[Cite as *State v. Bones*, 2015-Ohio-784.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26017
	:	
v.	:	T.C. NO. 12C3180/1
	:	
LARRY E. BONES	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ___6th___ day of ___March_____, 2015.

. . . . . .

KIRSTEN A. BRANDT, Atty, Reg. No. 0070162, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

LUCAS W. WILDER, Atty. Reg. No. 0074057, 120 W. Second Street, Suite 400, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant Larry Eugene Bones appeals his conviction and sentence for eleven counts of rape of child under the age of ten, in violation of R.C. 2907.02(A)(1)(b), all felonies of the first degree. Bones filed a timely notice of appeal

with this Court on December 5, 2013.

{¶ 2} A.B., the victim, is the daughter of Bones and "Brandy." A.B. was born on October 4, 1995. At the time of the trial in the instant matter, A.B. was eighteen years old.

{¶ 3} When A.B. was born, Bones and Brandy, who were not married, had recently broken up, and Bones was in a relationship with "Jennifer." For the first three months of her life, A.B. remained in the custody of Brandy but spent a great deal of time with Jennifer and Bones. When A.B. was approximately one-and-a-half years old, Bones obtained full custody of her, with Brandy receiving visitation every other weekend.

{¶ 4} Shortly thereafter, Bones ended his relationship with Jennifer and moved back in with Brandy. A.B., however, continued living with Jennifer. Jennifer allowed A.B. to visit Bones and Brandy on holidays and every other weekend. In 2000, Jennifer and Brandy agreed to a shared parenting arrangement involving A.B., wherein she spent alternating weeks with Jennifer and with Bones and Brandy. Bones and Brandy were not consistent with their visitation. In 2004, when A.B. was eight or nine years old, Jennifer terminated the shared parenting schedule and assumed full custody. Neither Bones nor Brandy objected to Jennifer's decision. Jennifer officially adopted A.B. when she was twelve years old.

{¶ 5} When she was approximately thirteen years old, A.B. disclosed to Jennifer that she had been sexually abused, but would not name the perpetrator nor the extent of the abuse. Just before she turned sixteen years old, A.B. told Jennifer that Bones was the individual who had sexually abused her. However, Jennifer did not want to involve the police at that time "because she still loved her father *** [a]nd she wasn't ready and

not willing." Tr. 204-05, Vol. I.

{¶ 6} Despite her initial reluctance, A.B. eventually disclosed to the police that she had been repeatedly sexually abused by Bones from October 4, 1998, until October 3, 2004, when she was between the ages of three and eight years old. On November 14, 2012, Bones was indicted for sixteen counts of rape of a child under ten years old. The case was tried before a jury which began on November 4, 2013.

{¶ 7} During the five-year period wherein the sexual abuse occurred, Bones moved around a great deal and lived at several different locations. At trial, A.B. provided the following testimony regarding the nature and extent of the sexual abuse she suffered from Bones as well as the locations where the abuse occurred.

{¶ 8} COUNTS I, II, & III: Misty Lane, Huber Heights, Ohio

{¶ 9} From October of 1998 until October of 2000, A.B. visited Bones at an apartment he shared with Brandy located on Misty Lane in Huber Heights, Ohio. A.B. was three to four years old during this period. A.B. testified that when she was left alone with Bones, he would touch her vagina with his fingers and then digitally penetrate her. A.B. also recalled that in addition to digital penetration, he would also place his mouth on her vagina. When Bones was finished sexually assaulting her, A.B. recalled that he would allow her to play on a hill located behind the apartment complex.

{¶ 10} COUNTS IV, V, VI, & VII: Pritz Avenue, Dayton, Ohio

{¶ 11} From 2000 to 2002, Bones and Brandy lived at a residence located on Pritz Avenue in Dayton, Ohio. A.B. was between the ages of five and six years old at this time. At the Pritz Avenue residence, Bones subjected A.B. to the same types of sexual abuse she had been made to endure at the apartment on Misty Lane. Specifically,

Bones touched her vagina with his fingers and placed his mouth on her vagina. Bones also placed his penis in A.B.'s mouth. A.B. recalled that she would vomit when Bones would ejaculate in her mouth. A.B. testified that the first time she vomited during the forced oral sex, Bones called her a "b****" and ordered her to clean up the mess. Tr. 142.

{¶ 12} A.B. testified that Bones also anally raped her at the Pritz Avenue address. A.B. testified that she recalled being down on her hands and knees, dressed only in a shirt. A.B. further recalled that during the act, she would ask Bones to "[j]ust please stop," but he would continue until he ejaculated. Tr. 144. The first time this occurred, A.B. testified that she bled from her rear end when she took a bath. After Bones anally raped her, he would allow A.B. to play at a park located nearby the residence. A.B. testified that after one instance when Bones anally raped her, they walked to her grandmother's home. On the way there, A.B. testified that she remembered that she observed a dead dog lying next to some railroad tracks. A.B.'s grandmother (Bones' mother) confirmed A.B.'s recollection of the dead dog next to the railroad tracks when she testified at trial.

{¶ 13} Counts VIII & IX: Pritz Avenue (Complicity)

{¶ 14} A.B. testified that while she was visiting the Pritz residence, Bones invited two unidentified men to come over in order to engage in sexual conduct with her. A.B. testified that Bones would tell her that the men "wanted to spend some time with her." After the men arrived, Bones forced her to go into a bedroom with each of the men. A.B. would then perform oral sex on the men while they watched her in the mirror. A.B. would stare at a pile of clothes in the bedroom in order to cope with what she was being forced to do.

{¶ 15} Counts XV, XVI, XVII, & XVIII: Enterprise Avenue, Dayton, Ohio

{¶ 16} When A.B. was approximately six or seven years old, Bones left Dayton and moved to Texas. In the meantime, Brandy moved to a residence located on Enterprise Avenue in Dayton. Shortly thereafter, Bones moved back to Dayton and began living at the Enterprise Avenue residence with Brandy. A.B. testified that she only visited Bones a few times at the Enterprise address. Nevertheless, Bones continued to sexually abuse A.B. in the same manner as he had at both the Misty Lane and Pritz Avenue residences. Specifically, Bones digitally penetrated her vagina, placed his penis in her anus, performed oral sex on her, and forced her to perform oral sex on him.

{¶ 17} Counts X, XI, XII, XIII: Clover Street, Dayton, Ohio

{¶ 18} When A.B. was approximately seven or eight years old, Bones and Brandy moved to another residence located on Clover Street in Dayton, Ohio. Upon visiting the Clover Street residence, Bones sexually abused A.B. as he had at the Misty Lane, Pritz Avenue, and Enterprise Avenue addresses. Bones digitally penetrated A.B.'s vagina, placed his penis in her anus, performed oral sex on her, and forced her to perform oral sex on him.

{¶ 19} A.B. testified that she was always alone with Bones when the abuse occurred. Bones secured A.B.'s compliance and silence with respect to the sexual abuse by telling her "[t]hat it was their way *** [of] [s]howing love," and "no one else should know." Tr. 154, Vol. I.

{¶ 20} Jennifer testified that when A.B. was between the ages of three and four years old, she began exhibiting disturbing behaviors. Specifically, A.B. would become very upset when Jennifer would drop her off at the Misty Lane residence with Bones.

Jennifer testified that A.B. would complain about her "private area hurting" when she came back from Bones' residence. A.B. also began wetting herself and having night terrors. Jennifer routinely observed swelling and redness in A.B.'s vaginal and rectal areas. A.B. seemed to be "terrified around men." Tr. 192, Vol. I. A.B. was also exhibiting sexualized behaviors, including rubbing herself against Jennifer and other things and trying to kiss using her tongue. *Id*. According to Jennifer, A.B.'s sexual behaviors began to escalate as court-ordered visitations with Bones continued at Pritz Avenue, Enterprise Avenue, and Clover Street. Because the visitation was court-ordered, Jennifer testified that she believed that she did not have any choice but to maintain the schedule. Jennifer enrolled A.B. in psychological counseling and arranged appointments with various doctors to address the vaginal redness and swelling. The doctors gave Jennifer creams and ointments to help with the redness and swelling. Significantly, when the visits with Bones stopped in 2004, Jennifer testified that A.B. stopped complaining about pain and discomfort in her genital area.

{¶ 21} Bones testified on his own behalf at trial. Bones acknowledged that on many occasions during visitations between 1998 and 2004, he watched A.B. unsupervised in his various residences. Bones, however, denied that he ever sexually abused A.B. or allowed any of his acquaintances to do so. Moreover, Bones denied that he ever visited the Enterprise Avenue residence. Bones testified that A.B. was a "liar." Tr. 393, Vol. II.

