[Cite as *State v. Wright*, 2013-Ohio-5910.]

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

State of Ohio — Court of Appeals No. L-12-1327

Appellee — Trial Court No. CR0201202202

v.

George E. Wright, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, George Wright, appeals from the judgment of the Lucas County Court of Common Pleas, following a bench trial, which convicted him of rape and gross sexual imposition. For the following reasons, we affirm.

A. Factual and Procedural Background

{¶ 2} Appellant was indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b) and (B), a felony of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4) and (C), a felony of the third degree. Appellant pleaded not guilty, waived his right to a jury trial, and proceeded to a trial before the bench.

{¶ 3} Testimony from the trial reveals that appellant was a lifelong friend of the victim's mother, J.B. Recently, however, appellant and J.B. developed a romantic relationship. As their relationship progressed, appellant began spending more time at J.B.'s house. In addition, appellant began to look after J.B.'s four children while J.B. was at work. At the time, J.B. was picking up extra shifts, and would sometimes work 20 hours a day.

{¶ 4} On or around Wednesday night, January 19, 2011, at midnight, appellant was upstairs in J.B.'s bedroom watching a movie with the victim and the victim's younger sister. The victim was 12 years old at the time. While the movie was playing, appellant showed the victim a picture and a video on his cell phone of a boy and girl having sex. Appellant then asked the younger sister to leave the room, and appellant locked the bedroom door. Appellant then went to the bathroom and returned wearing nothing but boxers. He proceeded to approach the victim and put his hand up her shirt, under her bra, and fondled her breasts. He then pulled her pants and underwear down and began touching her pubic region. The victim described the incident as follows:

Q. Okay. And then what did [appellant] do?

A. Put his fingers on my private part.

Q. Are you - - do you have a name for that private part?

A. I just call it private part.

Q. Is this the part you go pee out of?

A. Yes.

Q. So he was touching your skin there?

A. He at first [sic] and then he put his fingers up there.

Q. Inside your private part?

A. Yes.

[Defense Counsel]: Objection; leading.

The Court: Overruled.

A. Yes.

Q. And what did that feel like when he did that, [victim]?

A. It hurted [sic].

Q. Did you tell [appellant] it hurt?

A. I was saying ouch.

Q. And did he stop?

A. No, not right away, no.

Q. What did he say, if anything?

A. I kept saying it and getting louder and he told me to shush.

Q. Were you quiet then?

A. Yes.

Q. And then what happened?

A. He stopped and he told me not to tell or write it in my diary or nothing, cause if I do I know what will happen to him if I did, and I told him go to jail and he said - - he said, So that's why you don't tell.

After the incident, appellant gave the victim a bag of chips, and she left the room. The victim put the bag of chips in the refrigerator and went to bed.

{¶ 5} The next morning, the victim told her sister at the bus stop that, "[Appellant] was touching me." Once at school, the victim started crying and went to the bathroom. There, she told her best friend what had happened to her. The victim told her friend to call J.B. and explain what happened. The victim testified that she did not tell her mother herself because appellant was always around.

{¶ 6} Either that day or the next, the friend's mother contacted J.B. and relayed the story. J.B. removed the children from the house and confronted appellant. Appellant denied any wrongdoing, and explained that the girls were "fast." Later, in a voluntary interview with the police, appellant claimed that the victim had earlier given him some lubricant and a pornographic dvd, and he regretted not removing himself from the situation sooner, before any of the false allegations occurred.

{¶ 7} On Friday, January 21, 2011, the victim was taken to the hospital where she was interviewed by the police. In addition, a sexual assault nurse examiner (SANE)

examined the victim and completed a rape kit. However, the rape kit did not contain any material that could be tested against the known DNA samples.

{¶ 8} At the conclusion of the trial, the trial court found appellant guilty, and sentenced him to life in prison with the possibility of parole after ten years on the count of rape, and 54 months on the count of gross sexual imposition. The court further ordered the sentences to be served concurrently.

B. Assignments of Error

{¶ 9} Appellant has timely appealed from his conviction, and raises five assignments of error for our review:

1. The trial court abused its discretion when it allowed the prosecution to ask leading questions of the victim in direct examination.

2. The admittance of hearsay statements under the excited utterance exception was an abuse of discretion.

3. The trial court erred by allowing the entire police report to be read into evidence, in violation of Evid.R. 612.

4. Appellant's convictions were unsupported by sufficient evidence and were against the manifest weight of the evidence.

5. Cumulative Error Deprived Appellant of a Fair Trial.

II. Analysis

{¶ 10} The main thrust of appellant's appeal is that there is no credible evidence proving that he engaged in "sexual conduct" with the victim. "Sexual conduct" is a necessary element of rape,[1] and is defined as,

> 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).

Here, the trial court found that appellant digitally penetrated the victim's vagina. Appellant argues the evidence only shows touching of the victim's "private parts," not penetration.

A. Leading Question

{¶ 11} In his first assignment of error, appellant argues that the only evidence of penetration was the result of an impermissible leading question. Specifically, appellant refers to the victim's trial testimony, wherein she states,

---

[1] "No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: * * * (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2907.02(A)(1)(b).

Q. So he was touching your skin there?

A. He at first [sic] and then he put his fingers up there.

Q. Inside your private part?

A. Yes.

[Defense Counsel]: Objection; leading.

The Court: Overruled.

Appellant argues that "up there" could have meant inside the labia or other crevices surrounding the vaginal orifice, the touching of which would not constitute rape. He contends that the state's use of the word "inside" directed the victim's testimony, and established the element of sexual conduct.

{¶ 12} "A leading question is one that suggests to the witness the answer desired by the examiner." (Internal quotation omitted.) *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 138. Pursuant to Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." "However, the trial court has discretion to allow leading questions on direct examination." *Id.* at ¶ 138.

{¶ 13} Here, the victim, a 14-year-old child at the time of the trial, testified that appellant touched her skin, "*and then* he put his fingers up there." The victim's testimony indicates two distinct types of conduct, and the phrase "up there" appears to mean insertion. The state's leading question merely further developed this testimony. Therefore, upon consideration of the victim's age and the nature of her testimony, we

hold that the trial court did not abuse its discretion in allowing the use of a leading question. *See State v. Madden*, 15 Ohio App.3d 130, 133, 472 N.E.2d 1126 (12th Dist.1984) (not an abuse of discretion to allow leading questions to develop the child victim's testimony that the defendant had placed his penis in the child's mouth); *State v. Garrett*, 8th Dist. Cuyahoga No. 58551, 1991 WL 81469 (May 16, 1991) (not an abuse of discretion to allow the prosecutor to interrogate a nine-year-old rape victim through the use of leading questions).

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

B. Excited Utterance

{¶ 15} Appellant's second assignment of error challenges the trial court's admission of testimony from the victim's sister that the victim told her "[appellant] was touching her." The trial court allowed the hearsay testimony on the basis that it fell under the exception for excited utterances in Evid.R. 803(2), which excepts, "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 16} "We review a trial court's admission of a statement as an excited utterance under Evid.R. 803(2) under an abuse of discretion standard." *State v. Williams*, 2013-Ohio-726, 987 N.E.2d 322, ¶ 23 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 219, 373 N.E.2d 1234 (1978). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[T]he decision of the trial judge, in

determining whether or not a declaration should be admissible under the spontaneous exclamations exception to the hearsay rule, should be sustained where such decision appears to be a reasonable one, even though the reviewing court, if sitting as a trial court, would have made a different decision." *Duncan* at 219, quoting *Potter v. Baker*, 162 Ohio St. 488, 500, 124 N.E.2d 140 (1955).

{¶ 17} In *Duncan*, the Ohio Supreme Court approved a four-part test to determine whether a hearsay statement is admissible under Evid.R. 803(2):

> Testimony as to a statement or declaration may be admissible under an exception to the hearsay rule for spontaneous exclamations where the trial judge reasonably finds (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declarations spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such

startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

Duncan at paragraph one of the syllabus.

{¶ 18} In this case, the parties focus on the second element—whether a sufficient amount of time had passed to make the statement no longer the unreflective and sincere expression of the victim's actual impressions and beliefs. The Ohio Supreme Court has established precedent that "an appellate court should allow a wide discretion in the trial court to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." *Id.* at 219. Further, we have recognized that "the test for an excited utterance is often applied liberally to out-of-court statements made by child declarants who are alleged to have been sexually assaulted." *In re Joshua C.*, 6th Dist. Erie No. E-03-015, 2003-Ohio-6752, ¶ 13; *see also State v. Taylor*, 66 Ohio St.3d 295, 304, 612 N.E.2d 316 (1993). "The rationale for doing so is based on the recognition that a young child's limited reflective powers make it more likely that a given statement is trustworthy." *In re Joshua C.* at ¶ 13.

{¶ 19} Here, appellant argues that the circumstances of the victim going to bed, waking up some seven hours later, and getting ready for school before making the statement to her sister, evidences that she was no longer under the stress of excitement caused by the alleged incident. In support, he cites *In re Joshua C.*, in which we held that the trial court abused its discretion in admitting the victim's statements to her mother as excited utterances. *In re Joshua C.* at ¶ 15. In that case, however, the victim did not

seem much different than normal, did not cry or appear upset, chatted with her mother for a while before saying that she had something to tell her, and indicated that she feared the perpetrator might be angry with her. *Id.* Here, in contrast, the record indicates only that the victim appeared sad and did not say anything all day. Because the trial court has "wide discretion" to determine whether the victim was still under the stress of an exciting event, and because of the liberal application of the excited utterance rule to children who are victims of sexual assaults, we cannot say that the trial court's decision to allow the testimony was unreasonable. Therefore, we hold that the trial court did not abuse its discretion in permitting the victim's sister to testify regarding the victim's statement that "[appellant] was touching her."

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

C. Reading of the Police Report

{¶ 21} In his third assignment of error, appellant argues that the trial court erred when it allowed Sergeant Jill Mannebach to read her official report of the incident into the record during redirect examination. In reaching its decision, the trial court relied on Evid.R. 106, which provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it." Here, the trial court allowed the testimony on the basis that appellant had cross-examined Mannebach on a portion of her report regarding both the date of the incident, and whether the victim

had used the word "vagina" in her interview with Mannebach. Appellant argues that he did not introduce the report, but rather used it to allow Mannebach to "refresh her recollection." We agree. However, we find the error to be both invited and harmless.

{¶ 22} On cross-examination, appellant questioned Mannebach regarding whether her report accurately reflected what the victim told her. Specifically, appellant asked Mannebach, "After reviewing your report, does that refresh your recollection of what date it was?" Appellant continued to question Mannebach regarding whether the victim told her a specific range of dates that was listed in the report. Appellant also referred to the report, which used the word "vagina," and questioned whether the victim herself had used that word. Notably, though, appellant did not introduce the report, and the record does not contain it as evidence. Therefore, the entire police report was not admissible under Evid.R. 106. *See State v. Fears*, 86 Ohio St.3d 329, 339, 715 N.E.2d 136 (1999) (Evid.R. 106 does not apply where "[t]he defense did not introduce the statement, but merely referred to a transcript of the interview in cross-examining [another witness].").

{¶ 23} Nevertheless, appellant's assignment of error is precluded by the invited error doctrine, under which "a party is not permitted to take advantage of an error that he himself invited or induced the court to make." *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001). Recently, in *State v. Phillips*, 6th Dist. Lucas No. L-12-1111, 2013-Ohio-4525, ¶ 24, we applied this rule in a similar situation where defense counsel repeatedly cross-examined an officer about the contents of his report in an attempt to impeach the officer's credibility. We recognized that "[i]nvited error would preclude a

defense counsel who induces hearsay evidence on cross-examination from precluding further hearsay testimony on redirect examination." *Id.* at ¶ 23, quoting *State v. Settles*, 3d Dist. Seneca No. 13-97-50, 1998 WL 667635, *6 (Sept. 30, 1998). Thus, we held that "because appellant persisted in questioning [the officer] about the contents of the report, he cannot now complain about the state's ability to conduct its redirect examination." *Id.* at ¶ 24. Likewise, here, appellant induced the hearsay testimony of part of what the victim said to Mannebach, and cannot now complain that the state included the rest of the report.

{¶ 24} Furthermore, even assuming that there was error that was not invited, we find such error to be harmless. In a bench trial in a criminal case, the judge is presumed to have considered "only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987), quoting *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968). Here, the record contains affirmative evidence that the trial court *did not* consider the officer's testimony. In rendering its findings, the trial court stated, "In this case I find the testimony of [the victim], [her sister] and [J.B.] to be very credible and, therefore, based upon the only credible evidence this Court finds in this case, the court finds that this defendant has committed the offense of rape and the offense of gross sexual imposition." Therefore, because the trial court did not consider the officer's statements, the harmless error doctrine applies. Crim.R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

D. Sufficiency and Manifest Weight

{¶ 25} As his fourth assignment of error, appellant argues separately that his convictions are based on insufficient evidence and are against the manifest weight of the evidence.

{¶ 26} In conducting a sufficiency review, the court must determine "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.

{¶ 27} In this case, appellant argues that there is insufficient evidence to demonstrate that he penetrated the victim's vagina. In support, he notes that the victim never testified or said to anyone that he penetrated her vagina. Further, he contends that an equally logical inference from the victim's statements that "he put his fingers up there," is that the touching occurred around the genital area and not the vagina. However, such a view requires us to view the evidence in the light most favorable to appellant. Instead, we are compelled to view the evidence in the light most favorable to the prosecution, and in that light, we conclude that a rational trier of fact could find the essential element of penetration proven beyond a reasonable doubt based on the victim's testimony. Therefore, we hold that appellant's conviction for rape is not based on insufficient evidence.

{¶ 28} Furthermore, we hold that appellant's conviction is not against the manifest weight of the evidence. When reviewing a manifest weight claim,

> [t]he 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 *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 29} Here, the victim testified that appellant "put his fingers up there," and clarified that she meant "inside" her private part. Further, the victim testified that it hurt, and she kept telling appellant that it hurt. Appellant attempts to attack the witness's credibility by pointing out three minor inconsistencies regarding whether appellant took her pants all the way off or only pulled them down to her ankles, whether the incident occurred on a Friday or a Wednesday, and whether she had ever had a talk with her mother about "good touch and bad touch." However, we do not find those inconsistencies sufficient to discredit her testimony regarding appellant's actions. This is not the exceptional case where the evidence weighs heavily against the conviction.

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

E. Cumulative Error

{¶ 31} Finally, as his fifth assignment of error, appellant argues that his conviction should be reversed on the basis of cumulative error. The cumulative error doctrine provides that, "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. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. Here, we have not found multiple instances of error by the trial court. Therefore, the cumulative error doctrine does not apply. *See State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000) ("[I]n order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case.").

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

III. Conclusion

{¶ 33} For the foregoing reasons, the judgment of the Lucas 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE