[Cite as *State v. Jenkins*, 2014-Ohio-1304.]

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

State of Ohio — Court of Appeals No. E-12-060

Appellee — Trial Court No. 2011-CR-158

v.

Robert E. Jenkins — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

John M. Felter, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Robert Jenkins, appeals from the judgment of the Erie County Court of Common Pleas, which convicted him of one count of rape. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} In April 2011, appellant was indicted on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Appellant pleaded not guilty, and the matter proceeded to trial. On July 3, 2012, approximately two weeks before the start of the trial, appellant's written jury waiver was filed. When the trial began on July 16, 2012, the trial court noted that appellant, in open court, had previously waived his right to a jury trial and consented to try the matter to the bench.

{¶ 3} Testimony from the bench trial reveals that S.W., appellant's stepdaughter, recalled that she had been raped by appellant four years earlier, in the summer of 2006. At the time of the alleged rape, S.W. was 12 years old. S.W. testified that her memory was triggered in November 2010, when she was texting with her boyfriend and the boyfriend said, "Everything will be ok, I'll be here for you, it'll be all right." She explained that appellant used to say those words to her when her mother and father were fighting during their divorce, and it reminded her of how good her relationship with appellant had been and why it has since deteriorated.

{¶ 4} S.W. specifically remembered that one summer night she fell asleep while watching a movie with her mother and sister in the living room. When she awoke, her mother and sister were not in the house. S.W. testified that she went down the hall and saw light from a television coming from appellant's bedroom. Because S.W. was afraid of the dark, she went into the room and climbed into bed with appellant as she had done in the past. Appellant told S.W. that it was late and that she needed to go to sleep. S.W.

testified that although she was not tired, she pretended to roll over and go to sleep. After she rolled over, she felt appellant place his hand inside of her waistband. S.W. moved away, but appellant moved closer and tried to stick his hand up the bottom of her shorts. When he did this, S.W. squeezed her legs together tightly to prevent appellant from touching her. She stated that appellant placed his hand in her shorts a third time and stuck his finger in her vagina. He then took his hand out of her shorts and smelled his finger. S.W. testified that they then heard the front door of the house close, and she got up and went to her bedroom and appellant got up and went back to the other side of the bed.

{¶ 5} S.W. testified that when she got to her room, she wrote down what had just happened to her and placed the note in a bag of her clothes. Later, when she grabbed some of her clothes to go take a shower, the note fell out and S.W.'s mother found it. The mother confronted S.W., but S.W. explained that she had just made it up; that what she described had not really happened. The mother, however, a sexual abuse victim herself, testified that she never found any note.

{¶ 6} Subsequent to remembering this traumatic incident, S.W. went from being a friendly, outgoing person to being more withdrawn and isolated. She testified that her grades and her performance in athletics both suffered. Eventually, S.W. told her father what she had remembered, and they agreed that S.W. had to report the incident to the police.

{¶ 7} At the police station, the officers organized a recorded call between S.W. and appellant. S.W. began the conversation by asking appellant for directions, but then transitioned to the rape allegation. The conversation proceeded as follows:

[S.W.]: Um, I remembered some stuff over the weekend and I was wondering if you could like help me out with it.

[Appellant]: What's that?

* * *

[S.W.]: Well when I was 12 and I was staying the night at your house I remembered – I remembered you told me that I had to go to bed, like I – mom and [S.W.'s sister] weren't there so like I went back into your room and you said that I had to go to bed because it was late. So I pretended to go to sleep and you did some things to me.

[Appellant]: I did?

[S.W.]: Yeah, and I – I was just wondering if you could, you know, you could help me out here. I – I wrote it all down and –

[Appellant]: I don't know what you're talking about.

[S.W.]: Like –

[Appellant]: Unless I was practically asleep and thought your mom was laying next to me. That'd be the only thing.

[S.W.]: I mean, I – I don't know like I wrote it all down and I – I lied to mom. Mom asked me if it was real and I told her no.

[Appellant]: I don't recall that, [S.W.]. I don't recall that at all.

[S.W.]: I remember everything. I remember every little detail.

[Appellant]: I ain't never touched you.

[S.W.]: I just – I guess I don't – I don't understand why.

[Appellant]: Why –

[S.W.]: Like why I would have these memories. Like, why would you –

[Appellant]: I don't know.

[S.W.]: - - like why would you do this.

[Appellant]: Not unless somebody kept saying it in your head.

[S.W.]: No.

[Appellant]: I don't know why you would think that. I tried not to be alone with you girls for that reason. I don't want to be accused of that.

[S.W.]: I don't –

[Appellant]: Especially with – especially with what's going on with your dad and me.

[S.W.]: I don't know. I just didn't know if like you thought I was attractive or something and it was just like a one-time thing –

[Appellant]: Well, you are – you are attractive, honey. But you're a kid. What am I gonna get out of that?

[S.W.]: That's why I don't understand, like, why. Like, I know it happened because when mom came through the door you jumped. Like, we – mom opened the door in the house and you could hear her and you jumped back and I pretended to wake up.

[Appellant]: I always – I always jump. She comes in and opens the bedroom door I jump. I don't sleep that hard. Never touch you, honey.

[S.W.]: I don't know, it's just – it's just been on my mind and I was wondering if I could talk about it.

[Appellant]: No, if I did it once and I was that type of person I'd of did it again, wouldn't I? I don't think a person does that once.

[S.W.]: I don't know. I just needed some closure.

[Appellant]: No, I love you, honey, but I don't love you that way.

[S.W.]: Okay.

[Appellant]: Yeah, I don't know where you got that from. What did mom say? What brought all this about?

[S.W.]: I – I just remembered over the weekend, it just kind of hit me. And mom doesn't know.

[Appellant]: I just – I don't get it, why you would even think that.

[S.W.]: I mean, I was just – I was just talking with some friends and I just, like, one of them said something and I just remembered, like, it just all came flooding back to me. No one else knows.

[Appellant]: Like I said, maybe it's cause we was laying there together and I was half asleep thinking you were mom. I don't – it don't make sense to me.

[S.W.]: So it could've happened?

[Appellant]: Cause I don't remember any of it.

[S.W.]: But – but it could've happened?

[Appellant]: Uh, I don't know if it could've or not. Because I can't remember even laying – being in the same room with you when mom wasn't there.

[S.W.]: I mean, I remember –

[Appellant]: Me – me and mom always had it so we weren't – I was hardly ever left alone with you guys except during the day.

[S.W.]: No. Um, no, I remember very – it was like – it's super clear. I was watching a movie with mom and [S.W.'s sister] and when I woke up from the movie they were gone. And we were in the new house. Like, the house you're in right now. So, like, the bed – the TV was on in your bedroom and the door was open so I walked back there and you told me that it was late and I had to go to sleep.

[Appellant]: Damn, I don't remember none of that, honey. Where was mom and them?

[S.W.]: I don't – I don't know. That's why I'm saying, I –

[Appellant]: See, that don't make sense.

[S.W.]: Like, I woke up and they were gone. I don't know where mom and [S.W.'s sister] were.

[Appellant]: Well, you know mom and [S.W.'s sister] don't go nowhere at night. Where does mom ever go at night? If we all don't go.

[S.W.]: I couldn't – I couldn't tell you.

[Appellant]: That don't make sense to me.

[S.W.]: I just need to know, like, I have to know if it could've happened.

[Appellant]: Ain't nothing happen to you. I don't know why you would have that dream.

[S.W.]: It wasn't –

[Appellant]: Or whatever it was.

[S.W.]: It wasn't a dream

* * *

[Appellant]: All right. I'm going to let you go, the boss just walked by.

[S.W.]: All right.

[Appellant]: Shaking his head.

[S.W.]: All right.

[Appellant]: All right. I love you.

[S.W.]: You too.

[Appellant]: Okay. You have a good day.

[S.W.]: You too.

[Appellant]: Okay, bye-bye.

[S.W.]: Bye.

{¶ 8} In addition to S.W., the state called Dr. Eric Ostrov. Following questions concerning his credentials and his previous experiences with allegations of sexual abuse and, in particular, with allegations that occur much later than the actual abuse, the state requested that Ostrov "be deemed an expert in this Court." Appellant's trial counsel did not object, "[a]ssuming that prosecution is trying to have him admitted as an expert in psychology." Thereafter, the court deemed Ostrov "an expert and qualified to testify in this case regarding the allegations presented by the State."

{¶ 9} After being recognized as an expert, Ostrov testified concerning suppressed memories, and the idiosyncrasies of S.W.'s story that lent it credibility. In addition, the recorded conversation between S.W. and appellant was played, and Ostrov testified concerning appellant's responses, and how they tended to show that appellant did, in fact, rape S.W. For example, Ostrov pointed out that although S.W. only initially said, "you did some things to me," appellant assumed that it was sexual and offered an excuse that Ostrov had commonly heard perpetrators use, i.e., that it was a mistake: "Unless I was practically asleep and thought your mom was laying next to me." He also noted that appellant was the first to use the word "touched." Further, Ostrov commented that

appellant's reference that he tried to avoid situations where he was alone with the girls indicated that it had been an issue for him in the past.

{¶ 10} On the third day of trial, following the state's presentation of evidence, appellant called three witnesses in his defense. However, the audio recording equipment at the court was not working properly, and the testimony was not recorded. Upon discovery of this issue, appellant's appellate counsel sought to recreate the record pursuant to App.R. 9. Both appellant's trial counsel and the state submitted their trial notes and recollections of the testimony. The trial court subsequently, pursuant to App.R. 9(E), filed a supplement to the record based on the notes of the parties and the court's own recollection. The supplemental record summarized the testimony of S.W.'s half-brother, R.J., who is also appellant's son, S.W.'s mother, and Dr. Terrance Campbell.

{¶ 11} R.J. testified that S.W. used to make fun of appellant's speech problem. In addition, he testified that around the same time that S.W. purportedly remembered the rape, appellant and S.W. had gotten into an argument because appellant refused to buy S.W. an iPod for Christmas. R.J. further commented that during the argument, he could smell alcohol on S.W.'s breath. Finally, R.J. testified that his mother never drives at night because she had previously been in a nighttime automobile accident.

{¶ 12} S.W.'s mother testified that she was sexually molested as a child. She also testified that she does not remember ever seeing a note or confronting S.W. about the alleged incident. In addition, S.W.'s mother testified that the allegation that appellant

inserted his finger into S.W.'s vagina and then smelled it was familiar to her because during her relationship with appellant, he would sometimes do the same thing.

{¶ 13} Lastly, Campbell was presented as an expert in psychology. He testified that the three stages of memory were recording, storage, and retrieval. He also testified regarding repressed memories and imagination inflation. Based on his review of S.W.'s statements, he concluded that the inconsistencies between her statements as reported by her to the police and to her counselor were consistent with source monitoring errors. Campbell testified that S.W. sincerely believed her statements, but was reporting imagination.

{¶ 14} Upon the conclusion of the evidence, the trial court found appellant guilty, and sentenced him to six years in prison.

B. Assignments of Error

{¶ 15} Appellant has timely appealed his conviction, and now raises seven assignments of error for our review:

1. Defendant/appellant did not properly waive his right to a jury trial.

2. The court erred by not holding a *Daubert* hearing to determine the credibility of the state's expert witness.

3. The court's decision was not based on sufficient evidence.

4. The court's decision was against the manifest weight of the evidence.

5. The court's judgment entry correcting the record pursuant to App.R. 9(E) did not include findings of fact and conclusions of law.

6. The court's judgment entry correcting the record pursuant to App.R. 9(E) is insufficient to allow for proper appellate review.

7. The cumulative effect of the trial court's errors deprived defendant/appellant of his right to a fair trial.

II. Analysis

{¶ 16} For ease of discussion, we will address appellant's assignments of error out of order.

A. Waiver of Jury Trial

{¶ 17} In his first assignment of error, appellant argues that the jury waiver was not properly executed. Thus, he is entitled to a new trial.

{¶ 18} R.C. 2945.05 provides the manner in which a criminal defendant may waive a jury trial. It states,

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which

the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.[1]

{¶ 19} In analyzing this statute, the Ohio Supreme Court has identified that for a waiver to be valid it must be "(1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court." *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, ¶ 9. "Absent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury." *State v. Pless*, 74 Ohio St.3d 333, 339, 658 N.E.2d 766 (1996).

{¶ 20} Here, appellant makes two arguments. First, he argues that the written waiver was not executed until after the trial. As support, appellant points to an executed jury waiver that was filed on August 7, 2013, over one year after he was convicted. Having reviewed the record, we are uncertain why that waiver would have been filed at that time; nonetheless, we find its presence inconsequential. In pointing to the August 7, 2013 waiver, appellant has overlooked a different signed waiver that was filed on July 3,

[1] *See also* Crim.R. 23(A) ("In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.").

2012, two weeks *before* his trial. Therefore, we find appellant's argument that the written waiver was not executed until after trial to be without merit.

{¶ 21} Second, appellant argues that it is not apparent from the record that he waived his right to a jury trial in open court. "To satisfy the 'in open court' requirement in R.C. 2945.05, there must be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged the jury waiver to the trial court." *Lomax* at ¶ 49. In *Lomax*, the trial transcript only contained one reference to a jury waiver: "Since there's going to be a jury waiver, does the State care to make an opening statement at this time?" *Id.* at ¶ 45. The Ohio Supreme Court noted that the trial court did not address Lomax and have him acknowledge that he was waiving his right to a jury trial. Further, the Ohio Supreme Court recognized that the phrase "since there's going to be a jury waiver" implied that the waiver had not yet occurred at the commencement of the trial. *Id.* at ¶ 47. Therefore, the court held that the "in open court" requirement was not satisfied. *Id.*

{¶ 22} Here, at the beginning of the trial, the court noted, "The matter is scheduled for trial today. The Defendant previously in open Court waived his right to a jury trial and consented to try this matter to the bench." Unlike *Lomax*, the trial court's statement, in conjunction with the filed jury waiver, clearly indicates that the waiver had occurred prior to trial. Also unlike *Lomax*, the trial court directly stated that the waiver was

previously made in open court.[2] Further, there is nothing in the record showing irregularity in the acceptance of the jury waiver that would "contradict the presumption of regularity accorded all judicial proceedings." *State v. Sweet*, 72 Ohio St.3d 375, 376, 650 N.E.2d 450 (1995). Therefore, we presume the regularity of the manner in which the trial court accepted appellant's jury waiver, and hold that his jury waiver was properly made in open court.

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

B. *Daubert* Hearing

{¶ 24} In his second assignment, appellant argues that the trial court erred when it failed to hold a *Daubert* hearing to determine the reliability and credibility of the state's expert witness, Ostrov, on the issue of repressed memory.

{¶ 25} Evid.R. 702, which governs expert testimony, states:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

[2] The state argues in its brief that the waiver was made in open court during a hearing on July 12, 2012. The record contains no mention of this hearing.

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 26} In his assignment of error, appellant appears to challenge both that Ostrov is not qualified as an expert in the subject of repressed memory as required under Evid.R. 702(B), and that his testimony is not based on reliable scientific, technical, or other specialized information as required by Evid.R. 702(C).

{¶ 27} Regarding Ostrov's qualifications as an expert, we first note that "[p]ursuant to Evid.R. 104(A), the trial court determines whether an individual qualifies as an expert, and that determination will be overturned only for an abuse of discretion." *State v. Baston*, 85 Ohio St.3d 418, 423, 709 N.E.2d 128 (1999); *see also* Evid.R. 104(A) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the

court * * *."). An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 28} Here, appellant argues that "no mention was made of [Ostrov's] expertise in the field of repressed memory." Notably, Ostrov testified that a difference existed between "repressed memory" and "suppressed memory," and both Ostrov and appellant's expert, Campbell, expressed disapproval of "repressed memory" theories. Instead, Ostrov concluded that S.W. experienced suppressed memory, which essentially means that she did not want to think about something, she did not think about it, and she moved on with her life. As to his qualifications to testify regarding suppressed memory, Ostrov testified that he is a licensed clinical psychologist concentrating in sex offenders and child custody. He testified that he has worked on myriad sex offender cases, and has evaluated both the offender and the victim. He also has written extensively about the subject, and his many publications were listed in his curriculum vitae. He continued, stating that he has worked on approximately 30 or 40 allegations of sexual abuse involving clergy members, and that in many of those cases, the accusations often arise much later than the occurrence of the actual abuse, which necessarily involves an analysis of whether the memory is valid. Therefore, in light of Ostrov's training and experience, we cannot say that the trial court abused its discretion in qualifying him as an expert witness.

{¶ 29} Regarding whether Ostrov's testimony was based on reliable scientific, technical, or other specialized information, we note that under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the trial court acts as a gatekeeper to ensure that the expert testimony is sufficiently relevant and reliable to justify its submission to the trier of fact. In exercising this gatekeeping function, the trial court should consider (1) whether the theory or technique has been tested, (2) whether the theory or technique has been subjected to peer review, (3) the potential rate of error, and (4) whether the theory or technique has gained general acceptance. *Id.* at 593-594; *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998). Further, "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." (Emphasis sic.) *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Thus, "[the abuse of discretion standard] applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion." *Id.*

{¶ 30} Appellant contends that the trial court did not inquire into Ostrov's theories or techniques with regard to repressed memory, whether those theories and techniques had been subject to peer review, what the known rate of error is based on his theories and techniques, and whether his methodology has gained general acceptance. However, Ostrov did testify regarding the "Statement Validity Analysis" technique that he used, its

origin, and its wide-spread use to "give some information about the credibility of children's statements when they allege sexual abuse." In addition, Ostrov testified that several studies supported the concepts of suppressed memory and disassociation, including a study in *The Psychological Bulletin* and one in the *Journal of Traumatic Stress*. Based on this testimony, we hold that the trial court did not abuse its discretion when it accepted Ostrov's testimony under Evid.R. 702(C).

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

C. The Record on Appeal

{¶ 32} In his fifth and sixth assignments of error, appellant challenges the trial court's supplement to the record. App.R. 9(E) provides,

> If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

{¶ 33} Here, because of a recording equipment malfunction at the courthouse, the third day of the trial was not recorded. In accordance with App.R. 9(E), the trial court filed a supplement to the record, which summarized the testimony taken on that day.

{¶ 34} In his fifth assignment, appellant contends that the trial court erred by not issuing findings of fact and conclusions of law in its supplemental entry. We find no merit to appellant's argument. App.R. 9(E) contains no requirement for issuing findings of fact and conclusions of law. Further, the case on which appellant relies, *State v. Jackson*, 8th Dist. Cuyahoga No. 80398, 2002-Ohio-4576, does not stand for the proposition that findings of fact and conclusions of law are required in a supplement to the record. Rather, that case involved a remand to the trial court so that the court could enter findings of fact and conclusions of law in its judgment denying the defendant's postconviction petition for relief as required by R.C. 2953.21(G).

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

{¶ 36} In his sixth assignment, appellant argues that the record, which summarizes an entire day of testimony from three different witnesses into three pages of text, is insufficient for the purposes of appellate review. We construe appellant's argument as a challenge to the accuracy of the record provided by the trial court. In this case, because the third day was not recorded, the trial court received submissions from the prosecutor and appellant's trial counsel detailing their notes and recollections from the testimony of the witnesses. "Where a trial court receives and evaluates conflicting evidence regarding the state of the record, the decision to correct or supplement the record pursuant to

App.R. 9(E) rests upon the court's ability to weigh the evidence." *State v. Schiebel*, 55 Ohio St.3d 71, 82, 564 N.E.2d 54 (1990). "Where it is supported by competent, reliable evidence, such ruling will not be reversed by a reviewing court absent an abuse of discretion." *Id.*

{¶ 37} In his brief, appellant does not describe what part of the testimony from the three witnesses was left out of the trial court's supplement. Instead, he generally references "the testimony from [Campbell] who testified in detail regarding the issue of repressed memory which directly refuted the reliability theories discussed by [Ostrov], and the testimony from [S.W.'s] mother and brother, which directly refutes [S.W.'s] testimony, and suggests that the weight of the evidence leans in [appellant's] favor." Upon our review of the record, we find that the trial court's supplement was consistent with the submissions of both the prosecutor and appellant's trial counsel. Therefore, the trial court did not abuse its discretion regarding the contents within the supplement to the record.

{¶ 38} Furthermore, we cannot discern any prejudice to appellant as the supplement contained the testimony that was offered to refute and contradict the state's evidence, and the record already included Campbell's report explaining his conclusion that S.W. had imagined the abuse.

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

D. Sufficiency of the Evidence

{¶ 40} In his third assignment of error, appellant argues that his conviction is based on insufficient evidence.

{¶ 41} "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.

{¶ 42} Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(b), which prohibits sexual conduct with another who is not a spouse when "[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Appellant posits that the state failed to provide sufficient evidence that S.W. was 12 years old at the time of the rape, or that appellant used force or the threat of force. As to the latter, the statute simply does not require force as an element of the crime. As to the former, S.W. testified that her birthday was in October 1993, and the event occurred in the summer of 2006. Thus, she concluded that she was 12 at the time. When viewing this testimony in a light most favorable to the prosecution, we hold that a rational trier of fact could have found that she was 12 years old at the time of the offense beyond a reasonable doubt.

{¶ 43} Appellant also contends that there is insufficient evidence to support that the incident actually occurred. However, S.W.'s testimony, if believed, is sufficient to establish all of the elements of the crime of rape. Therefore, we hold that appellant's conviction is not based on insufficient evidence.

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

E. Manifest Weight

{¶ 45} Appellant's fourth assignment of error challenges the conviction as being against the manifest weight of the evidence.

{¶ 46} When reviewing a manifest weight claim, the court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. 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." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶ 47} Appellant correctly identifies that this case turns on the credibility of S.W.'s allegations. He argues that his conviction is against the manifest weight of the evidence because both R.J. and S.W.'s mother refuted S.W.'s story. Specifically, he contends R.J.'s testimony established a motive for S.W. to fabricate the story in that she was angry with appellant for refusing to buy her an iPod and that she had vowed to get revenge, while S.W.'s mother's testimony dispelled the story's believability because

certainly a mother who had suffered childhood abuse would remember reading a note from her daughter alleging that appellant had raped her. Furthermore, appellant asserts that Campbell's testimony discredited Ostrov's conclusion that S.W. accurately remembered the abuse.

{¶ 48} Upon our review of the record, we cannot say that this is the exceptional case where the trier of fact clearly lost its way. S.W. was unequivocal in her testimony of the abuse. Any inconsistencies in her story occurred when the story was relayed through her counselor and the police, and even then, those inconsistencies concerned minor points such as whether she was with her boyfriend, talking on the phone with her boyfriend, or texting her boyfriend when she remembered the abuse. In addition, S.W.'s story was buttressed by Ostrov's testimony that identified characteristics giving the story credibility such as the amount of detail, the fact that it included an interruption, and the fact that S.W. also had good things to say about appellant. Finally, the trial court was able to hear appellant's response when confronted with the allegation in the recorded phone call, and hear that he was the one who jumped to the idea of sexual abuse and touching. Therefore, we hold that appellant's conviction was not against the manifest weight of the evidence.

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

F. Cumulative Error

{¶ 50} Finally, as his seventh 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.").

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

III. Conclusion

{¶ 52} For the foregoing reasons, the judgment of the Erie 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.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE