[Cite as *State v. Lockhart*, 2008-Ohio-57.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 06CAA100080
JOHN C. LOCKHART, JR	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 06CRI010011
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 9, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ALISON SKINNER PETERS 140 North Sandusky Street 3rd Floor Delaware, OH 43015	ANTHONY M. HEALD CHAD A. HEALD 125 North Sandusky Street Delaware, OH 43015

Farmer, J.

{¶1} On January 13, 2006, the Delaware County Grand Jury indicted appellant, John Lockhart, Jr., on three counts of rape in violation of R.C. 2907.02(A)(1)(b) and three counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). Said charges arose from incidents involving appellant and his live-in girlfriend's nine year old daughter.

{¶2} A jury trial commenced on July 20, 2006. The jury found appellant guilty on one of the rape counts and all three counts of gross sexual imposition. By judgment entry filed October 16, 2006, the trial court sentenced appellant to an aggregate term of life in prison.

{¶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 COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE A TYPED COPY OF AN INTERVIEW OF THE ALLEGED VICTIM PERFORMED BY CRAIG HILL OF DELAWARE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES."

II

{¶5} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE PHOTOGRAPHS OBTAINED FROM THE S.A.N.E., SARA BALDOSSER."

III

{¶6} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GAVE AN IMPROPER JURY INSTRUCTION AS TO COUNTS TWO, FOUR AND SIX ON THE ELEMENT OF 'PURPOSE'."

IV

{¶7} "THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

V

{¶8} "THE COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE DEFENDANT'S ORAL MOTIONS TO DISMISS AND/OR CONTINUE THE TRIAL BASED ON THE COURT'S APPLICATION OF *VALENTINE V. KONTEH,* F3RD. 62."

VI

{¶9} "THE JURY'S VERDICT OF GUILTY WAS IMPROPER AS THE STATE OF OHIO FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SHOW THAT ON OR ABOUT FEBRUARY 2, 2005, THE DEFENDANT COMMITTED THE CRIMES OF RAPE AND GROSS SEXUAL IMPOSITION."

I

{¶10} Appellant claims the trial court erred in permitting a typed transcript of an audiotaped interview of the victim by Craig Hill, an investigating officer with the Delaware County Department of Job and Family Services (State's Exhibit 14).

{¶11} The first concern is whether the typed transcript was properly authenticated. Evid.R. 901 governs requirement of authentication or identification. Subsection (A) states, "The requirement of authentication or identification as a condition

precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

{¶12} Because there is no official certification by the typist as to the transcript's authenticity, the only exception that applies is set forth in Evid.R. 901(B)(1) which states the following:

{¶13} "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

{¶14} "*(1) Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be."

{¶15} Mr. Hill described the procedures for audiotaping the interview. T. at 603-605. Mr. Hill then opined State's Exhibit 14, the typed transcript, was a fair and accurate copy. T. at 614. We therefore conclude the typed transcript was properly authenticated.

{¶16} Next, appellant argues the trial court erred in permitting the jury to determine whether the interview "should be considered as substantive evidence or for impeachment purposes." Appellant's Brief at 8. We note it is obvious from the victim's cross-examination that defense counsel used the transcript. The trial court provided the transcript to appellant prior to trial. July 19, 2006 T. at 14. It is also clear from the cross-examination that defense counsel questioned the victim on inconsistencies between her statements in the interview and her trial testimony. T. at 333-345. In particular, defense counsel questioned the victim's testimony on direct that appellant

"was humping me" like her dog does which was not included in the transcript of the interview. T. at 303, 333.

{¶17} We find the interview presents both consistent and inconsistent statements. The transcript does not qualify under the exceptions to hearsay under Evid.R. 801(D)(1). However, the transcript qualifies as it was used in cross-examination under Evid.R. 613(A) which states, "In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel."

{¶18} The trial court declined to rule on the Evid.R. 613(A) issue therefore, the specific safeguards of Evid.R. 613(B) were not afforded to appellant:

{¶19} "Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

{¶20} "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

{¶21} "(2) The subject matter of the statement is one of the following:

{¶22} "(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

{¶23} "(b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(B) or 706;

{¶24} "(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence."

{¶25} The trial court permitted the jury to speculate as to the use of the interview statements during its deliberations. As such, the admission of the interview transcript without specific instructions was error. However, we find the error to be harmless. 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). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right. The victim testified with specificity, and the testimony taken as a whole was essentially the same as to the sexual activity. The physical evidence also corroborated the victim's testimony.

{¶26} Upon review, we find the trial court erred in providing the interview transcript to the jury absent cautionary instructions, but we find the error to be harmless.

{¶27} Assignment of Error I is denied.

II

{¶28} Appellant claims the trial court erred in admitting into evidence the photographs obtained during the physical examination of the victim [State's Exhibits 32(a)–(f)]. Specifically, appellant claims the photographs were not true and accurate depictions because they admitted a "red hue." We disagree.

{¶29} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that 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.

{¶30} Sara Baldosser, the Sexual Assault Nurse Examiner who examined the victim at the hospital, testified to the following on re-direct:

{¶31} "Q. Anything about that camera or the picture that produces or changed since you took these pictures?

{¶32} "A. Yes, it has. Our camera was developing photographs that were really red, and it was on – the photographs weren't coming out as clear as we were seeing with the culpa scope. We had the camera adjusted so the coloring on it, so this wasn't so red because the red was drawing out the actual injuries.

{¶33} "Q. The adjustment you just mentioned was after you saw Alycia McDaniel?

{¶34} "A. That's correct." T. at 568-569.

{¶35} The jury was given the actual photographs after this specific clarification. Nurse Baldosser testified as to her personal observation of the victim's genitalia, and described her injuries and pointed them out in the photographs. T. at 530-531.

{¶36} The jury was given the "hue" clarification during Nurse Baldosser's re-direct examination, and also her specific observations on direct testimony vis-à-vis the photographs.

{¶37} Upon review, we find the trial court did not abuse its discretion in admitting the photographs into evidence.

{¶38} Assignment of Error II is denied.

III

{¶39} Appellant claims the trial court erred in giving an incorrect jury instruction.

{¶40} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App.3d 338; *Blakemore*. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St.3d 286.

{¶41} Specifically, appellant argues the trial court erred in instructing the jury on the definitions of sexual arousal and purpose regarding the gross sexual imposition counts:

{¶42} "The purpose of sexually gratifying either person is an essential element of sexual contact.

{¶43} "A person acts purposely, when it is his specific intention to cause a certain result. Purpose is a decision of the mind to do an act with a conscious objective to produce a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

{¶44} "The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and all of the other facts and circumstances in evidence. Whether the touching of a victim's erogenous zone was for purposes of sexual arousal or gratification may be inferred from the type, nature and circumstances surrounding the contact.

{¶45} "Further, the term sexual arousal or gratification contemplates any touching of the described areas which a reasonable person would perceive as sexually

stimulating or gratifying. So then it must be established in this case that at the time frame in question there was present within the mind of the defendant a specific purpose of sexually arousing or gratifying himself or the other person." T. at 1016-1017.

{¶46} We concur the "reasonable person" language was given in error. R.C. 2907.01(B) defines "sexual contact" as follows:

{¶47} " 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶48} The "purpose" included in the definition is limited to the sexual arousal or gratification of the specific persons involved in the act. The reasonable person test is not applicable in a jury charge on gross sexual imposition.

{¶49} Although the trial court erred in giving the complained of jury instruction, we find the error to be harmless. The victim specifically testified as to appellant's arousal i.e., he had peed, it was wet, "slimy." T. at 281.

{¶50} Upon review, we find the trial court erred in giving the complained of jury instruction, but find the error to be harmless.

{¶51} Assignment of Error III is denied.

IV

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

{¶53} 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.

