[Cite as *State v. Hogle*, 2015-Ohio-2783.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014–CA-41
	:	
v.	:	T.C. NO. 2013CR353
	:	
MICHAEL A. HOGLE	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the __10th__ day of ____July___, 2015.

. . . . . .

NATHANIEL R. LUKEN, Atty, Reg. No. 0087864, Assistant Prosecutor, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

J. ALLEN WILMES, Atty. Reg. No. 0012093, 7821 N. Dixie Drive, Dayton, Ohio 45414
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant Michael A. Hogle appeals his conviction and sentence for one count of rape, in violation of R.C. 2907.02(A)(2), a felony of the first degree; and one count of gross sexual imposition (GSI), in violation of R.C. 2907.05(A)(1), a felony of the fourth degree. Hogle filed a timely notice of appeal on October 1, 2014.

{¶ 2} The incident which forms the basis for the instant appeal occurred at approximately 4:00 a.m. on July 4, 2013, at a residence located in Fairborn, Ohio. The residence belonged to Hogle's girlfriend, R. The victim, J.M., had been living at the residence since June 29, 2013, with Hogle and R.

{¶ 3} J.M. testified that on the night of July 3, 2013, she had been at home when Hogle and R. both returned from their respective jobs between 6:00 and 7:00 p.m. Immediately upon returning home, both Hogle and R. began drinking beer and shots of alcohol. At approximately 11:00 p.m., Hogle left the residence and went to drink more alcohol at a neighbor's house. Shortly thereafter, R. went to bed in the room she shared with Hogle, and J.M. fell asleep on the sofa in the front living room where she customarily slept in a t-shirt and shorts. At some point after 12:00 a.m. on July 4, 2013, J.M. heard Hogle enter the house and continue drinking in the computer room which adjoined the living room. J.M. testified that she said goodnight to Hogle and then eventually fell back to sleep.

{¶ 4} At approximately 4:00 a.m., J.M. testified that she awoke to "a weight" on top of her. When J.M. opened her eyes, she realized that Hogle was on top of her and had pinned her arms above her on the sofa with one hand. With his other hand, Hogle pulled up J.M.'s shirt in order to expose her breasts. J.M. testified that Hogle also pulled her shorts to the side and partially inserted his hand inside her vagina. J.M. described the event as "painful" and "horrifying" and testified that she "felt paralyzed" and "unable to move." J.M. further testified that while Hogle was fondling her vagina, he leaned down and bit her on the breast. Hogle then attempted to place his flaccid penis in her vagina, but was initially unable to achieve an erection. After a short time, however, J.M. testified

that Hogle achieved a partial erection. Hogle spit in his hand for lubrication and then used that hand to place his penis inside J.M.'s vagina. As he did so, Hogle said, "let me rape you" to J.M. J.M. testified that Hogle tried to kiss her on the mouth, but she turned her head and he kissed her on the cheek. Hogle stopped the sexual assault, got up from the sofa, and walked towards the computer room. J.M. testified that she did not know if Hogle ejaculated during the assault.

{¶ 5} After the assault ended, J.M. testified that she was very upset and laid on the sofa for an indeterminate amount of time before she got up, changed her clothes, and texted her friend, C., that she had been raped and needed help. C. texted J.M. back approximately ten minutes later stating that he would be there shortly. J.M. testified that before leaving the house, she took her insulin because she is diabetic and grabbed a sandwich. J.M. testified that at approximately 8:00 a.m., she went outside and sat in a chair in the far end of the front yard near a fire pit and waited for C. to arrive.

{¶ 6} C. arrived at around 8:30 a.m. and called the police to report the assault. At approximately 9:17 a.m., City of Fairborn Police Sergeant Mark David Stannard and Officer Ray Liebherr, III, were dispatched to R.'s residence. Upon arriving, Sgt. Stannard testified that he first spoke with J.M. who was "upset, shaking visibly," and had "unsteady speech." After speaking with J.M. and getting a witness statement from her, Sgt. Stannard and Officer Liebherr made contact with R. who had come outside when the police arrived. Sgt. Stannard informed R. that he was there to investigate the rape allegations made by J.M., and he asked for consent to search the premises. R. signed the consent form provided by Sgt. Stannard and permitted the officers to enter the house. Once inside the house, Sgt. Stannard took pictures of the area where the assault was

alleged to have occurred and collected the clothes J.M. was wearing during the assault.

{¶ 7} Sgt. Stannard asked R. if she would go wake Hogle so they could speak to him. Hogle met with the officers in the living room of the house. Sgt. Stannard immediately informed Hogle that he was there to investigate the sexual assault allegations made by J.M. and "wanted to get his side of the story." Hogle initially denied that he had any contact, sexual or otherwise, with J.M. Hogle stated that he left R.'s house late in the evening and had drinks with a neighbor at a nearby bar. Hogle stated that he then returned home, went to the computer room for a short time, and then went to bed with R. At no time did Hogle ask for an attorney, nor did Sgt. Stannard advise him of his *Miranda* rights.

{¶ 8} Sgt. Stannard asked Hogle to prepare a written statement regarding his recollection of the previous night, and Hogle complied. Sgt. Stannard also asked Hogle if he would submit to a cheek swab in order to provide a DNA sample. Hogle consented, and Sgt. Stannard performed a cheek swab and retrieved the DNA sample. The officers exited the residence, and once outside, Officer Liebherr read Hogle's written statement which was inconsistent with what he had earlier told the officers. Specifically, Hogle wrote that he had come home intoxicated from visiting with his neighbor and consumed more alcohol, at which point "[he] had taken advantage of [J.M.]." Hogle also wrote that he was sorry for what he had done.

{¶ 9} Sgt. Stannard immediately went back to the house and asked Hogle to come outside on the porch in order to explain his written statement. Sgt. Stannard asked Hogle if he had inserted his penis into J.M.'s vagina. Hogle stated that he did not because he was unable to maintain an erection. Hogle, however, did admit that he

inserted his fingers into J.M.'s vagina. Hogle also told Sgt. Stannard that J.M. "did not tell him no." At that point, Sgt. Stannard asked Hogle if he would accompany Officer Liebherr to police headquarters to be interviewed by a detective. Hogle agreed, and Officer Liebherr transported him to the police station.

{¶ 10} At the police station, Detective Steven W. Jahns transported Hogle from the jail where he was being held to an interview room. Det. Jahns *Mirandized* Hogle and then interviewed him regarding the rape allegations made by J.M. During the interview, Hogle made several incriminating statements, admitting that he was aware that J.M. did not want to have sex with him and that he forced himself upon her.

{¶ 11} On October 4, 2013, Hogle was indicted for two counts of rape (force or threat of force), in violation of R.C. 2907.02(A)(2), both felonies of the first degree, and one count of GSI, in violation of R.C. 2907.05(A)(1), a felony of the fourth degree. At his arraignment on October 25, 2013, Hogle pled not guilty to the charged offenses.

{¶ 12} On November 13, 2013, Hogle filed a motion to suppress the oral and written statements he made to Sgt. Stannard and Officer Liebherr at R.'s residence. A hearing was held on Hogle's suppression motion on February 12, 2014. On April 1, 2014, the trial court issued a decision overruling Hogle's motion to suppress.

{¶ 13} The case proceeded to trial on June 9, 2014, and Hogle was ultimately found guilty of one count of rape (digital penetration) and one count of GSI. The jury acquitted Hogle of the remaining rape count (penile penetration). On September 3, 2014, the trial court sentenced Hogle to three years imprisonment for the rape and eighteen months for the GSI. The trial court ordered that the sentences be served concurrently to one another, for an aggregate sentence of three years in prison. Hogle

was also required to register as a Tier III sex offender.

{¶ 14} It is from this judgment that Hogle now appeals.

{¶ 15} Hogle's first assignment of error is as follows:

{¶ 16} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPRRESS."

{¶ 17} In his first assignment, Hogle contends that the trial court erred when it overruled his motion to suppress the statements, both oral and written, that he made during his initial encounter with Sgt. Stannard and Officer Liebherr. Specifically, Hogle argues that he was subjected to a custodial interrogation by the officers without first being advised of his *Miranda* rights. Thus, Hogle claims that all of the statements he made to the officers were subject to suppression.

{¶ 18} A trial court acts as the trier of fact during hearings on motions to suppress, and, thus, is in the best position to determine questions of fact and to evaluate witness credibility. *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, 897 N.E.2d 1149, ¶ 12 (2d Dist.). Therefore, in reviewing the trial court's decision, we must accept the findings of fact that are supported by competent, credible evidence, and then independently determine whether those facts meet the applicable legal standards. *Id.*

{¶ 19} The Fifth Amendment to the United States Constitution provides that "[n]o person *** shall be compelled in any criminal case to be a witness against himself." "The Fifth Amendment privilege against compulsory self-incrimination 'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.' " *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 190, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004),

quoting *Kastigar v. United States*, 406 U.S. 441, 445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Ohio v. Reiner*, 532 U.S. 17, 20, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001). "The right to *Miranda* warnings is grounded in the Fifth Amendment's prohibition against compelled self-incrimination." *State v. Strozier*, 172 Ohio App. 3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶16 (2d Dist.), citing *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

{¶ 20} Police are not required to give *Miranda* warnings to every person they question, even if the person being questioned is a suspect. *State v. Biros,* 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997)*; State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 49 (2d Dist.). *Miranda* warnings are required only for custodial interrogations. *Biros* at 440. *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "The ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). The inquiry whether a person is subject to custodial interrogation focuses upon how a reasonable person in the suspect's position would have understood the situation. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The subjective views of the interviewing officer and the suspect are immaterial to the determination of whether a custodial interrogation was conducted. *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994); *Hatten* at ¶ 50.

{¶ 21} "Instead, we have considered factors such as the location of the interview

and the defendant's reason for being there, whether the defendant was a suspect, whether the defendant was handcuffed or told he was under arrest or whether his freedom to leave was restricted in any other way, whether there were threats or intimidation, whether the police verbally dominated the interrogation or tricked or coerced the confession, and the presence of neutral parties." *State v. Cundiff,* 2d Dist. Montgomery No. 24171, 2011-Ohio-3414, ¶ 57, quoting *Hatten*, at ¶ 50.

{¶ 22} Even when an individual is not in custody and *Miranda* warnings are not required, a defendant's statement may be involuntary and subject to exclusion. *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, 897 N.E.2d 1149, ¶ 14 (2d Dist.), citing *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.3d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *vacated on other grounds*, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). *See also State v. Brewer*, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990); *State v. Marks*, 2d Dist. Montgomery No. 19629, 2003-Ohio-4205. A defendant's statement to police is voluntary absent evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring*, 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987); *State v. Otte*, 74 Ohio St.3d 555, 562, 660 N.E.2d 711 (1996).

{¶ 23} " 'Interrogation' includes express questioning as well as 'any words or

actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *Strozier* at ¶20, quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). "Interrogation" must reflect "a measure of compulsion above and beyond that inherent in custody itself." *Innis,* 446 U.S. at 300. "Police officers are not responsible for unforeseeable incriminating responses." *State v. Waggoner*, 2d Dist. Montgomery No. 21245, 2006-Ohio-844, ¶14; *Strozier* at ¶20.

{¶ 24} Upon review, we find that the record establishes that Hogle was not in custody when he was interviewed by Sgt. Stannard and Officer Liebherr at R.'s residence on the morning of July 4, 2013. Accordingly, the trial court did not err when it overruled Hogle's motion to suppress the oral and written statements he made during the interview. Initially, we note that Hogle was neither handcuffed, nor was he told that he was under arrest. Sgt. Stannard testified that they did not physically intimidate Hogle, nor did they threaten, trick, or coerce him in any way. Significantly, the entire interview only lasted approximately twenty minutes. Although evidence was presented that Hogle had been drinking alcohol on the night of and prior to the incident, Sgt. Stannard testified that Hogle was lucid and answered the questions posed to him in a coherent manner.

{¶ 25} Hogle argues that because he was in his home, he had nowhere else to go when the officers questioned him. Therefore, Hogle asserts that his movement was restricted and he was not free to leave. However, the evidence adduced at the suppression hearing clearly establishes that although the interview was conducted in his residence, Hogle could have exercised the following options, to wit: 1) ended the encounter and asked the officers to leave; 2) ignored the officers and gone to a different

room in the house; and 3) left the residence and gone to another location. Hogle chose not to pursue any of these options.

{¶ 26} Instead, the record establishes that Sgt. Stannard asked Hogle if he was willing to answer some questions regarding J.M.'s allegations. Hogle answered in the affirmative. We note that Hogle initially denied that he had any contact, sexual or otherwise, with J.M. in his oral statement to the officers. Similarly, when asked to provide a written statement by Sgt. Stannard, the record establishes that Hogle voluntarily agreed. Contrary to Hogle's mischaracterization of the evidence, he was not taken into custody immediately after providing the written statement. Sgt. Stannard and Officer Liebherr left the residence and returned to speak further with Hogle only after becoming aware that he had made an incriminating statement in the writing that directly contradicted the oral statement he made to the officers moments earlier. After speaking with Hogle regarding the contents of the written statement, Sgt. Stannard asked him if he would voluntarily accompany the officers to the police station in order to speak with a detective. The record establishes that Hogle voluntarily acquiesced to Sgt. Stannard's request.

{¶ 27} At the suppression hearing, defense counsel and Sgt. Stannard engaged in the following exchange when the officer was being cross-examined:

> Defense Counsel: And based upon your questioning of the victim, you made a determination that the suspect of this felony was Mr. Hogle; correct?
>
> Sgt. Stannard: Correct.
>
> Q: Okay. And based upon what you learned, your dispatch and the fact

> that Mr. Hogle was the suspect at that time, before you talked [to] Mr. Hogle, after you learned all of this but before you talked to him, if Mr. Hogle had got up from his slumber and started to walk toward the door and you said something to him and he said how are you doing, Officer, you know, I'm going out to get a beer, I'm leaving, you would not have let him leave, would you?
>
> ***
>
> You wouldn't have let him leave at that time because he was the suspect; fair?
>
> A: Fair.

{¶ 28} Hogle argues that the preceding exchange establishes that he was subject to a custodial interrogation because he was not free to leave. The standard, however, for determining whether someone is in custody for the purpose of *Miranda* warnings is objective, not subjective. Neither the subjective intent of the officer nor the subjective belief of the defendant is relevant in determining whether the defendant was in custody. *State v. Cundiff*, 2d Dist. Montgomery No. 24171, 2011-Ohio-3414, ¶ 57. Accordingly, the subjective intent of Sgt. Stannard regarding whether Hogle was in custody is immaterial. The evidence adduced by the State established that the encounter between the officers and Hogle in his home was entirely consensual. "The mere presence of police officers does not render a suspect powerless, particularly when the suspect is within the familiar surroundings of his own home." *State v. Chenoweth*, 2d Dist. Miami No. 2010 CA 14, 2011-Ohio-1276, ¶ 6. The courts of this state have generally found that an individual is not in custody when questioning takes place in the individual's home and the

individual is free to move about and is questioned by an officer over a brief period of time. *Id*. at ¶ 7. There was no evidence of threats or intimidation made by the police officers toward appellant at any time. Thus, the court could reasonably conclude that a person in Hogle's situation would not have believed he was in custody prior to his interview by police.

{¶ 29} Hogle's first assignment of error is overruled.

{¶ 30} Hogle's second assignment of error is as follows:

{¶ 31} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A VERDICT WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 32} In his second and final assignment of error, Hogle argues that the verdict finding him guilty of rape and GSI were not supported by the manifest weight of the evidence.

{¶ 33} A claim that a jury verdict is against the manifest weight of the evidence involves the following test:

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The 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. McKnight, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 71.

{¶ 34} The credibility of the witnesses and the weight to be given to their testimony

are matters for the trier of facts to resolve. *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997).

{¶ 35} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510 (Oct. 24, 1997).

{¶ 36} In the instant case, the evidence does not weigh heavily against Hogle's conviction. The evidence of Hogle's guilt is overwhelming. Significantly, Hogle admitted to forcing himself upon J.M. by digitally penetrating her. J.M.'s testimony regarding the incident clearly corresponds with the admissions made by Hogle in his written statement and the oral statements he made to Det. Jahns after being taken into custody. Specifically, J.M. testified that Hogle pinned her arms over her head with one hand while digitally penetrating her with several fingers on his free hand. J.M. testified that she was unable to get free from Hogle because of the way he held her down. J.M. testified that while he restrained her, Hogle bit her breast and said "let me rape you." Emily Draper, a technician from the Miami Valley Regional Crime Lab, testified that Hogle's DNA was subsequently recovered from J.M's breast.

{¶ 37} Accordingly, Hogle's convictions are not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony were matters for the court to resolve. The trial court did not lose its way simply because it chose to believe the testimony of the victim, J.M., who testified at length regarding Hogle forcing her to submit to digital rape and the biting of her breast. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 38} Hogle's second assignment of error is overruled.

{¶ 39} Both of Hogle's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

Nathaniel R. Luken
J. Allen Wilmes
Hon. Stephen Wolaver