

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

vs.

ANTHONY C. PRYOR

Defendant-Appellant

: JUDGES:
: Hon. William B. Hoffman, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. Julie A. Edwards, J.
:
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:

: Case No. 02CA91
:
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: OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 02CR057

JUDGMENT: Affirmed in part, reversed in part and
remanded

DATE OF JUDGMENT ENTRY: February 2, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, J.

{¶1} On February 15, 2002, the Fairfield County Grand Jury indicted appellant, Anthony Pryor, on four counts of rape in violation of R.C. 2907.02, four counts of complicity to commit rape in violation of 2907.02 and R.C. 2923.03, two counts of kidnapping in violation of R.C. 2905.01 and one count of abduction in violation of R.C. 2905.02. Said charges arose from various incidents involving appellant's wife, Gloria Pryor, and her children, appellant's stepchildren, a girl, K.S., born May 31, 1991, and a boy, J.S., born June 30, 1992.

{¶2} A jury trial commenced on September 24, 2002. At the conclusion of the state's case-in-chief, appellant moved for a Crim.R. 29 acquittal on the two kidnapping counts and the one abduction count. The trial court granted the motion as to one of the kidnapping counts. The jury found appellant guilty of all remaining counts except for two of the four rape counts involving K.S. By judgment entry filed October 31, 2002, the trial court sentenced appellant to an aggregate term of three life sentences.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT VIOLATED MR. PRYOR'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN IT OVERRULED HIS MOTION TO HIRE AN EXPERT TO REVIEW THE CASE TO DETERMINE WHETHER PROPER PROTOCOL HAD BEEN FOLLOWED IN INTERVIEWING THE COMPLAINING WITNESSES."

II

{¶5} "THE TRIAL COURT VIOLATED ANTHONY PRYOR'S RIGHTS TO DUE PROCESS, CONFRONTATION, AND A FAIR TRIAL, AND ABUSED ITS DISCRETION, WHEN IT PERMITTED PREJUDICIAL TESTIMONY TO BE ADMITTED OVER THE OBJECTIONS OF DEFENSE COUNSEL."

III

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION, AND DENIED ANTHONY PRYOR THE RIGHT TO DUE PROCESS AND A FAIR TRIAL, WHEN IT REFUSED TO PERMIT A WITNESS TO GIVE AN OPINION CONCERNING WHETHER THE COMPLAINING WITNESSES WERE COACHED."

IV

{¶7} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED ANTHONY PRYOR'S RIGHTS TO DUE PROCESS, TO CONFRONT HIS ACCUSERS, AND A FAIR TRIAL WHEN IT PROHIBITED TRIAL COUNSEL FROM REVIEWING THE COMPLAINING WITNESS'S STATEMENTS."

V

{¶8} "THE TRIAL COURT VIOLATED ANTHONY PRYOR'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF GUILT AGAINST HIM, WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

VI

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW, AND VIOLATED MR. PRYOR'S RIGHT TO DUE PROCESS, WHEN IT FAILED TO INFORM HIM THAT

HE WAS SUBJECT TO POST-RELEASE CONTROL UPON HIS RELEASE FROM PRISON."

I

{¶10} Appellant claims the trial court erred in denying his request for an expert witness at state's expense. We disagree.

{¶11} The appointment of an expert rests within the trial court's sound discretion. *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217. We note harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A).

{¶12} Appellant argues he should have been appointed an expert witness to test whether the questioning protocol utilized by the arresting officer, Detective Gary Pierce of the Fairfield County Sheriff's Department, in interviewing the children unduly prejudiced appellant. In support of his position, appellant argues *State v. Gersin*, 76 Ohio St.3d 491, 1996-Ohio-114, is controlling. We find this case is not controlling for the following reasons. In *Gersin*, the trial court found an expert witness could not testify on the proper protocol in interviewing children who are suspected victims of sexual abuse. The Supreme Court of Ohio found the use of expert testimony as to proper interviewing protocol was relevant and admissible.

{¶13} In this case, the trial court denied appellant's request for a court-appointed expert, finding the protocol employed was valid. On August 9, 2003, the trial court held

an evidentiary hearing on the admissibility of such evidence, or as defense counsel termed it a "taint hearing." August 9, 2002 T. at 15. Detective Pierce testified at this hearing and explained his training in proper interviewing techniques of alleged sexual abuse victims. Id. at 18-21. Defense counsel questioned Detective Pierce's use of audiotape as opposed to videotape in recording the interviews. Id. at 24-25. Defense counsel argued by using audiotape over videotape, it is difficult to assess whether the interviewing of the children and the suspicion of leading questions prior to the interviews asked by the maternal grandmother and social worker improperly tainted Detective Pierce's interviews.

{¶14} Despite this argument, the trial court made a thorough analysis of the facts before denying the request. The trial court found the children were not of presumed incompetent years, they were eight and ten years old, their initial report was made to their maternal grandmother, Detective Pierce used open-ended questions and the expert could not testify as to credibility. Id. at 47-48; Entry filed August 20, 2002. The trial court personally reviewed the children's statements (Id. at 49-52), and stated its conclusions for denying the requested expert as follows:

{¶15} "Based upon the totality of these statements, the Court would find that essentially Detective Pierce's protocol was as he testified to. I do not see any improper inducements or threats against these minor victims in these statements that would lead the Court to feel that a serious issue has been raised about the protocol that was used in the interviewing of these children." T. at 52.

{¶16} Given the trial court's extensive review, we cannot find the trial court abused its discretion in denying appellant's request. Further, even if it were error to

deny the expert, we find that absent any proffered testimony on the disputed protocol, we cannot find any undue prejudice under the harmless error rule. The children testified, were examined and cross-examined, and Detective Pierce never testified as to the children's statements nor did he testify as to their credibility.

{¶17} Assignment of Error I is denied.

II

{¶18} Appellant claims the trial court erred in permitting Pediatric Nurse Practitioner Gail Horner to testify concerning certain studies when such studies were not admitted into evidence. We disagree.

{¶19} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173; *Blakemore*, supra.

{¶20} Nurse Horner examined K.S. On direct, Nurse Horner explained she found K.S. had the following:

{¶21} "****a transection in her hymen at 6:00 o'clock. A transection is a tear in the hymen at 6:00 o'clock, extending entirely through the hymen, which resulted in basically no hymenal tissue being presented from 6:00 to 7:00 o'clock.***And the hymen is the tissue around the opening to the vagina.

{¶22} "And then she also had on her posterior fourchette, which is kind of where the outer folds of the labia come together to kind of protect the hymen, there was an avascular scar, meaning a scar without any blood vessels in it, from 6:00 to 7:00 o'clock extending to the vestibule." T. at 451-452.

{¶23} On re-direct, Nurse Horner testified these findings were "consistent with a penetrating injury of the hymen" and "diagnostic of sexual abuse." T. at 481. To

support this conclusion, Nurse Horner cited to the fact that studies show such findings are found in a small percentage of sexual abuse cases, and her clinic conducted a study over a six month period of time "of girls who gave history of penile penetration of the vagina, and only 25 percent of those girls had any physical findings." T. at 482-483.

{¶24} On cross-examination, defense counsel extensively questioned Nurse Horner on the significance of lack of hymenal tissue at "6:00 to 7:00 o'clock." T. at 468-474.

{¶25} Appellant argues Nurse Horner's testimony regarding the studies was not supported by the evidence and was violative of Evid.R. 705, as the absence of any evidence on these studies thwarted appellant's ability to impeach the testimony. In admitting the testimony, the trial court based its reasoning on the fact that the re-direct questioning was a rebuttal to a door opened by defense counsel during cross-examination. T. at 484-485. We note opening an issue on cross-examination does not give the re-direct questioner carte blanc to put in any evidence not subject to the rules of evidence.

{¶26} We find the complained of testimony is minimal at best, and qualifies as harmless error. The issue of penetration was established by the children, and Nurse Horner conceded the two injuries could have occurred simultaneously and were indicative of penal penetration. Given the extent of the evidence, we find the complained of testimony to constitute harmless error. Further, Nurse Horner's opinion was premised on her personal examination of K.S.

{¶27} Assignment of Error II is denied.

III

{¶28} Appellant claims the trial court erred in denying the testimony of appellant's wife, Gloria Pryor, as it related to her opinion that the children were coached. We disagree.

{¶29} As previously stated, our standard of review is abuse of discretion on evidentiary issues. *Sage; Blakemore*.

{¶30} The children's maternal grandmother reported the children's allegations to the appropriate authorities. After defense counsel cross-examined Mrs. Pryor as to her rancorous relationship with her mother, the following exchange occurred:

{¶31} "Q. Do you recall a conversation that you and I had prior to today?

{¶32} "A. Yes.

{¶33} "Q. Do you recall as part of that conversation I asked you a question regarding whether or not you thought your mother was capable of instilling ideas in people's heads?

{¶34} "A. Yes." T. at 601.

{¶35} The prosecutor objected and the trial court sustained the objection. T. at 602-603.

{¶36} Pursuant to Evid.R. 701, we find the sought after opinion did not qualify as it was not offered as an opinion based upon Mrs. Pryor's knowledge. The only elicited testimony was whether Mrs. Pryor got along with her mother, not on her mother's ability to control others. In addition, the opinion was not based upon any direct factual evidence.

{¶37} Upon review, we find the trial court did not err in denying the testimony.

{¶38} Assignment of Error III is denied.

IV

{¶39} Appellant claims the trial court erred in not permitting defense counsel to participate in the in camera review of previous statements by the children. We disagree.

{¶40} At the conclusion of each of the children's testimony, defense counsel requested a Crim.R. 16(C)(1)(d) review. T. at 368, 763. At both times, the trial court took a recess and after the recess, ruled on the use of prior inconsistent statements. At no time did defense counsel object to this procedure. T. at 370-371, 765. There is no record of what happened when the trial court left the bench to review the statements. When portions of the transcript necessary to resolve issues are not part of the record, we must presume regularity in the trial court's proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶41} With no objection nor record of the in camera inspection, we are unable to find any prejudice to appellant.

{¶42} Assignment of Error IV is denied.

V

{¶43} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶44} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶45} Appellant was convicted of two counts of rape against K.S., two counts of complicity to commit rape involving K.S. and J.S., two counts of complicity to commit rape involving J.S. and Mrs. Pryor, one count of kidnapping and one count of abduction. Said charges are defined in pertinent part as follows, respectively:

{¶46} "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶47} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Rape, R.C. 2907.02(A)(1)(b).

{¶48} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶49} "(1) Solicit or procure another to commit the offense;

{¶50} "(4) Cause an innocent or irresponsible person to commit the offense." Complicity, R.C. 2923.03(A)(1) and (4).

{¶51} "(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious

physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

{¶52} "(2) Restrain another of his liberty." Kidnapping, R.C. 2905.01(B)(2)

{¶53} "(A) No person, without privilege to do so, shall knowingly do any of the following:

{¶54} "(2) By force or threat, restrain the liberty of another person, under circumstances which create a risk of physical harm to the victim, or place the other person in fear." Abduction, R.C. 2905.02(A)(2)

{¶55} The convictions can be broken into three areas in relation to the two children and the participation of Mrs. Pryor. In order to review under the manifest weight and sufficiency of the evidence, we will discuss each area separately.

K.S.

{¶56} The credibility of K.S. is the central issue raised by appellant. He argues K.S. provided little or no facts surrounding the sexual abuse that she states happened twenty times. In particular, appellant argues her memory is very clear on everything but the facts surrounding the incidents. Appellant also argues the physical evidence is inconsistent with vaginal intercourse twenty times.

K.S. AND J.S.

{¶57} Both children testified appellant forced them to engage in sexual relations with each other. Appellant claims their testimony is inconsistent with each other's. He argues their testimony is contradictory and incompatible.

J.S. AND MRS. PRYOR

{¶58} J.S. testified appellant forced him to engage in sexual relations with his mother. Originally, Mrs. Pryor denied this allegation. She changed her story after being questioned by police and changed her story at trial. Mrs. Pryor claimed appellant handcuffed and tied her to her bed which she struggled against. However, once J.S. entered the bedroom, she acquiesced to the sexual intercourse forced on J.S. by appellant. There were inconsistencies relative to her position on the bed.

MRS. PRYOR

{¶59} Appellant claims Mrs. Pryor had every reason to embellish her testimony because of the plea bargain she received. Appellant argues her bias and lack of credibility were overwhelming.

{¶60} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶61} The children testified as to the sexual incidents with appellant. The claims were reinforced by their mother, Mrs. Pryor. Appellant argues there are too many inconsistencies between the testimonies to substantiate the verdict.

{¶62} K.S. testified appellant touched her "private part" with his "private" while in the garage on King Street. T. at 342-343. She testified she was ten and one-half years old at the time. T. at 342. K.S. testified it happened about twenty times. T. at 345. She testified to appellant's pattern of waking her up in the middle of the night and having her come to his bed and making her take off her clothes. T. at 348-349. Appellant

would put his lips on her "private" and she would attempt to wiggle away, but he held her down. T. at 349-350. He also handcuffed her at the ankle. T. at 351.

{¶63} K.S. also testified appellant made her and her brother, J.S., engage in sexual relations together. T. at 355. She testified to penetration. T. at 356. She also testified to digital penetration by appellant. T. at 362.

{¶64} Nurse Horner testified to a tear in the hymen of K.S. with the result of no hymenal tissue at "6:00 to 7:00 o'clock" and an "avascular scar" on the posterior fourchette. T. at 451-452.

{¶65} We note K.S. was subjected to vigorous cross-examination on the timing and location of the alleged incidents. T. at 384, 398-406.

{¶66} J.S. testified to seeing appellant handcuff K.S. T. at 755-756. J.S. stated appellant locked himself, J.S. and K.S. in a bedroom together. T. at 756-757. J.S. testified appellant made him and K.S. take off their clothes, and made him get on top of K.S. and place his private on hers resulting in penetration. T. at 757-759, 820. J.S. also testified appellant made him take off his clothes while his mother was tied to a bed, and made him penetrate his mother. T. at 760-763, 802-804.

{¶67} J.S. was also subjected to aggressive cross-examination. T. at 823-825. Defense counsel elicited testimony that J.S. had been punished by appellant on several occasions; he was punished for lying and K.S. was punished for sneaking food. T. at 784-792, 795.

{¶68} Mrs. Pryor testified and for her part, had made a plea bargain. T. at 580-581. She testified to physical abuse by appellant of herself and the children. T. at 553, 558-559. She admitted to seeing appellant and K.S. having "sex together." T. at 555.

She noticed K.S. crying and admonished appellant to stop. T. at 556. Mrs. Pryor recounted an incident where the children were with appellant in a locked bedroom. T. at 559. When questioned about it, appellant told her it was better she "didn't know what was on the other side of that door." T. at 560. Appellant admitted to Mrs. Pryor of teaching the children on "how to have sex together." T. at 560. She overheard appellant threaten the children and observed appellant handcuff K.S. to the bed overnight. T. at 568-572. Mrs. Pryor spoke of a time appellant handcuffed her to her bed and made J.S. engage in sexual relations with her. T. at 572-575.

{¶69} Defense counsel also cross-examined Mrs. Pryor on her plea agreement and her dislike of her mother, and to inconsistencies in her statements. T. at 600-601, 605-608, 620-621. Defense counsel pointed out that she initially denied the sexual abuse, but later changed her story. T. at 628. Defense counsel also questioned her story about being tied to her bed "absolutely pinned" with her pelvic region staying "flat against the bed" as that would have made it impossible for J.S. to penetrate her. T. at 635, 653-655.

{¶70} All of the inconsistencies argued in this assignment of error were laid before the jury. The jury as the fact finders had the best view of the demeanor and credibility of the three witnesses. Each witness corroborated the other's testimony. It would be easy to reject Mrs. Pryor's self-serving statements if they had been made in a vacuum, but they were not. Each child gave the same account, and the accounts of K.S. were corroborated with physical findings.

{¶71} Upon review, we find sufficient evidence, if believed, to substantiate the guilty verdicts, and no manifest miscarriage of justice.

{¶72} Assignment of Error V is denied.

VI

{¶73} Appellant claims the trial court erred in failing to inform him of the post-release control provisions after release from prison. We agree.

{¶74} Based upon the authority of *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, the matter is remanded for re-sentencing on the issue of post-release control only.

{¶75} Assignment of Error VI is granted.

{¶76} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, J.

Hoffman, P.J. and

Edwards, J. concur.