{¶ 22} At the State's request, the trial court nolled the rape charge in Count XIV at the close of evidence on November 7, 2013. Bones was subsequently found guilty of the rape in Counts I-VII and X-XIII, not guilty of the complicity rapes in Counts VIII and IX, and

not guilty of the rapes described in Counts XV through XVIII. On November 19, 2013, Bones filed a motion for new trial in which he alleged juror misconduct. The trial court overruled Bones' motion for new trial and proceeded to sentencing. Ultimately, Bones was sentenced to three consecutive life sentences, and the trial court designated him a sexually-oriented offender.

{¶ 23} It is from this judgment that Bones now appeals.

{¶ 24} Bones' first assignment of error is as follows:

{¶ 25} "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. BONES' CONVICTIONS AND/OR THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE PROSECUTION DID NOT MEET ITS BURDEN OF PERSUASION AT TRIAL."

{¶ 26} In his first assignment, Bones contends that the State adduced insufficient evidence at trial in order to support his convictions for eleven counts of rape of a child under ten years old. In the alternative, Bones argues that his convictions were against the manifest weight of the evidence.

{¶ 27} Initially, we note that Bones preserved his insufficiency argument by making an unsuccessful Crim. R. 29 motion for acquittal at the close of evidence at trial. Crim. R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction for the charged offense. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing 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.' " (Citations omitted). *State v. Crowley*, 2d Dist. Clark No. 2007 CA 99, 2008-Ohio-4636, ¶ 12.

{¶ 28} "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046, 837 N.E.2d 315. "A claim that a jury verdict is against the manifest weight of the evidence involves a different 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.'" *Id*.

{¶ 29} 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).

{¶ 30} 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).

{¶ 31} Bones was convicted of eleven counts of rape of a child under ten years of age, in violation of R.C. 2907.02(A)(1)(b), which provides in relevant part 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." Under R.C. 2907.01(A), "sexual conduct" includes "anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body *** into the vaginal or anal opening of another."

{¶ 32} In her testimony, A.B. described numerous incidents of rape which occurred while she was between the ages of three and eight years old. According to testimony of A.B., Bones digitally penetrated her vagina and performed cunnilingus on her at the Misty Lane residence. At the Clover Street residence, A.B. testified that Bones digitally penetrated her vagina, performed cunnilingus on her, had anal intercourse with her, and made her perform fellatio on him. At the Pritz Avenue address, A.B. testified that Bones engaged in the same sexual conduct with her as he did with her at the Clover Street residence. Additionally, A.B. testified that Bones compelled her to perform fellatio on two unidentified men at the Pritz Avenue address. Lastly, A.B. testified that at the Enterprise Avenue residence, Bones digitally penetrated her vagina, performed cunnilingus on her, had anal intercourse with her, and made her perform fellatio on him. As previously mentioned, the jury found Bones not guilty of the complicity to rape Counts VIII and IX at Pritz Avenue and all of the rape Counts XV, XVI, XVII, and XVIII at Enterprise Avenue.

{¶ 33} Bones challenges A.B.'s testimony as unreliable on the basis that, at eighteen years of age, she was testifying about events which occurred approximately twelve to fifteen years ago. Bones further asserts that A.B.'s testimony was not credible

because she did not reveal that she had been sexually abused to Jennifer until she was thirteen years old, approximately five years after the abuse ceased. Bones further points out that A.B. did not reveal the abuser was her father until she was sixteen years old, and then only to Jennifer. The rapes were not reported to the police for another year. Bones' argument clearly suggests that if A.B. had actually been the victim of sexual abuse by her father, she would have come forward much sooner.

{¶ 34} At trial, however, the State presented the expert testimony of Dr. Brenda Miceli who opined regarding some of the behaviors that sexually abused children may exhibit, including the tendency to delay the reporting of sexual abuse, as was the case here. Bones did not object to the testimony of Dr. Miceli, and the jury was free to find her testimony to be credible. Moreover, A.B. testified that she did not come forward sooner with the details of the sexual abuse because Bones was her father, she still loved him, and she did not want him to hate her.

{¶ 35} We also note that A.B. was able to provide a detailed description of the sexual abuse she endured at the hands of Bones. Dr. Miceli testified that children "can't generate a memory that they don't have some experience with." Tr. 269, Vol. II. Dr. Miceli also testified that "[i]f a child doesn't understand sex, doesn't know what sexual contact is, doesn't understand how sexual behavior occurs, then they would not be able to come up with a memory related to that." Tr. 272, Vol. II. Further, although the abuse was not reported for a decade, this fact is not uncommon in a parent/child relationship due to loyalty and fear per Dr. Miceli.

{¶ 36} Jennifer's testimony regarding the behavioral manifestations of the sexual abuse further corroborated A.B.'s allegations of the childhood sexual abuse.

Specifically, the behaviors observed by Jennifer, including the bed-wetting, extreme clinginess, night terrors, and fear of men are all common emotional behaviors displayed by a sexually abused child per Dr. Miceli. Jennifer further testified that when A.B. was approximately three or four years old, she began exhibiting sexualized behaviors, including rubbing herself against Jennifer and other things and trying to kiss using her tongue. According to Jennifer, the sexual behaviors which started when A.B. was visiting the Misty Lane residence began to escalate as court-ordered visitations with Bones continued at Pritz Avenue, Enterprise Avenue, and Clover Street.

{¶ 37} Bones also characterizes A.B.'s testimony as vague. Bones' argument in this regard mischaracterizes the record. Although A.B. did testify that she was subject to some confusion over the appearance of the various residences where the sexual abuse occurred, she was able to recall specific details regarding the abuse itself, the places where the abuse occurred, and notable events which happened after the abuse concluded. These details were corroborated by the police who investigated the rapes and A.B.'s relatives who testified at trial.

{¶ 38} A.B. testified that she remembered a hill behind Bones' residence on Misty Lane that she would be allowed to play on after the sexual abuse ended. A.B. also testified that she recalled a park near the Clover Street residence that Bones allowed her to play at when he finished sexually abusing her. Detective Robert Schumacher testified that he traveled to both locations when he was investigating A.B.'s claims against Bones. Det. Schumacher took pictures of both locations and noted that there was a hill behind the Misty Lane residence and a park located very close by the Clover Avenue residence. Additionally, A.B.'s grandmother corroborated A.B.'s memory of seeing a dead dog next

to the railroad while en route to the grandmother's house with Bones. The grandmother and Brandy also corroborated Jennifer's testimony regarding A.B.'s red and swollen vagina.

{¶ 39} Construing the evidence presented in a light most favorable to the State, as we must, we conclude that a rational trier of fact could find all of the essential elements of the crimes of rape to have been proven beyond a reasonable doubt. Bones' rape convictions are therefore supported by legally sufficient evidence.

{¶ 40} Finally, Bones' 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 jury to resolve. The jury did not lose its way simply because it chose to believe the testimony of the victim, A.B., who testified at length regarding the multiple instances of digital penetration, fellatio, cunnilingus, and anal rape perpetrated by Bones while A.B. was between the ages of three and eight years old. For his part, Bones merely denied the events ever happened and called A.B. a liar. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against conviction, or that a manifest miscarriage of justice has occurred.

{¶ 41} Bones' first assignment of error is overruled.

{¶ 42} Bones' second assignment of error is as follows:

{¶ 43} "THE TRIAL COURT ERRED IN OVERRULING MR. BONES' REQUEST FOR A NEW TRIAL BASED UPON JUROR MISCONDUCT."

{¶ 44} In his second assignment, Bones argues that the trial court erred when it overruled his request for a new trial based upon alleged juror misconduct. In his motion for new trial, Bones stated the following:

> After the release of the Jury and as the detective in the case, the two prosecuting attorneys and defense counsel were leaving the third floor of the Court House via the public elevators, several of the jurors were also leaving the third floor. Included among them were Jurors One and Seven among others. During this exodus, one of the jurors remarked to the others that she would have to watch coverage of the trial on the news that night. Another juror expressed surprise that there was any news coverage of the trial in that they had not seen any cameras. The first juror then explained that indeed the reporter for Channel Two had done a "big story" the night before on the "Larry Bones Trial."

{¶ 45} Attached to the motion for new trial was the affidavit of defense counsel wherein he stated that he overheard the exchange between the two jurors. Defense counsel further averred that it was his "belief that one of the jurors *** was discussing the previous night's coverage of the trial *** contrary to the Court's stated prohibition." No additional documentation was filed with the motion.

{¶ 46} The trial court rejected Bones' request for an evidentiary hearing, finding that the motion for new trial did not contain any independent evidence of juror misconduct. The court concluded that the affidavit of defense counsel fell short of establishing that any misconduct was caused by the introduction of extraneous information into jury deliberations.

{¶ 47} Crim.R. 33(A)(2) provides that "a new trial may be granted on motion of the defendant for * * * misconduct of the jury * * *." We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *State v. Taylor,* 2d Dist. Montgomery No.

23916, 2011–Ohio–2563, ¶ 13. The term "abuse of discretion" implies that the trial court's decision is unreasonable, arbitrary or unconscionable. *State v. Griffin*, 2d Dist. Montgomery No. 24001, 2012-Ohio-503, ¶ 9. "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." Citation omitted. *Id.* "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo,* would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Id.*

{¶ 48} "* * * [M]isconduct of a juror will not be presumed, but must be affirmatively proved. The law presumes proper conduct on the part of the jury. Clear and positive evidence 'aliunde' is necessary to overcome this presumption." *State v. Sapp,* 10th Dist. Franklin No. 94APA10-1524, 1995 WL 491390, *7 (Aug. 15, 1995), citing *Lund v. Kline*, 33 Ohio St. 317, 320, 13 N.E.2d 575 (1938).

{¶ 49} Evid. R. 606(B) provides the following:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

on any juror, only after some outside evidence of that act or event has been presented.

{¶ 50} In *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), the Ohio Supreme Court stated that:

> Evid.R. 606(B) governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict. The first sentence of Evid.R. 606(B) embodies the common-law tradition of protecting and preserving the integrity of jury deliberations by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations. The rule is designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties.

Id. at 75.

{¶ 51} The Ohio Supreme Court further stated in *Schiebel* that:

> In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves, * * * and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. * * * *Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of*

impeaching the verdict or for laying a foundation of evidence aliunde.

Id. at 75-76. (Emphasis added)

{¶ 52} The circumstances in the instant case are similar to the facts in *State v. Kellum*, 2d Dist. Miami No. 81 CA 47, 1982 WL 3795 (Sept. 10, 1982), wherein we held that the affidavit of the defendant's attorney, who had overheard a juror's comments to the prosecutor about extraneous information, was not evidence aliunde. "A third person's affidavit to the effect that he has heard jurors make, subsequent to trial, statements tending to impeach their verdict, is not evidence aliunde. This result is based on the fact that the evidence is received not from another source, but from the jurors themselves." *Id*. at * 8.

{¶ 53} The Sixth Circuit Court of Appeals reviewed a similar situation in *Doan v. Brigano*, 237 F.3d 722 (6th Cir.2001). In *Doan*, following a conviction, the defense attorney interviewed the jurors and was told they had conducted an experiment in order to determine whether the defendant's story was credible. One of the jurors also looked up the legal terms "purposeful" and "intent" in a dictionary. The defendant submitted the sworn affidavit of one of the jurors. The trial court overruled the motion for a new trial, and entered a conviction, which was later affirmed by the First District Court of Appeals. *State v. Doan*, 1st Dist. Hamilton No. C-940330, 1995 WL 577524 (Sept. 29, 1995). Doan subsequently filed a petition for habeas corpus relief in the United States District Court. While the *Doan* court ultimately denied the habeas relief sought by the petitioner, the court found that Evid.R. 606 conflicts with the guarantees of the U.S. Constitution, specifically, the Sixth Amendment right to a fair trial before an impartial jury. The *Doan* court criticized Ohio's aliunde rule because, in the court's view, it prevents the

consideration of clear evidence of jury misconduct.

{¶ 54} *Doan*, however, is inapplicable to the instant case. In *Doan*, the appellant presented the affidavit of a juror, who swore to events she herself had observed and in which she had participated. By contrast, the affidavit that accompanied the motion for a new trial in the instant case came directly from the defense attorney who merely repeated a conversation between two jurors that he allegedly overheard after Bones' trial had ended. Moreover, the defense attorney failed to present any additional evidence which corroborated what he overheard.

{¶ 55} Upon review, we conclude that the affidavit from Bones' defense attorney was not outside evidence. Like the affidavit in *Kellum*, defense counsel's affidavit simply conveyed hearsay statements from a juror without any information from a source who had firsthand knowledge of the alleged misconduct. Furthermore, the statement at issue was not an admission by the juror that the juror had watched the report, but only a comment that such a report was televised the previous night. Absent any additional independent evidence, the trial court did not abuse its discretion when it overruled Bones' motion for new trial.

{¶ 56} Bones' second assignment of error is overruled.

{¶ 57} Bones' third assignment of error is as follows:

{¶ 58} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING MR. BONES' REQUEST FOR A CONTINUANCE TO SECURE THE ATTENDANCE OF DR. OBIDES."

{¶ 59} In his third assignment, Bones argues that the trial court erred when it overruled his request for a continuance in order to secure the attendance of Dr. Obides,

who was subpoenaed to testify regarding the results of medical examination of A.B. during the time in which the rapes occurred. As mentioned previously, when Jennifer began to notice swelling, redness in A.B.'s vaginal and anal area, and A.B. was complaining of pain in the same area, Jennifer took her to the doctor to be examined. One of the doctors who examined A.B. was Dr. Obides.

{¶ 60} At some point after 2002 after he examined A.B., Dr. Obides retired from the practice of medicine and moved to New York. Defense counsel subpoenaed Dr. Obides on October 31, 2013, approximately four days before Bones' trial began. On November 6, 2013, the third day of trial, the following exchange occurred:

> The State: *** I believe one of the reasons why [we] went on the record is to talk about Defense attorney's attempt to reach certain doctors that have sense [sic] left the state. ***.
>
> Defense Counsel: Your Honor, at this point, I think to protect the record, I'm going to have to ask the Court to adjourn the trial or continue the trial to let me try to find Dr. Obides, *** who had offered a [sic] opinion directly on this issue of whether there was – he did an examination to determine whether or not there was evidence of any sexual abuse during this period of time that we're dealing with in this case.
>
> My understanding is he has retired many years ago and has now moved to the state of New York. I do not have an address on him, but we would like to have him. I do not have him here for today.
>
> The Court: Have you known about this witness from the first time that you received discovery in this matter?

Defense Counsel: Your Honor, he is one of many doctors that we have identified. He was originally subpoenaed, I think, by the State back in our March trial – back in March when we had a trial date that was previous. It's on the witness list of the State. I have known about him.

I did not realize until the last few weeks that he was not subpoenaed for this event or this trial date. We issued the subpoenas then after our final pre-trial in this case and learned that he cannot be served at the hospital or in the area because the belief of the folks at the hospital is that after he retired he moved to New York.

The Court: And when did you issue the subpoena, Mr. Staton?

Defense Counsel: They were electronically filed, I believe, the Thursday of last week, which would have been the *** the 31st.

The Court: So even today it's less than seven days before the start of the trial and certainly less than that because we're in the third day of trial.

Defense Counsel: That's right, Your Honor.

The Court: Can you, for the record, tell me what efforts you have gone through to obtain the appearance of this doctor?

Defense Counsel: Your Honor, I let in a subpoena to the last known address. We've also done an Internet search for him, and I've had my staff contact the hospital where he used to work to ascertain if anyone knew his whereabouts, if they had a directory that could direct us to him or if they had a number where he could be contacted. And all of those efforts failed.

The Court: So the only information that you have is the last known

information is he moved somewhere to New York –

Defense Counsel: That's correct, Your Honor.

The Court: -- is that correct? And you have no address for him, no employment address, and if I understand, you don't even know if he's alive or dead at the present time.

Defense Counsel: I do not, Your Honor. My understanding is he's retired many years ago or at least several years ago. So I – he doesn't – no longer in practice.

The State: And just to be clear, Your Honor, the State has – this case had prior trial dates. The State did make efforts in those last trial dates to subpoena, you know, all the doctors within the medical records. It was very difficult to find a lot of them.

*** But it was very difficult in this case to actually, you know, track down the doctors across reports given the timeframe, and that's part of the reason that the State, you know, didn't do it this time because they hadn't had success in getting those doctors to come forward even when subpoenaed, you know, in advance of trial to an extent where, you know, there was [sic] months to try and work on it.

That and the fact that, you know, there was no real requirement in the charges for physical injury, and the State didn't think anything in the medical report really said one way or the other whether sexual abuse occurred.

***

> [W]e were unsuccessful even with months of attempting to subpoena most of the doctors in those medical reports, including some of the doctors that Defense counsel was talking about. We attempted to bring them in to talk to them and could not locate them for pretty much any of the medical records that have dealt with the child going to be seen for the vaginal redness, and some of the opinions that Defense counsel's talking about, and that alone could not – the diagnosis wasn't sexual abuse based on that at all.
>
> The Court: Well, it appears that the doctor in question that you mentioned, the State attempted themselves over several months to locate the doctor without success. [Defense Counsel], it sounds like you have done everything, exhausted everything that you could do to locate this doctor.
>
> Even if I continued this trial, there's no assurance that we could even find the doctor or if he's alive or dead or where he's at. So I am at this point in time, based upon what's been represented here, I'm not inclined to continue this trial to allow any further effort to locate him because I think it would be futile at this point in time, and so I'm going to deny your motion to continue, based upon failure to locate that doctor, based upon the facts on the record. ***.

Tr. 420-423, Vol. III.

{¶ 61} A trial court has broad discretion to grant or deny a continuance. *State v. Bocock*, 2d Dist. Montgomery No. 22481, 2008-Ohio-5641, ¶22. Factors a trial court

should consider include "'the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which give [sic] rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.'" *Id.* at ¶23, quoting *State v. Maxwell*, 2d Dist. Montgomery No. 13966, 1993 WL 393835 (Oct. 7, 1993).

{¶ 62} Here, the trial court did not abuse its discretion in denying a continuance. With regard to Dr. Obides, the fact that Bones waited until the close of the State's case to seek a continuance was dilatory. See *State v. Wayne*, 2d Dist. Montgomery No. 25243, 2013-Ohio-5060, ¶ 16. We note that Bones waited to request the continuance until after he had called his last witness. At that point, a continuance would have inconvenienced the State, the trial court, and the jury. *Id*. Dr. Obides had been subpoenaed by both the defense and the State, and yet, his whereabouts still remained unknown. Defense counsel did not even know whether Dr. Obides was still alive. Moreover, it is unclear what, if any, relevant testimony that Dr. Obides would have been able to provide other than the fact that he examined A.B. during the period in question and that she suffered from redness, pain, and swelling in the vaginal and anal area. These facts clearly support the trial court's denial of a continuance.

{¶ 63} Bones' third assignment of error is overruled.

{¶ 64} Bones' fourth assignment of error is as follows:

{¶ 65} "MR. BONES' TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE."

{¶ 66} In his fourth assignment, Bones contends that he received ineffective assistance when his counsel failed to secure Dr. Obides' attendance at trial and failed to offer A.B.'s medical records into evidence. Specifically, Bones argues A.B.'s medical records further supported the defense's argument that she did not have any physical injuries consistent with rape.

{¶ 67} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, 2d Dist. Montgomery No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 68} An appellant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). The test for a claim of ineffective assistance of counsel is not whether counsel pursued every possible defense;

the test is whether the defense chosen was objectively reasonable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

{¶ 69} Initially, we note that defense counsel pursued nearly every possible avenue regarding securing Dr. Obides' attendance at trial. The doctor, however, had retired and moved to New York in the intervening years since he had examined A.B. The record establishes that defense counsel searched for updated information on Dr. Obides, but was unable to find anything. We note that the State admitted that it also spent months attempting to locate Dr. Obides but was likewise unsuccessful. Defense counsel admitted that he did not even know if Dr. Obides was still alive. Without any updated contact information, which neither the State nor defense counsel was able to obtain, successful service of an out-of-state subpoena would never have been accomplished.

{¶ 70} Additionally, defense counsel was able to establish through other witnesses that A.B. was examined on several different occasions for vaginal redness and swelling with no resulting physical documentation of sexual abuse, such as vaginal or rectal tearing. Defense counsel elicited from Jennifer, Brandy, and the grandmother that the doctor simply sent A.B. home with a cream and instructions to avoid bubble baths, without a formal opinion finding that sexual abuse had occurred. Bones' assertion that Dr. Obides' testimony and/or the medical records "could have provided [evidence] that [A.B.]

was examined at the time the rape was occurring but exhibited no physical signs of abuse" is undermined in part by the fact that digital penetration and oral sex acts do not lend themselves to documentary physical evidence. Moreover, the medical records of A.B.'s examinations fail to shed any light on whether sexual abuse occurred at all as none was reported or alleged at the time. Accordingly, Bones is unable to establish that he received ineffective assistance of counsel.

