} Once in her father's bed, Daughter complained about being too warm. Mr. Higdon suggested that she remove some articles of clothing. Daughter testified that she removed her pants and bra, but kept on her shirt and underwear. Daughter further testified that Mr. Higdon eventually began talking about orgasms before exposing himself and asking her to touch his penis. Daughter refused. Mr. Higdon later licked his finger and asked his daughter twice if he could touch her vagina. Daughter refused both times. Mr. Higdon then asked his daughter if he could "kiss" her vagina. Daughter testified that she shrugged her shoulders and removed her underwear even though she felt uncomfortable. Mr. Higdon then performed oral sex on his daughter. Mr. Higdon then asked his daughter, "Do you want me to do it again?" Daughter testified that she again shrugged her shoulders and that her father again performed oral sex on her. Afterwards, daughter asked her father, "Do other dads do this?" Mr. Higdon responded, "Sometimes." Daughter then asked her father, "Did you do this to Mom?" He again responded, "Sometimes." Mr. Higdon then told his daughter, "We can do this again * * * next time."

{¶5} Daughter then went to the bathroom to wipe her father's saliva from her vagina. She returned to her own bedroom and testified that she was crying because she was upset and because her stomach was hurting. Daughter then called for her father because she wanted to call her mother on the phone and tell her what had just happened. Mr. Higdon would not let his daughter call her mother. Mr. Higdon then told his daughter that she was having a bad dream. Daughter then went downstairs and fell asleep in the living room.

{¶6} Daughter did not attend school the following day because her stomach was still hurting. Mrs. Higdon picked her children up from Mr. Higdon's house that evening. Daughter told her mother that night about the incident with her father. Mrs. Higdon immediately called the police.

{¶7} Officer Josh Wilson of the Medina Police Department arrived at Mrs. Higdon's apartment and collected the clothes that daughter wore the prior night. The police sent the clothing to the Ohio Bureau of Criminal Investigation and Identification (BCI) for forensic analysis. Detective Amy Kerr phoned Mrs. Higdon that night and arranged to meet with her and daughter the next day, December 4, 2012, at the Child Advocacy Center (CAC) for a medical examination and interview. Detective Kerr recommended that daughter receive counseling. Heeding Detective Kerr's advice, Mrs. Higdon took her daughter to several sessions with Dr. Barbara Michelson, a trauma specialist, and Dr. Cynthia Keck-McNulty, a mental health therapist. Detective Kerr later met with and interviewed Mr. Higdon at the police station. Mr. Higdon denied sexually abusing his daughter.

{¶8} Melissa Wilhelm, a forensic scientist at BCI, examined the daughter's clothing and found amylase, an enzyme found in saliva and other bodily fluids, on the crotch area of her underwear. Ms. Wilhelm took a swab from the area in question on the daughter's underwear for DNA analysis. Lindsey Nelsen-Rausch, a forensic scientist for BCI's forensic DNA unit, performed the DNA analysis and determined that the swab contained a mixture of DNA that is consistent with contributions from the daughter and Mr. Higdon. According to Ms. Nelsen-Rausch's testimony, the expected frequency of such an occurrence is 1 in 2,974,000,000 unrelated individuals. Julie Heinig, the assistant laboratory director at the DNA Diagnostics Center, analyzed Ms. Wilhelm's and Ms. Nelsen-Rausch's findings and agreed with their calculations and results.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN THE JURY SELECTION PROCESS WHEREAS THE APPELLANT WAS NOT AFFORDED A JURY OF HIS PEERS.

{¶9} In his first assignment of error, Mr. Higdon argues that his jury as finally seated did not represent a fair cross-section of the community. Specifically, Mr. Higdon claims that because roughly two-thirds of the impaneled jurors in his case were females, his jury was not fairly representative of Medina County. As such, Mr. Higdon asserts that he was denied his right to an impartial jury under the Sixth Amendment of the United States Constitution.

{¶10} Crim.R. 24(F) provides that a defense attorney "may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law." Such a challenge, however, "shall be made before the examination of the jurors" on voir dire. *Id.*; *see also State v. Gulley*, 12th Dist. Clermont No. CA2005-07-066, 2006-Ohio-2023, ¶ 13, citing *State v. Bradley*, 12th Dist. Clermont No. CA97-10-086, 1998 WL 526536, at *8 (Aug. 24, 1998); *State v. Curry*, 2nd Dist. Clark No. 2012-CA-50, 2014-Ohio-3836, ¶ 30. Here, Mr. Higdon's defense counsel did not object to the composition of the petit jury until after the jury was sworn and empaneled. Therefore, Mr. Higdon's Sixth Amendment challenge was untimely.

{¶11} Mr. Higdon's first assignment of error is therefore overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF THE CHARGES BECAUSE THE FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} In his second assignment of error, Mr. Higdon argues that his conviction for rape with force was against the manifest weight of the evidence. This Court disagrees.

{¶13} 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). In making this determination, this Court is mindful that evaluating evidence and assessing credibility are primarily for the trier of fact. *State v. Velez*, 9th Dist. Lorain No. 13CA010518, 2015-Ohio-642, ¶ 16, citing *State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 31. "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." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340.

{¶14} Mr. Higdon argues that "a number of witnesses and pieces of evidence * * * support the fact that his conviction was against the manifest weight of the evidence." Specifically, Mr. Higdon points to his daughter's testimony that she did not seek immediate help after her father sexually abused her. Mr. Higdon also points to parts of Mrs. Higdon's testimony that, he contends, shows that she attempted to turn their children against him by "poison[ing] their minds" with thoughts that he was an alcoholic, a liar, and weak. Moreover, Mr. Higdon points to testimony showing that neither Detective Kerr nor Dr. Keck-McNulty explored the possibility that Mrs. Higdon and her daughter were fabricating their stories against him, even though both admitted that allegations of child sexual abuse are common in divorce proceedings.

Lastly, Mr. Higdon points to testimony from Ms. Wilhelm and Ms. Nelsen-Rausch where both admitted that although forensic testing found amylase on the daughter's underwear, neither could conclusively determine that the amylase was from saliva as opposed to some other bodily fluid. Dr. Heinig later testified for the defense that although DNA testing could not exclude Mr. Higdon from the list of possible contributors of the amylase on the daughter's underwear, it is uncertain whether it was he or his daughter that actually contributed the amylase.

{¶15} "This Court has repeatedly held that the trier of fact is in the best position to determine the credibility of witnesses and evaluate their testimony accordingly." *State v. Johnson*, 9th Dist. Summit No. 25161, 2010-Ohio-3296, ¶ 15. Here, the jury apparently accepted the testimony of Mr. Higdon's daughter. "The jury has the right to place considerable weight on the testimony of the victim." *State v. Felder*, 9th Dist. Lorain No. 91CA005230, 1992 WL 181016, *1 (July 29, 1992). The daughter's testimony, if believed, supports the conclusion that she was raped by her biological father. Although Mr. Higdon attempted to show at trial that his daughter was lying because Mrs. Higdon had poisoned their children's minds in the midst of a bitter divorce, the jury was free to disregard that theory. Moreover, while neither Detective Kerr nor Dr. Keck-McNulty investigated the nature of the Higdons' divorce and the impact it may have had on the children, both testified that the facts of this specific case, in their respective opinions, did not necessitate an investigation. Lastly, while none of the State's witnesses could conclusively determine that the amylase found on the daughter's underwear was the product of saliva, Ms. Wilhelm, Ms. Nelsen-Rausch, and Dr. Heinig all testified that amylase is more common in saliva than in any other bodily fluid.

{¶16} After reviewing the entire record, we cannot conclude that the jury lost its way and committed a manifest miscarriage of justice in convicting Mr. Higdon of rape. Accordingly, Mr. Higdon's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED WHEN ALLOWING HEARSAY TESTIMONY FROM THE MOTHER OF THE VICTIM BY ALLOWING HER TO READ VERBATIM FROM A DOCUMENT SHE PREPARED BASED ON THE STATEMENT OF [DAUGHTER].

{¶17} In his third assignment of error, Mr. Higdon argues that the trial court erred in allowing Mrs. Higdon to read to the jury a letter that she had prepared for Detective Kerr on December 13, 2012, just 11 days after her daughter's rape. The letter paraphrased statements that daughter had made to her mother regarding her recollection of the sexual abuse that she encountered. Mr. Higdon contends that the reading of the letter constituted inadmissible hearsay testimony. We disagree.

{¶18} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. An appellate court will not disturb evidentiary rulings "absent an abuse of discretion that produced a material prejudice to" the aggrieved party. *State v. Roberts,* 156 Ohio App.3d 352, 2004-Ohio-962, ¶ 14, (9th Dist.). 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, an appellate 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).

{¶19} In this case, assuming, arguendo, that the trial court abused its discretion in allowing Mrs. Higdon to read the December 13, 2012 letter in its entirety, we conclude that such

an error was harmless beyond a reasonable doubt because no substantial right of Mr. Higdon's was affected. *See* Crim.R. 52(A). In our analysis of Mr. Higdon's second assignment of error above, we discussed the overwhelming evidence of guilt against Mr. Higdon. Even if we were to disregard Mrs. Higdon's testimony involving the letter, the evidence against Mr. Higdon is still overwhelming. *See State v. Williams*, 6 Ohio St.3d 281, 290 (1983), citing *Harrington v. California*, 395 U.S. 250, 254 (1969). Moreover, the contents of Mrs. Higdon's letter were merely duplicative, as daughter, son, Dr. Michelson, and Dr. Keck-McNulty all provided testimony at trial that comported with the letter's content. Therefore, because Mr. Higdon has not explained how the letter in question being read to the jury prejudiced him in light of the other testimony and evidence presented at trial, *see* App.R. 16(A)(7), we reject Mr. Higdon's arguments concerning Mrs. Higdon's testimony, *see State v. Reives-Bey*, 9th Dist. Summit No. 25138, 2011-Ohio-1778, ¶ 14.

{¶20} Mr. Higdon's third assignment of error is overruled.

III.

{¶21} Mr. Higdon's assignments of error are overruled, and the judgment of the Medina 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 Medina, 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.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MATTHEW A. KERN, Assistant Prosecuting Attorney, for Appellee.