[Cite as *State v. Moshos*, 2010-Ohio-735.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-008
	:	O P I N I O N
- vs -		3/1/2010
	:	
DANIEL M. MOSHOS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5051

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy,103 E. Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

James P. Tyack, 536 South High Street, Columbus, Ohio 43215, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Daniel M. Moshos, appeals from his conviction in the Clinton County Court of Common Pleas for one count of public indecency, one count of attempted rape, and two counts of gross sexual imposition. We affirm.

{¶2} On July 26, 2007, C.J, a 52-year-old married mother of two, filed a police report with the Wilmington Police Department alleging that appellant, a physician with Corporate Health Services (Corporate Health) located in Wilmington, Ohio, exposed his

private parts and asked her to perform oral sex during a follow-up examination conducted at his office. On August 27, 2007, following a police investigation, appellant was arrested and charged with public indecency.

{¶3} On September 1, 2007, news of appellant's arrest for public indecency was reported in the local newspaper.

{¶4} Several days later, on September 5, 2007, Detective Josh Riley of the Wilmington Police Department received a call from an anonymous woman who stated that she "had the same thing happen [to her]," and that "the victim from the case [they] filed charges on was telling the truth." Upon further police investigation, which included identifying the anonymous woman as D.V., a 44-year-old single mother, appellant was indicted on two counts of gross sexual imposition and one count of attempted rape.

{¶5} After the trial court denied his motion to suppress and motion in limine, and following a four-day jury trial, appellant was found guilty on all counts and sentenced to serve a total of three years in prison.

{¶6} Appellant now appeals his conviction, raising five assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order and his fourth and fifth assignments of error will be addressed together.

{¶7} Assignment of Error No. 2:

{¶8} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS AND PERMITTED INCRIMINATING EVIDENCE TO BE USED AT TRIAL WITHOUT PROPER AUTHENTICATION, ESTABLISHMENT OF CHAIN OF CUSTODY, AND THE GENUINE QUESTION AS TO ITS AUTHENTICITY HAD BEEN RAISED IN VIOLATION OF THE OHIO RULES OF EVIDENCE, APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS PURSUANT TO THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶9} Appellant argues that the trial court erred by allowing the state to play to the jury a digital audio recording of an alleged conversation between C.J. and appellant because the recording "could not be authenticated," and therefore, was "clearly not the best evidence." We disagree.

{¶10} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *State v. Craft,* Butler App. No. CA2006-06-145, 2007-Ohio-4116, ¶48. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Pringle,* Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶17.

{¶11} To be admissible, an audio recording must be authentic, accurate, and trustworthy. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶109; *State v. Coleman* (1999), 85 Ohio St.3d 129, 141. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Bettis,* Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶26. The "sufficient to support a finding standard" is not rigorous, and the threshold of admissibility articulated in it is low. *State v. Steele,* Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶115, citing *State v. Easter* (1991), 75 Ohio App.3d 22, 25. In turn, because "conclusive evidence as to authenticity and identification need not be presented to justify allowing evidence to reach the jury," the evidence establishing authenticity need only be sufficient to afford a rational basis for a jury to decide that the evidence is what its proponent claims it to be. *State v. Bell*, Clermont

App. No. CA2008-05-044, 2009-Ohio-2335, ¶17, 30.

{¶12} Turning to the facts of this case, in order to establish that the digital audio recording was what the state claimed it to be, namely a recording of a conversation between C.J. and appellant, it was not required to "prove beyond any doubt that the evidence is what it purports to be." *Bell* at ¶30, quoting *State v. Aliff* (Apr. 12, 2000), Lawrence App. No. 99CA8, 2000 WL 378370 at *9. Instead, the state needed only to demonstrate a "reasonable likelihood" that the recording was authentic. *Bell* at ¶30. Such evidence may be supplied by the testimony of a witness with knowledge. Evid.R. 901(B)(1); *State v. Brantley,* Butler App. No. CA2006-08-093, 2008-Ohio-281, ¶34.

{¶13} At trial, C.J. testified that she agreed to "wear a wire" and participate in a "covert audio recording" in order to elicit incriminating statements from appellant during her follow-up examination at his Corporate Health office. C.J. then testified that she listened to the recording, that she was able to clearly identify herself and appellant in the recording, that the recording contained no additions, omissions, or deletions, and that listening to it "gave [her] the creeps." When asked if the digital audio recording was a "fair and accurate representation" of the conversation she had with appellant that day, C.J. responded affirmatively. In addition, and in further explaining the tapes accuracy and authenticity, C.J. testified that the recording was "so accurate" that she could "see him doing it again," and that hearing appellant's voice "on that tape [was] like reliving it again."

{¶14} In ruling on the admissibility of the digital audio recording, the trial court found that it was properly "authenticated by testimony of a witness who has knowledge that the tape is what it is claimed to be." We find no error in the trial court's decision. As noted above, C.J., a witness with knowledge, provided extensive testimony regarding the authenticity of the digital audio recording. See, e.g., *Were*, 2008-Ohio-2762 at ¶109;

State v. Nelson (Nov. 21, 1997), Greene App. No. 96CA 134, 1997 WL 822673 at *2; *State v. Hall* (May 10, 1995), Hamilton App. No. C-940277, 1995 WL 276716 at *2. Therefore, as the digital audio recording was properly authenticated, appellant's second assignment of error is overruled.

{¶15} Assignment of Error No. 3:

{¶16} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY DENYING HIS ABILITY TO CROSS EXAMINE ONE OF THE ALLEGED VICTIMS REGARDING HER TRUTHFULNESS IN VIOLATION OF EVIDENCE RULE 608(B), OHIO EVIDENCE RULE 404(A)(2), THE CONFRONTATION CLAUSE, AND THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶17} In his third assignment of error, appellant argues that the trial court erred when it prohibited him from cross-examining D.V. regarding her alleged prior instance of misconduct. We disagree.

{¶18} "Evid.R. 608(B) provides a well-established rule of law that protects a legitimate state interest in preventing criminal trials from bogging down in matters collateral to the crime with which the defendant was charged." *State v. Myricks*, Montgomery App. No. 22846, 2009-Ohio-5304, ¶26, quoting *State v. Boggs* (1995), 63 Ohio St.3d 418, 422-23. In turn, a defendant may seek to impeach a witness on cross-examination by questioning the witness about prior instances of misconduct when such questioning is "clearly probative" of the witness' character for truthfulness or untruthfulness. Evid.R. 608(B); *State v. Buchanan*, Brown App. No. CA2008-04-001, 2009-Ohio-6042, ¶54; *State v. Rogers*, Fayette App. No. CA2004-06-014, 2005-Ohio-6693, ¶11. As a result, "[t]here is a requirement of a 'high degree of probative value of instances of prior conduct as to truthfulness or untruthfulness of the witness before the

trial court will allow such cross-examination.'" *Rogers*, quoting *State v. Miller,* Trumbull App. No. 2004-T-0082, 2005-Ohio-5283, ¶35. The decision to allow a defendant to question a witness about prior instances of misconduct is a matter that rests within the sound discretion of the trial court, and therefore, the trial court's decision to exclude such evidence will not be reversed absent an abuse of discretion. *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶7; *State v. Carter*, Clermont App. No. CA2000-01-003, at 9; *State v. Miller* (Aug. 10, 1998), Madison App. No. CA97-10-050, at 5-6.

{¶19} Appellant initially argues that the trial court erred by prohibiting him from cross-examining D.V. regarding alleged "sworn to falsifications" she made on an affidavit issued to obtain a "Domestic Relations Civil Protection Stalking Order" in May of 2000. However, after a thorough reviewing the record, we find that appellant's desire to question D.V. about statements she allegedly made regarding her relationship with a former co-worker in an affidavit used to obtain a civil protection order in an unrelated domestic dispute nearly nine years prior does not exhibit a "high degree of probative value" as to her truthfulness or untruthfulness. Therefore, based on the facts of this case, the trial court did not err, let alone abuse its discretion, by prohibiting appellant from cross-examining D.V. regarding her alleged prior instance of misconduct.

{¶20} We also reject appellant's claim that the trial court's decision violated the Confrontation Clause found in the Sixth Amendment of the United States Constitution. Contrary to appellant's claim, the trial court's decision to exclude evidence with minimal probative value under Evid.R. 608(B), such as the case here, does not violate a defendant's Sixth Amendment rights. See *State v. Rainey*, Montgomery App. No. 23070, 2009-Ohio-5873, ¶22; *Boggs*, 63 Ohio St.3d at 422.

{¶21} Assignment of Error No. 4:

{¶22} "THE EVIDENCE WAS INSUFFICIENT TO FIND THE APPELLANT GUILTY AND THUS, APPELLANT IS ENTITLED TO A JUDGMENT OF ACQUITTAL AS TO COUNTS ONE THROUGH FOUR PURSUANT TO OHIO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE."

{¶23} Assignment of Error No. 5:

{¶24} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶25} In his fourth and fifth assignments of error, appellant argues that the trial court erred by denying his Crim.R. 29 motion for acquittal, that the state provided insufficient evidence to support his convictions, and that his convictions were against the manifest weight of the evidence. In support of these claims, appellant essentially argues that his convictions were not supported by credible testimony or evidence. We disagree.

{¶26} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *State v. Rodriguez*, Butler App. No. CA2008-07-0162, 2009-Ohio-4460, ¶60.

{¶27} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond

a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶28} Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Carroll* at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing *Hancock,* 2006-Ohio-160 at ¶39. Under a manifest weight challenge, 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. *Good* at ¶25. This discretionary power would be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶18.

{¶29} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Smith,* Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *Rodriguez*, 2009-Ohio-4460 at ¶62.

Crimes Against C.J.:

{¶30} Appellant was charged with public indecency in violation of R.C. 2907.09(A)(1), a fourth-degree misdemeanor, after it was alleged he exposed his private parts to C.J. during a follow-up examination conducted at his Corporate Health office.

Public Indecency: R.C. 2907.09(A)(1)

{¶31} R.C. 2907.09(A)(1), a fourth-degree misdemeanor, prohibits anyone from recklessly exposing their private parts "under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household."

{¶32} At trial, C.J. testified that she went to Corporate Health where she was placed under appellant's care after she injured her foot at work. She then testified that during her initial examination, appellant put her leg "across his lap," which she thought was "kind of weird" and "unusual," and that, after her examination ended, appellant told her to "hide" a business card with his personal cell phone number and e-mail address in her purse. Following appellant's orders, and not thinking anything of it at the time, C.J. testified that she put the card in her purse and went to the front desk to schedule a follow-up examination.

{¶33} A few days later, C.J. testified that she received a phone message from Corporate Health indicating that she needed "to get in there about [her] toe" because it was an "emergency." Upon her arrival, and after being escorted back to the examination room, C.J. testified that appellant began "rubbing" her leg when he stated "you really are something else." When asked how that made her feel, C.J. testified that she felt like a "tramp," and that she "knew he was out for something else."

{¶34} C.J. continued by testifying that after appellant got up from his chair and turned towards the door, she noticed "his shirt and his pants getting loose," and that, when he turned around, "his penis was hanging out." When asked how she knew it was his penis, she testified that it was "obvious" and that it was "pretty close" to her face. C.J. then testified that appellant, who had since put his penis in his hand, then asked if she "[did] blow jobs." In response, C.J. testified that she was "shocked" and that she

immediately hurried towards the door and exited the Corporate Health office.

{¶35} Several weeks later, C.J. testified that she reported appellant to the police and agreed to participate in a "covert audio recording" in order to elicit incriminating statements from him.[1] The digital audio recording produced as a result of C.J.'s cooperation with police contained, in pertinent part, the following conversation:

{¶36} "[C.J.]: I've been having trouble concentrating.

{¶37} "* * *

{¶38} "[C.J.]: Ever since I've seen you – you whipped out that big – I couldn't believe the size –

{¶39} "[APPELLANT]: You're bad. * * *

{¶40} "[C.J.]: I mean, are you average or not average or –

{¶41} "[APPELLANT]: Maybe sometime I will give you a snack. What do you think?

{¶42} "* * *

{¶43} "[C.J.]: So, when you going to –

{¶44} "[APPELLANT]: Some day, some day –

{¶45} "* * *

{¶46} "[APPELLANT]: I've got to run here. I am so far behind.

{¶47} "[C.J.]: All right. But you are going to show it to me again, aren't you?

{¶48} "[APPELLANT]: And by the way, I'm pleased to know that that wasn't a problem.

{¶49} "* * *

{¶50} "[C.J.]: [C]ome on, let's face it, I seen your penis. I'm sorry. I know I

1. In further explaining why she did not immediately report appellant to the police, C.J. testified that "when you're a woman, it's hard to get someone to believe stuff like that."

shouldn't say that, but I just, you know, just let's keep – all right.

{¶51} "[APPELLANT]: The walls have ears.

{¶52} "[C.J.]: And I'm sorry if I done anything –

{¶53} "[APPELLANT]: Oh, you didn't. I have no problem with you at all. I really don't. I think you're a really nice lady.

{¶54} "[C.J.]: Okay.

{¶55} "[APPELLANT]: I like you.

{¶56} "[C.J.]: And if you'll apologize to me, we'll get it over with.

{¶57} "[APPELLANT]: I'm sorry. I didn't mean to make you feel bad about anything."

{¶58} After a thorough review of the record, we find that the state presented extensive credible evidence to support appellant's conviction for public indecency. See *State v. West* (July 15, 1996), Butler App. No. CA95-11-196, at 3-4. Therefore, because appellant's conviction for public indecency did not create such a manifest miscarriage of justice that it must be reversed, we find no reason to disturb the jury's finding of guilt. See *State v. Cunningham* (Dec. 6, 1999), Clermont App. No. CA99-01-003, at 9; *State v. Stacey* (Mar. 15, 1995), Clinton App. No. CA94-09-024, at 7.

Crimes Against D.V.:

{¶59} Appellant was charged with two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), after it was alleged that he made sexual contact with D.V. on a Clinton County roadway as well as during a follow-up examination conducted at his Corporate Health office. Appellant was also charged with attempted rape in violation of R.C. 2907.02(A)(2) and R.C. 2923.02, a second-degree felony, for yet another encounter during a follow-up examination at his Corporate Health office. Each of these alleged incidents will be addressed separately.

Gross Sexual Imposition: R.C. 2907.05(A)(1)

{¶60} Gross sexual imposition in violation of R.C. 2907.05(A)(1), a fourth-degree felony, prohibits any person from having "sexual contact with another, not the spouse of the offender," when the "offender purposefully compels the other person * * * to submit by force or threat of force." Sexual contact, as defined by R.C. 2907.01(B), includes "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

Clinton County Roadway:

{¶61} At trial, D.V. testified that she went to the Corporate Health offices where she was placed under the care of appellant after she injured her neck at work. After claiming appellant acted professionally during her first visit, D.V. then testified that appellant canceled her follow-up examination and informed her that if she wanted the results of her x-rays that she needed to meet him at nearby restaurant. When asked if she thought this was unusual, D.V. testified that she "never thought about it" and that she "just want[ed her] test results."

{¶62} After meeting in the restaurant parking lot, D.V. testified that appellant asked her to come with him to "see a realtor" and that "he would talk on the way." Because she was concerned about her x-ray results, D.V. testified that she got into appellant's car and "never thought anything about it."

{¶63} D.V. continued by testifying that after appellant drove to a nearby home, and after they "waited around there for a short time," the realtor never arrived. Thereafter, while appellant drove her back to the restaurant, D.V. testified that appellant pulled off the road into "a little dirt gravel part," exited the vehicle, walked around the car "fondling himself," "pulled on the back of [her] hair," "pushed [her] against the car," and

ejaculated on her clothing. When asked if she consented to such actions, D.V. stated "definitely not," and that she felt "sick," shocked," and "stupid for putting [herself] in that situation." D.V. also testified that she threw her semen stained clothes away because she "didn't want them in [her] house," and that she decided not to report the incident to police because she felt "ashamed."

Follow-Up Examination:

{¶64} Several days after the roadside incident, D.V. testified that appellant called her to "see if [she] was okay," and to see if she was coming to her next appointment. In response, D.V. testified that she told appellant to "cancel it and release [her]" so that she could go back to work.[2] The state then presented evidence indicating appellant called D.V. on several more occasions to inquire as to why she missed her appointments, and that appellant told D.V. that she was required to return for a final examination in order to obtain her release. However, upon returning to Corporate Health, D.V. testified that appellant refused to release her, and told her that "if he released [her], he wouldn't be able to see [her] anymore." In further explaining why she continued to return to Corporate Health, D.V. testified that she believed appellant "had [her] life in his hands" because "whatever he said or done depended on if [she] worked or not."

{¶65} Thereafter, during one of her many follow-up examinations, none of which resulted in her release, D.V. testified that appellant walked up behind her and grabbed her breasts, which prompted her to push her "arms out and [break] loose." D.V. then testified that even though she was able to break free from his initial hold, appellant grabbed her again and "started talking about blow jobs," and asked if she "ever

2. In explaining the significance of a "release," D.V. testified that she "wanted to be released because you have to be discharged or released. You have to have that paper * * * to go back to work."

performed a blow job." After freeing herself once again, D.V. testified that she left the examination room, retrieved her paper work from the nurse's station, and exited the Corporate Health office.

{¶66} In reviewing the entire record, and after weighing the evidence and all reasonable inferences, we find that the state presented extensive credible evidence to support appellant's conviction for two counts of gross sexual imposition. See *State v. Stair*, Warren App. No. CA2001-03-017, at 8, 2002-Ohio-18; *State v. Anderson* (Oct. 18, 1993), Clermont App. No. CA93-03-019, at 6. As noted above, the evidence indicates appellant forced himself upon D.V. while stopped alongside a Clinton County roadway and during a follow-up examination at his Corporate Health office. Therefore, because appellant's conviction for two counts of gross sexual imposition did not create such a manifest miscarriage of justice that it must be reversed, we find no reason to disturb the jury's finding of guilt.

Attempted Rape: R.C.2907.02(A)(2) & R.C. 2923.02

{¶67} To be convicted of attempted rape, the state must prove that the offender "(1) intend[ed] to compel submission to sexual conduct by force or threat, and (2) commit some act that 'convincingly demonstrates' such intent." *State v. Thomas*, Butler App. No. CA2006-03-041, 2006-Ohio-7029, ¶13, quoting *State v. Davis*, 76 Ohio St.3d 107, 114, 1996-Ohio-414; see, also, R.C. 2907.02(A)(2); R.C. 2923.02(A). Sexual conduct, as defined by R.C. 2907.01(A), includes, among other things, fellatio.

{¶68} Although she did not want to remain under appellant's care, D.V. testified that she returned to Corporate Health because she "couldn't stand the pain anymore."[3] Thereafter, D.V. testified that during her final follow-up examination with appellant, he

instructed her to lay face down on the exam table, that he "put his hand behind [her] head," "grabbed [her] hair," and put his exposed penis "directly in front of [her]" so that it brushed against her chin. In further explaining this encounter, D.V. testified that appellant "would have tried oral sex" if she had not "pulled away" and "turned [her] head."

{¶69} D.V. continued by testifying that although she "tried to get up," appellant "stood there and leaned towards [her]" so she could not get off the table as he "rubbed" himself until he ejaculated on her pants. However, once appellant leaned back, D.V. testified that she pushed appellant away, slid off the table, left the room, and went to the bathroom where she "tried to get a hold of [herself]" before she left the office. When asked why she did not report appellant to the authorities that day, D.V. testified that she "couldn't' believe it [herself]," so she "didn't expect anybody else too."

{¶70} Besides D.V.'s testimony, the state also introduced her semen-stained pants that contained DNA evidence indicating, among other things, that although 99.96 percent of the male population could be excluded as the source of the stain, appellant could not. In addition, the state introduced testimony from R.K., D.V.'s former co-worker and appellant's former patient, who testified that appellant told him D.V. had "nice tits and ass," that "her tits are more than a handful," and that "he'd like to slide * * * his dick * * * between her tits."

{¶71} After a thorough review of the record, we find that the state once again provided extensive credible evidence, as described in detail above, to establish that appellant attempted to rape D.V. during a follow-up examination at his Corporate Health office. See *Thomas*, 2006-Ohio-7029 at ¶25; *State v. Laseur*, Warren App. Nos.

3. D.V. also testified that she attempted to see her family physician for her neck pain. However, after realizing it was a workers' compensation claim, D.V.'s physician informed her that he was unable to treat her because "everything had to go through Corporate Health."

CA2002-10-117, CA2002-11-121, 2003-Ohio-3874, ¶19. Therefore, because appellant's conviction for one count of attempted rape did not create such a manifest miscarriage of justice that it must be reversed, we find no reason to disturb the jury's finding of guilt.

{¶72} As we have already determined appellant's convictions for one count of public indecency, one count of attempted rape, as well as two counts of gross sexual imposition were not against the manifest weight of the evidence, we necessarily conclude that there was sufficient evidence to support the jury's finding of guilty in this case. See *Bell*, 2009-Ohio-2335 at ¶72. Accordingly, appellant's fourth and fifth assignments of error are overruled.

{¶73} Assignment of Error No. 1:

{¶74} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR SEVERANCE OF COUNT ONE OF THE INDICTMENT FROM COUNTS TWO, THREE AND FOUR AND AS A RESULT VIOLATED THE OHIO RAPE SHIELD ACT IN §2907.02 AND §2907.05, OHIO REVISED CODE §2945.59 AND THE APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS PURSUANT TO THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶75} In his first assignment of error, appellant argues that the trial court erred by denying his motion to sever. We disagree.

{¶76} The decision to grant or deny a motion to sever is a matter in the trial court's discretion, and therefore, we review the trial court's decision under an abuse of discretion standard. *State v. Garrett*, Clermont App. No. CA2008-08-075, 2009-Ohio-5442, ¶40-41; *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶49. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Hancock*, 2006-Ohio-160 at ¶130.

{¶77} At the outset, we note that appellant did not renew his motion to sever at the close of the state's case or at the close of all evidence. As this court has previously noted, where a defendant files a motion to sever, but ultimately fails to renew his motion at the close of either the state's case or presentation of all evidence, the defendant waives all but plain error on appeal. *State v. Cobb*, Butler App. No. CA2007-06-153, 2008-Ohio-5210, fn. 6; *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶10; see, also, *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶68. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Crim.R. 52(B); *State v. Lott* (1990), 51 Ohio St.3d 160, 164; *State v. Smith*, Butler App. No. CA2008-03-064, 2009-Ohio-5517, ¶96.

{¶78} It is well-established that "[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *Lott* at 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340, 343; *State v. Ashcraft*, Butler App. No. CA2008-12-305, 2009-Ohio-5281, ¶14. In turn, "[j]oinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses." *Ashcraft* at ¶14, quoting *State v. Schaim*, 65 Ohio St.3d 51, 58, 1992-Ohio-31. Nonetheless, pursuant to Crim.R. 14, if it appears that the defendant would be prejudiced by joinder of the charged offenses, the trial court may grant a severance. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶95.

{¶79} While the defendant bears the burden of proving prejudicial joinder, the state may rebut a defendant's claim of prejudice by utilizing one of two methods. *Ashcraft* at ¶16, citing *Lott* at 163; *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276; *LaMar*, 2002-Ohio-2128 at ¶50. Initially, pursuant to the "other acts test," the state

may rebut the defendant's claim of prejudice by demonstrating that it could have introduced evidence of the joined offenses at separate trials pursuant to the "other acts" provision found in Evid.R. 404(B). *State v. Coley*, 93 Ohio St.3d 253, 259, 2001-Ohio-1340; *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶30; *Diar* at ¶96. On the other hand, the state may separately negate a claim of prejudice by satisfying the less stringent "joinder test," which requires the state to merely demonstrate "that evidence of each crime joined at trial is simple and direct." *Coley* at 260; *LaMar* at ¶50; *Brinkley* at ¶37; see, also, *State v. Coleman*, 85 Ohio St.3d 129, 137, 1999-Ohio-258; *State v. Mills* (1992), 62 Ohio St.3d 357, 362.

{¶80} In other words, and as recently noted by this court, "[a] showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper." *State v. Bice*, Clermont App. No. CA2008-10-098, 2009-Ohio-4672, ¶53. Therefore, "[i]f the state can meet the joinder test, it need not meet the stricter 'other acts' test." *Johnson*, 88 Ohio St.3d at 109, 2000-Ohio-276; *State v. Roy* (Sept. 28, 1998), Butler App. No. CA97-11-216, at 7-8; see, e.g., *Lott*, 88 Ohio St.3d 95 at 163; see, also, *State v. Wiles* (1991), 59 Ohio St.3d 71, 77; *State v. Franklin* (1991), 62 Ohio St.3d 118, 122.

{¶81} In its decision denying appellant's motion to sever, the trial court determined that appellant "failed to affirmatively demonstrate undue prejudice would result from joinder of the offenses" for "[t]he evidence [as] to each of the [c]ounts is simple and distinct and should not be confusing to the trier of fact," and that the "jury should reasonably be able to segregate the facts constituting the crime under each of the four [c]ounts without difficulty." After a thorough review of the record, which includes a lengthy transcript of the four-day jury trial, we find no error, let alone plain error, in the trial court's decision to deny appellant's motion to sever.

{¶82} At trial, during its opening and closing statements, the state presented an organized, chronological overview of the facts as to each of the four offenses alleged by the two victims. See *Ashcraft*, 2009-Ohio-5281 at ¶20. In addition, not only were its witnesses all "victim specific" in their testimony, the state elicited extensive testimony from each victim who provided a detailed description of her own unwanted sexual encounters with appellant. Id. at ¶20, 23. As a result, we find that the evidence pertaining to each victim and each offense could easily be segregated and was unlikely to confuse the jury. *Brinkley*, 2005-Ohio-1507 at ¶37.

{¶83} Moreover, as noted by the Ohio Supreme Court, claims of prejudicial joinder are less persuasive where the evidence is "amply sufficient to sustain each verdict, whether or not the indictments were tried together." *Sapp*, 2004-Ohio-7008 at ¶73; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶170. In this case, as previously noted, the state presented extensive evidence detailing each of appellant's unwanted sexual acts he committed against each of the two victims. Therefore, not only is there no indication that appellant would have defended the charges differently had they been tried separately; the strength of the state's case "establishes that the prosecution did not attempt to prove one case simply by questionable evidence of other offenses." *Lott*, 51 Ohio St.3d at 164; *Franklin*, 62 Ohio St.3d at 123; *Mills*, 62 Ohio St.3d at 362; *Johnson*, 88 Ohio St.3d at 110, 2000-Ohio-276; *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶172, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, 187.

{¶84} Finally, the trial court provided a limiting instruction to the jury that required it to consider the charges against appellant as separate matters. See *Franklin*, 62 Ohio St.3d at 123; *State v. Williams,* 73 Ohio St.3d 153, 159, 1995-Ohio-275; *Coley*, 93 Ohio St.3d at 261, 2001-Ohio-1340. Specifically, the court stated the following:

{¶85} "The State of Ohio chose to consolidate the four counts contained within the indictment for purposes of trial. It will be your responsibility to analyze the facts under each count separately to ultimately arrive at a decision."

{¶86} The court then stated:

{¶87} "Evidence may have been admitted as relevant evidence under one count under the indictment even though it is not relevant evidence against [appellant] under a separate count. You must carefully separate such evidence and consider it only as it applies, if at all, to [appellant] and the charged offense under each separate count."

{¶88} "[A] jury is presumed to have followed the trial court's instructions," and there is nothing in the record to indicate the jury failed to do so in this case. *Ashcraft*, 2009-Ohio-5281 at ¶26, citing *State v. Dunkins* (1983), 10 Ohio App.3d 72, 73; *Williams*, 73 Ohio St.3d at 159.

{¶89} In light of the foregoing, appellant failed to demonstrate that he was prejudiced by the joinder of the charged offenses at trial. Therefore, because the trial court did not err in denying his motion to sever, appellant's first assignment of error is overruled.

{¶90} Judgment affirmed.

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