[Cite as *State v. Rainey*, 2009-Ohio-5873.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23070
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-1065
v.	:	
	:	
WILLIAM J. RAINEY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 6th day of November, 2009.

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BROGAN, J.

{¶ 1} William J. Rainey appeals from his conviction and sentence on two counts of rape and two counts of gross sexual imposition involving a child under age thirteen.

{¶ 2} Rainey advances six assignments of error on appeal. First, he contends his convictions are against the manifest weight of the evidence. Second, he claims the trial court erred in not allowing him to cross examine the victim regarding a prior false accusation. Third, he argues that prosecutorial misconduct deprived him of a fair trial. Fourth, he asserts that the trial court erred in not declaring a mistrial when two jurors saw him in handcuffs. Fifth, he contends the trial court erred in overruling his Crim.R. 29 motion for acquittal. Sixth, he raises a claim of cumulative error.

{¶ 3} The present appeal stems from an incident that occurred on March 12, 2008. At that time, Rainey shared a home with twelve-year-old D.A. and her mother. D.A. testified that she was home alone with Rainey that day. While she was on her bed drawing, Rainey came into her room and got on the bed with her. According to D.A., Rainey put a hand up her shirt and touched her chest. He then put a hand inside her pants and touched her "on [her] private." D.A. testified that Rainey proceeded to put a hand inside her "private." He then put his "private" inside her "front private." After the incident ended, the child ran outside, barefoot through the snow, to a neighbor's house.

{¶ 4} The neighbor, C.M., heard D.A. outside, crying hysterically and pounding on her window and door. C.M. opened the door and observed the child "stuttering and shaking." D.A. reported to C.M. that Rainey had touched her breast and vagina and had put his fingers and penis in her vagina. D.A. then hid in a bathroom while C.M. attempted to contact the child's mother. C.M. ultimately reached D.A.'s aunt and explained what had happened. After she completed the call, Rainey appeared at her house, acting "like a crazy man," banging on her door and windows

and demanding that D.A. come outside. As Rainey reached the bathroom window near where D.A. was hiding, the child "totally panicked" and asked C.M. not to disclose her presence. C.M. then confronted Rainey, ordered him to leave, and locked her door with a deadbolt. She also called the police.

{¶ 5} D.A.'s mother appeared at C.M.'s house a short time later and took the child back home. When D.A.'s aunt arrived, she saw the child's mother and Rainey sitting at a kitchen table. The aunt proceeded to D.A.'s bedroom and spoke with the child, who was crying. D.A. told her aunt that Rainey was touching her and had "tried to put his thing in [her]." Because the child was so upset, her aunt did not inquire any further. The aunt returned to the living area and heard Rainey proclaim that he "didn't touch her." She described his demeanor and appearance as "[p]lain out pissy drunk." According to the aunt, Rainey eventually decided to leave, explaining that he was going to Georgia "to start a new life."

{¶ 6} Following Rainey's departure, D.A.'s mother agreed to take the child to the hospital. A pelvic exam revealed pari-vaginal petechial bruising, which a hospital pediatrician testified is consistent with sexual contact. A forensic scientist from the Miami Valley Regional Crime Laboratory also examined the shorts D.A. had been wearing and found a substantial amount of semen inside them. DNA testing established, to a reasonable degree of scientific certainty, that the semen was Rainey's. A swab of D.A.'s rectum also revealed the presence of semen, but the sample was inadequate to obtain a DNA profile.

{¶ 7} Rainey testified in his own defense and denied D.A.'s allegations. He stated that he entered her room on March 12, 2008 and found her on her bed

drawing and watching television. Rainey became angry because D.A. had not completed any of her chores. He testified that he grabbed D.A. by the shirt collar and confronted her. In response, she kicked him in the groin. He responded by grabbing D.A.'s thigh and partially collapsing on her in pain. Dizzy and dazed, he stumbled as he attempted to leave and fell into D.A. again, this time grabbing the waistband of her shorts as he attempted to gain his balance. According to Rainey, he apologized and left the room. He then went to his own bedroom feeling nauseated. While there, he called for D.A. to bring him a glass of water. When she failed to respond, he went outside to look for her. Rainey opined that D.A. had accused him of touching and raping her because she was mad at him. He had no explanation, however, for the presence of his semen inside D.A.'s shorts.

{¶ 8} A jury ultimately found Rainey guilty on the four charges set forth above. The trial court merged one of the gross sexual imposition charges into one of the rape charges. It then imposed an aggregate sentence of fifteen years to life in prison. This timely appeal followed.

{¶ 9} In his first assignment of error, Rainey contends his convictions are against the manifest weight of the evidence. In support, he claims inconsistencies in D.A.'s testimony undermined her credibility. He also asserts that the physical evidence contradicted her allegations and that she had a motive to lie.

{¶ 10} With regard to inconsistencies in D.A.'s testimony, Rainey stresses that a hospital form listed her complaint as "having been groped by mom's boyfriend, touched over clothing, waved his wiener at her." Rainey points out that the form does not mention rape or digital penetration, which D.A. alleged at trial. Rainey also notes

that D.A.'s trial testimony did not mention two of the three things that were included in the hospital form—being touched outside of her clothing and Rainey waving his "wiener" at her. Rainey additionally points out D.A.'s agreement on cross examination that she told a doctor "everything" and her subsequent acknowledgment that she initially failed to mention Rainey's penis touching her "private parts" because her mother was present in the hospital room. Finally, Rainey alleges inconsistencies in D.A.'s testimony about whether he "got off of her" before taking his penis out of his pants and whether she saw his penis or saw him waving it.

{¶ 11} As for the physical evidence, Rainey stresses that no semen was found on the outside of D.A.'s body, that she had no supra-pubic tenderness, and that there were no lacerations or tears of the vaginal vault. Rainey also notes that the only swab revealing the presence of semen inside D.A.'s body was an anal swab. He alleges that this is inconsistent with D.A.'s allegation of vaginal rape. Moreover, Rainey points out that there was not enough DNA on the anal swab to link it to him. He additionally argues that D.A. had a motive to lie because she admitted thinking he was bossy and disliking him making her do chores. Rainey stresses D.A.'s testimony about being happy he no longer is around.

{¶ 12} Finally, Rainey contends his gross sexual imposition convictions are against the manifest weight of the evidence because D.A. only testified about being "touched" on her chest under her shirt and on her "private" under her shorts. Rainey claims testimony about "touching" alone is not indicative of a purpose to arouse or gratify sexually, which is an element of gross sexual imposition.

{¶ 13} Upon review, we find Rainey's first assignment of error to be

unpersuasive. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 14} The evidence before us does not weigh heavily against Rainey's convictions. Although the hospital form mentioned above omits D.A.'s allegations of rape and digital penetration, it apparently was completed by a worker at the intake desk in the emergency room. The record does not reveal whether D.A. or her mother provided the information to the intake desk employee. If D.A.'s mother provided the information, then the form does nothing to establish inconsistency in D.A.'s testimony. The record reveals that D.A.'s mother was angry with D.A. about the allegations and did not want the police involved. In an effort to protect Rainey, her boyfriend, she may have minimized D.A.'s complaints when providing the information to the intake employee. In any event, emergency room paperwork indicates that D.A. did tell a doctor that Rainey had penetrated her with his finger and penis. Even assuming, arguendo, that D.A. initially did not disclose this information, the jury still reasonably could have credited her trial testimony that those events occurred. The other alleged inconsistencies in D.A.'s trial testimony were relatively insignificant.

There was some dispute about whether Rainey briefly "got off of her" to take his penis out of his pants and whether she ever saw his penis. These discrepancies did not render D.A.'s testimony so wholly lacking in credibility that the jury necessarily should have rejected it.

{¶ 15} Although a weight-of-the-evidence argument permits a reviewing court to consider the credibility of witnesses, that review must be tempered by the principle that weight and credibility questions are primarily for the trier of fact. *State v. Goldwire,* Montgomery App. No. 19659, 2003-Ohio-6066, at ¶13, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "'Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.'" Id. at ¶14, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. Having reviewed the record before us, we believe the jury acted well within its discretion in crediting D.A.'s testimony and finding her allegations to be true.

{¶ 16} Rainey's remaining arguments do not persuade us otherwise. While he points out certain physical evidence that was lacking, the record contains testimony that few victims of child sexual abuse exhibit physical signs of the abuse. In the present case, however, a doctor testified that D.A. did have pari-vaginal petechial brusing. The doctor explained that this could be caused by an accidental

injury or sexual contact. The record contains no evidence, however, of any accident that might have caused the injury. Moreover, Rainey ignores the fact that a substantial quantity of his semen was found inside D.A.'s shorts. Its presence there strongly corroborates the child's allegations of sexual activity. As for the presence of semen on an anal swab, we do not find it particularly helpful to Rainey, even though D.A. did not allege anal penetration. It may be, as the State contends, that a small quantity of semen transferred to her anal cavity after the sexual activity. Or it may be that Rainey also penetrated D.A.'s anus, and the child was too embarrassed to disclose it. In any event, nothing in the record suggests that someone else was the source of the semen, and its discovery on an anal swab does nothing to exonerate Rainey. Although D.A. admitted disliking Rainey, the jury also reasonably could have rejected his claim that she fabricated her allegations.

{¶ 17} Finally, we reject Rainey's claim that D.A.'s testimony about him "touching" her did not support his convictions for gross sexual imposition. As the State points out, R.C. 2907.05(A)(4) prohibits touching an erogenous zone of a person under age thirteen for the purpose of sexual arousal or gratification. This purpose may be inferred from the facts and circumstances. *State v. Mundy* (1994), 99 Ohio App.3d 275, 288-289. In the present case, the jury certainly could have inferred an illicit sexual purpose from the fact that Rainey touched D.A.'s breast and vagina under her clothes before proceeding to penetrate her with his finger and penis.

{¶ 18} Having reviewed the record, weighed the evidence and all reasonable inferences, and considered the credibility of the witnesses, we cannot say that the

jury clearly lost its way and created a manifest miscarriage of justice. The evidence does not weigh heavily against Rainey's convictions. His first assignment of error is overruled.

{¶ 19} In his second assignment of error, Rainey claims the trial court erred in not allowing him to cross examine D.A. regarding a prior false accusation. This argument concerns defense counsel's proffer that, when she was four or five years old, D.A. falsely had accused an older cousin of looking at her genitals. Defense counsel proffered that D.A. had lied about the incident because she was mad at her cousin. Applying Evid.R. 608(B), the trial court ruled that the incident was not clearly probative of D.A.'s truthfulness or untruthfulness. The trial court noted that "the child was four or five and did not allege abuse, contact, or conduct of a sexual nature but instead that a cousin had seen her naked." On appeal, Rainey insists that he should have been allowed to cross examine D.A. about her false allegation. He claims the allegation clearly was probative of D.A.'s untruthfulness. He also contends the trial court gave no explanation for its contrary conclusion.

{¶ 20} Upon review, we find Rainey's second assignment of error to be unpersuasive. A defendant is permitted under Evid.R. 608(B), in the trial court's discretion, to cross-examine a victim regarding false accusations if they are clearly probative of truthfulness or untruthfulness. *State v. Boggs* (1992), 63 Ohio St.3d 418, 421.[1] Arguably, any lie told by a witness, including a false claim by D.A. that her

[1]We note that, based on defense counsel's proffer, the rape-shield statute had no applicability in Rainey's case because there was no sexual activity between D.A. and her cousin. Defense counsel's claim was that D.A. had lied about her cousin seeing her naked. See *Boggs*, 63 Ohio St.3d at 421 ("False accusations, where no sexual activity

cousin had looked at her genitals, would seem somewhat probative of that witness' truthfulness or untruthfulness. In the present case, however, the trial court declared that defense counsel's proffer was "not probative" of D.A.'s truthfulness or untruthfulness. Although Rainey claims the trial court provided no explanation for its ruling, the record demonstrates otherwise. In declining to allow cross examination of D.A. on the issue, the trial court noted that the child was four or five years old at the time of the alleged fabrication and did not allege any sexual contact or conduct. In essence, the trial court found, based on the passage of time and the specific nature of the alleged fabrication, that its probative value was too diminished to justify cross examination on the issue. In other words, the trial court appears to have concluded that D.A.'s allegedly false accusation approximately eight years earlier was not "clearly probative" of her untruthfulness as a twelve-year-old. The trial court did not abuse its discretion in reaching this conclusion.

{¶ 21} Rainey's citation to *State v. Smith* (Nov. 8, 1995), Greene App. No. 94-CA-86, does not persuade us otherwise. In *Smith*, we held that the trial court unreasonably had limited cross examination of a child sexual-abuse victim concerning her prior false allegation that an unidentified assailant had grabbed her "out of the bushes." This false allegation had been made sometime between 1989 and 1991. The victim's allegations of sexual abuse by the defendant in *Smith* were made in 1991. Upon review, we reasoned that "when the essence of the case reduces to the credibility of witnesses—when there is no corroborating evidence

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is involved, do not fall within the rape shield statute.").

introduced—the court should grant some latitude to defendants for inquiry into a prior false allegation of sexual activity * * *." Unlike *Smith*, D.A. made the allegations about her cousin when she was four or five years old, roughly eight years before she came forward with her allegations about Rainey. Moreover, D.A.'s allegations were far from the only evidence in the case. The State also proved that Rainey's semen was found inside her shorts. Therefore, we find *Smith* to be distinguishable.

{¶ 22} Finally, we reject Rainey's one-sentence argument that the trial court's cross-examination ruling deprived him of his Sixth Amendment right to confront D.A. The constitutional right to confront witnesses is not absolute. *Boggs*, 63 Ohio St.3d at 422. The exclusion of evidence with minimal probative value under Evid.R. 608(B) does not violate a defendant's Sixth Amendment rights. Id. at 422-423. Rainey's second assignment of error is overruled.

{¶ 23} In his third assignment of error, Rainey argues that prosecutorial misconduct deprived him of a fair trial. In support, he cites four specific instances of alleged misconduct. The first two occurred during the prosecutor's opening statement. Rainey faults the prosecutor for stating, "And we've got this Defendant. DNA cannot lie." He also criticizes the prosecutor for emphasizing to the jury that slight penetration of the vagina was sufficient to prove rape. Third, Rainey claims the prosecutor engaged in misconduct during closing argument by saying: "And the State asks that you come back and tell this Defendant what he already [sic], he's guilty of all charges." The final instance of alleged misconduct involved the prosecutor cross examining Rainey about whether he had made any statements to a certain detective.

{¶ 24} Upon review, we are unpersuaded by Rainey's arguments. To prevail

on his prosecutorial misconduct claim, he must show that the prosecutor's conduct was improper and that it prejudiced his substantial rights. *State v. Kelly,* Greene App. No.2004-CA-20, 2005-Ohio-305, ¶18. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Cornwell,* 86 Ohio St.3d 560, 570-571, 1999-Ohio-125, quoting *Smith v. Phillips* (1982), 455 U.S. 209.

{¶ 25} With regard to the prosecutor's DNA remark, defense counsel objected and the trial court sustained the objection. Therefore, the jury presumably disregarded the statement. As for the prosecutor's statements about slight penetration being sufficient to establish rape, we find nothing objectionable. The remarks were a correct statement of the law, and they were pertinent to the facts of the case. Indeed, during trial the State presented evidence about D.A. claiming that Rainey's penis had gone "part way" inside of her. We also find no misconduct in the prosecutor urging the jury, during closing argument, to "come back and tell this Defendant what he already [sic], he's guilty of all charges." We do not dispute Rainey's claim that the statement left the jury with the "notion that [he] was indeed guilty." But that is the point of a prosecutor's closing argument. We are unpersuaded by Rainey's contention that the prosecutor's statement argued facts not in evidence because he never admitted his guilt. The prosecutor did not say Rainey had admitted his guilt. Instead, the prosecutor started to say that Rainey already knew he was guilty. This statement was not improper. If Rainey was guilty of the offenses charged, he certainly had to know it.

{¶ 26} Finally, we find no misconduct in the prosecutor's cross examination. The prosecutor twice asked Rainey whether, after his arrest, he had told detective

Jerome Dix his story about D.A. kicking him in the groin. In response, Rainey denied having talked to Dix about the incident. On appeal, Rainey contends the prosecutor's questioning constituted an improper comment on his right to remain silent and sought to place a burden on him to defend himself. We disagree. Prior to the challenged cross examination, Dix himself testified that Rainey had talked to him. After reviewing his police report, Dix testified that Rainey had stated, "I'm not worried anyway because [D.A.] is lying. I never touched that girl." Dix then testified that Rainey never mentioned D.A. kicking him in the groin. Because the record contains evidence that Rainey did make post-arrest statements to Dix, thereby not relying on his right to remain silent, the prosecutor was entitled to inquire about things he omitted from his conversation with the detective.[2] Cf. *State v. Gillard* (1988), 40 Ohio St.3d 226, 232, overruled on other grounds, *State v. McGuire*, 80 Ohio St.3d 390, 1997-Ohio-335. Accordingly, the third assignment of error is overruled.

{¶ 27} In his fourth assignment of error, Rainey contends the trial court erred in not declaring a mistrial when two jurors saw him in handcuffs. The jurors saw Rainey as he was being escorted off of an elevator during a recess. The trial court spoke with the jurors about the incident, and they both indicated that it would not impact their ability to be fair and impartial. The trial court found no prejudice and overruled Rainey's motion for a mistrial.

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[2]Even assuming, arguendo, that the prosecutor improperly cross examined Rainey about his failure to tell Dix that D.A. had kicked him, we would find little prejudice. As set forth above, Dix *already had testified* during the State's case that Rainey did not mention being kicked in the groin. On appeal, Rainey does not challenge this portion of Dix's testimony.

{¶ 28} Upon review, we see no abuse of discretion in the trial court's ruling. "Generally, a brief and inadvertent exposure to the jurors of a handcuffed defendant is not so inherently prejudicial as to require a mistrial. The defendant bears the burden of affirmatively demonstrating prejudice." *State v. Ogletree* (Aug. 14, 1987), Montgomery App. No. 9768; *see, also, State v. Kidder* (1987), 32 Ohio St.3d 279, 286 ("[T]he danger of prejudice to defendants is slight where a juror's view of defendants in custody is brief, inadvertent and outside the courtroom."). We find no prejudice to Rainey as a result of being observed in handcuffs. The two jurors assured the trial court that they could remain impartial and agreed not to mention the incident to other jurors. We note too that Rainey subsequently testified and admitted being held in jail. Finally, although Rainey complains about the lack of a formal cautionary instruction, he never requested one. In any event, the trial court's discussion with the two jurors served the same purpose. The fourth assignment of error is overruled.

{¶ 29} In his fifth assignment of error, Rainey contends the trial court erred in overruling his Crim.R. 29 motion for acquittal. This argument challenges the legal sufficiency of the evidence to sustain his convictions. *State v. Crump*, Montgomery App. No. 22862, 2009-Ohio-4110, ¶11. Rainey insists the State presented legally insufficient evidence because it failed to prove an essential element of each offense, namely that D.A. was not his spouse.

{¶ 30} Upon review, we are unpersuaded by Rainey's argument. "When the state fails to affirmatively ask the victim whether she was the spouse of the offender, [a trier of fact may] infer from the testimony or circumstances, if sufficient, that a

defendant and his victim are not married." *State v. Brown*, Cuyahoga App. No. 86577, 2006-Ohio-4584, ¶13. In the present case, the State presented evidence that D.A. was twelve years old and that her mother was Rainey's girlfriend. This evidence is legally sufficient to support an inference that D.A. was not Rainey's spouse. The fifth assignment of error is overruled.

{¶ 31} In his sixth assignment of error, Rainey raises a claim of cumulative error. He contends the effect of the errors alleged in his first five assignments of error, even if individually harmless, cumulatively deprived him of a fair trial.

{¶ 32} It is true that separately harmless errors may violate a defendant's right to a fair trial when the errors are considered together. *State v. Madrigal,* 87 Ohio St.3d 378, 397, 2000-Ohio-448. To find cumulative error present, we first must find multiple errors committed at trial. Id. at 398. We then must find a reasonable probability that the outcome below would have been different but for the combination of separately harmless errors. *State v. Thomas,* Clark App. No.2000-CA-43, 2001-Ohio-1353. In our review of Rainey's other arguments, however, we found no multiple errors. Therefore, we find no cumulative error. The sixth assignment of error is overruled.

{¶ 33} Having overruled each of Rainey's assignments of error, we affirm the judgment of the Montgomery County Common Pleas Court.

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DONOVAN, P.J., and FROELICH, J., concur.

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