{¶ 71} Bones' fourth assignment of error is overruled.

{¶ 72} Bones' fifth and final assignment of error is as follows:

{¶ 73} "THE TRIAL COURT ABSED ITS DISCRETION BY DISALLOWING EVIDENCE THAT ANOTHER PERSON COMMITTED SEXUAL ABUSE AGAINST [A.B.] AND THAT [A.B.] HAD REPORTED THE ABUSE."

{¶ 74} In his final assignment, Bones argues that the trial court abused its discretion by excluding evidence that A.B. was sexually assaulted by another male and reported the assault immediately. Specifically, Bones asserts that the trial court's decision was error because "evidence of third-party guilt was left out[,]" and "evidence countering Dr. Miceli's testimony that young children will often not report incidents of abuse was refused."

{¶ 75} In order to evaluate this argument, we start with the general proposition that "[a] trial court has broad discretion in determining whether to admit or exclude evidence. Absent an abuse of discretion that materially prejudices a party, the trial court's decision will stand." *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66, 567 N.E.2d 1291 (1991), citing *State v. Withers*, 44 Ohio St.2d 53, 55, 337 N.E.2d 780 (1975). An abuse of discretion occurs when a trial court "makes a decision that is unreasonable, arbitrary, or

unconscionable." *Huntington Natl. Bank v. Burch*, 157 Ohio App.3d 71, 2004-Ohio-2046, 809 N.E.2d 55, ¶ 14 (2d Dist.), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 76} Evid.R. 402 provides that "[a]ll relevant evidence is admissible * * * [and that] [e]vidence which is not relevant is not admissible." Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶ 77} At trial, defense counsel sought to call D.A. as a witness. D.A. was the father of a boy who was accused of inappropriately touching A.B. when both children were approximately five years old. Defense counsel proffered that if called as a witness, D.A. would have given the following testimony: (1) A.B. accused his son of sexual assault; (2) Jennifer called Bones to inform him of the abuse; (3) Bones called D.A. to discuss A.B.'s allegation; (4) D.A. and his wife discussed the incident with their son; (5) the boy admitted that "he had touched [A.B.'s] butt;" and (6) A.B's disclosure resulted in a medical examination and a criminal investigation. The trial court excluded the evidence because it was irrelevant to the rape charges against Bones and was overly prejudicial.

{¶ 78} Defense counsel wanted to elicit D.A.'s testimony because he wanted to rebut Dr. Miceli's testimony that most children do not immediately disclose instances of sexual abuse. Defense counsel sought to establish that A.B. was actually capable of reporting and that she did, in fact, report an incident of inappropriate touching during the same time frame when she was being sexually abused by Bones. In fact, the jury did learn of this report made while A.B. was of tender years. Additionally, defense counsel

wanted to attribute A.B.'s counseling to the incident of inappropriate touching by D.A.'s son.

{¶ 79} However, the record establishes that A.B. entered into counseling starting when she was three years old, a full two years before the incident with D.A.'s son. For defense counsel to be permitted to suggest that A.B. entered counseling when she was three years old because of an incident which occurred when she was five would have been contrary to the facts in evidence and entirely misleading to the jury.

{¶ 80} We note that defense counsel was permitted to elicit very general testimony from Jennifer regarding the incident with D.A.'s son. Jennifer testified that A.B. reported the incident when she was five years old, and the Huber Heights Police Department investigated A.B.'s claims. However, no formal action was ever taken against the boy because of the age of the children when the incident occurred.

{¶ 81} Regardless, the specific details of the incident were properly excluded because they had no probative value with respect to whether Bones repeatedly sexually abused his daughter, A.B. We note that defense counsel was not trying to establish that D.A.'s son was A.B.'s abuser, rather, Bones' defense was that the rapes never occurred and that A.B. was a "liar." Thus, the trial court did not err when it excluded D.A.'s testimony.

{¶ 82} Bones' fifth and final assignment of error is overruled.

{¶ 83} All of Bones' assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and HALL, J., concur.

Copies mailed to:

Kirsten A. Brandt
Lucas W. Wilder
Hon. Dennis J. Adkins