[Cite as *State v. Evans*, 2015-Ohio-1788.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JERIC LAMAR EVANS Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Willliam B. Hoffman, J. Hon. John W. Wise, J. Case No. 2014 CA 00167 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2014 CR 00542
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 11, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY KATHLEEN O. TATARSKY ASSISTANT PROSECUTOR 110 Central Plaza South, Suite 510 Canton, Ohio 44702-1413	EUGENE M. CAZANTZES 101 Central Plaza South Suite 1000 Canton, Ohio 44702

Wise, J.

{¶1}. Appellant Jeric Lamar Evans appeals his conviction, in the Court of Common Pleas, Stark County, on one count of sexual battery. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. At the times pertinent to this case, the eighteen-year-old female victim in this case, M.L., lived with her female roommate, K.F., in an apartment on Cleveland Avenue NW in Canton. K.F.'s boyfriend, Tyberious Thomas, sometimes also lived in the apartment.

{¶3}. Appellant Evans was at that time friends with M.L., although they had never had a "boyfriend/girlfriend" relationship. Tr. at 116. M.L. and appellant had known each other for about three years and had gone to the same high school. Appellant lived with his aunt, but he periodically stayed at K.F.'s and M.L.'s apartment. He usually slept in M.L.'s bedroom or on the couch.

{¶4}. On November 1, 2013, M.L., appellant, and three other friends went looking for some parties around the area of Sherman Street in Akron, Ohio, near the campus of the University of Akron. On this occasion, K.F. was working and did not go with them. M.L. drank heavily that night, including a bottle of New Amsterdam vodka, some Pinnacle vodka, and a tall can of Lime-A-Rita beer. She also took some Xanax, and it was later determined that there were traces of marijuana and Butalbital in her system.

{¶5}. At approximately 2:30 A.M. on November 2, 2013, M.L. and appellant returned to the apartment in Canton. K.F., who was watching television in her room, heard someone falling down the steps. She went to the door and saw M.L. on the

hallway stairs leading to the apartment. She was having difficulty standing and navigating the steps, and her eyes were rolling back in her head. According to K.F., M.L. was "pretty messed up." Tr. at 211.

{¶6}. Appellant and K.F. helped M.L. get up the stairs. They tucked her into M.L.'s bed, and she soon passed out.

{¶7}. Appellant went into the kitchen, got some food, and took it into M.L.'s room. *See* Tr. at 219.

{¶8}. When M.L. first woke up shortly after dawn, she noticed her door was closed and locked, an unusual occurrence for M.L.'s room. Tr. at 172. Appellant was lying in her bed.

{¶9}. K.F. soon woke up and saw M.L. standing over her bed, crying. M.L. said she didn't feel good and wanted to sleep in K.F.'s room. She then got in bed with K.F. and Tyberious. For the next few hours, M.L. kept waking up, crying and vomiting. The only things M.L. remembered from earlier was being held down in her bed, being in pain, and not being able to move. She had felt like she was going in and out of consciousness. *See* Tr. at 112.

{¶10}. By the time they all woke up, it was afternoon. Appellant had departed the apartment. K.F. sensed something was wrong. M.L. was bleeding and had bruises on her thighs and back. K.F. insisted that M.L. go to the hospital. M.L. went to Mercy Medical Center and asked about getting a rape kit. Joann Tabellion, R.N., a sexual assault nurse examiner (SANE) was contacted for the examination, which took place at about 3:30 PM that afternoon. Nurse Tabellion thereafter contacted the Canton Police Department.

{¶11}. Following further investigation by law enforcement officials, appellant was arrested. Appellant did not deny that he had sex with M.L., but he maintained that it was a consensual act. However, M.L. specifically denied agreeing to have sex with appellant on the night in question. *See* Tr. at 115.

{¶12}. On April 14, 2014, appellant was indicted on one count of sexual battery, R.C. 2907.03(A)(2), a felony of the third degree. Appellant declined a plea offer, and the matter proceeded to a jury trial on July 22-23, 2014. Appellant was found guilty of sexual battery as charged.

{¶13}. On August 4, 2014, after reviewing a pre-sentence investigation, the trial court sentenced appellant to four years in prison. A sentencing entry was filed on August 12, 2014.

{¶14}. On September 4, 2014, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶15}. "I. THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING HEARSAY TESTIMONY.

{¶16}. "II. THE CUMULATIVE EFFECT OF PRESENTATION OF OTHER ACTS EVIDENCE, HEARSAY, AND INEFFECTIVE ASSISTANCE OF COUNSEL DENIED THE APPELLANT HIS RIGHT TO A FAIR TRIAL.

{¶17}. "III. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶18}. We will address appellant's final assigned error first.

III.

{¶19}. In his Third Assignment of Error, appellant contends his sexual battery conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

Sufficiency of the Evidence

{¶20}. In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶21}. Appellant's conviction for sexual battery was based on R.C. 2907.03(A)(2), which states: " No person shall engage in sexual conduct with another, not the spouse of the offender, when *** [t]he offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."

{¶22}. In addition, R.C. 2907.01(A) states as follows: " '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."

{¶23}. The trial record in the case sub judice indicates that Nurse Tabellion's rape examination of M.L. followed a multi-step protocol, including a "head to toe" assessment, the taking of photographs, a pelvic examination, an oral history and other

measures. *See* Tr. at 153. The examination revealed scratches and/or bruising on M.L.'s left upper thigh, left knee, and her shoulder and back. M.L. told Tabellion that her buttocks region and the walls of her vagina were hurting, although she was unsure regarding what penetration had occurred. Although M.L. seems to have had no problem communicating with Tabellion for purposes of the exam, she did not name the perpetrator at that time.

{¶24}. The jury also heard the testimony of Samuel Troyer, a forensic DNA analyst for the Ohio BCI. Troyer analyzed swabs from M.L.'s anus and cervix that were collected as part of the examination. He also conducted a scientific examination of the underpants M.L. was wearing at the time in question. Troyer found semen on the underwear and on the swabs. Testing on the aforesaid items resulted in a finding of the presence of the DNA consistent with that of M.L. and appellant. Tr. at 147.

{¶25}. Evidence was also adduced that M.L. and appellant exchanged text messages after she returned from the hospital. Appellant, in response to a text questioning why he had done something like this to M.L., at first said he didn't know what she was talking about. However, he later apologized to M.L. via a phone call, claiming he was intoxicated at the time and that he "can't control [his] hormones when [he's] drunk." Appellant also offered to pay her medical bills. K.F. and another friend heard appellant's statements, as the phone was set on speaker mode.

{¶26}. The State also called Canton Patrolman Robert Huber, who interviewed M.L. at the hospital and took initial police custody of the rape kit, and Sergeant Grant Pressley, who was assigned by the detective bureau to investigate the sexual assault. Although M.L. again refused at first to identify the perpetrator, she came to the police

station on November 5, 2013 and gave Sgt. Pressley a statement identifying appellant. Tr. at 182.

{¶27}. Upon review of the record and transcript in a light most favorable to the prosecution, we find that a reasonable finder of fact could find the elements of sexual battery, including the factor of knowledge of the existence of the victim's substantial impairment as set forth in R.C. 2907.03(A)(2), beyond a reasonable doubt.

Manifest Weight of the Evidence

{¶28}. Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 and a new trial ordered.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also, State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717.

{¶29}. We note that at trial, appellant's trial counsel tried to create the inference via cross-examination that M.L. denied consenting to have sex with appellant on November 2, 2013 because her parents did not approve of some of her interracial friendships. *See* Tr. at 122-123. Appellant presently further alleges several weak points and/or inconsistencies in the trial testimony. For example, he asserts that M.L. was unable to say whether any penetration or cunnilingus had occurred. Furthermore, he maintains the State's witnesses gave differing accounts of some of the details of the

events at issue. For example, there was a discrepancy regarding the presence of Tyberious: K.F. stated that she was alone in the apartment when M.L. and appellant returned and that Tyberious showed up about forty-five minutes later; Tyberious, however, claimed he was there at the outset. *See* Tr. at 219 and 186. K.F. and one of M.L.'s friends, Ashton, both claimed to have overheard the aforementioned phone conversation during which appellant apologized and stated he could not "control his hormones" when he was drinking. However, the testimony indicates that neither of them mentioned this conversation to police officers. Also, the incriminating text messages from appellant brought out in the testimony were not preserved by M.L. or law enforcement. Finally, M.L. conceded that several individuals "jumped" appellant when she and Ashton went to his home the next day. Tr. at 131-132. Ashton, however, denied that any fight took place. Tr. at 204-205.

{¶30}. Nonetheless, upon consideration of the entire trial record, we hold that the jury's decision did not create a manifest miscarriage of justice requiring appellant's convictions to be reversed and a new trial ordered.

{¶31}. Appellant's Third Assignment of Error is overruled.

I.

{¶32}. In his First Assignment of Error, appellant contends the trial court erred in allowing alleged hearsay statements by the victim, via the testimony of the SANE nurse, to be heard by the jury. We disagree.

{¶33}. As an initial matter, because appellant in this assigned error also claims a violation of his right to confront witnesses, we note that issues concerning the Confrontation Clause and the application of hearsay exceptions are separate and

distinct considerations. *See State v. Love,* Gallia App.No. 10CA7, 2011–Ohio–4147, ¶ 23. We will address appellant's arguments in that light.

{¶34}. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case sub judice, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably. *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027, 2000 WL 222190. Even where we conclude a challenged comment was hearsay, the issue on appeal becomes whether appellant was prejudiced by the testimony, as error in admitting hearsay does not justify reversal where it is harmless. *See, e.g., State v. Loch,* Franklin App.No. 02–AP–1065, 2003–Ohio–4701, ¶ 13, citing *State v. Carter* (1995), 72 Ohio St.3d 545, 550, 651 N.E.2d 965.

{¶35}. Evid.R. 803(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." We note appellant did not object to the testimony of Nurse Tabellion or her written report at trial (*see* Crim.R. 52(B)) and he has not presently specified the particular statements he contends are hearsay (*see* App.R. 16(A)(7)). Appellant essentially makes the overall assertion that Nurse Tabellion was engaging in

investigative procedures during her examination of M.L., rather than providing medical diagnosis or treatment. However, upon review, and reiterating that M.L. never identified the perpetrator during the sexual assault examination, we disagree with appellant's position regarding the nurse's testimony, and we find no abuse of discretion or plain error in the trial court's allowance of same under Evid.R. 803(4).

{¶36}. In regard to appellant's claim of a confrontation violation, we note the Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." In *Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177,* the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination. Nonetheless, it is well-established that the Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. *See State v. Siler,* 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, (5th Dist. Ashland), ¶ 51, quoting *State v. Marbury,* Montgomery App.No. 19226, 2004–Ohio–1817, ¶ 38, citing *Crawford* at 59, f.n. 9. In the case sub judice, M.L., the victim, age eighteen at the time of the offense and age nineteen by the time of trial, took the stand at trial and testified. We find no Confrontation Clause violation under the circumstances of the case sub judice. *Accord State v. Buzanowski*, 8th Dist. Cuyahoga No. 99854, 2014-Ohio-1947, ¶ 52.

{¶37}. Appellant's First Assignment of Error is overruled.

II.

{¶38}. In his Second Assignment of Error, appellant contends he was deprived of a fair trial based on the existence of cumulative error. We disagree.

{¶39}. The doctrine of cumulative error provides that a conviction will be reversed where the cumulative effect of evidentiary errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not singularly constitute cause for reversal. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

{¶40}. In support of his "cumulative error" argument, appellant revisits the issue of the alleged hearsay statements of M.L. via the SANE nurse, as well as a claim that the trial court erred in allowing certain "other acts" evidence regarding appellant. The first of these occurred when M.L.'s roommate K.F. referred to a prior dispute appellant had had with police, to which defense counsel successfully objected. *See* Tr. at 215. The second occurred during Detective Pressley's testimony, when he began to state that appellant "had a prior --," at which point he was cut off by a defense objection. *See* Tr. at 180. Finally, appellant makes a generalized claim that he was deprived of the effective assistance of trial counsel.

{¶41}. Notwithstanding this Court's past reluctance to embrace cumulative error as grounds for reversal (*see State v. Mascarella*, 5th Tuscarawas No. 94 AP 100075, 1995 WL 495390 (July 6, 1995)), we have reviewed the pertinent parts of the record in this matter, and we find reversible error has not been demonstrated on this basis as urged by appellant.

{¶42}. Appellant's Second Assignment of Error is therefore overruled.

{¶43}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J. and

Hoffman, J., concur.

JWW/d 0427