{¶54} Appellant was convicted on one count of rape in violation of R.C. 2907.02(A)(1)(b) which states the following:

{¶55} "(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:

{¶56} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶57} Appellant was also convicted on three counts of gross sexual imposition over a continuous period of time (November 27, 2004-December 31, 2004 and January 1, 2005-February 1, 2005) in violation of R.C. 2907.05(A)(4) which states the following:

{¶58} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶59} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶60} The physical examination of the victim revealed a two centimeter bruise on her genitalia, a .25 centimeter vascular red bruise, and penetrating injuries to her

hymen. T. at 530-531, 536. The injuries were inconsistent with bubble baths or urinary infections. T. at 546, 552.

{¶61} The victim testified she was nine years old. T. at 267. She testified the sexual contact began after she, her sister, and her mother moved to Ohio to live with appellant after Thanksgiving of 2004. T. at 275, 375. The sexual contact began with appellant rubbing his penis on the victim's leg. T. at 276. Appellant then began rubbing the victim's "personal area" with his finger. T. at 281-282. Appellant pulled down the victim's pants and penetrated her vagina with his finger. T. at 285. It then progressed to touching her "butt" with his tongue. T. at 286. The victim testified the sexual contact occurred prior to Christmas, 2004. T. at 288-289. There was one incident of cunnilingus. T. at 289-290, 292. The last incident of sexual contact occurred just prior to the victim reporting the incidents to her mother on February 4, 2005. T. at 292-293.

{¶62} Appellant was convicted on three incidents of gross sexual imposition from November 27, 2004-December 31, 2004 and January 1, 2005-February 1, 2005 and one count of rape on February 2, 2005. The victim testified to numerous incidents of sexual contact from after Thanksgiving 2004 to February 2, 2005. The sexual contact included rubbing of the vaginal area and anus. The rape involved digital penetration of the vagina which was substantiated through the physical examination.

{¶63} We find sufficient evidence of at least three individual incidents of gross sexual imposition and one incident of digital penetration. We conclude that although the testimony as to dates was not precise, appellant's continuing course of conduct was sufficient to establish the two time spans and the February 2, 2005 date. The jury

chose to believe the victim's testimony which was substantiated by the physical examination as opposed to appellant's general denial.

{¶64} Upon review, we find sufficient evidence to support the jury's decision, and no manifest miscarriage of justice.

{¶65} Assignment of Error IV is denied.

V

{¶66} Appellant claims the trial court erred in sua sponte ordering the state to provide a bill of particulars the day before trial and erred in denying appellant's request for a continuance. We disagree.

{¶67} Prior to trial, the trial court ordered the state to file a bill of particulars to inform appellant of the specifics of the charges. July 19, 2006 T. at 3-5. Once the bill of particulars was provided, the trial court limited the state's presentation to "digital penetration" as disclosed in the bill of particulars. Id. at 20.

{¶68} The grant or denial of a continuance rests in the trial court's sound discretion. *State v. Unger* (1981), 67 Ohio St.2d 65; *Blakemore.*

{¶69} There had been previous continuances requested by appellant. The trial court denied appellant's final request. The issue of the specifics of the charges was not raised until the eleventh hour of the final trial date.

{¶70} Upon review, we find the trial court did not abuse its discretion in denying appellant's request for another continuance.

{¶71} Assignment of Error V is denied.

VI

{¶72} Appellant claims the state failed to produce evidence that any specific crime occurred on February 2, 2005. We disagree.

{¶73} The victim testified the last incident of sexual abuse happened just before she told her mother. T. at 292-293, 312. The victim's mother testified the victim told her of the sexual abuse on February 4, 2005. T. at 402. Mr. Hill testified he interviewed the victim as soon as it was reported in February of 2005. T. at 600. State's Exhibit 14 indicates the interview occurred on February 4, 2005.

{¶74} Given the timeline and testimony presented, the incident happened immediately before February 4, 2005 because it was reported to the mother in the afternoon after school. We further note the indictment charged "on or about February 2, 2005."

{¶75} Upon review, we find sufficient evidence to identify the last act of sexual conduct/contact occurred on or about February 2, 2005.

{¶76} Assignment of Error VI is denied.

{¶77} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

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JUDGES

SGF/sg 1218

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JOHN C. LOCKHART, JR	:	
Defendant-Appellant	:	CASE NO. 06CAA100080

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed.

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JUDGES