[Cite as *State v. Bower*, 2015-Ohio-1889.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SHELBY COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 17-14-14**

v.

ROBERT E. BOWER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Shelby County Common Pleas Court
Trial Court No. 13 CR 000059

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Jonathan M. Richard **for Appellant**

Melissa L. Wood **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, Robert E. Bower ("Bower"), appeals the April 8, 2014 judgment entry of sentence of the Shelby County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} This case stems from a February 23, 2013 incident in which Bower, who was then 63 years old, forced the victim, who was then 26 years old, to the floor of the basement of his pizza shop, held her against her will, and raped her. (Feb. 4, 2014 Tr. at 103). On February 28, 2013, the Shelby County Grand Jury indicted Bower on two counts: Count One of rape in violation of R.C. 2907.02(A)(2), a first-degree felony, and Count Two of kidnapping with a sexual-motivation specification in violation of R.C. 2905.01(A)(4), a first-degree felony. (Doc. No. 2).

{¶3} On March 5, 2013, Bower appeared for arraignment and entered pleas of not guilty. (Doc. No. 25).

{¶4} On February 4-7, 2014, a jury trial was held. The jury found Bower guilty of the charges in the indictment on February 7, 2014. (Doc. No. 198). On April 8, 2014, the trial court sentenced Bower to eight years in prison. (Doc. No. 221).

{¶5} On May 5, 2014, Bower filed a notice of appeal. (Doc. No. 231). He raises three assignments of error for our review. We will address Bower's first

assignment of error first, followed by his second and third assignments of error together.

Assignment of Error No. I

The Trial Court Erred by Improperly Defining the Sexual Conduct Element of Rape.

{¶6} In his first assignment of error, Bower argues that the trial court erred by improperly defining the sexual-conduct element of rape in its instruction to the jury.

{¶7} Bower concedes that he did not object to the State's jury instruction. The failure to object to a jury instruction constitutes a waiver of that issue absent plain error. *State v. Jordan*, 3d Dist. Marion No. 9-08-11, 2008-Ohio-4647, ¶ 37, citing *State v. Bridge*, 3d Dist. Allen No. 1-06-30, 2007-Ohio-1764, ¶ 19, citing *State v. Underwood*, 3 Ohio St.3d 12 (1983), syllabus. "Crim.R. 52(B) governs plain-error review in criminal cases." *State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶ 55, citing *State v. Risner*, 73 Ohio App.3d 19, 24 (3d Dist.1991). "For there to be plain error under Crim.R. 52(B), the trial court must have deviated from a legal rule, the error must have been an obvious defect in the proceeding, and the error must have affected a substantial right." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Under the plain-error standard, the appellant must demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors." *Id.*, citing *State v. Waddell*, 75 Ohio

St.3d 163, 166 (1996), citing *State v. Moreland*, 50 Ohio St.3d 58 (1990). "We recognize plain error '"with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."'" *Id.*, quoting *State v. Landrum*, 53 Ohio St.3d 107, 110 (1990), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶8} Bower was indicted for rape under R.C. 2907.02(A)(2), which provides:

> No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

R.C. 2907.02(A)(2).

> "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. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(A). The statute does not define cunnilingus. However, this court has defined cunnilingus as "a sexual act committed with the mouth and the female

sexual organ." *State v. Ramirez*, 98 Ohio App.3d 388, 393 (3d Dist.1994), citing *State v. Bailey*, 78 Ohio App.3d 394, 395 (1st Dist.1992). In *Ramirez*, we further held that penetration is not required to complete the act of cunnilingus. *Id.* The Supreme Court of Ohio adopted the definition of cunnilingus that we embraced in *Ramirez*. *See State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 86.

{¶9} Here, the trial court provided the jury instruction:

> Sexual conduct means cunnilingus between persons regardless of sex. Cunnilingus means a sexual act committed with the mouth and the female sex organ. Penetration is not required to commit cunnilingus. Rather, the act of cunnilingus is completed by the placing of ones [sic] mouth on the female genitalia. The female breast is not genitalia.

(Feb. 7, 2014 Tr. at 749).

{¶10} It was not plain error for the trial court to provide that jury instruction.

> As the Ohio Supreme Court has noted, "[s]tare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant

> improvement over the current course that we should depart from precedent."

State v. Baker, 3d Dist. Allen No. 1-11-49, 2012-Ohio-1890, ¶ 14, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 1. The reasoning of this court's decision in *Ramirez*, as adopted by the Supreme Court of Ohio, is sound, and overruling it would not be a "'significant improvement over the current course that we should depart from precedent.'" *Id.*, quoting *Westfield* at ¶ 1.

{¶11} Accordingly, Bower's first assignment of error is overruled.

Assignment of Error No. II

> **The Trial Court Erred by Allowing Substantially Prejudicial Testimony With Limited Probative Value at Trial in Violation of Evidence Rule 403(A).**

Assignment of Error No. III

> **The Cumulative Nature of the Admission of Prejudicial Testimony Was So Extensive That it Prevented Appellant From Having a Fair Trial.**

{¶12} In his second assignment of error, Bower argues that the trial court abused its discretion by allowing substantially prejudicial testimony with limited probative value in violation of Evid.R. 403(A). Specifically, Bower argues that the testimony of Joshua Rayburn ("Rayburn") and Jeff Poeppelman ("Poeppelman") was inadmissible under Evid.R. 403(A). In his third assignment

of error, Bower argues that the cumulative errors in allowing that testimony deprived him of a fair trial and require reversal of his convictions and sentence.

{¶13} Generally, the admission or exclusion of evidence lies within the trial court's discretion, and a reviewing court should not reverse absent an abuse of discretion and material prejudice. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶14} "[I]f the party wishing to exclude evidence fails to contemporaneously object at trial when the evidence is presented, that party waives for appeal all but plain error." *Bagley*, 2014-Ohio-1787, at ¶ 53-54, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 59-60, *State v. Barrett*, 4th Dist. Scioto No. 03CA2889, 2004-Ohio-2064, ¶ 20, and *State v. Lenoir*, 2d Dist. Montgomery No. 22239, 2008-Ohio-1984, ¶ 19. As we stated above, for us to find plain error, an appellant "must demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors." *Id.* at ¶ 55.

{¶15} Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. "Under Evid.R. 403(A), '[a]lthough relevant, evidence is not admissible if its probative

value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.'" *State v. Velez*, 3d Dist. Putnam No. 12-13-10, 2014-Ohio-1788, ¶ 122, quoting *State v. Maag*, 3d Dist. Hancock Nos. 5-03-32 and 5-03-33, 2005-Ohio-3761, ¶ 71. "'Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision.'" *Id.*, quoting *State v. Calhoun*, 11th Dist. Ashtabula No. 2010-A-0057, 2012-Ohio-1128, ¶ 82. "'[D]espite the mandatory terms of Evid.R. 403(A), when considering evidence under that rule, the trial court is vested with broad discretion and an appellate court should not interfere absent a clear abuse of that discretion.'" *State v. Nevins*, 171 Ohio App.3d 97, 2007-Ohio-1511, ¶ 49 (2d Dist.), quoting *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 21.

{¶16} With respect to Bower's argument under his second assignment of error, he failed to present any citations to case law or statutes in support of his assertions. Consequently, Bower failed to comply with App.R. 16(A)(7), which requires Bower to include in each assignment of error an argument explaining "the reasons in support of the contentions, with citations to the authorities, statutes, and part of the record on which appellant relies." "[A]n appellate court may disregard an assignment of error pursuant to App.R. 12(A)(2): 'if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).'"

Rodriguez v. Rodriguez, 8th Dist. Cuyahoga No. 91412, 2009-Ohio-3456, ¶ 4, quoting App.R. 12(A). *See also Hawley v. Ritley*, 35 Ohio St.3d 157, 159 (1988). However, in the interest of justice, we elect to address Bower's arguments.

{¶17} Bower argues that Rayburn's testimony regarding text messages sent between Rayburn and the victim and his description of the victim's demeanor after the rape was inadmissible under Evid.R. 403(A). Regarding the text messages, Rayburn testified that the victim sent him two text messages on February 23, 2013 at 2:10 a.m. and 2:47 a.m. (Feb. 6, 2014 Tr. at 456). Specifically, Rayburn testified that the text message he received at 2:47 a.m. read "Josh" with exclamation points behind it. (*Id.* at 456). Rayburn did not identify the text of the text message that the victim sent him at 2:10 a.m. Rayburn further testified that he sent the victim a text message at 3:19 a.m., asking her if she was still awake. (*Id.* at 456-457). He stated that he did not receive a reply from the victim. (*Id.* at 457).

{¶18} Regarding the victim's demeanor after the incident, Rayburn testified that he saw her at the police station "between 4:30 and 5 a.m." and that:

> [s]he was very distraught. It was obvious she'd been crying heavily. She had mascara runnin' down her face. She was – she didn't have any shoes on. She was wearin' a shirt I didn't recognize. It was a long sleeved tee shirt. Her hair was a mess. She was just very –

> obviously very distraught. It looked like she had really been through something terrible.

(*Id.* at 458-459).

{¶19} Bower further argues that Poeppelman's testimony regarding a conversation he had with Bower on February 22, 2013 prior to the incident was also inadmissible under Evid.R. 403(A). At trial, Poeppelman testified that Bower told him on February 22, 2013 that "he wanted to hook up with a 20 year old" because "he wanted to feel – feel young – feel young again." (Feb. 5, 2014 Tr. at 319-320). Bower argues that Poeppelman's testimony was prejudicial because it was elicited "for the sole purpose of appealing to the emotions and morals of the jury to feel disgusted in the fact that a 63 year-old man would want to have sex with a woman in her twenties purely to 'feel young again.'" (Appellant's Brief at 10).

{¶20} First, Bower did not object to Rayburn's testimony concerning the text messages. Because Bower failed to object to Rayburn's identification of the text messages at the time that testimony was elicited, we apply plain-error review. Bower concedes that Rayburn's testimony regarding the identification of the text messages was relevant; however, he argues that "the remainder of his testimony had no probative value to offer to the case as the same information had already

been testified to by Cortney Norris, the young girl who first saw [the victim] after the alleged incident." (Appellant's Brief at 11).

{¶21} Bower is correct that Rayburn's testimony regarding the text messages exchanged between Rayburn and the victim is relevant; however, Bower makes no further argument as to how Rayburn's testimony regarding the text messages was unfairly prejudicial or that the outcome of his trial would clearly have been different had the trial court not permitted Rayburn to testify concerning the text messages, and we find no reason either. Thus, it was not plain error for the trial court to permit Rayburn to testify concerning the text messages.

{¶22} Second, because the defense intended to challenge whether the victim consented, it was relevant for the jury to consider Bower's motive or intent, and to consider the victim's demeanor after the rape. (*See* Feb. 4, 2014 Tr. at 120-121). *State v. Lester*, 3d Dist. Putnam No. 12-85-03, 2008-Ohio-6070, ¶ 56 (statements made by the victim to the physician who examined her after the rape were relevant because the defendant alleged that the victim consented); *State v. Muncy*, 4th Dist. Scioto No. 11CA3434, 2012-Ohio-4563, ¶ 18 (concluding that Muncy was not unfairly prejudiced by the introduction of prior statements that he made to police demonstrating his motive to willfully flee law enforcement because he intended to challenge whether he acted willfully); *State v. Brown*, 2d Dist. Montgomery No. 10618, 1988 WL 66942, *2 (June 20, 1988) (evidence of

Brown's conduct when law enforcement arrived at the scene was relevant to his intent because Brown argued that he was so intoxicated he lacked the necessary intent to commit arson). The trial court did not abuse its discretion by allowing Rayburn to testify about his observations about the victim's demeanor after the rape because it was probative of whether the victim consented or whether Bower's actions were against her will. Likewise, the trial court did not abuse its discretion by allowing Poeppelman to testify concerning Bower's statement to him prior to the rape because Poeppelman's testimony was probative of Bower's motive or intent. Accordingly, Rayburn's and Poeppelman's testimony was not unfairly prejudicial because it did not present the opportunity for an unfair jury-decision basis. Instead, it went to the State's case-in-chief—proving the elements of rape and kidnapping—and negating the defendant's defense that the victim consented.

{¶23} Third, based on the argument presented in his brief, we assume that Bower is challenging the portion of Rayburn's testimony regarding the victim's demeanor after the rape as being needlessly cumulative under Evid.R. 403(B) in addition to being unfairly prejudicial under Evid.R. 403(A). Evid.R. 403(B) provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or *needless presentation of cumulative evidence*." (Emphasis added.) However, other than stating that Rayburn's testimony was repetitive of Cortney Norris's ("Norris")

testimony, Bower failed to point us to how Rayburn's testimony was needlessly cumulative to the testimony provided by Norris. Therefore, we assume that Bower is challenging Rayburn's testimony regarding the victim's demeanor as being needlessly cumulative to Norris's testimony that she observed the victim "bawling and panicking and shaking" and "frightened" when the victim came into Norris's home seeking help on February 23, 2013. (Feb. 5, 2013 Tr. at 280-281). Rayburn's testimony regarding the victim's demeanor after the rape was not needlessly cumulative for the same reason that it was not unfairly prejudicial—that is, Rayburn's testimony served to aid the jury in considering whether the victim consented or whether Bower's actions were against her will.

{¶24} As such, the probative value of Poeppelman's and Rayburn's testimony was not substantially outweighed by the danger of unfair prejudice, and Rayburn's testimony was not needlessly cumulative of Norris's testimony.

{¶25} Bower also avers that the cumulative effect of these errors prevented him from obtaining a fair trial. "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. Spencer*, 3d Dist. Marion No. 9-13-50, 2015-Ohio-52, citing *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 222-224 and *State v. Garner*, 74 Ohio St.3d 49, 64

(1995). "To find cumulative error, a court must first find multiple errors committed at trial and determine that there is a reasonable probability that the outcome below would have been different but for the combination of the harmless errors." *State v. Stober*, 3d Dist. Putnam No. 12-13-13, 2014-Ohio-5629, ¶ 15, quoting *In re J.M.*, 3d. Dist. Putnam No. 12-11-06, 2012-Ohio-1467, ¶ 36. Because we found no error as alleged by Bower in his second assignment of error, the doctrine of cumulative error does not apply. *State v. Bertuzzi*, 3d Dist. Marion No. 9-13-12, 2014-Ohio-5093, ¶ 110.

{¶26} Bower's second and third assignments of error are overruled.

{¶27} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr