[Cite as *State v. W.J.*, 2015-Ohio-2353.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-457 (C.P.C. No. 13CR-4919)
v.	:	(REGULAR CALENDAR)
[W.J.],	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 11, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Thompson Steward, LLC, and *Lisa F. Thompson*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, W.J., appeals from a judgment entry of the Franklin County Court of Common Pleas, finding him guilty pursuant to jury verdict of five counts of rape, one count of unlawful sexual conduct with a minor, and two counts of sexual battery. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed September 16, 2013, plaintiff-appellee, State of Ohio, charged W.J. with six counts of rape, in violation R.C. 2907.02, all felonies of the first degree; one count of disseminating matter harmful to juveniles, in violation of R.C. 2907.31, a fifth-degree felony; one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, a third-degree felony; and two counts of sexual battery, in

violation of R.C. 2907.03, both felonies of the third degree. All of the charged offenses concerned the same victim, K.J., who is W.J.'s daughter. W.J. entered a not guilty plea to all charges.

{¶ 3} At a jury trial commencing May 5, 2014, the state presented the testimony of K.J., the victim, who was 14 years old at the time of trial. K.J. testified that the first time her father sexually abused her, she was 11 years old. K.J. said she, her brother, and her sister were still asleep on an air mattress in their father's bedroom early in the morning when her father woke her up and told her she could get in the bed with him. She said she "didn't think anything of it," so she got into bed with W.J., and that is when he started to touch her inappropriately. (Tr. Vol. II, 67.) Specifically, K.J. said her father "started to touch [her] butt, and he just kept on [her] legs and thighs." (Tr. Vol. II, 69.) K.J. said she asked W.J. what he was doing and he said, "[n]othing," and that was the end of it for the first day. (Tr. Vol. II, 69.)

{¶ 4} As time passed, K.J. said her father's behavior toward her escalated. She testified that W.J. would put his penis near her and touch portions of her lower body with it. Eventually, her father moved into another apartment and K.J. had a bedroom separate from her father's that she shared with her brother and sister. K.J. said her father would come into her bedroom with no pants on and say "I got something to show you," to "prepare [her] to be better in life." (Tr. Vol. II, 71.) K.J. testified that W.J. would then show her his penis, remove K.J.'s pants and undergarments, and put his penis inside her vagina. The first time he vaginally penetrated her, K.J. said there was a lot of pressure, it hurt, and she experienced vaginal bleeding. K.J. said she was 11 years old at the time of this incident. K.J. did not know how many times in total her father had put his penis in her vagina because "it went on for more than a year," saying he repeated this behavior "the whole time that I was in Ohio up until" W.J.'s arrest on September 6, 2013. (Tr. Vol. II, 73-74.)

{¶ 5} K.J. testified that aside from the vaginal penetration, W.J. would also put his penis in her mouth. She said her father would tell her he was teaching her a lesson "so that [she] would know what to do when [she] got older." (Tr. Vol. II, 74.) The first time W.J. put his penis in her mouth, K.J. said she was 11 years old. K.J. said this was a separate incident from the first time he put his penis in her vagina. K.J. testified that

there were repeated instances of W.J. putting his penis either in her vagina or in her mouth when she was both 12 and 13 years old.

{¶ 6} K.J. then described what happened on September 6, 2013, the day her father was arrested. K.J. said her father suggested she accompany him in his car to a pet supply store to buy a new leash and collar for the family dog. Instead of going to the pet store, however, K.J. said W.J. called T.G., his former girlfriend, and drove to pick her up. Before picking up T.G., W.J. stopped at a convenience store and purchased some alcohol. K.J. said she had been sitting in the front passenger seat, but once they picked up T.G., K.J. moved to the second row of seats. W.J. then drove the three of them to a park on Broad Street. While they were driving around, K.J. said her father and T.G. were drinking the alcohol and talking about money, and that T.G. asked W.J. how much he was going to pay her.

{¶ 7} When they arrived at the park, K.J. said W.J. drove to the back of the park and parked the car with the tail end up against some cement cylinders. K.J. said her father instructed her to take her pants off but she told him she did not want to. At that point, T.G. went into the back seat with K.J., removed K.J.'s pants, and W.J. told T.G. to put her mouth on K.J.'s vagina. T.G. did as instructed, and K.J. said her father watched and instructed T.G. to continue performing cunnilingus on K.J. After that, K.J. said her father put the steering wheel up high and reclined his seat, then told K.J. to sit on top of his penis. K.J. told him she did not want to, but W.J. grabbed her arm and tugged her towards him while T.G. pushed K.J. toward W.J. W.J. then put his penis inside K.J.'s vagina even though she told him she did not want to do it, and he "just ignored [her] and just continued." (Tr. Vol. II, 87.) While this occurred, K.J. said T.G. was sitting on the side "talking crazy, was, like 'Do it to her' kind of stuff." (Tr. Vol. II, 87.) Eventually, K.J. said her father pushed her off of him, told her to go to the back seat, laid her on her back, and put his penis inside her vagina again. K.J. testified that W.J. ejaculated on the seat, told K.J. to put her pants on, and then drove T.G. back to where he had initially picked her up.

{¶ 8} After dropping off T.G., K.J. said W.J. drove back to the same convenience store and purchased more alcohol. The two drove around for a while before returning home because K.J.'s mother kept calling looking for them. When they got back to their

apartment, W.J. parked the car but did not go inside the apartment. W.J. again had K.J. "get on top of his penis" while they were in the parked car outside the apartment, and he again put his penis inside her vagina. (Tr. Vol. II, 93.) While they were inside the car, K.J.'s brother came out of the apartment and saw her in the car with W.J., causing W.J. to push K.J. to the back and scream at K.J.'s brother and his friends to go away. K.J. told her brother to go get her mother. K.J. said her mother then called the police.

{¶ 9} When the police arrived, K.J. testified she told the police what happened because she "finally had proof of what he had done, and [she] knew it would all be over and [she] wouldn't have to keep hiding it." (Tr. Vol. II, 96.) K.J. then went to Nationwide Children's Hospital to be evaluated. K.J. said a nurse swabbed her vagina and her mouth and performed an internal examination, and a social worker came to speak with her about what had happened.

{¶ 10} K.J. said she had not told anyone about the abuse before because W.J. would buy her things and tell her that if she told anyone, he would not buy things for her anymore. K.J. said W.J. bought her a phone and other things she wanted like clothes and shoes, and that he generally "just did more for [her] than he did for the rest of the kids." (Tr. Vol. II, 97.) K.J. said she would always tell W.J. she did not want to do whatever sexual thing he was demanding, but that he would do them anyway. She also said that she would threaten to tell her mom what was happening but that W.J. would tell her that her mother would not believe her. K.J. said she never told a teacher about what was happening because she did not want children's services to get involved and have her family split up. K.J. said she was afraid of being called a liar and she was ashamed.

{¶ 11} Additionally, K.J. said she was embarrassed because she had once become pregnant when she was 12 years old as a result of sexual intercourse with her father and she had an abortion. When W.J. found out K.J. was pregnant, he made her tell her mother because her mother was K.J.'s legal guardian and was the one who would have to sign the consent for her to get an abortion. K.J. said her father told her mother that K.J. had had sex with some boy, which was not true.

{¶ 12} When W.J. wanted to be alone with K.J., K.J. said her father would send her siblings to the store or to run an errand "so no one would catch him in the act." (Tr. Vol.

II, 72.) K.J. said no one else ever knew about her father's abuse because he would only initiate things when her mother and siblings were asleep or out of the house.

{¶ 13} On cross-examination, K.J. said her father would occasionally "threaten to whoop [her]" if she did not perform the sexual act he requested. (Tr. Vol. II, 142.) She said that he actually did whip or hit her "[a] couple of times" for saying no to sex, and that he would withhold stuff or take stuff away. (Tr. Vol. II, 142.) K.J. said W.J. would sometimes show her videos of T.G. performing oral sex on him, and K.J. told someone from children's services about those videos after W.J.'s arrest.

{¶ 14} K.J.'s brother, I.J., who was 13 years old at the time of trial, testified that on the day his father was arrested, W.J. took K.J. to go get a leash and collar for their dog, but the two of them were gone for three or four hours. I.J. said he was outside with some friends when he saw his father's car pull up in front of the apartment. When he ran up to the car, I.J. said he saw his father sitting in the front seat in his underwear and K.J. was in the back seat. I.J. said that when K.J. saw him there, she told him to go get their mother. I.J. sent his sister M.J. to go get their mother, and he stood by the car while W.J. was telling everyone to leave. On cross-examination, I.J. said he never saw anything inappropriate happen between his father and K.J. prior to the day of his father's arrest, but he noticed that W.J. would buy a lot of gifts for K.J.

{¶ 15} M.N., K.J.'s mother, testified that she never had any indication that W.J. was abusing K.J. in any way. M.N. further stated that K.J. never disclosed anything to her about the abuse. When asked about K.J. having an abortion, M.N. said that K.J. told her she became pregnant after having sex with a boy who lived down the street. A few weeks prior to W.J.'s arrest, M.N. said she took all five of her kids to Georgia for about four days, and, that while they were there, K.J. told her she was glad they left but that K.J. would not elaborate as to what that meant. M.N. said none of her other children ever came to her with any concerns that K.J. was being abused.

{¶ 16} Kelli Skaggs, a social worker at Nationwide Children's Hospital emergency department, testified she met with K.J. during the early morning hours of September 7, 2013 when Detective Jay Shockey of the Columbus Division of Police brought K.J. in for treatment. Skaggs said K.J. told her that she performed oral sex on W.J. and that T.G. performed oral sex on K.J. Skaggs further stated that K.J. disclosed vaginal intercourse

between K.J. and W.J. Skaggs said K.J. told her about two instances of vaginal intercourse occurring on the same evening: once in the back seat of the car while it was parked at a park, and again in the parked car when they returned to the apartment complex. K.J. then told Skaggs that "things like this have been happening for the past three years." (Tr. Vol. II, 245.) Skaggs asked her for more specific information, and she said K.J. told her that for the past three years, W.J. has been making her perform oral sex on him and he has put his penis inside her vagina. K.J. further told Skaggs that she once became pregnant as a result of the sexual intercourse with W.J. and "forcibly had an abortion." (Tr. Vol. II, 245.)

{¶ 17} When asked about her experience interviewing child victims of sexual abuse, Skaggs said it is "not normal for kids to disclose every time" they are abused. (Tr. Vol. II, 248.) She said the reasons child victims do not always disclose their abuse range from "immediate trauma to fear," to "the way that they process" what happened to them. (Tr. Vol. II, 248.) Additionally, Skaggs said she does not expect child victims to disclose abuse in the same way every time, but that it is more common for them to give different details each time they describe the abuse. Following her interview with K.J., Skaggs said she passed along the information she had gathered to the medical providers who would be treating K.J. in order to help them craft an appropriate treatment for K.J.

{¶ 18} Lindsay Eckles Hoffman, a sexual assault nurse in the emergency department at Nationwide Children's Hospital, testified that she examined K.J. during the early morning hours of September 7, 2013. Relying on both the history provided to her by Skaggs and K.J.'s responses to questions, Eckles Hoffman performed a complete examination of K.J. Eckles Hoffman did not observe any bodily injuries to areas other than the genitals, but she observed redness and bleeding on K.J.'s vagina, indicating an acute trauma, and "notches" in K.J.'s hymen indicating trauma that had already healed. (Tr. Vol. II, 269.) Eckles Hoffman also said she swabbed various parts of K.J.'s body, including vaginal swabs, rectal swabs, oral swabs, cut hair standards, and fingernail scrapings. Eckles Hoffman collected K.J.'s clothing that she was wearing, as well. Additionally, Eckles Hoffman took photographs of K.J.'s vaginal area and drew a blood sample to perform testing for sexually transmitted infections.

{¶ 19} Another sexual assault nurse examiner from Nationwide Children's Hospital, Gail Hornor, also testified. Hornor did not actually examine K.J. in person, but she reviewed Eckles Hoffman's documentation of the exam. Hornor said the documentation suggested an acute injury, meaning it occurred within the last 72 hours. Hornor said the injuries to K.J.'s hymen represented older injuries that heal with time, and the number of "notches" suggested K.J. could have been penetrated more than five times. (Tr. Vol. III, 354.) The older injuries documented on K.J. were at least three weeks old, but there was no way for Hornor to know exactly how old they were. Hornor testified that K.J. had a follow-up examination and it revealed that K.J. had the sexually transmitted infection trichomoniasis. Hornor said it is possible for a person infected with trichomoniasis to have the infection for months and not know about it. Hornor said the observation of both old and new injuries on K.J. was consistent with the history K.J. provided at the hospital about both past and recent sexual abuse.

{¶ 20} T.G., W.J.'s former girlfriend, then testified. T.G. said she had already pleaded guilty and been sentenced on one count of unlawful sexual conduct with a minor and one count of disseminating matter harmful to a juvenile. T.G. testified she met W.J. in 2008 and the two of them were in a relationship for about four years. She admitted she has had "dozens" of convictions for drugs and prostitution in her life. (Tr. Vol. III, 305.) After her relationship with W.J. ended, T.G. said she got back into prostitution in order to earn a living.

{¶ 21} On the day of September 6, 2013, T.G. said W.J. called her and she wanted to meet up with him to get money from him so that she could buy a rock of crack cocaine. When W.J. picked her up, T.G. said K.J. was in the car with him. T.G. testified W.J. gave her $15 and then instructed T.G. to perform oral sex on K.J. T.G. said she did as she was instructed, then she watched as K.J. and W.J. had sex in two different positions. When asked why she did not refuse when W.J. told her to perform oral sex on K.J., T.G. said she cooperated because she needed the money. T.G. agreed that when the police first contacted her after this incident, she denied ever being with W.J. and K.J. T.G. testified that there had been a previous incident when W.J. brought K.J. to T.G.'s apartment and asked if T.G. would allow K.J. to watch as T.G. and W.J. had sex.

{¶ 22} Detective Tim Elkins of the Columbus Division of Police's special victim's bureau sexual assault unit testified that he investigated the sexual assault of K.J. on September 6, 2013. Detective Elkins testified he responded to a call from patrol about K.J., and he responded to Brent Boulevard along with Detective Shockey. Upon arriving at the scene, Detective Elkins said he saw W.J. in the back of a patrol car, and he and Detective Shockey then spoke with K.J., her mother, and her brother, and they examined the vehicle where the offense occurred. Because K.J. indicated the offense occurred in the car, Detective Shockey impounded the car and sent it to the police department's impound lot where it would be held in a secure facility. After conducting interviews at the scene, Detectives Elkins and Shockey drove K.J. and her mother to Nationwide Children's Hospital in order to have the medical staff perform a rape kit on K.J.

{¶ 23} As they were driving, Detective Elkins said K.J.'s mother saw a woman outside and said, "[t]here's [T.G.] right there," so they pulled over to talk to T.G. even though they were not expecting to see her. (Tr. Vol. III, 381.) Detectives Elkins and Shockey parked the car and walked over to T.G. so that she would not be too close to K.J. or M.N. After speaking to T.G., the detectives placed her under arrest and called for a patrol car to take her to police headquarters. The detectives then dropped K.J. and her mother off at the hospital and returned to police headquarters to interview T.G. and W.J. Detective Elkins executed a search warrant to obtain samples of W.J.'s DNA as well as to swab his penis to test for the presence of anyone else's DNA on him. The crime scene search unit executed a second search warrant on W.J.'s car to look for DNA evidence there.

{¶ 24} Patrick Crawford, a forensic scientist at the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that he processed K.J.'s rape kit and that he identified semen on both K.J.'s vaginal and anal swabs. Crawford said K.J.'s skin swabs also tested positive for semen and amylase. Another forensic scientist at BCI, Andrea Weisenburger, testified that she analyzed the DNA samples collected from W.J. and that those samples matched the DNA found in K.J.'s rape kit. Weisenburger further testified that she analyzed the DNA sample collected from T.G., and that a test of K.J.'s underwear revealed the presence of DNA that did not belong to either K.J. or W.J., but the sample was not sufficient to determine to whom the third person's DNA belonged.

Additionally, Weisenberger said that penile swabs collected from W.J. revealed a mixture of DNA consistent with both W.J. and K.J.

{¶ 25} At the close of the state's evidence, W.J. moved for a Crim.R. 29 motion for acquittal, and the trial court granted that motion only with respect to Count 5 of the indictment, disseminating matter harmful to a juvenile. The trial court denied the Crim.R. 29 motion with respect to the remaining charges.

{¶ 26} W.J. testified in his own defense. W.J. denied ever raping K.J. before September 6, 2013. However, W.J. admitted having sex with K.J. on September 6, 2013, but he blamed his actions on drinking and suggested his drink may have been spiked with some kind of drug. W.J. said he saw T.G. perform oral sex on K.J. and then he had vaginal intercourse with his daughter, but he did not implicate himself in ordering T.G. to assault K.J. W.J. denied having sex with K.J. in the car again once he drove back to their apartment.

{¶ 27} On cross-examination, W.J. said that when I.J. came to the car outside the apartment complex, I.J. misinterpreted what he saw. W.J. suggested K.J. had concocted the story about the prior incidents of sexual assault because his children did not want W.J. to be in a relationship with T.G.

{¶ 28} Brittany Valentine, a social worker with Franklin County Children Services, testified that she dealt with the W.J. family in January 2012 to determine why the children were not enrolled in school. During her time working with the family, neither K.J. nor anyone else reported any concerns of sexual abuse to Valentine.

{¶ 29} Following deliberations, the jury returned guilty verdicts to five counts of rape, one count of unlawful sexual conduct with a minor, and two counts of sexual battery. Three of the rape counts for which the jury returned guilty verdicts specifically referenced the fact that K.J. was less than 13 years old when the rape occurred. The other two rape counts for which the jury returned guilty verdicts referred to the events of September 6, 2013. The jury returned a not guilty verdict to Count 2 of the indictment, rape alleged to have occurred when K.J. was 11 years old. At a May 9, 2014 sentencing hearing, the trial court determined, for the purposes of sentencing, Counts 7 and 8, rape and sexual battery, should merge, and that Counts 9 and 10, rape and sexual battery, should merge. The trial court sentenced W.J. to an aggregate prison term of 25 years to

life, and it journalized W.J.'s convictions and sentence in a May 14, 2014 judgment entry. W.J. timely appeals.

II. Assignments of Error

{¶ 30} Through his counsel, W.J. assigns the following two errors for our review:

> [1.] The trial court violated [W.J.'s] rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was not supported by sufficient evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.
>
> [2.] The trial court violated [W.J.'s] rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was against the manifest weight of the evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶ 31} In addition to the merit brief prepared by counsel, W.J. also filed a pro se brief, assigning the following four errors for our review:

> [1.] The trial court abused it's discretion in not granting a mistrial after the court's witness violated the defendant's confrontation clause of the Sixth Amendment to the United States Constitution.
>
> [2.] The trial court abused it's discretion not granting the jury the opportunity to review the transcripts of the victim and in not allowing the defendant to have an opportunity to object to the court's denial of allowing the jury to review the transcripts thereby causing a manifest miscarriage of justice and plain error.
>
> [3.] The trial court abused it's discretion in not granting a mistrial after the defendant was prejudiced by the states witness introducing evidence of prior bad acts which exposed the jury to criminal patterns of the defendant thereby violating the defendant's right to trial Six Amendment to the United States Constitution.
>
> [4.] The cumulative errors which took place during the defendant's trial deprived the defendant of a constitutional fair trial.

(Sic passim.)

III. First Assignment of Error – Sufficiency of the Evidence

{¶ 32} In his first assignment of error, W.J. asserts there was insufficient evidence to support his convictions. On appeal, W.J. does not challenge the sufficiency of the evidence with respect to the counts relating specifically to the events of September 6, 2013. Instead, W.J. alleges there was insufficient evidence to find him guilty of the three rape charges contained in Counts 1, 3, and 4 of the indictment, all alleged to have occurred when K.J. was less than 13 years old.

{¶ 33} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id*. The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 34} To convict a defendant of rape under R.C. 2907.02(A)(1)(b), the state is required to prove the defendant engaged in sexual conduct with the victim, who was not his spouse, and who was less than 13 years old. *State v. Rojas*, 10th Dist. No. 11AP-683, 2012-Ohio-1967, ¶ 9. As defined in R.C. 2907.01(A), "sexual conduct" means "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." The statute further provides that "[p]enetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶ 35} K.J. testified that she was 11 years old the first time her father had vaginal intercourse with her. She further testified that she was 11 years old the first time her father made her perform fellatio on him. K.J. then testified that there were repeated instances of W.J. putting his penis inside either K.J.'s vagina or mouth when she was 11 and 12 years old. A victim's testimony is sufficient evidence to support sexual conduct by vaginal intercourse or fellatio. *State v. Timmons*, 10th Dist. No. 13AP-1038, 2014-Ohio-3520, ¶ 23, citing *State v. Henderson*, 10th Dist. No. 10AP-1029, 2011-Ohio-4761, ¶ 17. Although W.J. argues the evidence is insufficient because no other witness testified that

they knew of or suspected any sexual abuse by W.J. prior to the incident on September 6, 2013, such corroborating evidence is not required to prove the rape offense. *Id*., citing *Henderson* at ¶ 17, citing *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 53 (noting "[c]orroboration of victim testimony in rape cases is not required").

{¶ 36} To the extent W.J. challenges K.J.'s credibility as a witness, we note that a review of the sufficiency of the evidence does not implicate an assessment of witness credibility. *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (stating that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility"). Accordingly, the state presented sufficient evidence of the offense of rape as contained in Counts 1, 3, and 4 of the indictment. We overrule W.J.'s first assignment of error.

IV. Second Assignment of Error – Manifest Weight of the Evidence

{¶ 37} In his second assignment of error, W.J. argues his convictions were against the manifest weight of the evidence. Once again, W.J. does not challenge those convictions related to the events of September 6, 2013 and instead argues only that his convictions for rape contained in Counts 1, 3, and 4 of the indictment are against the manifest weight of the evidence.

{¶ 38} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a ' "thirteenth juror" ' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Thus, the jury may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 39} An appellate court considering a manifest weight challenge "may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the

evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 40} The focus of W.J.'s manifest weight argument is K.J.'s credibility. W.J. first argues that even though physical evidence showed past injuries to K.J.'s hymen and that K.J. had an abortion, K.J. admitted to telling her mother that she became pregnant by some boy in her neighborhood. When she testified at trial, K.J. said she became pregnant by her father and she admitted that she lied to her mother at the time in order to get her mother to consent to the abortion. W.J. argues that K.J.'s testimony admitting that she lied in the past somehow renders the entirety of her testimony unworthy of belief. W.J. further relies on M.N.'s testimony that her daughter told her she had sex with a boy her own age as support for his argument that K.J.'s testimony lacked credibility. However, the mere presence of conflicting evidence is not enough to render a conviction against the manifest weight of the evidence. *State v. McDaniel*, 10th Dist. No. 06AP-44, 2006-Ohio-5298, ¶ 16 (stating "[c]onflicting evidence and inconsistencies in the testimony, however, generally do not render the verdict against the manifest weight of the evidence"). Moreover, when asked at trial why she lied to her mother about the father of her unborn child, K.J. explained that it was W.J. who instructed her to lie to her mother in order to obtain her mother's consent for the procedure. K.J. presented a plausible explanation for lying to her mother in the past, and we do not agree with W.J. that K.J.'s admission to being untruthful to her mother in such a difficult situation renders all her testimony lacking in credibility.

{¶ 41} W.J. next argues K.J.'s testimony lacked credibility because K.J.'s siblings never reported seeing any abuse even though they all shared a bedroom and K.J. testified that her father would sometimes wake her up before initiating sexual conduct. Similarly, W.J. asserts that both T.G. and M.N. testified that they never saw any abuse or had any

reason to believe W.J. was abusing K.J. even though both T.G. and M.N. lived with K.J. at some point. Essentially, W.J. argues that K.J.'s testimony is implausible because, if K.J. was truthful, someone should have seen some abuse or noticed some warning signs.

{¶ 42} K.J. was asked very specifically at trial how her father was able to separate her from her siblings in order to avoid being caught, and K.J. explained that her father would make up an excuse to send the other children to the store or to run an errand so that he could be alone with her. Moreover, M.N. testified that although she never saw W.J. get into bed with K.J. or wake K.J. up in the middle of the night, she did see W.J. sometimes looking into the children's bedroom late at night and that W.J. would sometimes get out of bed in the middle of the night for what she thought was to go smoke a cigarette. Additionally, K.J.'s younger brother I.J. testified that he noticed that W.J. would buy gifts and other items for K.J. but not the other siblings, corroborating K.J.'s testimony that W.J. would buy her gifts in order to keep her quiet about the abuse.

{¶ 43} Finally, under this assignment of error, W.J. argues K.J.'s testimony is not credible because she never reported the past abuse until her father was arrested. W.J. suggests that because K.J. never reported her father's sexual abuse to a teacher, parent, or children's services case worker, even though K.J. testified that the abuse had gone on for a number of years, there is no reason to believe K.J. now. However, Skaggs, the social worker at Nationwide Children's Hospital, testified that child victims of sexual abuse do not always report the first instance of abuse, nor do they come forward immediately when abuse happens. Additionally, K.J. testified that she did not report the abuse in the past because she was afraid, ashamed, and embarrassed. Only when someone finally caught her father in the act did K.J. feel she was safe to report the past abuse because she had the proof she needed to make sure people knew she was telling the truth. K.J. also testified that her father attempted to keep her silent by buying her gifts and treating her more favorably than the other children and then threatening to take those things away if she told anyone what he had done.

{¶ 44} In light of the evidence discussed above, as well as the record in its entirety, we do not find the jury clearly lost its way in concluding W.J. raped K.J. on various occasions when she was 11 and 12 years old. Though W.J. points to his own self-serving testimony as evidence to the contrary, we find no error with the jury's decision to discount

that testimony in favor of both K.J.'s testimony and in the physical evidence corroborating her testimony. Thus, we do not find that W.J.'s convictions for rape contained in Counts 1, 3, and 4 of the indictment are against the manifest weight of the evidence. Accordingly, we overrule W.J.'s second assignment of error.

V. First and Third Pro Se Assignments of Error – Mistrial

{¶ 45} In his first pro se assignment of error, W.J. argues the trial court abused its discretion when it denied his trial counsel's motion for a mistrial based on an alleged violation of the Confrontation Clause. In his third pro se assignment of error, W.J. argues the trial court abused its discretion in denying his motion for a mistrial based on the erroneous admission of evidence of his prior criminal acts. Because both of these assignments of error address the trial court's alleged errors in failing to declare a mistrial, we address them jointly.

{¶ 46} An appellate court reviewing a trial court's decision on a motion for mistrial defers to the judgment of the trial court, as it is in the best position to determine whether circumstances warrant a mistrial. *State v. Glover*, 35 Ohio St.3d 18, 19 (1988). Thus, we review a trial court's decision for an abuse of discretion. *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶ 42 (10th Dist.), citing *State v. Sage*, 31 Ohio St.3d 173, 182 (1987). An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 47} " 'A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected.' " *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 52, quoting *State v. Reynolds*, 49 Ohio App.3d 27, 33 (2d Dist.1988). Instead, a trial court should only declare a mistrial when "the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127 (1991). In determining whether a defendant was deprived of a fair trial, we must determine whether, absent the error or irregularity, "the jury would have found the appellant guilty beyond a reasonable doubt." *Aleshire* at ¶ 42, citing *State v. Maurer*, 15 Ohio St.3d 239, 267 (1984). To determine whether the alleged misconduct resulted in prejudice, we must consider (1) the nature of the error, (2) whether an objection was made, (3) whether the

trial court provided corrective instructions, and (4) the strength of the evidence against the defendant. *Id*., citing *State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶ 20.

A. Mistrial Based on Confrontation Clause Violation

{¶ 48} W.J. requested a mistrial following T.G.'s testimony during which T.G. refused to answer certain questions based on her Fifth Amendment rights. W.J. argues that T.G.'s invocation of the Fifth Amendment deprived him of his right to confront the witnesses against him. Without getting into the specifics of the Confrontation Clause jurisprudence, we note that the questions that T.G. refused to answer related to her ability to remember the events of September 6, 2013 and whether she had previously testified that she had difficulty remembering the events of that day. Because W.J. admitted his guilt both at trial and on appeal to the counts in the indictment relating to the events of September 6, 2013, and the alleged error related only to T.G.'s testimony in regards to the events of September 6, 2013, W.J. cannot demonstrate prejudice from any potential Confrontation Clause violation. There was ample other evidence at trial to find W.J. guilty beyond a reasonable doubt, and T.G.'s testimony did not implicate the charges in the indictment related to events occurring before September 6, 2013. Accordingly, the trial court did not abuse its discretion in denying W.J.'s request for a mistrial based on T.G.'s testimony.

B. Mistrial Based on Evidence of Prior Criminal Acts

{¶ 49} With respect to his third pro se assignment of error, W.J. argues the trial court abused its discretion when it denied his motion for a mistrial based on K.J.'s testimony regarding W.J.'s prior criminal acts. "In general, evidence of an individual's other criminal acts, which are independent from the offense for which the individual is on trial, is inadmissible in a criminal trial." *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶ 32, citing *State v. Wilkinson*, 64 Ohio St.2d 308, 314 (1980); Evid.R. 404(B).

{¶ 50} On cross-examination, W.J.'s counsel asked K.J. about W.J.'s place of employment and conflicts that W.J. had with K.J.'s mother. The pertinent part of the exchange is below:

> Q: Okay. Did you ever hear your dad talk about an opportunity to go to Japan --

> A: Yes.
>
> Q: -- as part of his job?
>
> A: Yes, sir.
>
> Q: Okay. What did he -- let me rephrase that. Did he talk about it with your mom?
>
> A: Yes, sir.
>
> Q: And your mom didn't want him to go, did she?
>
> A: She didn't say she didn't want him to go, but she was, like -- she didn't think that he could go.
>
> Q: Okay. If he had gone to Japan for work, would you guys have gone with him or stayed here?
>
> A: We would have stayed here.
>
> Q: And you said your mom wasn't mad at him for wanting to go to Japan, but she didn't think he'd be able to?
>
> A: Yeah, because he's been in legal trouble before, and I think he's, like, been to prison already like twice, so she was, like, "You can't leave the country."

(Tr. Vol. II, 130-31.) Thereafter, W.J.'s counsel did not immediately object but proceeded to ask K.J. to identify a series of photographs. Only after K.J. completed her testimony did W.J.'s counsel request a mistrial based on K.J.'s statement regarding W.J.'s time in prison. The trial court noted that K.J.'s statement was responsive to the question asked by W.J.'s counsel, and, as the trial court noted, W.J.'s counsel "inquired several times into that area." (Tr. Vol. II, 158.) The trial court offered to provide a curative instruction if defense counsel so requested, and defense counsel responded he would think it over and let the court know whether he wanted such an instruction. There is no indication in the record that defense counsel indeed requested the court to move forward with providing a curative instruction.

{¶ 51} The state responds that any error from the trial court's denial of a mistrial based on K.J.'s statements was invited error. "Invited error prohibits a party from

'tak[ing] advantage of an error which he himself invited or induced the trial court to make.' " *State v. Jones*, 10th Dist. No. 12AP-1091, 2014-Ohio-674, ¶ 22, quoting *Lester v. Leuck*, 142 Ohio St. 91 (1943), paragraph one of the syllabus. When defense counsel elicits testimony regarding a defendant's prior criminal history, the defendant cannot then use the evidence he elicited as grounds for a mistrial. *See id*. (noting "[a] number of appellate courts have concluded that the doctrine of invited error prevents a defendant who elicits or provides inadmissible polygraph evidence at trial, from raising the erroneous admission of such evidence either as grounds for mistrial or reversal on appeal"). *See also State v. Beeson*, 2d Dist. No. 19312, 2002-Ohio-4341, ¶ 30 (determining trial court appropriately denied defendant's motion for mistrial where the testimony about defendant's prior criminal history "was not elicited by the State" but "was elicited by Defendant during cross-examination of the State's witness" and thus was invited error). As both the trial court and the state note, it was only after defense counsel repeatedly inquired into why K.J.'s mother did not think W.J. could go to Japan for work that K.J. said anything about W.J.'s criminal record.

{¶ 52} Moreover, K.J.'s statement was vague and did not reference any specific crime that W.J. committed. There was ample evidence at trial to convict W.J., and W.J. does not demonstrate how or if the admission of K.J.'s statement regarding his prior criminal history prejudiced him such that the jury would not have found him guilty but for this statement. Thus, we conclude the trial court did not abuse its discretion in denying W.J.'s motion for a mistrial based on K.J.'s statements referencing his prior criminal history.

{¶ 53} Having determined the trial court did not abuse its discretion in denying both of W.J.'s motions for mistrial, we overrule W.J.'s first and third pro se assignments of error.

VI. Second Pro Se Assignment of Error – Review of Testimony Transcripts

{¶ 54} In his second pro se assignment of error, W.J. argues the trial court abused its discretion when it declined to provide the jury with a transcript of K.J.'s testimony during deliberations when the jury requested it.

{¶ 55} As W.J. properly notes, after the jury retires to deliberate, "a court may, in the exercise of sound discretion, cause to be read all or a part of the testimony of any

witness, in the presence of or after reasonable notice to the parties or their counsel." *State v. Berry*, 25 Ohio St.2d 255, 263 (1971). We therefore review a trial court's decision of whether or not to read portions of the testimony to the jury upon request for an abuse of discretion. *Id.*; *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 123. W.J. does not articulate how the trial court abused its discretion in not providing the jury with a transcript of K.J.'s testimony, nor does the record indicate any prejudice to K.J. from the trial court refusing the jury's request.

{¶ 56} Additionally, to the extent W.J. argues in his pro se brief that the trial court violated his rights by responding to this question from the jury when he was not present, W.J.'s trial counsel expressly waived W.J.'s appearance for the trial court's answer of that jury question.

{¶ 57} Because the trial court did not abuse its discretion in not providing the jury with a transcript of K.J.'s testimony, we overrule W.J.'s second pro se assignment of error.

VII. Fourth Pro Se Assignment of Error – Cumulative Errors

{¶ 58} In his fourth and final pro se assignment of error, W.J. argues that the cumulative errors at his trial deprived him of a constitutionally fair trial and thus warrant reversal.

{¶ 59} Under the doctrine of cumulative error, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 132, citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. However, where there are not multiple errors, the doctrine of cumulative error is not applicable. *Id*.

{¶ 60} W.J. asserts that both his pro se assignments of error and the assignments of error raised by his appellate counsel are sufficient to implicate the doctrine of cumulative error. However, we have already determined none of those assignments of error have merit, and W.J. is thus unable to point to even one error, let alone two or more cumulative errors, that would warrant reversal. *State v. Moore*, 10th Dist. No. 11AP-1116, 2013-Ohio-3365, ¶ 61 (noting that where a case "presents no errors to cumulate," the doctrine of cumulative errors does not apply). We, therefore, overrule W.J.'s fourth and final pro se assignment of error.

VIII. Disposition

{¶ 61} Based on the foregoing reasons, the sufficiency of the evidence and the manifest weight of the evidence support W.J.'s convictions, and the trial court did not abuse its discretion in denying W.J.'s two motions for mistrial or in failing to provide a transcript of the victim's testimony to the jury during deliberations. Additionally, the doctrine of cumulative errors does not apply to warrant reversal in this case. Having overruled W.J.'s two assignments of error through his counsel and his four pro se assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and BRUNNER, JJ., concur.