[Cite as *State v. Turner*, 2012-Ohio-3863.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-11-025

Appellee — Trial Court No. 2008CR0533

v.

Paul Turner — **DECISION AND JUDGMENT**

Appellant — Decided: August 24, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Heather M. Baker, Assistant Prosecuting Attorney, for appellee.

James C. Young, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Paul Turner appeals from a judgment of the Wood County Court of Common Pleas, following a jury trial, that convicted him of one count of gross sexual imposition in violation of R.C. 2907.05(A)(1), a felony of the fourth degree. We affirm.

A. Facts and Procedural Background

{¶ 2} Appellant was indicted by the Wood County Grand Jury on one count of gross sexual imposition in violation of R.C. 2907.05(A)(1), which provides,

> No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

Appellant pleaded not guilty, and the matter was set for a jury trial.

{¶ 3} The testimony at trial established that on October 5, 2008, at around 2:00 a.m., appellant invited the victim to his dorm room on the campus of Bowling Green State University ("BGSU"). This was not an unusual occurrence as the two had known each other for several years, and, in fact, had dated for a short time while they were in high school. The victim, who was also a student at BGSU, testified that when she arrived, she noticed that appellant appeared intoxicated. Appellant offered her an alcoholic beverage, which she declined at first, and which she ultimately feigned drinking when appellant persisted.

{¶ 4} For the next 15 to 30 minutes, appellant and the victim sat and listened to music and watched television. Appellant then began rubbing the victim's leg. The victim testified,

I tried to blow it off at first because I thought he would stop, and he didn't stop. So I asked him to stop. And he was just like "why should I stop"? And I said "because I want you to." And that didn't make him stop. And so he started to like put his hand under my shirt and started touching my breast. And I tried to push his hand away, but, like, he just kept on it. And I asked him to stop, like, numerous times. And all he would ever say was, like "why should I stop"? I would just tell him "because I want you to stop". And he told me, like, that wasn't a good enough reason for him to stop. So after touching my breast for a while, he started touching my butt and, like, he started in between my legs. And I told him "why you doing this, like, we're friends". And he, like, said, like, you know, "we're not friends because I would die for my friend, and all I'm trying to do is fuck my ex-girlfriend". And I tried to, like, get up, and he like grabbed my arms and, like, he like had my arms like this with, like, one of his arms and, like, with the other hand like he was still, like, touching on me.

{¶ 5} The state questioned the victim in more detail, during which she reaffirmed that she continually told appellant "no" and "stop," but he would not stop. She further clarified that when appellant touched her between her legs, he was touching her vaginal area on top of her clothing.

{¶ 6} As to the use of force, the following exchange occurred:

Q And at one point he grabbed your arms?

A Yes.

Q Did you feel like you could get away from him?

A No. I tried to, like, pull his arms off me, but he was stronger than me.

On cross-examination, the victim conceded that appellant never said anything to threaten her. However, on redirect, she testified,

Q You started to explain to [defense counsel] that you felt like [appellant] was forcing you to do something when he was grabbing your arms. What were you trying to do when he was grabbing your arms?

A Push his arms away.

Q And where was he touching you at that point in time?

A When he grabbed my arms?

Q Yes.

A When he grabbed my arms, he was like under my shirt to - - like, he, at times he grabbed my arms. Like, he would touch pretty much everywhere, like in between my legs, under my shirt, and my butt.

{¶ 7} After about 15 to 20 minutes of this touching, appellant received a phone call from his roommate, asking to be let into the building. This ended the encounter. The

victim testified that after returning to her dorm room, appellant contacted her and said, "Forgive me for what I did because I'm drunk."

{¶ 8} That afternoon, the victim's roommate called the campus police, and the victim agreed to meet with them to describe the earlier events. The next day, the victim decided that she wanted to press charges against appellant. However, the victim testified that she was afraid for her safety because appellant knew where she lived, both at home and at school, and she was afraid of what the consequences would be for pursuing the criminal charges. As a result, the victim obtained a civil protection order against appellant. The protection order was entered into evidence.

{¶ 9} The state next called Officer Chris Pearcy as a witness. Pearcy was the officer who first spoke with the victim. After an initial objection and sidebar discussion regarding hearsay, Pearcy testified,

> [The victim] had stated that approximately 2 a.m. on the date of October 5th she had been contacted by [appellant] to come over to his room in Rogers residence hall, which she did. Upon arriving, she stated that he was acting funny, she believed he was drunk; she later made comments to the fact he was drunk. They were hanging out together for a while, for approximately 20 to 30 minutes, listening to music, watching some TV, at which point he pulled out a bottle of Seagram's liquor and poured her a glass, suggested that she drink it. She stated she didn't really want to drink it, so she pretended she was drinking it, set it aside, at which point

> [appellant] started making advances towards her, began touching her on her thigh, touching her vaginal area over her pants and was also touching her underneath her shirt, underneath her bra and her breasts. She stated that he was holding her hands, preventing her from resisting. She told him multiple times to stop, at which point he would say "give me a good reason to stop". At which point she said something to the effect of "I don't feel comfortable with what's going on, I don't want to have any kind of this activity", at which point he stated to her "that's not a good enough reason for me to stop." She stated at one point she got up to leave the room.

Here, the court interrupted the testimony, and instructed the state to move on to another question.

{¶ 10} Pearcy testified that as a result of this information, he asked the victim to provide a written statement of the incident. The written statement was entered into evidence by the defense. Pearcy also testified that they conducted a follow-up interview with the victim the next day, during which her recounting of the events was consistent with the earlier interview and with the written statement. The state then asked,

> Q You mentioned a little earlier that [the victim] told you that [appellant] had grabbed her arm. Did she complain of any injuries at the time?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Hearsay. This should have come up.

THE COURT: Overruled. He can summarize the nature of her complaint.

A When we talked to her on October 6th, she did not have any visible injuries; however, she complained that [appellant] had during the incident - -

THE COURT: Hang on. Can you just summarize?

A Sure. She had no visible injuries, soreness in her arms where he had grabbed her.

THE COURT: Thank you.

{¶ 11} The focus of the examination then switched to Pearcy's interactions with appellant. Pearcy testified that he, along with Detective Scott Sauer, first contacted appellant in his room in Rogers residence hall, and asked him if he would be willing to come back to the BGSU police station to speak with the officers. Appellant agreed and followed the officers to the station. There, appellant admitted to touching the victim in a manner consistent with her testimony. In addition, Pearcy testified that appellant initially admitted that he heard the victim say "stop," but later in the interview changed his statement and said that he did not hear her say "stop." Pearcy further testified that appellant admitted to grabbing the victim's arm, but that he denied ever striking her.

{¶ 12} Appellant was asked to complete a written statement, which he returned later that day. Appellant's written statement was entered into evidence. Pearcy testified that the main inconsistency between the written statement and the initial interview was

that appellant now claimed that he heard the victim say "stop," and replied, "Okay. I'll leave you alone." The written statement, however, stated,

> She never told me to stop, or said she didn't want to do anything. Her only words against what I was doing was "We shouldn't be doing this, you don't even like me." I proceeded to kiss on her neck and sayed [sic] to her, "I don't like anybody." We continued but then she began pulling away. I tried to continue but she was pulling away. So I stopped and said, "Ok, I'll leave you alone!"

{¶ 13} The state's final witness was Detective Sauer. In response to the state's invitation to recount what he learned from his interview with the victim, Sauer testified, without objection,

> She apparently was invited to Mr. Turner's room. And when she got there, apparently he appeared to be intoxicated to her. He offered her some type of a drink. To my knowledge she put it up to her lips but did not drink. That was my understanding. He did apparently also grab at her, didn't strike her, didn't punch her or anything like that but did physically touch her. He placed his hand on the outside of her pants in the area of her vagina and untucked her shirt and put his hands up her shirt and underneath her bra.

{¶ 14} Sauer also testified regarding his interview with appellant. He stated that during his interview, appellant admitted to touching the victim, to hearing her say "stop," and to grabbing her.

{¶ 15} Upon conclusion of the state's case, appellant moved for acquittal under Crim.R. 29, arguing that the evidence was insufficient to sustain a conviction on the element of force or threat of force. The trial court denied this motion. The defense then moved to admit the victim's written statement, and also audio recordings from a BGSU disciplinary hearing that were used on cross-examination of the victim. The defense rested without calling any witnesses. Appellant then renewed his Crim.R. 29 motion, which the trial court again denied.

{¶ 16} Following closing arguments, the trial court provided instructions to the jury, without objection from either party. The jury deliberated and returned a verdict of guilty. The trial court sentenced appellant on March 1, 2011.

B. Assignments of Error

{¶ 17} Appellant now timely appeals, asserting seven assignments of error:

> I. THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT WHEN IT PERMITTED THE STATE TO INTRODUCE EVIDENCE OF AN ALLEGED APOLOGY, A CIVIL PROTECTION ORDER VIOLATION AND OTHER EXTRANEOUS EVIDENCE THAT WERE MEANT TO UNFAIRLY PREJUDICE THE JURY INTO RETURNING A GUILTY VERDICT, ALL OF WHICH

VIOLATED RULES 403, 404(B), R.C. 2945.59 AND APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

II. THE APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON VOLUNTARY CONSENT AFTER THE EVIDENCE ESTABLISHED THAT THE VICTIM ENTERED APPELLANT'S DORM ROOM AT 2:00 A.M., FEIGNED INTOXICATION AND REMAINED ON THE PREMISES; THEREBY SHOWING SHE WAS WILLING TO CONTINUE ENGAGING IN PETTING WITH THE APPELLANT.

III. GIVEN THE APPELLANT'S CONFESSION WAS, *INTER ALIA*, THE PRODUCT OF AN ILLEGAL DETENTION AND SUBSEQUENT ARREST AND FOR THAT REASON WAS INVOLUNTARY, THEN IT FOLLOWS APPELLANT WAS DENIED DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN NO MOTION TO SUPPRESS WAS FILED TO RENDER THE CONFESSION INADMISSIBLE.

IV. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS SUBSTANTIALLY AND UNFAIRLY PREJUDICED BY HIS TRIAL COUNSEL'S ADVICE TO HIM NOT TO TESTIFY AND THE FAILURE NOT TO (1) CALL HIS ROOMMATE AS A WITNESS, (2) PRESENT EVIDENCE THAT

WAS AVAILABLE TO THE DEFENSE TO PROVE THE AFFIRMATIVE DEFENSE OF CONSENT, AND (3) REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION; ALL OF WHICH CONSTITUTED A DEFICIENT PERFORMANCE WITHIN THE MEANING OF *STRICKLAND V. WASHINGTON* IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT.

V. THE VERDICT FINDING APPELLANT GUILTY OF GROSS SEXUAL IMPOSITION WAS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO JUSTIFY A FINDING OF GUILT BEYOND A REASONABLE DOUBT, WHICH VIOLATED APPELLANT'S RIGHT TO DUE PROCESS.

VI. THE GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

VII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL VIOLATED DUE PROCESS AND RENDERED THE TRIAL FUNDAMENTALLY UNFAIR.

II. Analysis

A. The Trial Court's Evidentiary Rulings Were Not an Abuse of Discretion

{¶ 18} In his first assignment, appellant argues that the trial court erred when it allowed testimony regarding appellant's alleged apology and the issuance of the civil protection order, and its alleged subsequent violation.

{¶ 19} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Thus, we apply an abuse of discretion standard. *See id.* A trial court abuses its discretion when its attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *State v. Morris*, 2012-Ohio-2407, --- N.E.2d ---, ¶ 14.

{¶ 20} Here, appellant contends the trial court abused its discretion because (1) the contested evidence was not relevant under Evid.R. 401 and 402, (2) any probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Evid.R. 403(A), and (3) as to the civil protection order, the evidence was impermissible character evidence under Evid.R. 404. We will discuss the application of these rules to each category of evidence in turn.

1. Appellant's Apology

{¶ 21} As it relates to the alleged apology, we first note that no objection was made to the victim's testimony.[1] "Errors that arise during a trial that are not brought to

[1] The transcript does reveal some discussion about an objection to this testimony based on spoliation; specifically that the alleged apology was in the form of a text message that

the attention of the court are ordinarily waived and may not be raised on appeal unless there is plain error, i.e., but for the error, the outcome of the trial clearly would have been otherwise." *State v. McKee*, 91 Ohio St.3d 292, 294, 744 N.E.2d 737 (2001). Nevertheless, even if an objection had been made, the trial court did not abuse its discretion in allowing the victim to testify that appellant said "Forgive me, I'm drunk."

{¶ 22} Appellant first argues that the testimony is not relevant. "'Relevant evidence' means evidence having 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. "Evidence which is not relevant is not admissible." Evid.R. 402. Here, the apology is relevant because the fact that appellant asked for forgiveness tends to prove that he did the acts in question. Thus, appellant's first argument is without merit.

{¶ 23} Appellant next argues that the apology should have been excluded under Evid.R. 403(A), which provides, "Although 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." As pointed out by the state, appellant fails to offer any argument why he was unfairly prejudiced by the admission of his alleged apology. In light of this, we cannot say that the probative value was substantially

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was not received by the prosecution or turned over to the defense. However, the issue of spoliation is not before this court.

outweighed by the danger of unfair prejudice. Therefore, we hold the trial court did not abuse its discretion in allowing the victim's testimony concerning the alleged apology.

2. Civil Protection Order

{¶ 24} Turning to the civil protection order, we find that the evidence concerning it is relevant. The circumstances surrounding the civil protection order, including that the victim was fearful of her safety and that appellant allegedly violated it, tend to make it more probable that appellant did the contested acts.

{¶ 25} Appellant argues, however, that the evidence of his alleged violation of the civil protection order is inadmissible because it violates Evid.R. 404(B). Evid.R. 404(B) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This list of other purposes is not exhaustive. *Morris*, 2012-Ohio-2407, --- N.E.2d ---, at ¶ 18.

{¶ 26} Specifically, appellant argues that from this evidence the jury could infer "that [he] was dangerous and that his family, at the very least, posed a risk of danger to the victim. More importantly the admission of this evidence permitted the jury to infer that [appellant] had threatened [the victim] in the room." In opposition, the state argues that the violation of the civil protection order corroborated appellant's statements to the victim that he would "get it" the next time, which evidenced appellant's motive or intent. The state also argues that the testimony was circumstantial evidence of the threat of

force. We find the state's arguments to be more persuasive, and conclude that the trial court did not abuse its discretion in allowing this testimony.

{¶ 27} Finally, appellant argues that even if the evidence of the civil protection order is relevant and admissible under Evid.R. 404(B), it is still inadmissible because it is unfairly prejudicial. In support, he contends that the evidence "could only serve the purpose of creating bias in the jury" since it "revealed appellant was under some kind of prosecutorial or judicial scrutiny that was totally unrelated to any aspect of this case in any relevant way." The state, on the other hand, argues that any unfair prejudice stemming from its admission was slight because the violation was only "mentioned three times at trial, two of which were without any details whatsoever," "there was no discussion of the procedures involved in securing or enforcing the order," and "it was merely a piece of circumstantial evidence that neither side focused on."

{¶ 28} "[R]elevant evidence, challenged as being outweighed by its prejudicial effects, should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission." *State v. Frazier*, 73 Ohio St.3d 323, 333, 652 N.E.2d 1000 (1995). Here, we cannot say that the trial court abused its discretion in determining that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Any prejudicial effect caused by the evidence concerning either its issuance or its violation was minimized by the fact that the court did not permit testimony of the details surrounding how the civil protection order was obtained or violated.

{¶ 29} Accordingly, because the trial court did not abuse its discretion in allowing testimony concerning the apology or the civil protection order, appellant's first assignment of error is not well-taken.

B. No Plain Error Where Instructions Were Not Given on Consent or Sexual Imposition

{¶ 30} For his second assignment of error, appellant argues that he was entitled to jury instructions on consent and on the lesser-included offense of sexual imposition. "A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford*, 49 Ohio St.3d 247, 251, 551 N.E.2d 1279 (1990). Appellant acknowledges, however, that no objection was made at the trial.[2] "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Crim.R. 30(A). Thus, we must review this assignment for plain error under Crim.R. 52(B).[3] *State v. Nielsen*, 66 Ohio App.3d 609, 611, 585 N.E.2d 906 (6th Dist.1990) ("[A]n appellant's failure to object to jury instructions constitutes a waiver of any claim of error unless the absence of such instruction rises to the level of plain error.") "To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but

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[2] Notably, appellant argues that trial counsel was ineffective for failing to object. We will address the ineffective assistance argument under his fourth assignment of error.

[3] Crim.R. 52(B) provides, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

that except for the error, the result of the trial clearly would have been otherwise." *State v. Bock*, 16 Ohio App.3d 146, 150, 474 N.E.2d 1228 (12th Dist.1984). "[N]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Bradley*, 42 Ohio St.3d 136, 140, 538 N.E.2d 373 (1989).

{¶ 31} Appellant first argues that he was entitled to a jury instruction on consent due to the victim's actions in entering appellant's room at 2:00 a.m., sitting close enough to appellant to share a pair of iPod ear buds, letting him rub her leg for a while without stopping him, not jumping up and running out of the room when she had the opportunity, not saying anything to appellant's roommate when she left, and hugging appellant when she left the dorm. We disagree. The evidence presented at trial was that the victim consistently told appellant "no" and "stop," when he began touching her breasts, butt, and vaginal area. Indeed, appellant's own written statement acknowledges that the victim wanted him to stop: "We continued *but then she began pulling away. I tried to continue but she was pulling away. So I stopped and said, "Ok, I'll leave you alone!*" (Emphasis added.) Therefore, we do not find it was plain error for the trial court not to give an instruction on consent.

{¶ 32} Appellant next argues that he was entitled to a jury instruction on the lesser included offense of sexual imposition, which does not require the presence of force or threat of force. *See* R.C. 2907.06. "[A] charge on the lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on

the crime charged and a conviction upon the lesser included offense." *State v. Thomas*, 40 Ohio St.3d 213, 216, 533 N.E.2d 286 (1988). Here, we do not find that the evidence reasonably supports an acquittal on gross sexual imposition and a conviction on sexual imposition. Further, we do not find that the result of the trial clearly would have been different had the instruction been given. In this case, the evidence demonstrating force included the victim's testimony on direct and re-direct, the victim's written statement, Officer Pearcy's testimony that the victim complained of soreness in her arms, and both Officer Pearcy's and Detective Sauer's testimony that appellant admitted to grabbing the victim. In contrast, the evidence demonstrating a lack of force was only appellant's written statement wherein he said "Then I began feeling on her, she never moved my hands until I got closer to the vaginal area. Even then she barely moved my hands. I kept my hands outside of her pants. I did go up her shirt but it was not a forceful thing, it was something she let me do." Therefore, it was not plain error not to give an instruction on the lesser-included offense.

{¶ 33} Accordingly, appellant's second assignment of error is not well-taken.

C. Appellant Waived His Objection to the Admission of His Self-Incriminating Statements

{¶ 34} Under his third assignment of error, appellant makes a plethora of arguments surrounding whether his admissions to Officer Pearcy and Detective Sauer should have been suppressed. Appellant admits, though, that no motion to suppress was

filed.[4] "By failing to file a motion to suppress illegally obtained evidence, a defendant waives any objection to its admission." *State v. Campbell*, 69 Ohio St.3d 38, 44, 630 N.E.2d 339 (1994). Thus, appellant's assignment of error must fail since he has waived any objection to the introduction of his admissions.

{¶ 35} Moreover, the record reflects that appellant's arguments are meritless. Appellant presents a list of four grounds on which he contends a motion to suppress the self-incriminating statements would be likely to succeed: (1) for not being made freely and voluntarily, (2) for being made during an unnecessary delay by police in taking the appellant before a magistrate, (3) for being acquired after appellant requested the assistance of counsel, and (4) for being made under custodial interrogation without being informed of his *Miranda* rights. We will briefly address these arguments in reverse order.

{¶ 36} First, the record is clear that appellant was not subject to *custodial* interrogation, which is a requirement for the procedural safeguards in *Miranda* to apply. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 26. "*Miranda* defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Hoffner* at ¶ 27. Here, appellant voluntarily came to the police station, was not under arrest, left to go to a class, and returned later to bring his statement

[4] Again, appellant argues that this constitutes ineffective assistance of counsel, which we will address under his fourth assignment of error.

that he filled out away from the station. Thus, at no time was he subject to custodial interrogation. *See State v. Lux*, 2d Dist. No. 2010 CA 30, 2012-Ohio-112, ¶ 30 (defendant not subject to custodial interrogation where he voluntarily spoke with officer, agreed to go to the station for further interview, and was driven to the station by officer as a courtesy). Therefore, appellant's statements were not taken in violation of *Miranda*.

{¶ 37} Appellant's third argument fails factually because there is no indication in the record that appellant requested the assistance of counsel at any time during his interview with the officers.

{¶ 38} Appellant's second argument fails because the rule he cites to from *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), applies to an *arrested* person's confession where it is given after an unreasonable delay in bringing him before a judge. *Corley v. United States*, 556 U.S. 303, 306, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009). Here, appellant was not charged with any crime, and was not under arrest, when he made his self-incriminating statements.

{¶ 39} Finally, appellant's first argument is without merit because his admission was made voluntarily. As grounds for his belief that his admission was involuntary, appellant cites that he was not given his *Miranda* rights, did not speak with counsel, and was illegally detained and arrested without prompt judicial determination as to whether probable cause existed to detain him for further proceedings. As discussed above, none of these grounds have merit. Appellant further contends that the admission was involuntary because the police interviewed him for more than an hour, and more than

once. Appellant also contends that the police ordered appellant to write a statement and return it to them.

{¶ 40} "Whether a confession is voluntary depends upon '* * * the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment, and the existence of threat or inducement.'" *State v. Brewer*, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990), quoting *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus. Here, appellant, a college student, agreed to follow the officers to the station to be interviewed. He was not under arrest. He was free to leave to go to his class, and Sauer testified that he did not try to keep him at the station because he did not want to violate his civil rights. The record provides no indication that he was threatened or mistreated. Following the interview, he completed the witness statement on his own time, away from the police station. Thus, under the totality of the circumstances, appellant's self-incriminating statements were made voluntarily. *Compare State v. Mason*, 82 Ohio St.3d 144, 154, 694 N.E.2d 932 (1998) (statements voluntarily made where 30-year-old high school graduate who had taken some college courses, and who had two prior felony convictions, was asked to come to the station for interviews and he agreed, was not given *Miranda* warnings because he was not in custody, was not threatened, mistreated, or coerced, and was questioned twice, the second time lasting over four hours).

{¶ 41} Accordingly, because appellant failed to move to suppress his self-incriminating statements, and because his arguments in favor of suppression are without merit, his third assignment of error is not well-taken.

D. Appellant Received Effective Assistance of Counsel

{¶ 42} In his fourth assignment of error, appellant argues that his trial counsel was ineffective in four ways: (1) failing to move to suppress appellant's statements to the officers, (2) advising appellant not to testify, (3) failing to call appellant's roommate as a witness, and (4) failing to request appropriate jury instructions.

{¶ 43} To support a claim for ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694. In *Strickland*, the United States Supreme Court opined,

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 697.

{¶ 44} First, appellant argues trial counsel was ineffective for failing to move to suppress his statements to the officers. However, in light of our discussion under his third assignment of error, we find that appellant cannot demonstrate a reasonable probability exists that the result would have been different had counsel moved to suppress the statements.

{¶ 45} Second, appellant asserts counsel was ineffective for advising him not to testify. In support, appellant attached an affidavit to his appellate brief that describes what he would have said on the stand had he been called as a witness. However, we are "limited to what transpired in the trial court as reflected by the record," we cannot rely on evidence outside of the record. *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978); *see also State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (claim of ineffective assistance of counsel that would require proof outside the record is not appropriately considered on direct appeal). Moreover, "[t]he decision whether to call a defendant as a witness falls within the purview of trial tactics." *State v. Adkins*, 144 Ohio App.3d 633, 646, 761 N.E.2d 94 (12th Dist.2001). "Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995). We also note that while appellant was acting on his counsel's advice, the decision whether to take the stand ultimately rests with him. *See State v. Bey*, 85 Ohio St.3d 487, 499, 709 N.E.2d 484 (1999) ("defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an

accused"). Thus, appellant's claim does not support a finding of ineffective assistance of counsel.

{¶ 46} Third, appellant asserts counsel was ineffective for failing to call his roommate as a witness. Again, appellant attached an affidavit detailing what the roommate would have testified. As above, appellant's claim fails because it is based on matters outside the record, and because the decision to not call a witness is a legitimate trial tactic.

{¶ 47} Finally, appellant contends counsel was ineffective for not requesting appropriate jury instructions on consent and the lesser-included offense of sexual imposition. We have already held that jury instructions on consent and sexual imposition were not supported by the record; therefore, appellant has failed to demonstrate a reasonable probability exists that the result would have been different had counsel requested the instructions. As to not receiving the instruction on the lesser-included offense, we also note, "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Griffie*, 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996). Therefore, this claim of ineffective assistance of counsel must fail.

{¶ 48} Accordingly, since appellant cannot demonstrate a meritorious claim for ineffective assistance of counsel, his fourth assignment of error is not well-taken.

E. Appellant's Conviction Is Based on Sufficient Evidence

{¶ 49} As his fifth assignment of error, appellant argues that the conviction was based on insufficient evidence because the state failed to prove that "an alleged 'grab' during an otherwise consensual encounter rose to the level of 'force or threat of force' as required by [R.C.] 2907.05(A)(1)."

{¶ 50} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 51} "Force" is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Here, the evidence presented included the victim's testimony that appellant grabbed her arms and prevented her from pushing his hands away, and Pearcy's and Sauer's testimony that appellant admitted to grabbing the victim. From this, we hold that a rational trier of fact could have found that the state established the element of force. *See State v. Weimer*, 8th Dist. No. 88135, 2007-Ohio-3774, ¶ 10 (defendant used force where he held victim's hand down and she was not able to get off the bed and leave).

{¶ 52} Accordingly, appellant's fifth assignment of error is not well-taken.

F. Appellant's Conviction Is Not Against the Manifest Weight of the Evidence

{¶ 53} Appellant's sixth assignment of error challenges the jury's finding as being against the manifest weight of the evidence, specifically on the issue of force.

{¶ 54} When reviewing a manifest weight claim,

> 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

{¶ 55} We do not find that this is the "exceptional case in which the evidence weighs heavily against the conviction." In this case, the evidence before the jury tending to prove force was the victim's testimony that appellant grabbed her arms and prevented her from pushing his hands away, Pearcy's testimony that the victim complained of soreness in her arms, and Pearcy's and Sauer's testimony that appellant admitted to grabbing the victim. In contrast, the evidence proving a lack of force was appellant's witness statement that "[the touching] was not a forceful thing, it was something she let

me do." Based on this record, we hold that the conviction was not against the manifest weight of the evidence.

{¶ 56} Accordingly, appellant's sixth assignment of error is not well-taken.

G. The Doctrine of Cumulative Error Is Inapplicable

{¶ 57} As his seventh and final assignment of error, appellant raises the doctrine of cumulative error. "[A]lthough a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "However, in order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). In light of our findings with respect to appellant's other assignments of error, we hold that the doctrine of cumulative error is inapplicable and provides no basis for reversal.

{¶ 58} Accordingly, appellant's seventh assignment of error is not well-taken.

III. Conclusion

{¶ 59} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE