

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 06-CA-A-12-0093
JUAN PERALES	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Delaware County
Court Of Common Pleas Case No. 06CR I
01 0016

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 9, 2008

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Defendant-appellant Juan Perales appeals his conviction and sentence from the Delaware County Court of Common Pleas on two counts of rape and two counts of sexual battery. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 13, 2006, the Delaware County Grand Jury indicted appellant on two counts of rape in violation of R.C. 2907.02(A)(2), felonies of the first degree, and two counts of sexual battery in violation of R.C. 2907.03(A)(5), felonies of the third degree. The victim was appellant's stepdaughter, Amanda Perales (hereinafter "Amanda"). At his arraignment on March 1, 2006, appellant entered a plea of not guilty to the charges contained in the indictment.

{¶3} Subsequently, a jury trial commenced on October 3, 2006. The following testimony was adduced at trial.

{¶4} Appellant is the stepfather of Amanda Perales, the alleged victim in this case. At trial, Officer Adam Moore of the Delaware Police Department testified that, on September 6, 2005, Amanda came into the police department with her friend, Emily Ballinger, and Emily's mother, Kim Ballinger. The officer testified that Amanda told him that she had been sexually assaulted by appellant and that the last incident had occurred a few weeks after the 2004-2005 school year had ended.

{¶5} At trial, Amanda, who was 18 years old as of the time of trial, testified that she had a close relationship with appellant and that she considered him to be her father. She further testified that she did not learn that appellant was not her biological father until she was 12 years old when her last name was changed to Perales.

{¶6} Amanda testified that at the end of the 2004-2005 school year she had a big argument with her mother, appellant's wife, about a boy. Amanda testified that she lied and told her mother that she had basketball practice but instead went over to a friend's house where the boy was present. Amanda, who did not go home until 12:30 a.m. or 1:00 a.m., contacted the police that evening and told them that she was afraid to go home because of what had happened. The police ended up taking her home. Because of the argument and because she was not getting along with her mother, Amanda was sent to live with her grandparents in Alabama for the summer.

{¶7} At trial, Amanda testified that, during the summer of 2004, she went on a camping trip with appellant, her mother, her sisters and her friend Emily. Amanda testified that, at some point, she left the campgrounds with appellant and went home to retrieve some items. Amanda testified that, once they were home, appellant yelled for her to come into the bedroom and then asked her to take her pants off. When asked if this was the first time that something of this nature had happened between them, Amanda responded positively. Amanda further testified that, up until that point in time, she had a normal father-daughter relationship with appellant and that appellant was the one who was responsible for imposing discipline and setting ground rules for the children in the family.

{¶8} According to Amanda, shortly after the incident, she was at her friend's house with appellant working on the roof. Amanda testified that she was 16 years old at the time, so the incident would have occurred after August of 2004. Amanda further testified that she left her friend's house with appellant to get some shingles and that, when they arrived at the garage at Simero's, where appellant was employed, to pick up

the shingles, appellant shut the garage door, pushed her onto the seat of his truck and pulled down her pants. Amanda testified that she told appellant to stop, but that appellant then pulled his pants off and put his penis into her vagina. Amanda did not tell anyone afterwards because she was afraid of appellant and did not know what he would do. When asked how often similar incidents took place, Amanda testified “a couple of times a month.” Transcript at 94. According to Amanda, the incidents took place in appellant’s car, his Simero work truck and her mother’s house.

{¶9} At trial, Amanda was asked when the last time something happened between her and appellant. She testified that a couple of months before she went to Alabama, appellant, who was then living in an apartment,¹ picked her up from basketball practice and that the two then went to the warehouse where appellant worked. Amanda testified that she believed the incident occurred during the winter. According to Amanda, appellant pushed her onto the seat of his truck, pulled her pants down and had sexual intercourse with her.

{¶10} Amanda testified that prior to her return from Alabama, she thought appellant would no longer be living in the family home but was mistaken. She further testified that she felt sick when she returned home from Alabama and could not eat or sleep. Amanda, who testified that she began taking pills to help her sleep and cutting herself, testified that she decided to tell her friend Emily about the sexual abuse by writing her three notes. The notes were written while Amanda was still in Alabama, but were never mailed. Amanda testified that she gave the notes to Emily one day when Emily picked her up for school. Amanda testified that she was grounded at such time

¹ Appellant had moved out of the family home due to marital problems.

and was not allowed to go anywhere or do anything and that when appellant saw her in the car with Emily, he asked Amanda if her mother knew that she was riding with Emily.

{¶11} The following is an excerpt from Amanda's trial testimony:

{¶12} "Q. Amanda, did you know you were going to be in trouble for riding with Emily when you got caught by Manuel [appellant] that morning?

{¶13} "A. I figured I would be.

{¶14} "Q. Okay. What did you think was going to happen?

{¶15} "A. Probably still be grounded.

{¶16} "Q. Did you ever figure you were going to get sent back to Alabama?

{¶17} "A. No.

{¶18} "Q. When you come home, did your mom ever tell you, you screw up again, you're going back to Alabama?

{¶19} "A. No.

{¶20} "Q. That wasn't a concern of yours?

{¶21} "A. No.

{¶22} "Q. Have you ever lied to get out of trouble before?

{¶23} "A. Yes.

{¶24} "Q. What kind of situations have you lied to get out of trouble before?

{¶25} "A. I told her I went somewhere and I didn't really go there.

{¶26} "Q. What's the biggest lie you can remember ever telling your mom?

{¶27} "A. Probably that I was going to a basketball game and I went with my friend and two boys to Dublin to a movie.

{¶28} “Q. Okay. Have you ever lied about stuff that went on in the house with other people?”

{¶29} “A. No.

{¶30} “Q. Would you have lied about this to get out of trouble for riding in the car with Emily?”

{¶31} “A. No.

{¶32} “Q. Why not?”

{¶33} “A. Because you just don’t make up this big of a lie. If it was a lie, you don’t make up something this big.

{¶34} “Q. You know you were going to be in big trouble; right?”

{¶35} “A. Yeah.

{¶36} “Q. You just got back from being in Alabama because you were in trouble and here you are breaking another rule. You needed something big to get you out of trouble; didn’t you?”

{¶37} “A. Yeah, but not like this.” Transcript at 117-118.

{¶38} Amanda testified that one of the notes she gave Emily concerned how appellant had raped her and that, after reading the note, Emily tore it up and threw it away at Amanda’s request.

{¶39} At trial, Amanda also testified that she tried to tell her mother about the sexual abuse before she went to Alabama, but that appellant was around the whole evening and that she was unable to do so. She further testified that she did not feel that she could go to her mother, who she felt appellant had control over. When asked why she did not tell anyone in her family, Amanda testified that she feared that no one would

believe her because she had been in trouble before. She further testified that, after giving the notes to Emily, she told Emily's mother about the sexual incidents. Emily's mother, after speaking with Amanda's mother, then took Amanda to the police department.

{¶40} On cross-examination, Amanda testified that she had frequently lied to her mother and other people and that she had been lying for some time. She further testified that she sometimes asked Emily to lie for her. Amanda acknowledged that Emily wrote her a note for her 16th birthday in which Emily boasted about how often the two of them had lied to Amanda's mother. The note, which as admitted at trial as Defendant's Exhibit A, states, in relevant part, as follows: "I [Emily] don't think we can count how many times that we have lied to your mom. What fun times." Amanda further testified that, when she came back from Alabama, she knew she was not allowed to ride with Emily and knew that she was in trouble when appellant saw her riding with Emily on September 6, 2005. It was later the same day that Amanda went to the police station with the allegations of sexual abuse.

{¶41} At trial, Amanda also testified on cross-examination that she never told anyone about the alleged sexual abuse until the morning of September 6, 2005 even though she had the chance to tell her mother, Emily, her teachers, and Emily's mother, who worked for the school. She further agreed that she did not tell her grandparents while she was with them in Alabama, her Aunt Tonya, with whom she was close, or her uncle. Amanda further testified on cross-examination that, in April of 2005, she lived with appellant in his apartment for a couple of days after told to do so by Children's

Services following an alleged physical confrontation with her mother. The following is an excerpt from Amanda's trial testimony:

{¶42} "A. I had to stay there for a couple of days because child services told me to.

{¶43} "Q. How long did you stay there?

{¶44} "A. A couple of days.

{¶45} "Q. You didn't stay there a month and-a-half?

{¶46} "A. No.

{¶47} "Q. Do you recall telling Donna Bukovec [a Social Worker] that you had lived with your stepfather for a month and-a-half?

{¶48} "A. No.

{¶49} "Q. Do you recall telling Juston Hering [a Detective with the Delaware Police Department] that you stayed there for month and-a-half?

{¶50} "A. No.

{¶51} "Q. So your testimony is that you only stayed with your stepfather for a couple of days in April of 2004? [sic]

{¶52} "A. Yes.

{¶53} "Q. But when you went to the police and you had to move from your mother's house and go stay with your father, why didn't you tell the police at that point, I can't stay with my stepfather because he's been sexually abusing me?

{¶54} "A. Because I never talked to anybody from Child Services. They took it upon themselves [sic] to call my mom and her husband and it just got me in a lot more trouble....

{¶55} “Q. Now, I think you testified that at some point your mother, ‘kicked Manual out of the house.’ And he went and lived over at 151 East Central Avenue. Do you remember that?”

{¶56} “A. Yes.”

{¶57} “Q. Okay. And when he went to live over there, did you ask to go over and live with him at that time?”

{¶58} “A. No.”

{¶59} “Q. You never asked to go and stay, live with your dad, when he went over to 151 East Central?”

{¶60} “A. No.” Transcript at 146-147.

{¶61} On cross-examination, Amanda also was questioned about her Grand Jury testimony. She denied telling the Grand Jury that the sexual abuse occurred at appellant’s apartment, but then, after reviewing her Grand Jury testimony, admitted that she had testified to such effect. Amanda also admitted testifying that the sexual abuse was happening twice a month, but denied telling Donna Bukovec, a social worker, that the abuse was happening every other day. While Amanda testified that appellant sometimes used a condom, she denied telling Donna Bukovec that he never used one. She further denied telling Bukovec in September of 2005 that she thought she was pregnant even though Bukovec had such a notation in her notes from her interview with Amanda.

{¶62} The following is an excerpt from Amanda’s testimony on cross-examination:

{¶63} “Q. Okay. And let me show you, starting up there, read that and see if you recall telling Miss Bukovec something about protection? Do you recall making that statement to Miss Bukovec that he never used protection?

{¶64} “A. I don’t remember.

{¶65} “Q. You don’t remember. And do you recall testifying that the last time that you claim Mr. Perales had sex with you that you testified to today, when that was?

{¶66} “A. Would you repeat that?

{¶67} “Q. You testified today when Mr. Scarsella [the Assistant Prosecuting Attorney] asked you a question, when the last time it was when Mr. Perales had sex with you before you made the disclosure on September 6th. Do you remember what your answer was?

{¶68} “A. Yes.

{¶69} “Q. What was your answer?

{¶70} “A. In the Simerio truck.

{¶71} “Q. And approximately, the time period, how much before the end of the school year was that?

{¶72} “A. I don’t remember.

{¶73} “Q. You just told us that a couple of minutes ago, what the time period was. You don’t remember what you just testified?

{¶74} “A. A couple of months.

{¶75} “Q. A couple of months before you left to go on vacation. Do you remember testifying in front of the grand jury?

{¶76} “A. Yes.

{¶77} “Q. I’ll hand you what I would represent to you is a copy of the official transcript of your testimony at the grand jury and ask you if you can look at lines 20 and 21. And you were asked at the grand jury when the last time it was; is that correct?”

{¶78} “A. What was that?”

{¶79} “Q. You were asked, ‘what’s the last incident that you remember happening?’”

{¶80} “A. Yes.”

{¶81} “Q. Your answer was, ‘at his house’. The question was, ‘when was that?’ I’d like you to read what your answer was when they asked you, ‘when was that?’”

{¶82} “A. ‘About two weeks before I left, two or three weeks before I left for vacation’.”

{¶83} “Q. And not two or three months?”

{¶84} “A. No.”

{¶85} “Q. You testified that you had a conversation with a uniformed officer at the Delaware Police Department?”

{¶86} “A. Yes.”

{¶87} “Q. His name was Adam; does that sound right?”

{¶88} “A. Yes.”

{¶89} “Q. Do you recall telling Adam when the last time the incidents took place?”

{¶90} “A. No.”

{¶91} “Q. When you talked to Officer Moore, Adam, were you telling him the truth?”

{¶92} “A. Yes.”

{¶93} “Q. Do you recall telling Officer Moore that the last incident took place a few weeks after school let out?

{¶94} “A. No.

{¶95} “Q. So if Officer Moore came in here and said that, he’d be a liar?

{¶96} “A. No. I don’t remember saying that.” Transcript at 157-159.

{¶97} At trial, Amanda’s friend, Emily Ballinger, testified she had been best friends with Amanda for as long as she could remember and that they had been friends since the first grade. Emily Ballinger testified that she knew everything about Amanda and that Amanda never got along with her mother because “they were really strict on her.” Transcript at 224. According to Emily, Amanda did not like living with her parents. Emily testified that Amanda, when she returned from Alabama, was not allowed to ride with Emily to school and that Amanda, the day she got caught by appellant riding with Emily, gave her three notes. While one of the notes concerned how much Amanda wanted to see her natural father, another indicated that appellant had raped her. At Amanda’s request, Emily ripped up all the notes. Emily testified that while Amanda lied to her parents about where she was at times, she had never known her to lie to avoid getting into trouble.

{¶98} On cross-examination, Emily testified that Amanda wanted to live with her family since as early as Amanda’s 16th birthday. She also confirmed that Amanda had lived with appellant in his apartment for more than a day and a half and testified that Amanda might have lived with him for a couple months or a month and a half.

{¶99} Kim Ballinger, Emily’s mother, testified that she had been employed as a teaching assistant for 13 years in the school system. Kim Ballinger testified that

Amanda came to live with her and her family in September of 2005 and that, before such time, Amanda had talked about moving in with the Ballinger family when she turned 18 years old. Kim Ballinger testified that, to her knowledge, Amanda had never lied to her while living with the Ballinger family, but that Amanda had been grounded since living with them because of her grades. Kim Ballinger further testified that, after telling her of the sexual abuse, Amanda was sobbing.

{¶100} On cross-examination, Kim Ballinger admitted telling Donna Bukovec that Amanda “stretches the truth and tells tales.” Transcript at 268. She further testified that she had known that Amanda “stretches the truth and tells tales” ever since she knew Amanda. When asked, she guessed that Amanda had lived with appellant in his apartment for a couple of months. On redirect, Kim Ballinger testified that Amanda stretched the truth and told tales with respect to little things.

{¶101} At trial, Donna Bukovec, a licensed social worker with the Delaware County Jobs and Family Services, Children’s Services Division, testified that she received a call on September 6, 2005 from the police department. Bukovec testified that she interviewed Amanda that day and that, during the interview, Amanda indicated that she might be pregnant by appellant. Bukovec further testified that Amanda told her that the last time she had sexual relations with appellant was before she went to Alabama for the summer and that, when asked, Amanda told her that appellant did not use condoms or other protection. Bukovec further testified that Amanda told her that she had been living with appellant for one and a half months.

{¶102} On cross-examination, Bukovec testified that Amanda was upset and crying during the interview and that she said that the incidents occurred between 15 and

20 times. The following testimony was adduced when Bukovec was asked how often Amanda said the incidents occurred:

{¶103} “A. She stated that it varied. The first two incidents happened within two weeks of one another. Then she said it seemed like they were happening every other day or every week at some point during that time.

{¶104} “Q. Was she real clear with you on times?

{¶105} “A. She didn’t give specific times.

{¶106} “Q. Was she real clear with places?

{¶107} “A. Yes.

{¶108} “Q. Where did it happen most often?

{¶109} “A. She stated that – well, she stated it happened at home; it happened at her stepfather’s apartment and it happened in his work truck at his place of employment and it happened in a Mustang.” Transcript at 284-285.

{¶110} Bukovec further testified that, based on her experience and training, children generally did not immediately disclose allegations of sexual abuse out of fear that they will not be believed and because they are ashamed of what happened to them.

{¶111} Tina Perales, Amanda’s mother and appellant’s wife, testified at trial that she married appellant in June of 1995 and that the two separated in October of 2004. After their separation, appellant lived in an apartment on East Central Avenue. Tina Perales testified that while appellant would occasionally spend the night at the marital home, he never moved back in completely. When questioned about Amanda’s reputation for truth and veracity, Tina Perales further testified that Amanda was known “[n]ot to be very truthful” and that she did not tell the truth. Transcript at 295. Tina

Perales testified that she had problems with Amanda lying for years and that Amanda had children whom she babysat for lie on her behalf about having a boy in the house. According to Tina Perales, Amanda lied about her whereabouts and lied when she told Children's Services in April of 2005 that Tina had given her a black eye. As a result of the black eye incident, Amanda moved in with appellant for, according to Tina Perales, a month and a half or more.

{¶112} Tina Perales further testified that Amanda was upset when appellant moved out of the house in October of 2004 due to marital problems and wanted to go with him. She testified that Amanda was angry when told she could not move in with appellant. When asked who in the family was responsible for discipline, Tina Perales testified that appellant "very rarely" disciplined the children. Transcript at 300. She further testified that Amanda was upset when, in May of 2005, she had to return home from appellant's apartment and live again with her mother.

{¶113} According to Tina Perales, after the incident during May of 2005 when Amanda called the police after lying about going to basketball practice, Amanda was grounded and was then, in June of 2005, sent to her grandparents in Alabama after the school year ended. Contrary to Amanda's testimony, Tina Perales denied that, as part of Amanda's punishment, Amanda had to stay home from school for three days. Tina Perales further testified that Amanda was told that when she returned home from Alabama that she would have to obey rules and not lie or sneak around or would be sent back to Alabama. One of the conditions imposed on Amanda was that she ride the bus to school and not ride to school with Emily. According to Tina Perales, Amanda did not want to go back to Alabama.

{¶114} Tina Perales further testified that, after appellant told her on September 6, 2005 that Amanda was accepting rides to school with Emily, she called her parents in Alabama and told them that Amanda might be returning to Alabama. According to Tina Perales, whenever Amanda got angry with her or was grounded, she told Tina that she wanted to live with the Ballingers.

{¶115} When questioned about the roofing incident, Tina testified that when appellant left to pick up some flashing, he did not take his work truck with him. She further testified that Amanda asked to go with appellant when he left to pick up parts and that, when the two returned, Amanda never said anything to her and did not act in an unusual manner.

{¶116} The next witness to testify at trial was Tonya Vallejo, appellant's brother-in-law who lives in Alabama. Vallejo, who is Tina Perales' sister, testified that she spent a lot of time with Amanda in April – May 2005 and that the two of them talked and became close. When asked about Amanda's relationship with her mother, Vallejo testified that their relationship was "terrible" and that Amanda "constantly stated how she hated her mother; she didn't want to live with her. She would rather live with her dad [appellant],..." Transcript at 334.

{¶117} Vallejo further testified that she never heard any allegations against appellant until Amanda called her on September 7, 2005. When she asked Amanda why she wanted to live with appellant if the allegations were true, Amanda responded "[b]ecause it only happened twice and it never happened at the apartment." Transcript at 337. According to Vallejo, Amanda had a reputation for not telling the truth and had stated that she wanted to live with the Ballingers because she hated her mother.

{¶118} Amanda's uncle, Robert Ladd, also testified at trial that she did not have a reputation for being truthful. Ladd, who lives two doors down from the Perales' house, testified that, before Amanda moved out of the house in September of 2005, he saw her nearly every day and was close to her. He further testified that he believed Amanda to be untruthful and that she rebelled against her mother. Ladd testified that Amanda told him that she got a black eye from playing sports. Amanda, according to Ladd, also told him that she wished her parents were dead and that she knew how to take care of them and get out of the house.

{¶119} At trial, appellant took the stand and testified on his own behalf. He denied having any sexual relations with Amanda, who he described as having a "great relationship" with prior to September 6, 2005. Transcript at 358. According to appellant, Amanda was more like a son to him than a daughter and enjoyed sports and cars with him. Appellant testified that his wife was the discipliner in the family and that Amanda had needed to be disciplined for sneaking out and lying about where she had been. Appellant further testified that Amanda lived with him for approximately a month and a half starting in April of 2005 after she accused her mother of giving her a black eye.

{¶120} At trial, appellee did not produce any physical evidence.

{¶121} At the conclusion of the evidence and the end of deliberations, the jury, on October 5, 2006, found appellant guilty of all of the counts contained in the indictment. Appellant was sentenced to an aggregate sentence of five (5) years in prison.

{¶122} Appellant now raises the following assignments of error on appeal:

{¶123} “I. THE JURY’S VERDICTS ON ALL FOUR COUNTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT THE TRIAL OF THIS MATTER.

{¶124} “II. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED THE APPELLANT HIS RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT AND THE BILL OF PARTICULARS AS TO COUNTS ONE AND TWO ON THE MORNING OF THE TRIAL.

{¶125} “III. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ELICIT TESTIMONY ABOUT THE APPELLANT’S WIFE’S ALLEGED DRUG USE.

{¶126} “IV. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT’S MOTION FOR A NEW TRIAL.”

I

{¶127} Appellant, in his first assignment of error, argues that the jury’s verdict on all four counts was against the manifest weight of the evidence. We disagree.

{¶128} 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 the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, superceded by constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. In effect, the appellate court sits as

a “thirteenth juror” and “disagrees with the fact finder’s resolution of the conflicting testimony.” *Thompkins* at 387. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N .E.2d 212, syllabus 1. The standard is difficult to meet, as the rule is necessary “to preserve the jury's role with respect to issues surrounding the credibility of witnesses.” *Thompkins* at 389.

{¶129} Moreover, “[a] defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial.” *State v. Sevilla*, Franklin App. No. 06AP-954, 2007-Ohio-2789, ¶ 13, citing *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21. “The trier of fact is free to believe or disbelieve all or any of the testimony. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. Consequently, although an appellate court must act as a ‘thirteenth juror’ when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility.” *Id.* (Internal citations omitted).

{¶130} As noted by this Court in *State v. Tapp*, Delaware App. No. 2006-CAA-090058, 2007-Ohio-2959: “In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: ‘[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of

witnesses and evidence is not.’ See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.” Id. at ¶ 47.

{¶131} As is stated above, in the case sub judice, there was no physical evidence or medical testimony linking appellant to the offenses. Thus, the jury was left to determine whether or not appellant was guilty based on the testimony adduced at trial.

{¶132} Appellant, in support of his first assignment of error, notes that there was testimony from Amanda’s family and friends, including her mother, as to her reputation for lying and for being untruthful. Appellant further notes that Amanda did not make any allegations of sexual abuse against appellant until appellant saw her violating the house rules by riding to school with Emily, which Amanda knew she was prohibited from doing. Appellant argues that Amanda knew that she might be sent back to Alabama against her will for such violation and, as a result, concocted the allegations against appellant. According to appellant, the testimony adduced at trial shows Amanda’s “propensity to run to the police or other individual when she is in trouble at home and then lies about the situation.”

{¶133} Appellant further emphasizes that the note that Amanda wrote to Emily regarding an alleged rape by appellant was never produced at trial and that while Emily testified as to the contents of such note, Emily admitted at trial that she and Amanda repeatedly made up lies in the past. Appellant also stresses that Amanda’s testimony is rife with inconsistencies. Appellant points out that Amanda gave conflicting testimony about where and when the alleged sexual abuse took place. While Amanda testified at trial that the abuse occurred in appellant’s work truck, her mother’s house and appellant’s car, she testified before the Grand Jury that it also occurred at his

apartment. Appellant also notes Amanda denied telling the social worker that appellant did not use a condom and that she might be pregnant, and testified that she lived with appellant for a day and a half when numerous witnesses testified that she had lived with him for approximately a month and a half. Appellant also emphasizes that, in contradiction to her trial testimony, Amanda told Donna Buckovec, the social worker, that the sexual abuse occurred every other day.

{¶134} However, while this Court is troubled by the significant inconsistencies in Amanda's testimony, we note that, because there was no physical evidence in this case, the case came down to a matter of credibility. The jury, who heard testimony regarding such inconsistencies and heard testimony as to Amanda's reputation, was in the best position to determine whether appellant or Amanda was credible. As noted by appellee, the whole case hinged on the credibility of the witnesses who the jury had an opportunity to observe testifying. While appellant notes that appellant did not disclose the abuse until several months after the last incident, and only after she feared being disciplined for riding with Emily, Amanda testified at trial that she did not report the abuse earlier because she feared no one would believe her and because she was not ready for anyone to find out what had happened. She further testified that she did not want to leave her sisters. The jury clearly found Amanda to be a credible witness.

{¶135} In short, upon a careful review of the record, this Court cannot conclude that the jury lost its way and created a manifest miscarriage of justice when it found appellant guilty of the charges contained in the indictment.

{¶136} Appellant's first assignment of error is, therefore, overruled.

II

{¶137} Appellant, in his second assignment of error, argues that the trial court abused its discretion when it allowed the State to amend the indictment and the Bill of Particulars as to counts one and two of the indictment on the morning of the trial. We disagree.

{¶138} In the case sub judice, the indictment, which was filed on January 13, 2006, alleged, with respect to counts one (rape) and two (sexual battery), that the offenses took place sometime during the period from April 1, 2003 through September 1, 2003. The Bill of Particulars, which was filed on July 13, 2006, alleged that the two offenses took place during the period from April 1, 2003 through September 1, 2003 “in the general vicinity of the apartment residences located at 151 East Central Avenue,…” As is stated above, appellant moved into an apartment on East Central Avenue in October of 2004 due to marital problems.

{¶139} On the morning of October 3, 2006, before trial commenced, appellee made an oral motion to amend counts one and two of the indictment to allege a period from April 1, 2004 through September 1, 2004. Appellee noted that Amanda had alleged and testified before the Grand Jury that the sexual abuse began when she was 15 ½ years old, which would have been during the spring and summer of 2004 rather than 2003. Appellee argued that it had incorrectly calculated the dates of the offenses.

{¶140} When, as in the case sub judice, an amendment is allowed that does not change the name or identity of the offense charged, the accused is entitled to a discharge of the jury or a continuance, “unless it clearly appears from the whole of the proceedings that the defendant has not been misled or prejudiced by the defect or

variance in respect to which the amendment is made.” *State v. Honeycutt*, Montgomery App. No. 19004, 2002-Ohio-3490 at 3, quoting Crim.R. 7(D)². A trial court's decision to permit the amendment of an indictment is reviewed under an abuse of discretion standard. *State v. Beach*, 148 Ohio App.3d 181, 772 N.E.2d 677, 2002-Ohio-2759, at ¶ 23, appeal not allowed, 96 Ohio St.3d 1516, 2002-Ohio-4950. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. To demonstrate error, defendant must show not only that the trial court abused its discretion, but that the amendment prejudiced his defense. *Id.*

{¶141} In the case sub judice, the trial court stated that it would grant appellant a continuance in order to further prepare for trial based on the change of dates. The court stated on the record, in relevant part, after defense counsel indicated that his client wished to proceed:

{¶142} “THE COURT: All right, Mr. Perales, I understand what your counsel has said. I’m sure you’ve consulted with him, as stated here. Obviously, they’re changing the dates of the indictment to a whole different time period based upon, apparently, an error in addition. And I understand when you’re preparing for one period of time, it certainly changes the whole complexion of the case and I’m certainly willing to grant you a short period of time, a long period of time, I’ll put in the case anytime you want. If it’s necessary for you to prepare adequately for your defense. I just want you to know that.

² Crim.R. 7(D) states in part: “The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.”

I have no problem moving it. I can do it next week; I can do it next month. It doesn't make any difference to me because I want to get your case tried also." Transcript at 11.

{¶143} When the trial court granted the motion to amend the indictment to change the dates, the trial had yet to commence. Because the trial court offered appellant additional time to prepare based on the amendment, we find that appellant was not prejudiced. We find, for such reason, that the trial court did not abuse its discretion in permitting the dates in the indictment to be amended. Such decision was not arbitrary, unconscionable or unreasonable.

{¶144} Appellant also contends that the trial court erred in permitting appellee to amend the Bill of Particulars on the morning of the second day of trial to conform to the evidence. As is stated above, the Bill of Particulars alleged that the offenses had occurred in appellant's apartment on East Central Ave. On October 4, 2006, appellee filed an Amended Bill of Particulars stating, with respect to counts one and two that the offenses occurred in one of appellant's work trucks. Appellee filed the Amended Bill of Particulars after Amanda testified at trial that the incidents of sexual abuse took place at her mother's house, in appellant's work truck and in appellant's car.

{¶145} Crim.R. 7(D) provides that a court may amend a bill of particulars "at any time before, during, or after a trial * * * provided no change is made in the name or identity of the crime charged." There was no change made in the name or identity of the crime charged by the amendment. While appellant argues that he was prejudiced by such amendment because he prepared his defense based on the fact that there was proof that appellant was not residing at an apartment on East Central Avenue on the dates set forth in the original Bill of Particulars and that the offense therefore could not

have occurred there as alleged in the original Bill of Particulars, appellant had the opportunity to cross-examine Amanda as to location where each incident occurred. See *State v. Brown*, Delaware App. No. 2005-CAA01002, 2005-Ohio-5639. Furthermore, we note that appellant never requested a continuance due to such amendment. We find, therefore, no abuse of discretion.

{¶146} Appellant's second assignment of error is, therefore, overruled.

III

{¶147} Appellant, in his third assignment of error, argues that the trial court erred when it allowed appellee to elicit testimony about appellant's wife's alleged drug use.

{¶148} As is stated above, Tina Perales, appellant's wife, testified at trial for the defense. Tina Perales testified at length regarding Amanda's reputation for being untruthful and regarding her misbehavior. On cross-examination, she was questioned by appellee, over appellant's objection, about her alleged drug use. The following is an excerpt from Tina Perales' testimony on cross-examination:

{¶149} "Q. They found drug paraphernalia in your room; correct?"

{¶150} "A. No.

{¶151} "Q. They found choreboy in your bedroom; correct? A cleaning product...."

{¶152} "Ms. Hemmeter: What was the cleaning product?"

{¶153} "A. A scrubber.

{¶154} "Q. A scrubber. What kind of scrubber?"

{¶155} "A. I had used to scrub some scissors.

{¶156} "Q. When?"

{¶157} "A. A little while before. I was wrapping gifts...."

{¶158} “The Court: First of all, none of what you’re saying is being recorded because you keep walking away from the microphone. Second of all, how does what was found lead to finding drug paraphernalia in her room?”

{¶159} “Ms. Hemmeter: Because in the initial interview she [Tina Perales] stated that she didn’t use any more.

{¶160} “The Court: But how is that relevant to this case?”

{¶161} “Ms. Hemmeter: Because the defense is trying to show that Amanda is making this whole thing up.

{¶162} “The Court: So you’re bringing that up to show that she [Amanda] was truthful at least on that one aspect?”

{¶163} “Ms. Hemmeter: And later when asked about it, Mrs. Perales said it was used to clean scissor?”

{¶164} “The Court: All right, I’ll allow it.” Transcript at 320-321.

{¶165} Appellant now argues that the trial court erred in allowing appellee to cross-examine Tina Perales as to her alleged drug abuse because such alleged evidence was not relevant and was prejudicial to appellant.

{¶166} Evid.R. 402 provides that evidence that is relevant is admissible. Relevant evidence is evidence tending to make the existence of a fact of consequence more or less probable than it would be without the admission of the evidence. See Evid.R. 401. Under Evid.R. 403(A), relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion to the jury. The decision to admit or exclude relevant evidence is left to the sound discretion of the trial court and

will not be reversed absent an abuse of that discretion. See *State v. Johnson* (2000), 140 Ohio App.3d 385, 747 N.E.2d 863.

{¶167} We find that the trial court did not abuse its discretion in allowing the State to cross-examine Tina Perales as to her alleged drug use because the same was relevant. As noted by appellee, Amanda testified at trial that her mother frequently left her in charge of her younger siblings, causing tension between the two. She further testified that frequently she had to get her younger siblings dressed and ready for school and to feed them because her mother was in bed. In turn, Tina Perales testified that Amanda was a liar who caused all of the problems in the family. We concur with appellee that Tina Perales' alleged drug use was relevant "as corroboration of the victim's testimony concern[ing] the functioning of this family and of testimony concern[ing] her responsibilities regarding her siblings." In addition, such a cross-examination was relevant to rebut Tina Perales' testimony that Amanda was untruthful about everything. In short, we further find that the trial court did not abuse its discretion when it allowed such evidence and determined that the probative value was not outweighed by the danger of unfair prejudice or confusion.

{¶168} Moreover, assuming arguendo that the trial court erred in allowing the state to cross-examine Tina Perales as to her alleged drug use, we find that such error was harmless. Tina Perales' testimony as to this issue was not lengthy and was only a minor part of the entire trial. Based on the transcript as a whole, we cannot say that the outcome of the trial would have been different had the cross-examination not been permitted.

{¶169} Appellant's third assignment of error is, therefore, overruled.

IV

{¶170} Appellant, in his fourth assignment of error, contends that the trial court erred in denying his October 11, 2006, Motion for a New Trial pursuant to Crim.R. 33(A). We disagree.

{¶171} Crim.R. 33 states, in relevant part, as follows: “(A) Grounds

{¶172} “A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶173} “(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

{¶174} “(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶175} “(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶176} ”(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

{¶177} “(5) Error of law occurring at the trial;...”

{¶178} A trial court's ruling on a motion for a new trial under Crim.R. 33 will be reversed only for an abuse of discretion. *State v. Haddix* (1994), 93 Ohio App.3d 470, 480, 638 N.E.2d 1096.

{¶179} Appellant, in his brief, notes that, in his Motion for a New Trial, he raised the same issues as he raised in his brief in the case sub judice. Based on our disposition of appellant's first three assignments of error, we find that the trial court did not abuse its discretion in denying appellant's Motion for a New Trial.

{¶180} Appellant's fourth assignment of error is, therefore, overruled.

{¶181} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

JUDGES

JAE/0810

