[Cite as *State v. Stevens*, 2009-Ohio-6045.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-031
	:	O P I N I O N
- vs -		11/16/2009
	:	
CRAIG LEE STEVENS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-04-0647

Robin N. Piper, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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HENDRICKSON, J.

{¶1} Defendant-appellant, Craig Lee Stevens, appeals his conviction in the Butler County Court of Common Pleas for three counts of rape. For the reasons outlined below, we affirm in part, reverse in part, and remand for further proceedings.

{¶2} At approximately 2:00 a.m. on the morning of March 29, 2008, and after working the third shift as a cook at a local diner, A.K., who was 19 years old at the time, went

to visit her friend, C.S., appellant's 17-year-old daughter, at appellant's Butler County residence. After watching television, and because it was approaching 3:00 a.m., C.S. told A.K. that she should spend the night. A.K. agreed, took a shower, put on sweatpants and a t-shirt, and joined C.S. in her bed. The bed, which was described as "big enough" for the two teenagers, "wasn't as big as a full, but it was not a twin."

{¶3} Sometime after the girls went to sleep, appellant, who had since returned from a bar, entered his daughter's bedroom and asked A.K. if that was her car parked outside. A.K. responded affirmatively. Appellant then informed A.K. that she could spend the night and left the room. When asked if she noticed anything unusual about appellant that morning, A.K. stated that he was "intoxicated" and that she "could smell the alcohol."

{¶4} Several minutes later, appellant came back into the girls' bedroom, walked to the side of the bed where A.K. was sleeping and started "rubbing" her. A.K., who was "halfway sleeping," thought it was "weird," but started to "doze back off." However, when appellant continued "touching" her, A.K. became scared and tried to wake up C.S. who was sleeping next to her. Appellant continued to touch A.K. for approximately a minute before he exited the room and began pacing in the hallway. While appellant was gone, A.K. testified that she told C.S. that she was scared.

{¶5} Shortly thereafter, appellant again entered the girls' bedroom, "tried to crawl into bed," and began "feeling on" A.K. before he "eventually inserted [his finger]" into her vagina and "anal area." Appellant then pulled A.K.'s legs apart before "put[ting] his head in between [her] legs" and his "tongue on [her] vagina." When asked if she was doing anything to prevent appellant from touching her, A.K. testified that she "sa[id] no," "crossed her legs," and "tr[ied] to push him off," and that she never gave him permission to touch her.

{¶6} After appellant left the room for the final time, A.K. called Tom Mapes, appellant's neighbor and husband of Dina Mapes, A.K.'s boss and close friend, and asked

him to unlock his front door. A.K. then left appellant's house and ran across the street to the Mapes residence. Upon her arrival, Tom Mapes testified that A.K. was crying and acting "hysterical." Later that morning, A.K. called the police and went to the hospital where she submitted to a sexual assault evaluation.

{¶7} Following a police investigation, appellant was arrested and charged with, among other things, three counts of rape.[1] At the conclusion of the two day jury trial, appellant was found guilty and sentenced to seven years in prison, ordered to pay a total of $15,000 in fines, and notified that he was subject to a mandatory five year period of postrelease control. Appellant now appeals, raising four assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT."

{¶10} In his first assignment of error, although couched in terms of prosecutorial misconduct, appellant argues that "this [c]ourt must reverse his conviction because the trial court should have granted his request for a mistrial." We disagree.

{¶11} "A trial court should not grant a motion for a mistrial unless it appears that some error or irregularity has been injected into the proceeding that adversely affects the substantial rights of the accused, and as a result, a fair trial is no longer possible." *State v. Thornton*, Clermont App. No. CA2008-10-092, 2009-Ohio-3685, ¶11, citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 549. The trial court's decision to grant or deny a mistrial rests within its sound discretion, and this court will not disturb such a determination absent an abuse of discretion. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶92; *Thornton* at ¶11. An abuse of discretion implies that

1. Appellant was also charged with one count of sexual battery in violation of R.C. 2907.03(A)(5). However, this charge was later dismissed.

the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶12} During a sidebar conference, and while A.K., the alleged victim, was on the witness stand, a victim's advocate came into the courtroom, approached the witness, and, according to the record, "pour[ed] witness water" and "exchanged pleasantries." The victim advocate's unusual behavior caught the attention of the trial court judge who stated that he "[didn't] think that need[ed] to happen again." After realizing what had occurred, appellant immediately moved for a mistrial arguing that the victim advocate's behavior denied him a fair trial by "bolster[ing A.K.'s] credibility."[2]

{¶13} Upon taking the matter into consideration, the trial court noted that "about half of [the jury had] their back to the courtroom," and that "most of these jurors are not as trained to know what is usual or unusual * * *." The court then determined that although it would be "incredibly difficult for anyone paying any attention at all not to have seen" the victim's advocate approach the witness stand, the "jurors at that time seemed to be very much involved in their conversation," and that it was "not certain that they would have placed any significance to the fact that it occurred."[3] In denying appellant's motion, the court concluded that even though the victim's advocate acted "extremely inappropriate[ly]," it was "very difficult while not impossible to figure out what substantial rights of the defendant have been prejudicially affected."

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2. Appellant does not argue that the state actually permitted or instructed the victim's advocate, a representative of the prosecutor's office, to approach A.K. during her direct examination. See, e.g., *State v. Cook*, Ottawa App. No. OT-07-020, 2008-Ohio-89, ¶55-59. In fact, during the sidebar conference, appellant's trial counsel stated the following:

"I know [the prosecutor] had nothing to do with this, and would have told [the victim's advocate] specifically not to do that. The bottom line is that she did it, and it was inadvertent."

3. The court also stated that "[t]here was not a comment made to the victim's advocate by the [c]ourt or anyone else," and that it if the jurors saw victim's advocate approach the witness stand that it "[didn't know that they] would have had a particular reaction to it."

{¶14} While highly unusual, and even though the victim advocate's behavior can be classified as nothing short of a significant breach in courtroom decorum, because the trial court "is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial," we find that the trial court did not abuse its discretion in denying appellant's motion. *State v. Glover* (1988), 35 Ohio St.3d 18, 19; *State v. Kersey*, Warren App. No. CA2008-02-031, 2008-Ohio-6890, ¶8. The record is simply devoid of any evidence tending to show that appellant's substantial rights were prejudiced by the victim advocate's actions. See, e.g., *Jones v. State* (Dec. 28, 1994), Alaska App. No. A-4867, 1994 WL 16197104 at *3-*5 (finding trial court did not abuse its discretion in denying defendant's motion for mistrial where paralegal for the state "left counsel table, went up to witness stand, and began hugging and verbally consoling" witness in the presence of the jury); *State v. McPherson* (Tenn.Crim.App.1994), 882 S.W.2d 365, 370-371 (trial court did not abuse its discretion by denying defendant's motion for mistrial where the "victim-witness coordinator for the District Attorney's office, come up through the rails and up to the witness stand and started hugging the witness right in front of the jury"); *State v. Davis* (1989), 182 W.VA. 482, 487 (trial court did not abuse its discretion by denying defendant's motion for a mistrial where "sexual assault counselor * * * approached the witness stand to comfort the crying victim" in the presence of the jury); *State v. Cardall* (1999), 982 P.2d 79, 84 (finding witness' credibility not bolstered after mother of rape victim "entered the courtroom and proceeded to embrace, comfort, and console her" in the presence of the jury).

{¶15} Because there is no indication that appellant's substantial rights were somehow prejudiced, the trial court did not abuse its discretion by denying his motion for a mistrial. Accordingly, appellant's first assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE

STATE TO IMPEACH ITS WITNESS."

{¶18} In his second assignment of error, appellant argues that trial court erred by allowing the state to impeach the credibility of C.S., the state's own witness and daughter of appellant, by means of her prior inconsistent statement. Specifically, appellant argues that the state "feigned surprise" for the sole purpose of introducing C.S.'s prior statement. This argument lacks merit.

{¶19} Evid.R. 607(A), which is designed to prevent circumvention of the hearsay rule, provides, in pertinent part, "the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."[4] *State v. Kraus*, Warren App. No. CA2006-10-114, 2007-Ohio-6027, ¶18. The state can establish "surprise" when its witness' testimony is materially inconsistent with a prior oral or written statement and the state did not have any reason to believe that its witness would recant the original statement when called to testify. *State v. Gayheart* (Sept. 8, 1997), Fayette App. No. CA97-01-001, at 7-8; *State v. McCradic*, Richland App. No. 08-CA-058, 2009-Ohio-2592, ¶91, citing *State v. Holmes* (1987), 30 Ohio St.3d 20, 23. In turn, absent an express intention by the witness to the contrary, the state has the right to presume that its witness will testify in accordance with a prior statement. *State v. Bowling* (Dec. 30, 1993), Butler App. No. CA93-01-006, at 5, citing *State v. Jarvis* (Mar. 23, 1987), Butler App. No. CA86-07-110, at 3. The existence of surprise is a factual determination left to the broad and sound discretion of the trial court. *Gayheart* at 7, citing *State v. Moore* (1991), 74 Ohio App.3d 334, 343; *State v. Dearmond*, 179 Ohio App.3d 63, 2008-Ohio-5519, ¶27.

{¶20} The state called C.S., appellant's daughter, to testify regarding the events on

4. Appellant does not argue that the state's trial position did not suffer "affirmative damage" as a result of C.S.'s trial testimony. In fact, within his brief, appellant concedes that C.S.'s testimony was contradictory to her prior written statement. Since the state can establish affirmative damage by showing its witness testified to facts that "contradict, deny, or harm" its position, we will not address that issue here. *Gayheart* at 8; *State v. Crosky*, Franklin App. No. 06AP-655, 2008-Ohio-145, ¶107, citing *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 299.

the morning in question. C.S. testified that after appellant, her father, got into the bed with her and A.K., that A.K. never tried to wake her up, never called the Mapes, and, although she was "disgusted" by it, the entire sexual encounter between them was consensual. C.S.'s testimony was undeniably inconsistent and contradictory with the statement she had provided to police, which indicated, among other things, that she was "scared" after her father started touching A.K., that A.K. was "pinching [her] and kept nudging [her]" during the sexual encounter, and that A.K., in fact, did make a phone call that morning.[5] However, when the state asked C.S. if her prior written statement she provided to the police was consistent with her current testimony, appellant objected and the court called a sidebar conference.

{¶21} During the sidebar conference, the following exchange occurred:

{¶22} "[THE STATE]: Your Honor, * * * I didn't interview her. * * * I had tried to make contact with her previously and was unable * * *. I expected her to testify consistent with her statement that she gave previously as I expect every witness to testify consistent with their statement they gave previously. She did not do that.

{¶23} "* * *

{¶24} "THE COURT: Here is the question: Has [C.S.] told [the prosecutor] or any officer of the state, an agent of the [s]tate that she does not intend to testify consistent with her prior written statement to the police?

{¶25} "[THE STATE]: Never.

{¶26} "[APPELLANT'S TRIAL COUNSEL]: No.

{¶27} "THE COURT: Never?

{¶28} "[THE STATE]: Never."

{¶29} The trial court then overruled appellant's objection and permitted the state to

5. C.S. also testified that "the police officers and [A.K.] told [her] what to write" in her statement.

impeach C.S.'s credibility by means of her prior written inconsistent statement.

{¶30} After reviewing the record, it is clear that C.S. never provided express notice to the state that she would recant her original statement when called to testify.[6] As the Fifth District Court of Appeals recently found, a trial court does not abuse its discretion by finding that the state was surprised even though it was aware of the possibility that its witness may change her story where there has been no express notice by the witness that she would wholly deny her prior statement provided to the police. *State v. Dickie*, Licking App. No. 2009-CA-00029, 2009-Ohio-5443, ¶22, citing *State v. Lewis* (1991), 75 Ohio App.3d 689, 696. As a result, because C.S. never provided express notice to the state of her intention to recant her original statement, the trial court did not err, let alone abuse its discretion, by allowing the state to impeach C.S.'s credibility by means of her prior inconsistent statement. *Bowling*, Butler App. No. CA93-01-006 at 5. Therefore, appellant's second assignment of error is overruled.

{¶31} Assignment of Error No. 3:

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

{¶33} In his third assignment of error, appellant argues that his conviction was against the manifest weight of the evidence "because the [s]tate's evidence failed to establish that [his] conduct was without the victim's consent." We disagree.

{¶34} A manifest weight challenge concerns the inclination of the greater amount of

6. Appellant claims that the state had notice that C.S. would contradict her previous statement because she "she appeared for the Grand Jury proceedings * * * but that the [s]tate sent her home without testifying," and because she "attempted to contact the police on several occasions, and even went to the station to obtain her statement, but was unsuccessful." Appellant also claims that the state had notice that her testimony would be inconsistent because he "formally placed the state on notice that he intended to call [C.S.] as a witness," and because the state knew that C.S. and A.K. were "no longer friends because of the incident." None of these even remotely support appellant's contention that the "record amply demonstrates that the [s]tate was not surprised by [C.S.'s] testimony."

credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. In turn, "weight is not a question of mathematics, but depends on its effect in inducing belief." *Ghee* at ¶9. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *Hancock,* 2006-Ohio-160 at ¶39; *State v. Lester,* Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James,* Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell,* Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, upon review, the question is whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7; *Thompkins* at 387.

{¶35} Appellant was charged with rape in violation of R.C. 2907.02(A)(2), a first degree felony, which prohibits any person from engaging in sexual conduct with another "when the offender purposely compels the other person to submit by force or threat of force." "Sexual conduct," defined by R.C. 2907.01(A), includes, among other things, "cunnilingus between persons regardless of sex," and "the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another without privilege to do so."

{¶36} Appellant claims that his conviction for three counts of rape was not supported by the manifest weight of the evidence because A.K.'s testimony was not credible. To support this assertion, appellant argues that A.K.'s testimony "as well as her statements that night are inconsistent with her actions," and that the evidence demonstrates that he engaged in a "consensual act."

{¶37} After reviewing the record, and while there may be a question as to A.K.'s credibility, "the weight to be given the evidence, and the credibility of witnesses are primarily for the trier of facts." *State v. Pringle*, Butler App. Nos. CA2007-08-293, CA2007-09-238, 2008-Ohio-5421, ¶28. It is entirely appropriate for the trier of fact to believe the testimony of some witnesses while disregarding the testimony of others. *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶51. As a result, we defer to the jury's decision finding A.K.'s testimony credible for it was "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Therefore, because the evidence presented at trial indicated appellant inserted his fingers into A.K.'s vagina and anal cavity without her consent, and that he performed cunnilingus on her after forcing her legs apart, we cannot say that it clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be reversed. Accordingly, appellant's third assignment of error is overruled.

{¶38} Assignment of Error No. 4:

{¶39} "THE TRIAL COURT ERRED IN IMPOSING POSTRELEASE CONTROL."

{¶40} In his fourth assignment of error, appellant argues that although the trial court properly notified him at the sentencing hearing that he was subject to a mandatory five-year period of postrelease control, the trial court erred by incorrectly indicating he was subject to

an optional three-year period of postrelease control on its sentencing entry. We agree.

{¶41} As noted above, appellant was convicted on three counts of rape in violation of R.C. 2907.02(A)(2), a first-degree felony, thereby subjecting him to a mandatory five-year period of postrelease control. See R.C. 2967.28(B)(1). Both parties agree that the trial court properly notified appellant that he would be subject to a five-year period of mandatory postrelease control at the sentencing hearing.[7]

{¶42} However, in its "Judgment of Conviction Entry," the trial court incorrectly stated that "post release control is optional in this case up to a maximum of three (3) years[.]" As noted by the Ohio Supreme Court, a court imposing mandatory postrelease control is required "to include in the sentencing entry a statement that [the] offender convicted of a first – or second – degree felony offense *will* be subject to postrelease control after leaving prison." (Emphasis sic.) *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶68. As a result, because the trial court's sentencing entry does not include a statement indicating appellant was subject to a mandatory five year term of postrelease control upon his release, it does not conform to statutory mandates, and therefore, is void. See id.; see, also, *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085; *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; *State v. Boswell,* 121 Ohio St.3d 575, 2009-Ohio-1577. Accordingly, appellant's final assignment of error is sustained, we vacate appellant's sentence, and remand this matter to the trial court for resentencing. See, e.g., *State v. Allen*, Sandusky App. No. S-09-004, 2009-Ohio-3799, ¶32; *State v. Wheeler*, Summit App. No. 24488, 2009-Ohio-3557, ¶12.

{¶43} Judgment affirmed in part, reversed in part, and remanded.

YOUNG, P.J., and RINGLAND, J., concur.

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7. The state concedes that appellant was properly notified of his mandatory five year period of postrelease control, but that the trial court's sentencing entry "does not accurately reflect this."

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