[Cite as *State v. Metcalf*, 2012-Ohio-674.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-326
	:	O P I N I O N
- vs -		2/21/2012
	:	
JAMES A. METCALF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-05-0841

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, James Metcalf, appeals his convictions in the Butler County Court of Common Pleas for two counts of rape and two counts of sexual battery. We affirm Metcalf's convictions.

{¶ 2} In May 2010, Metcalf was seeking to reconcile with his ex-wife, Kimberly, so he started spending time at Kimberly's apartment in Hamilton, Ohio. Their 15-year-old daughter, A.M., and Kimberly's two other children from another relationship also lived in this apartment.

On May 4, 2010, A.M. was in her mother's room watching one of her younger brothers play a video game when Metcalf came into the room, sat down beside her, and started kissing her neck. A.M. got up and left, but Metcalf followed A.M. into her bedroom. Metcalf pushed A.M. to her bed, held her down, pulled off her pants, and forced A.M. to have vaginal intercourse with him. After using A.M.'s Tweety Bird t-shirt to wipe her off, Metcalf threatened to kill A.M. if she told anyone what happened.

{¶ 3} Two days later, on May 6, 2010, A.M. was playing a video game in her mother's room when Metcalf came into the room and began fondling her breasts and vagina. A.M. left her mother's room and went into her bedroom. Metcalf followed A.M. into her room and forced himself on her. A.M. told Metcalf to "stop" and attempted to push him off, but Metcalf again forced vaginal intercourse on A.M. Although Metcalf threatened to kill A.M. if she told anyone what happened, later that evening, A.M. confided in a friend about the rapes. A.M.'s friend called the police, and the Hamilton City Police Department started an investigation.

{¶ 4} Based on information acquired after interviewing A.M., Detective Mark Hayes obtained two search warrants. The first warrant permitted him to search the apartment where the rapes occurred, and the second warrant required Metcalf provide an oral swab of his DNA. Hayes executed the warrants while A.M. was being examined at a nearby hospital.

{¶ 5} Cathleen Hackett, a sexual assault nurse examiner with Ft. Hamilton Hospital, examined A.M. and collected forensic evidence. Hackett discovered A.M. was menstruating and was wearing the same menstrual pad at the time of the examination that she had been wearing at the time of the second rape. Hackett collected the menstrual pad as evidence, placed it in a rape kit, and turned the kit over to the Hamilton City Police Department.

{¶ 6} On May 7, 2010, Detective Hayes interviewed Metcalf at the police station. Metcalf initially denied that he had any sexual contact with A.M., but later stated that if any of his DNA was found on A.M. it was because she had set him up. In a written statement to

police, Metcalf said the following:

> There is no reason at all that my DNA should be found inside her vagina, in her butt, or on her breasts. The only reason there would be DNA on her breast, butt or vagina is if she did something to me when I was asleep. When I woke up she was wiping her vaginal area with the green Tweety Bird shirt. She had her pants down around her knees, squatting when she was wiping. I asked what she was doing. She didn't say anything. She threw the shirt in the closet. My pants weren't on me like they were when I went to sleep. They were pulled down a little bit. * * * Unless she set me up, there should be no secretion inside her. There was blood on my penis when I woke up. I know that she was raggin'.* * *
>
> I think that [A.M.] might have had sex with me while I was a sleep [sic] to set me up.

{¶ 7} A preliminary hearing was held on May 19, 2010. Thereafter, on June 29, 2010, a grand jury indicted Metcalf on two counts of rape in violation of R.C. 2907.02(A)(2) and two counts of sexual battery in violation of R.C. 2907.03(A)(5). A jury trial was held. At trial, the state presented testimony from A.M., Hackett, Hayes, and two expert witnesses. Hanna Cox, a forensic scientist employed with Ohio's Bureau of Criminal Identification and Investigation ("BCI"), testified that the menstrual pad from A.M.'s rape kit tested positive for the presence of semen. Dwayne Winston, an associate technical director in the Forensic Identity Department at Laboratory Corporation of America ("LCA"), testified that LCA had conducted DNA testing on Metcalf's DNA sample and the menstrual pad. The lab was able to develop a partial Y-STR DNA profile from the menstrual pad that was consistent with Metcalf's Y-STR DNA profile. Winston testified that only 1 in 1,087 men would be expected to have a Y-STR DNA profile consistent with the profile obtained from the menstrual pad. Metcalf, his ex-wife Kimberly, and his mother testified in Metcalf's defense.

{¶ 8} The jury returned guilty verdicts on all counts, and the trial court sentenced Metcalf to an aggregate term of 16 years in prison. Metcalf was also classified as a Tier III sexual offender, with lifetime reporting requirements.

{¶ 9} Metcalf appeals his convictions, arguing three assignments of error.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S ABUSE OF DISCRETION AS TO THE DNA TEST.

{¶ 12} In his first assignment of error, Metcalf argues that the trial court erred when it allowed inadequate Y-STR DNA test results to be introduced into evidence. Metcalf contends that the Y-STR DNA evidence was not reliable as the results provided by Winston only allowed for 95 percent accuracy. However, Metcalf did not object to the introduction of the DNA evidence at trial. All but plain error has therefore been waived. See *State v. Smith*, 80 Ohio St.3d 89, 107 (1997).

{¶ 13} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 436 (1997).

{¶ 14} Generally, all relevant evidence is admissible, unless otherwise excluded by law. Evid.R. 402. An expert's testimony is relevant and therefore admissible as long as the testimony is based on "reliable scientific, technical, or other specialized information." Evid.R. 702 (C). Under Evid.R. 702(C),

> To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or

> experiment was conducted in a way that will yield an accurate result.

{¶ 15} DNA evidence has been widely accepted as reliable and admissible evidence since the 1990s. See *State v. Pierce*, 64 Ohio St.3d 490, 494 (1992); *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 86. "DNA evidence expressed in terms of population frequency is admissible if it is relevant. Questions regarding the reliability of DNA evidence in a given case, including DNA statistics on population frequency, go to the weight of the evidence rather than its admissibility." *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 85. "No pretrial evidentiary hearing is necessary to determine the reliability of the DNA evidence. The trier of fact * * * can determine whether DNA evidence is reliable based on the expert testimony and other evidence presented." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 78.

{¶ 16} Y-STR testing, a type of DNA testing which detects only the male Y-chromosomes, is typically done where DNA evidence includes a mixture of male and female DNA. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶ 21-23. Pursuant to Winston's testimony, Y-STR testing alone cannot uniquely identify a particular person because the exact same Y chromosome profile is passed down paternally from father to son. The results of Y-STR testing either exclude the individual and his paternal relatives or cannot exclude the individual and any of his paternal relatives.

{¶ 17} In the present case, the prosecutor questioned Winston about the DNA found on the menstrual pad as follows:

> Q: * * * [W]hen you conducted the Y-STR testing on the menstrual pad, what did you find?
> * * *
>
> A: We were able to develop a partial Y-STR profile from the menstrual pad, and it is consistent with the Y-STR profile from James Metcalf.
>
> Q: And sir, what is the chance that this same genetic profile would be

found in a random member of the population?

A: Using the 95 competency estimate, based on the number of people we have in our database, you would expect to see this profile in one in every 1,087 male individuals.

{¶ 18} On cross-examination, Winston agreed that it would be more appropriate to say that Metcalf could not be excluded as a source of the DNA found on the menstrual pad. Winston testified that when doing Y-STR testing, 17 different genetic areas are examined. If an individual's Y-STR profile matches those 17 areas, then that individual cannot be excluded. Winston testified that seven of the 17 genetic areas tested on the menstrual pad sample had no reportable result, meaning that the result in that area was below reporting thresholds. When questioned by the defense about the unreported numbers, Winston testified as follows:

Q: * * * If any - - well, if any of those seven nonreported numbers didn't match up to Mr. Metcalf's profile, then he would be excluded, right?

A: Correct.

Q: There are seven different numbers that we don't have reported in this test?

A: Nonreported results or reported below thresholds, yes.

{¶ 19} Winston's DNA testimony was admissible as it was highly probative in showing that Metcalf could not be excluded as a source of the DNA found on A.M.'s menstrual pad. Metcalf offered no evidence challenging the DNA evidence or the manner in which the samples were tested or collected. Instead, Metcalf relied on the cross-examination of the expert. By cross-examining Winston about the seven unreported genetic areas, Metcalf challenged the certainty of the DNA evidence. The jury was then free to assign the evidence whatever weight it deemed proper in arriving at the verdict.

{¶ 20} Based on the foregoing, we do not find that Winston's testimony was inadmissible or that the trial court committed error, plain or otherwise, in the admission of the

DNA evidence. Metcalf's first assignment of error is overruled.

{¶ 21} Assignment of Error No. 2:

{¶ 22} THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S ABUSE OF DISCRETION IN PERMITTING THE PROSECUTION TO REPEATEDLY REFER TO THE DNA AS THE DEFENDANT'S.

{¶ 23} In his second assignment of error, Metcalf contends that the trial court abused its discretion by allowing the prosecution to refer to the DNA discovered on the menstrual pad as Metcalf's DNA when no such reasonable scientific certainty existed. Metcalf claims the prosecutor's characterization of the DNA evidence as "Metcalf's DNA" or "DNA similar to Metcalf's DNA" was prejudicial. Metcalf has pointed to various instances in the record where the trial court overruled his objection to the prosecutor's characterization of the evidence. Each instance occurred during cross-examination of the defense's witnesses.

{¶ 24} When Kimberly took the stand in Metcalf's defense, she testified that she did not believe her daughter was very truthful. On cross-examination, the prosecutor asked Kimberly whether she was aware that "DNA that's consistent" with Metcalf's had been found on A.M.'s menstrual pad. The trial court allowed the question over the defense's objections, stating that the questioning was relevant in determining the veracity of Kimberly's opinions.

{¶ 25} When Metcalf took the stand in his own defense, he denied having sexual intercourse with his daughter. On cross-examination, the prosecutor questioned Metcalf about the DNA found on A.M.'s menstrual pad. At various times, the prosecutor referred to the DNA as "your [Metcalf's] DNA" or "DNA that is consistent with your [Metcalf's] DNA." The trial court allowed such questioning on the basis that the source of the evidence was a question of fact for the jury to decide.

{¶ 26} "A cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists." *State v. Coulter*, 75 Ohio App.3d 219, 231

(12th Dist.1992), citing *State v. Gillard*, 40 Ohio St.3d 226 (1988), paragraph two of the syllabus. Further, "[t]he scope of cross-examination * * * lies within the sound discretion of the trial court, viewed in relation to the particular facts of each case." *State v. Cox*, 12th Dist. No. CA2000-07-144, 2001 WL 705664, *2 (June 25, 2001), citing *State v. Acre*, 6 Ohio St.3d 140, 145 (1983). A court's exercise of such discretion will not be disturbed on appeal absent an abuse of discretion. *State v. Ferguson*, 71 Ohio App.3d 342, 348 (12th Dist.1991). An abuse of discretion means more than an error of judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 27} We find that the trial court erred by allowing the prosecutor to characterize the DNA evidence found on the menstrual pad as "Metcalf's DNA." Although there was expert testimony introduced that the partial Y-STR DNA profile developed from the menstrual pad was "consistent with" Metcalf's Y-STR DNA profile, there was no evidence introduced indicating that Metcalf's DNA profile was an exact match for the DNA sample found on the menstrual pad.

{¶ 28} While the prosecutor's characterization of the evidence was at times improper, we do not find that the trial court's error in allowing such characterization was prejudicial. The record indicates that there were only two instances where the prosecutor characterized the DNA evidence as "Metcalf's DNA." The rest of the time, the prosecutor correctly characterized the evidence as "consistent with" Metcalf's DNA profile.

{¶ 29} Furthermore, "[w]here evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams*, 6 Ohio St.3d 281, 290 (1983), quoting *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726 (1969). In the present case, the state presented overwhelming

evidence of Metcalf's guilt. A.M. testified Metcalf forced sexual intercourse on her on two separate occasions. She further testified that at the time of the second rape she had been menstruating, and she had not changed her menstrual pad after the rape. There was expert testimony from forensic scientists that A.M.'s menstrual pad tested positive for the presence of semen, and the Y-STR DNA profile developed from the menstrual pad was consistent with Metcalf's Y-STR DNA profile. There was also testimony that the Y-STR profile developed from the menstrual pad is found in only one in every 1,087 males.

{¶ 30} Metcalf's statement to the police also corroborates A.M.'s testimony that Metcalf raped her. Metcalf originally claimed that there was no reason "at all" that his DNA would be found on A.M. He then qualified his statement, stating that "the only reason there would be [his] DNA" found on A.M. was if A.M. did something to him while he was asleep. Metcalf claimed that when he woke up on May 6, 2010, he found A.M. squatting near him with her pants down, his own pants were pulled down a little bit, and there was blood on his penis. Metcalf stated that he thought A.M. might have had sex with him to set him up. In light of the guilty verdict, it is clear that Metcalf's defense that he was "set up" by A.M. while he was sleeping was not believed by the jury.

{¶ 31} Accordingly, because the state provided overwhelming evidence of Metcalf's guilt, the error in allowing the prosecutor to refer to the DNA evidence as "Metcalf's DNA" was harmless. Metcalf's second assignment of error, therefore, is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE DEFENDANT WAS DENIED A FAIR TRIAL AFTER RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 34} In his third assignment of error, Metcalf claims he was denied effective assistance of counsel because his trial counsel failed to file a certified copy of the May 19, 2010 preliminary hearing transcript. During trial, the court denied counsel's attempt to use an

uncertified copy of the preliminary hearing transcript to cross-examine A.M. Without this transcript, Metcalf contends that he was unable to adequately impeach A.M. based upon her prior testimony.

{¶ 35} A copy of the May 19, 2010 preliminary hearing transcript was filed with the trial court on December 3, 2010, two days after A.M. testified at trial. Although the preliminary hearing transcript is part of the record on appeal, Metcalf has failed to point to any inconsistencies in A.M.'s prior testimony which could have been used to impeach her credibility at trial. Pursuant to App.R. 12(A)(2), "[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." App.R. 16(A) requires an appellant include in his brief, "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, *with citation to* the authorities, statutes, and *parts of the record on which appellant relies*." (Emphasis added.) "An appellate court may rely upon App.R. 12(A) in overruling or disregarding an assignment of error because of 'the lack of briefing' on the assignment of error." *State v. Watson*, 126 Ohio App.3d 316, 321 (12th Dist.1998), quoting *Hawley v. Ritley*, 35 Ohio St.3d 157, 159 (1988). "It is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any alleged error." *Watson*.

{¶ 36} Accordingly, we find that Metcalf has failed to comply with App.R. 16(A) because he has failed to cite to those parts of the record on which he relies in support of his contention that he was prejudiced by his trial counsel's failure to file the preliminary hearing transcript. Metcalf's third assignment of error is overruled on the basis of App.R. 12(A)(2).

{¶ 37} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.