[Cite as *State v. Jones*, 2013-Ohio-5906.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-12-049

Appellee — Trial Court No. 2011CR0675

v.

Taurus X. Jones — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather Baker and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas, following a jury trial, which convicted appellant, Taurus Jones, of one count of rape and one count of abduction. For the following reasons, we affirm.

A. Factual and Procedural Background

{¶ 2} The testimony from the trial reveals that on the night of August 27, 2012, appellant picked up the victim from her house in Toledo, Lucas County, Ohio, and drove her down to Bowling Green, Wood County, Ohio, so that they could attend an "icebreaker" party. Also in the vehicle, a red pickup truck, was appellant's friend, Lance Vidales.[1] Notably, appellant and the victim had been involved in a romantic relationship for approximately three and a half years, but were currently prohibited from being near each other due to a no contact order.

{¶ 3} After arriving at the party at around 1:00 a.m., the victim left appellant and met her friend Jamesha Lindsey. Jamesha was there with four other girls: Jasmine Cogdell, Victoria Littleton, Anastasia Sweet, and Breanne Ramsey. Approximately one hour later, the "icebreaker" ended, and the girls decided to go to an after-party at a fraternity house down the street. There, the girls saw appellant, but they testified that the victim did not interact with him. Lance, on the other hand, testified that the victim stood by appellant the entire time and had her arms on his back. A short time after they arrived at the after-party, a fight erupted and the police arrived, causing everyone to scatter. Lance testified that he and appellant were going to meet up with the victim and the girls at Waffle House. When the girls did not show up at Waffle House, appellant and Lance began calling Jamesha's cell phone and driving around the city looking for them.

[1] A fourth person, known to the parties only as "Boona," was also in the truck on the way down to Bowling Green.

{¶ 4} Appellant and Lance spotted the girls driving down Wooster Street. They turned their truck around and began following Jamesha's car. When Jamesha turned down a side street, appellant pulled the truck in front of them, blocking their path. The parties offered different versions of what happened next.

{¶ 5} Jamesha testified that appellant approached the car in a rage, opened the back door, "snatched" the victim out of the car causing her to fall to the ground, then picked her up and put her in the passenger side of the truck. According to Jamesha, the victim was screaming, "Get off of me. Quit touching me. Let me go." Appellant then took off in the truck with the victim, and proceeded down Wooster Street towards the expressway. Before reaching the expressway, appellant's truck stopped suddenly and the passenger door opened. Jamesha testified that she could see the victim's legs fly out of the truck, but it appeared the victim could not escape. The door then closed and the truck kept going. Jamesha did not follow the truck onto the expressway.

{¶ 6} The victim testified that as appellant was approaching the car she was laying her head down in Victoria's lap to try to hide from appellant because she was afraid of him and she did not want to go with him. She testified that she told the other girls "Don't let me go with him." Appellant then "snatched" the victim out of the car, put her in his truck, and drove off. As they were driving down Wooster Street, the victim reached over and attempted to take the key out of the ignition. However, she only was able to shift the truck into park. The truck stopped abruptly and the victim tried to get out of the vehicle,

but she testified that appellant grabbed her and pulled her back in, and they proceeded onto the expressway.

{¶ 7} Jasmine testified that appellant angrily approached the car, pulled the victim from the car, and drug her across the curb into his truck. Jasmine did not remember if the victim was screaming or yelling for help when she was being pulled from the car. Jasmine then testified that they followed the truck onto Wooster Street. There, she observed the truck stop suddenly, with the passenger door flying open. She stated that the door then shut, and the truck continued onto the expressway.

{¶ 8} Victoria testified that appellant was frustrated and mad when he approached the car. She heard him say something to the effect of "She came with me, so she going to leave with me." She testified that the victim's head was in her lap, and that the victim was trying to act as if she was asleep or passed out. Victoria testified that the victim was saying, "Please don't let me leave with him." According to Victoria, appellant opened the back door and "snatched" the victim out of the car, throwing her on the ground. Appellant then picked the victim up and threw her in the truck. While they were following the truck down Wooster Street, Victoria observed the truck stop suddenly and the passenger door come open. She stated that she saw some part of the victim's body hanging out of the truck and that there was a struggle going on inside. The door then closed, and the truck went down the street onto the expressway.

{¶ 9} Anastasia testified the victim had her head down across her lap when "a boy" told the victim to get out of the car. Anastasia was unable to identify the boy as

appellant. Anastasia remembered the victim telling her "Don't let me go with him. Just act like I'm passed out drunk." Appellant then opened the door and pulled the victim out of the car. He then picked the victim up off the ground and put her in his truck. The truck drove away and the girls followed it down Wooster Street. On Wooster Street, the truck stopped and the passenger door opened. Anastasia heard screaming, and it appeared to her that the victim was trying to get out of the vehicle. The door then closed and the truck got onto the expressway.

{¶ 10} In his interview with the police, which was introduced as evidence, appellant stated that when he pulled up in the truck he asked Jamesha where the victim was, and Jamesha told him the victim was in the back seat. He then stated that Jamesha unlocked the door, and when he opened it, he saw the victim lying across some girls' laps. Appellant said that the victim was drunk, and as he helped her out of the car, she stumbled and fell. Appellant then got her up and into the passenger side of his truck. He stated that she was willingly going with him and that she had told him earlier that she was going to ride back to Toledo with him. The truck then travelled down Wooster Street towards the expressway. Appellant stated that the truck stopped when the victim shifted it into park, but she never opened the passenger door or tried to get out. They then continued onto the expressway and back to Toledo.

{¶ 11} Finally, Lance, who was in the truck at the time, testified that appellant approached the car, saying "come on, I bring you up, I drop you off." Someone unlocked the car, and appellant opened the back door. The victim then got out of the car and tried

to stand up, but fell because she was "buzzed." Lance testified that appellant then picked the victim back up, and led her into the truck. According to Lance, the victim never yelled for appellant not to take her, and she did not get in the truck against her will. Lance stated that they then went directly down Wooster Street and onto the expressway. He testified that the truck never stopped on Wooster Street.

{¶ 12} Once back in Toledo, appellant dropped Lance off at his house. What happened next is again a point of contention between the parties.

{¶ 13} The victim testified that when they dropped Lance off, she tried to escape the vehicle and run away, but appellant grabbed her and pulled her back in. She stated that they then went and parked on a different street. Again, the victim tried to run away, but appellant caught her. The victim testified that she then got into an argument with appellant because appellant thought she was pregnant by another person. She testified that appellant began punching her in her stomach. Eventually, they returned to the truck and drove to another house in Toledo where she tried to run away, but again was caught. They then went to appellant's mother's house. The victim testified that appellant told her that if she was quiet he would help her fix herself up before taking her home. However, the victim made some type of noise inside the house so appellant punched her in the back, causing her to fall to the floor. Appellant's mother, Doris Jones, heard the noise and came downstairs. Doris' boyfriend also came downstairs and tried to break up the situation. The victim testified that Doris never offered to call the victim's mother to come take her home, but rather told appellant that the victim should not be there.

{¶ 14} After ten or fifteen minutes, the victim and appellant left, and he drove to an abandoned house and parked in the driveway. The two talked for a little while before appellant started kissing the victim. The victim testified that appellant then had intercourse with her despite the fact that she was telling him to stop and get off her. She recalled that appellant then said, "Are you going to try [sic] make it seem like I raped you?" After that, he stopped. According to the victim, they had not had sex at any other time that week. Appellant then took the victim home, but before she got out of the car, he took her wallet, which contained her I.D. and a couple of dollars.

{¶ 15} In contrast, in his interview with the police, appellant stated that when they dropped Lance off, the victim was "cool." They then went to another street, where the victim started crying. She then opened the door and said she was going to walk home. Appellant got her and put her in the truck and told her he would drive her home. Instead, appellant took her to his mother's house so that she could clean herself up since she was still crying. Appellant recalled that the victim fell up the porch stairs, which caused Doris to wake up. Doris came downstairs and said she was going to call the victim's mom, but the victim told her not to. Appellant then drove the victim to another street, and stated that the victim fell asleep on his chest for approximately 30 minutes to an hour. He then took her home. Appellant was adamant that he did not have sex with the victim that night. He did say, however, that he had been having sex with her earlier in the month, and in particular that week at Jamesha's house.

{¶ 16} When appellant finally returned the victim to her home, she went inside where her mother, L.T., was waiting for her. L.T. testified that she noticed the victim was upset. After repeated inquiries, the victim eventually told L.T. that appellant had done something to her. Upon hearing this, L.T. called the police. The victim ultimately filed a report with the Bowling Green Police Department later that morning. She testified, though, that she did not want to file the report, but L.T. forced her to. The victim complied because she was afraid her mother would put her out of the house. The victim then went to Toledo Hospital at her mother's direction where a rape kit was completed. The examination revealed bruising under the victim's right eye, a scratch on her neck, and a small laceration in her vagina, all of which were documented by photographs entered into evidence. Further, analysis of the rape kit revealed that appellant's semen was located in the victim's vagina and on her underwear, and his DNA was located on the scratch on the victim's neck.

{¶ 17} Several months after the incident, on March 15, 2012, the victim went to the office of appellant's attorney. There, she completed and signed an affidavit that denied any incidents of rape or abduction on the night in question. Specifically, the victim attested, "[Appellant] never forced me to go down to Bowling Green with him, nor did he ever force me to return back to Toledo. We did not have any sexual contact that night and the allegations that he abducted me and raped me are false." The victim testified that she completed the affidavit because she did not want to go through with pressing charges against appellant. She continued that she did not want to be in her

current situation of testifying against appellant. Nevertheless, on the witness stand the victim testified that the statements she made in the affidavit were false.

{¶ 18} Following the presentation of evidence, the jury found appellant guilty of abduction in violation of R.C. 2905.02(A)(1), a felony of the third degree, and rape in violation of R.C. 2907.02(A)(2), a felony of the first degree. The trial court proceeded immediately to sentencing, and sentenced appellant to 30 months in prison for the count of abduction, and ten years in prison on the count of rape. The sentences were ordered to be served consecutively for a total prison term of 12 and one-half years.

B. Assignments of Error

{¶ 19} Appellant has timely appealed his conviction, assigning five errors for our review:

> 1. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT IN DENYING HIS RULE 29 MOTION FOR ACQUITTAL.
>
> 2. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY OF APPELLANT'S OTHER ACTS UNDER EVID.R. 404(B).
>
> 3. THE TRIAL COURT ERRED IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO

CONSTITUTION IN DENYING HIS MOTION FOR A CONTINUATION OF [THE] JURY TRIAL.

4. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE CONSTITUTION OF THE STATE OF OHIO.

5. THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

II. Analysis

{¶ 20} For ease of discussion, we will address appellant's assignments of error out of order, beginning with his third assignment.

A. Denial of Motion to Continue the Trial

{¶ 21} In his third assignment of error, appellant contests the trial court's denial of his motion for a continuance made on the eve of trial. Appellant requested the continuance because on the Wednesday and Friday of the week before the trial, appellant's counsel received approximately 100 pages of discoverable material from the state. Counsel stated that the late disclosure prevented him from adequately examining the materials and reviewing them with appellant.

{¶ 22} "The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial

of a continuance unless there has been an abuse of discretion." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). An abuse of discretion connotes that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 23} "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger* at 67, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). The trial court should recognize all of the competing considerations and weigh any potential prejudice to the defendant against its right to control its own docket and the public interest in the prompt and efficient dispatch of justice. *Id.*

{¶ 24} Here, the trial court examined the materials that were disclosed to appellant. Of the 100 pages of material, the court found that almost half related to a prior case for which counsel also represented appellant, 34 pages were photographs that related to previously provided medical records, other pages included the criminal history of non-expert witnesses of which only two had any criminal record, and other materials pertained to search warrants about which counsel was already aware. Therefore, based on the nature of the materials that were disclosed, and counsel's familiarity with them, the trial court denied appellant's motion for a continuance. Upon our review of the record, we cannot conclude that the trial court's determination was an abuse of discretion.

{¶ 25} Accordingly, appellant's third assignment of error is not well-taken.

B. Denial of Crim.R. 29 Motion for Acquittal

{¶ 26} In his first assignment, appellant argues that the trial court erred when it denied his Crim.R. 29(A) motion for acquittal.

{¶ 27} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *See State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39-40. The relevant inquiry in a sufficiency review is "whether, after viewing 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 28} Here, appellant's motion was made on the basis that the state failed to establish that Wood County was the proper venue for the rape charge. "[A] motion for judgment of acquittal must be granted when the evidence is insufficient for reasonable minds to find that venue is proper." *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 24. To that end, R.C. 2901.12(A) states, "The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." In addition, R.C. 2901.12(H) provides,

> When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those

offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

(1) The offenses involved the same victim, or victims of the same type or from the same group.

(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.

(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or similar modus operandi.

(6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

{¶ 29} Appellant argues that venue in Wood County is not proper because all of the elements of the offense of rape occurred in Lucas County. Further, appellant argues that the offenses of abduction and rape did not constitute a continuing course of criminal conduct because the intervening act of the victim voluntarily leaving appellant's mother's house dispelled any notion that the abduction was ongoing. However, because the offenses involved the same victim, the state provided prima facie evidence that the

offenses occurred as part of a course of criminal conduct. R.C. 2901.12(H)(1). Furthermore, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the abduction and rape constituted a continuous course of conduct, as the interaction between the victim and appellant was ongoing and uninterrupted. Therefore, the state provided sufficient evidence to prove that venue in Wood County was proper.

{¶ 30} Accordingly, appellant's first assignment of error is not well-taken.

C. "Other Acts" Evidence

{¶ 31} As his second assignment of error, appellant challenges the state's elicitation of testimony from the victim, L.T., the victim's friend Danielle Cook, and the victim's cousin T.T. regarding prior incidents where appellant had allegedly set the victim's house on fire, and where he chased her with his car. Appellant argues that this testimony is impermissible evidence of other crimes, wrongs, or acts in contravention of Evid.R. 404(B).

{¶ 32} "The admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66. In this case, however, appellant failed to object to the testimony, thus he has waived all but plain error. *State v. Getsy*, 84 Ohio St.3d 180, 192, 702 N.E.2d 866 (1998). "For a court to notice plain error,

the error must be an obvious defect in a trial's proceedings, it must have affected substantial rights, and it must have affected the outcome of the trial." *State v. Steele*, Slip Opinion No. 2013-Ohio-2470, ¶ 30. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶ 33} Evid.R. 404(B) states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Ohio Supreme Court has summarized the appropriate steps to follow when determining whether other acts evidence is admissible:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of

unfair prejudice. *See* Evid.R. 403. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶ 34} Initially, we note that it is not disputed that the evidence of appellant's previous interactions with the victim is relevant to the determination of whether he is guilty of the present crimes. Instead, the parties focus on the second step of the analysis; that is, whether the other acts were admitted to prove character to show actions in conformity therewith or whether the other acts were admitted for some other, legitimate purpose.

{¶ 35} The state argues that the evidence is admissible for the purpose of proving appellant's intent. In support, it cites *State v. Roden*, 5th Dist. Stark No. 1999CA00275, 2000 WL 874211 (June 12, 2000), for the proposition that appellant's intent is at issue when he raises a consent defense in a sexual offense case. Specifically, the state argues the evidence is necessary to show that appellant intended to force himself upon the victim, and that the sex was not consensual. However, the state's argument is misplaced. Appellant did not attempt to show that the sex was consensual. Rather, his theory of the case was that they never had sexual contact on that night, but they did have it a few days earlier, which explains the presence of his semen in her vagina since testimony was presented that traces of semen can be found in a victim's vagina for up to 72 hours. Furthermore, it is clear from the record that the purpose of the other acts evidence was to show that appellant had been violent with the victim before, and therefore he must have

been violent with her on the night in question as well. Such is the paradigm example of impermissible other acts evidence under Evid.R. 404(B).

{¶ 36} Nevertheless, we conclude that this case does not provide the exceptional circumstances that result in a manifest miscarriage of justice. The other acts evidence in this case comprised only a small portion of the evidence admitted, and was overshadowed by the consistent testimony of the girls that appellant snatched the victim out of Jamesha's car, and the presence of appellant's DNA in the victim's vagina and, more importantly, on her underwear. Therefore, we hold that the trial court's admission of the other acts evidence did not constitute plain error.

{¶ 37} Accordingly, appellant's second assignment of error is not well-taken.

D. Ineffective Assistance of Counsel

{¶ 38} Appellant's fourth assignment of error is that his trial counsel provided ineffective assistance. To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 696. Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. * * * [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance

* * *." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. In addition,

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 143, quoting *Strickland* at 697.

{¶ 39} Here, appellant presents ten instances of perceived ineffective assistance. In five of those, he argues that counsel was ineffective for failing to object to the other acts testimony that was the subject of his second assignment of error. However, as discussed above, in light of the small emphasis on the other acts, and the significant amount of evidence tending to prove his guilt, we do not find that a reasonable probability exists that but for the error, the result of the proceedings would have been different. Thus, his argument based on those instances is without merit.

{¶ 40} Appellant next argues that counsel was ineffective for failing to object to hearsay evidence and for failing to properly utilize the victim's grand jury testimony to impeach her testimony at trial. This argument is also without merit. At the portion of the transcript cited by appellant, the victim is being cross-examined by appellant's trial counsel and her testimony does not include any hearsay statements. Moreover, the parties agreed during a sidebar conference at the trial that the victim's testimony was, in

fact, not inconsistent with her grand jury testimony. Thus, appellant has not shown that counsel's performance was deficient.

{¶ 41} Appellant next contends that counsel was ineffective for failing to properly utilize Detective Hartman's investigative report to cross-examine him regarding statements attributed to the victim. At trial, appellant's counsel attempted to cross-examine Hartman regarding statements the victim made about with whom she initially drove down to Bowling Green. The trial court sustained the state's objection based on hearsay. Appellant asserts that the controlling rule is Crim.R. 16(B)(6), which provides:

> Upon receipt of a written demand for discovery by the defendant, * * * the prosecuting attorney shall provide copies or photographs * * * [of] the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
>
> * * *
>
> (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, *provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross*

examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness. (Emphasis added.)

{¶ 42} Appellant argues that because the victim "did not 'adopt' her written statement in accordance with the rule, counsel was ineffective in his attempt to cross examine Detective Harman regarding [the victim's] statements in his report." Appellant misunderstands Crim.R. 16(B). Crim.R. 16(B) provides that police reports are discoverable. Crim.R. 16(B)(6) is applicable where the witness who gave a statement to the police officer is testifying at the trial. That rule provides that the officer's report cannot be used to cross-examine the witness as his or her prior statement unless the witness explicitly adopts the statement in the report. Here, however, counsel was cross-examining the preparer of the report, not the victim. For that purpose, it is immaterial whether the victim "adopted" the written statement. Therefore, this argument is without merit.

{¶ 43} Next, appellant contends counsel was ineffective because he did not object to the state's use of leading questions in the re-direct examination of the victim. Appellant makes no argument how he was prejudiced by this alleged failure, nor can we identify any basis for concluding that the results of the proceeding would have been different had counsel objected. Therefore, appellant's argument based on this incident is without merit.

{¶ 44} In his second to last argument, appellant asserts that counsel's failure to object to hearsay statements during the testimony of Raquel Ruiz—the nurse who

examined the victim and completed the rape kit—constituted ineffective assistance. Specifically, he argues that many of the statements the victim made to Ruiz were not related to medical diagnosis or treatment, and thus should not have been admitted. Although not expressly stated in his brief, appellant appears to be referencing statements the victim made to the nurse that identified appellant as the cause of her injuries.

{¶ 45} Evid.R. 803(4) provides an exception to the hearsay rule for "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Generally, however, "statements of fault are seen as outside the scope of Evid.R. 803(4) because such statements are usually not relevant to either diagnosis or treatment." *State v. Dever*, 64 Ohio St.3d 401, 413, 596 N.E.2d 436 (1992). Nevertheless, even if the statements were inadmissible hearsay, appellant cannot demonstrate a reasonable probability that the result of the proceeding would have been any different had counsel made an objection, as appellant's DNA was found on the victim's body at the site of the injuries. Furthermore, appellant was not prejudiced by Ruiz's testimony for the reason that the victim also testified and was subject to cross-examination on her statements. Therefore, appellant has not demonstrated ineffective assistance of counsel based on this instance.

{¶ 46} In his last argument, appellant challenges counsel's failure to object to the hearsay testimony of Victoria that as appellant was approaching Jamesha's car, the victim

was saying, "Please don't let me leave with him." However, Victoria's testimony falls under the excited utterance exception to hearsay found in Evid.R. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). Further, as with Ruiz's testimony, appellant was not prejudiced because the victim testified and was subject to cross-examination regarding her statements. Therefore, this argument is without merit.

{¶ 47} Accordingly, because appellant has failed to demonstrate any instances of deficient conduct by his counsel that prejudiced his defense, appellant's fourth assignment of error is not well-taken.

E. Manifest Weight

{¶ 48} Finally, as his fifth assignment of error, appellant argues that his conviction is against the manifest weight of the evidence. In particular, he points out that the victim's testimony is not credible given her demonstrated pattern of lying, and the fact that she voluntarily sought out appellant's trial counsel for the purpose of providing an affidavit, which stated that appellant did not force her to go back to Toledo and did not have sex with her on that night.

{¶ 49} When reviewing a claim that the conviction is against the manifest weight of the evidence,

> [t]he 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. Lang,* 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 50} Here, this is not the exceptional case in which the evidence weighs heavily against the conviction. Although significant questions regarding the victim's credibility exist, the testimony of the five girls who were in the car with the victim and the presence of appellant's semen in the victim's vagina and on her underwear support the victim's version of the events on the night in question, and contradict appellant's version. Therefore, when reviewing the record as a whole, we cannot say that appellant's conviction is against the manifest weight of the evidence.

{¶ 51} Accordingly, appellant's fifth assignment of error is not well-taken.

III. Conclusion

{¶ 52} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

_____
JUDGE