[Cite as *State v. Gillard*, 2023-Ohio-2682.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. CT2022-0040
MICHAEL T. GILLARD	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2022-0250
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 2, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RONALD L. WECH Muskingum County Prosecutor BY: MICHAEL HUGHES 27 North Fifth Street, Suite 201 Zanesville, OH 43701	SAMUEL H. SHAMANSKY 523 South Third Street Columbus, OH 43215

Gwin, P.J.

{¶1} Defendant-appellant Michael T. Gillard ["Gillard"] appeals his convictions and sentences after a jury trial in the Muskingum County Court of Common Pleas.

Facts and Procedural History

{¶2} On June 5, 2020, Gillard and his girlfriend lived in Coolville, Ohio. However, when in Zanesville, Gillard would stay at his mother's house on Ridge Road. Gillard travelled to his mother's house after dropping his girlfriend off at her place of employment.

{¶3} On June 5, 2020, fourteen-year-old M.G. and her mother, J.G. were residing with her maternal grandmother at a home located on Oakland Avenue. M.G. lived in the house with her grandparents, while J.G. lived in the detached garage. Gillard was an acquaintance of J.G. and had previously dated her older daughter A.G.

{¶4} M.G. testified that she went to the mall on the day in question with her friend L.P. and L.P.'s sister. After they returned to the Oakland Avenue residence, J.P. introduced M.G. to Gillard, who had arrived on his motorcycle while they were away. M.G. testified that she had never had any prior discussions or phone calls with Gillard and did not remember seeing him before. At some point after introducing Gillard to her daughter, J.G. testified that Gillard made a sexual comment about M.G. Gillard testified that J.G. asked him if he had any "meth." 10T. at 1323[1]. J.G. testified that Gillard asked her if she wanted some "ice." 4T. at 523.

{¶5} M.G. testified that Gillard's motorcycle was parked down from "Timmy's" car in the driveway. 8T. at 1054. She testified that Gillard asked J.G. if he could take M.G.

[1] For clarity, the transcript from Gillard's jury trial on April 6 - 11, 2021 will be referred to as, "__T.__," signifying the volume and the page number.

and L.P. shopping to get clothes for school. 8T. at 1055. Gillard then asked M.G. if she would like to go for a ride on his motorcycle. At first M.G. did not want to go; however, after teasing from L.P. and J.G. she acquiesced in what she thought was to be a short ride around the block. 8T. at 1057; 1150-1151. M.G. gave her cell phone to L.P. for safekeeping and left on the motorcycle with Gillard. 4T. at 631-633; 8T. at 1058.

{¶6} Instead of going around the nearby stadium, Gillard drove to his mother's house. 8T. at 1058. M.G. testified that Gillard entered the residence to grab a beer and a cigarette, and M.G. followed him into the house. They remained in the kitchen between five and ten minutes. They then moved onto the porch where M.G. attempted to perform a "beer trick" by removing the cap of a glass bottle using a knife. After that, M.G. and Gillard returned to the residence and sat on the couch in the living room, where they talked for another five to ten minutes. M.G. testified that Gillard then asked for a back rub. Gillard then removed M.G.'s tank top while fondling her breasts, eventually removing her bra as well. Gillard then began to try to remove M.G.'s pants. He was able to remove one of M.G.'s legs from her pants, as M.G. was shoving him away, eventually falling to the floor. 8T. at 1075. Once on the floor, Gillard "stuck his dick inside" of M.G.'s vagina. Id. at 1076; 1087. Gillard was moving back and forth. Id. at 1088. M.G. testified that Gillard forced his penis in her mouth after asking her to kiss it. Id. at 1090-1091. M.G. testified that Gillard's mouth also came in contact with her vagina. 8T. at 1085. She further testified that Gillard placed both his hands and mouth on her exposed breasts.

{¶7} M.G. attempted to scoot away while on her back on the floor, telling Gillard that she was only fourteen years old. As a result, M.G. received a rug burn on her back from the carpeting.

{¶8} M.G. testified that Gillard got dressed and acted as if nothing had happened. He asked M.G. if she wanted to drive his car back to her grandmother's house, which she did. On the way, Gillard was touching M.G.'s thigh. Gillard gave M.G. his black Cash App card and a gold bracelet, which, at the time M.G. mistook for a watch. Gillard told M.G. he would put money on the card, if she did not tell anyone what had happened. 8T. at 1096-1097.

{¶9} After returning to her grandparent's residence, M.G. testified that she ran straight to her bedroom. In her bedroom she showed L.P. the rug burn, the black Cash App card and the bracelet. M.G. was crying, shaking and visibly distressed. L.P. testified that M.G. told her that she received the rug burn while trying to get away, but Gillard dragged her across the carpet. 4T. at 616. M.G. testified that she did not tell L.P. how she sustained the rug burn. 8T. at 1133.

{¶10} J.G. testified that she asked the girls to go to a nearby dollar store with her and they agreed to go. J.G. went inside the store and the girls remained in the car. A friend came into the store to ask what was wrong with M.G., prompting J.G. to immediately leave and return to the car. 4T. at 530. L.P. told M.G. if she did not say something to her mother then she, L.P. would. M.G. told her mother that Gillard had "hurt her." Enraged, J.P. "flew down the road" to confront Gillard. En route, she called 9-1-1.

Gillard's arrest and interview

{¶11} Deputy Graham Schaumleffel formerly of the Muskingum County Sheriff's Office testified that on June 5, 2022, he was flagged down by a woman, later identified as J. G., in a car who told him that she had called 9-1-1. 3T. at 390[2]. This encounter was only a couple hundred feet from J.G.'s home. Deputy Schaumleffel interviewed J.G. at her home, where she gave him the black Cash App card and bracelet that M.G. had given to her. Id. at 395. The lights to the deputy's sheriff's cruiser remained flashing during this time. Id. at 401. M.G. and her mother pointed to Gillard as they saw his motorcycle stop at the top of a nearby hill. Id. at 402-403. A.G. got off of the back of the motorcycle and ran down the hill to the home. Id. The motorcycle took off. Deputy Hamilton made the initial stop with Deputy Schaumleffel arriving shortly thereafter. 4T. at 405.

{¶12} Deputy Brandon Hamilton testified that he initiated a traffic stop of Gillard. 3T. at 473. Gillard volunteered to Deputy Hamilton that he, Gillard, had crazy sex with A.G. and that they each urinated on each other. Id. at 477. Deputy Hamilton collected DNA samples from Gillard's finger's and penis at the sheriff's office.

{¶13} Detective Brad Shawger obtained a waiver from Gillard of his *Miranda* rights. 6T. at 796-797. State's Exhibit 58. The interview was recorded and played for the jury. Id. at 799-800. State's Exhibit 41. Gillard went into detail about his sexual relations with A.G. Id. at 818. Gillard told the detective that A.G. had taken his black Cash App card. Id. at 821. Gillard claimed the only person that he had sex with was A.G. Id. at 823. Gillard claimed M.G. had never been to his mother's home and that he had never had sex with her. Id. at 812- 813. Detective Shawger testified that he interviewed A.G.

[2] Deputy Schaumleffel is presently employed by the Stark County Sherriff's Office.

and that she denied having sex with Gillard on June 5, 2020. Id. at 803. A.G.'s blue and white underwear was found on the living room couch during a consensual search of Gillard's mother's home.

{¶14} A.G. testified that she did not have sex with Gillard on June 5, 2020. 9T. at 1242. She further testified that her blue and white underwear were not left there on that day, but from another time. Id. at 1243-44. She testified that she got off of Gillard's motorcycle at the top of the hill because they could see the police were at the home of her mother. Id. at 1253. She testified that the motorcycle did not break down when she was with Gillard. Id. at 1259.

Forensic interview

{¶15} M.G. was taken to Nationwide Children's Hospital in Columbus. Jamie Casto, a forensic interviewer interviewed M.G. The video of the interview was played for the jury without objection. State's Exhibit 49. 5T. at 667-668. M.G.'s account of the events was similar to her testimony at trial. 5T. at 674-679. The only difference being that M.G. told Ms. Casto that she had not seen Gillard in three years and that Gillard was a friend of her deceased step-father.

{¶16} Logan Stover, the Sexual Abuse Nurse Examiner (S.A.N.E.) testified that she found nothing abnormal, even with the colposcope observation, in her examination of M.G. 5T. at 729. She observed no abrasions, redness, bruising or swelling in the vagina of M.G. Id. at 732. M.G. told Ms. Stover that Gillard had put his fingers and his penis inside her vagina. 5T. at 730. Pictures of the abrasion on M.G.'s back were admitted into evidence. State's Exhibit 53; 54. 5T. at 714.

Gillard testifies at trial

{¶17} Gillard testified that, while he was socializing at J.G.'s house, he smoked some "meth" with T. Y. who was at the home. 10T. at 1321-1322. In his words, he "[d]id a couple hits on a bubble." Id. J.G. asked Gillard if he had any meth, to which he responded no. Id. at 1323. M.G. and L.P. walked out at this time. M.G. commented on how she liked his motorcycle and asked to be taken on a ride. 10T. at 1324. He agreed. Gillard specifically denied offering to take M.G. shopping for clothes. He testified that, after J.G. remarked that M.G. needed clothing for school, Gillard responded, "I [have] my own kids to take care of." Id.

{¶18} While taking M.G. for a ride, Gillard noticed that his motorcycle was "stalling out." 10T. at 1308, 1325. As such, he drove to his mother's residence to exchange the motorcycle for his car. While at his mother's residence, Gillard went inside the house to get a cigarette and a couple beers. M.G. remained outside on the wooded deck area attached to the house. Id. at 1308.

{¶19} Gillard had to enter the car through the passenger side and open it for M.G., because the driver side door was broken. Id. 1308. After M.G. got in, she claimed that she could not locate her phone and asked Gillard to call it for her. Id.at 1309. Gillard walked back to the deck to look for the phone but was unable to locate it. He returned to the car and M.G. drove them back to the Oakland Avenue residence. Id.

{¶20} Upon their arrival, Gillard apologized for his motorcycle malfunctioning and M.G. exited the vehicle. Gillard then continued to wait at the Oakland Avenue residence for A.G., who, according to J.G. was on her way. Id. Approximately five minutes later,

A.G. arrived in a Dodge Ram truck, approached Gillard's vehicle, and they agreed to drive back to his mother's residence to have sex. 10T. at 1310-1311.

{¶21} As Gillard was driving, A.G. began performing oral sex on him, which continued after they entered the living room of the Ridge Road residence. 10T. at 1311-1312. Eventually, they moved to the floor in front of the couch, engaged in vaginal intercourse and urinated on each other. Id. 1312. Gillard removed his underwear and threw them down the stairwell leading to the basement. Id. Before leaving to return to the Oakland Avenue address, Gillard reminded A.G. to grab her purse and blue underwear, which were both laying on the couch. Id. A.G.'s underwear remained on the couch and were later discovered by law enforcement during its investigation. After Gillard replaced the battery to his motorcycle, he and A.G. rode back to the Oakland Avenue residence.

{¶22} Gillard testified he dropped A.G. off at the top of the hill because she expressed concerns that she was in trouble for stealing her boyfriend's truck. 10T. at 1316. Shortly thereafter, law enforcement initiated a traffic stop of Gillard's motorcycle and notified him that he was "under investigation for a sexual assault with a minor." Id. at 1318.

{¶23} Gillard admitted that he lied to Detective Shawger during his interview about the events. 10T. at 1316; 1343. He admitted that he did not tell the police at first about M.G. going for a ride on the back of his motorcycle. Id. at 1319-1320. Gillard claimed that he lied because Detective Shawger told him that, "I don't care what color you are." Id. at 1320. Gillard lied to the police because he did not want to "get signed off for something I didn't do." Id.

DNA Evidence

{¶24} Some of the samples collected by law enforcement were tested by the Bureau of Criminal Investigation for DNA. The tested samples include those taken from M.G.'s breasts, vagina, and underwear, as well as the standard provided by Gillard. 7T. at 938, 945, 955. Other items, which included, pubic hair, neck, thigh, and fingernail swabs from M.G., and an oral swab from A.G. were not tested. 8T. at 1024-1025, 1439. The wet spot on the carpet in Gillard's mother's home and neither set of soiled underwear were tested. Id. None of the tested samples revealed the presence of sperm. Id. at 1022, 1033; 10T. at 1415. Moreover, none of the tested samples definitively revealed the presence of Gillard's DNA on M.G. 7T. at 942-965, 8T. at 999, 10 T. at 1453. Similarly, M.G.'s DNA could not be excluded from Gillard' s penile swab, as it contained a mixture of DNA. 11T. at 1500-1501. At most, Y-STR testing from M.G.'s breast and vaginal samples revealed the presence of a male DNA profile from which Gillard could not be identified, but could also not be excluded. 7T. at 945, 955, 1564.

{¶25} On June 17, 2020, Gillard was indicted with two counts of Rape [vaginal and cunnilingus] in violation of R.C. 2907.02(A)(2), both felonies of the first degree, and one count of Attempted Rape [fellatio] in violation of R.C. 2923.02(A) and R.C. 2907.02(A)(2), a felony of the second degree.

{¶26} On April 14, 2022, the jury found Gillard guilty of all charges and sentencing was set for May 31, 2022. On that date, the court sentenced Gillard to serve a prison term of ten years, with an indefinite prison term of fifteen years, on each of Counts One and Two. A prison term of six years, with an indefinite prison term of nine years, was imposed on Count Three. Each prison term was ordered to be served concurrently, for

an aggregate prison sentence of ten to fifteen years. Additionally, as a result of his convictions, Gillard was classified as a Tier III Sex Offender.

Assignments of Error

{¶27} Gillard raises two Assignments of Error,

{¶28} "I. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF HIS RIGHT TO DUE PROCESS BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

{¶29} "II. THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION OF EVIDENCE RELATED TO APPELLANT'S IRRELEVANT PRIOR BAD CONDUCT FOR THE IMPERMISSIBLE PURPOSE OF ATTACKING HIS CHARACTER IN VIOLATION OF THE OHIO RULES OF EVIDENCE AND HIS RIGHTS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

I.

{¶30} In his First Assignment of Error, Gillard admits that the record contains sufficient evidence to support the jury's finding of guilty on all charges; however, Gillard argues the testimony from the witnesses, including M.G., was so riddled with inconsistencies and contradictions, that it was not credible. Therefore, Gillard contends that his conviction is against the manifest weight of the evidence.

Standard of Appellate Review – Manifest Weight

{¶31} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387,

678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355*; *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

{¶32} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, *supra,* 78 Ohio St.3d at 386-387, 678 N.E.2d 541(1997), *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶83. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387, 678 N.E.2d 541, *citing Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652(1982) (quotation marks omitted); *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1244, ¶25, citing *Thompkins.*

{¶33} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E.2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80,

461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978).

{¶34} As one Court has explained,

> When faced with a manifest weight of the evidence challenge, we must consider whether the state "carried its burden of persuasion" before the trial court. *State v. Messenger*, Slip Opinion No. 2022-Ohio-4562, ¶ 26; *see State v. Martin*, Slip Opinion No. 2022-Ohio-4175, ¶ 26. Unlike the burden of production, which concerns a party's duty to introduce enough evidence on an issue, the burden of persuasion represents a party's duty to convince the factfinder to view the facts in his or her favor. *Messenger* at ¶ 17. Therefore, in order for us to conclude that the factfinder's adjudication of conflicting evidence ran counter to the manifest weight of the evidence—which we reserve for only the most exceptional circumstances—we must find that the factfinder disregarded or overlooked compelling evidence that weighed against conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387-388, 678 N.E.2d 541 (1997). We accordingly sit as a "thirteenth juror" in this respect. Id.

State v. Gibson, 1st Dist. Hamilton No. C-220283, 2023-Ohio-1640, ¶ 8.

{¶35} Further, to reverse a jury verdict as being against the manifest weight of the evidence, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required pursuant to Article IV, Section 3(B)(3) of the Ohio Constitution. *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, ¶ 2-4, *citing Thompkins* at paragraph four of the syllabus.

Issue for Appellate Review: *Whether the jury clearly lost their way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.*

{¶36} Gillard dwells on inconsistencies that are on collateral or inconsequential aspects of the case. For example, where M.G. disclosed what had occurred to her friend L.P. Whether M.G. told L.P. that Gillard had dragged her across the carpet. Whether M.G. remembered Gillard from the past. Gillard also points to differences in the time frame of the attack and lack of DNA evidence and evidence of injury to M.G. [Appellant's brief at 15-16].

{¶37} Gillard overlooks, however, that M.G. consistently stated for over two years that Gillard forced his penis into M.G.'s vagina and mouth; that Gillard forced his mouth onto M.G.'s vagina, and that Gillard forced his lips and hands on M.G.'s breast. He further minimizes the inconsistencies and lies that he initially told the police.

{¶38} While there was conflicting testimony presented at trial, a defendant "is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented." *State v. Rankin*, 10th Dist. No. 10AP-1118, 2011-Ohio-5131, ¶ 29. *See also State v. J.E.C.,* 10th Dist. No. 12AP-584, 2013-Ohio-1909, ¶ 42. The jury may consider conflicting testimony from a witness in determining credibility and the persuasiveness of the account by either discounting or otherwise resolving the discrepancies. *State v. Taylor,* 10th Dist. No. 14AP-254, 2015-Ohio-2490, ¶ 34, *citing Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641, ¶ 28 (10th Dist.). "'The finder of fact can accept all, part or none of the testimony offered by a witness, whether it is expert opinion or eyewitness fact, and whether it is merely

evidential or tends to prove the ultimate fact.'" *State v. Petty*, 10th Dist. Franklin No. 15AP-950, 2017-Ohio-1062, ¶ 63, *quoting State v. Mullins*, 10th Dist. No. 16AP-236, 2016-Ohio-8347, ¶ 39.

{¶39} In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist. 1999). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶40} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Gillard's guilt.

{¶41} Upon review of the entire record, weighing the evidence and all reasonable inferences as a thirteenth juror, including considering the credibility of witnesses, we cannot reach the conclusion that the trier of facts lost its way and created a manifest miscarriage of justice. While Gillard is certainly free to argue that the witnesses were either mistaken or lying, on a full review of the record we cannot say that the jury clearly lost its way or created a manifest injustice by choosing to believe the testimony of the

state's witnesses. The jury was able to observe the witnesses, including M.G. and Gillard, testify subject to cross-examination, as well as hear Gillard's interview with the police and M.G.'s forensic interview taken the day of the events.

{¶42} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes for which Gillard was convicted. We do not find that the jury disregarded or overlooked compelling evidence that weighed against conviction.

{¶43} Gillard's First Assignment of Error is overruled.

II.

{¶44} In his Second Assignment of Error, Gillard contends the state introduced evidence that he was a drug dealer or user in contravention of Evid.R. 404(B). He further claims that the state failed to provide notice that it intended to use such evidence at trial in contravention of Evid. R. 404(B)(2).

{¶45} However, Gillard points to nowhere in the record where he objected to the evidence. *See*, *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 843 N.E.2d 174, 2006-Ohio-903, at ¶ 13; *See also,* State *v. Davis,* Licking App. No. 2007-CA-00104, 2008-Ohio-2418 at ¶ 91. Gillard's reference to a motion in limine that he filed does not change this result because he failed to bring the matter to the trial court's attention by objecting during trial. *See*, *State v. Grubb,* 28 Ohio St.3d 199, 503 N.E.2d 142(1986), *citing State v. White*, 6 Ohio App.3d 1, 451 N.E.2d 533 (8th Dist. 1982) ("An order granting or denying a motion in limine is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated. An appellate court need not review the propriety of such an order unless the claimed error

is preserved by a timely objection when the issue is actually reached during the trial."); *See, also*, Evid.R. 103(A)(1).

{¶46} Because he failed to object at trial, the trial court was never called upon to determine the admissibility of the evidence, or the state's compliance or lack of compliance with the notice requirements. We further note that Gillard himself testified that, while he was socializing at J.G.'s house, he smoked some "meth" with T. Y. who was at the home. 10T. at 1321-1322. In his words, he "[d]id a couple hits on a bubble." Id. He further testified that J.G. asked Gillard if he had any meth, to which he responded no. Id. at 1323.

{¶47} Normally, an appellate court need not consider error that was not called to the attention of the trial court at a time when the error could have been avoided or corrected by the trial court. *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977). Accordingly, a claim of error in such a situation is usually deemed to be waived absent plain error. *See* Crim.R. 52(B). Gillard did not raise plain error with respect to any of the testimony. Because he does not claim plain error on appeal, we need not consider it. *See, State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17–20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, 2015 WL 4549872, ¶ 25, *citing Wright v. Ohio Dept. of Jobs & Family Servs*., 9th Dist. Lorain No. 12CA010264, 2013-Ohio-2260, 2013 WL 2407158, ¶ 22 ("when a claim is forfeited on appeal and the appellant does not raise plain error, the appellate court will not create an argument on his behalf"); *State v. Carbaugh,* 5th Dist. Muskingum No. CT2022-0050, 2023-Ohio-1269, ¶67; *State v. Fitts,* 6th Dist. Wood Nos. WD18-092, WD18-093, 2020-

Ohio-1154, ¶21; *Simon v. Larreategui,* 2nd Dist. Miami No. 2021-CA-41, 2022-Ohio-1881, ¶41.

{¶48} However, even if we were to consider Gillard's argument he would not prevail.

Standard of Appellate Review – Plain Error

{¶49} Crim.R. 52 distinguishes between errors to which the defendant objected at trial and errors to which the defendant failed to object at trial. *See State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶14. If the error is one to which the defendant objected at trial, an appellate court reviews the error under the Crim.R. 52(A) harmless-error standard and "*the government* bears the burden of demonstrating that the error did not affect the substantial rights of the defendant." (Emphasis sic.) Id. at ¶ 15. If the error is one to which the defendant failed to object at trial, an appellate court reviews the error under the Crim.R. 52(B) plain-error standard and "*the defendant* bears the burden of demonstrating that a plain error affected his substantial rights." (Emphasis sic.) Id. at ¶ 14. *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.2d 75, ¶91. The Ohio Supreme Court reviewed the plain error standard of review to be utilized by appellate courts,

> Under this standard, the defendant bears the burden of "showing that but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16. An appellate court has discretion to notice

> plain error and therefore "is not required to correct it." [*State v*.] *Rogers* [143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860] at ¶ 23.

State v. West, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, ¶ 22. *See also State v. McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, 204 N.E.3d 459, ¶ 90. ("McAlpin could not establish plain error, because he cannot show a reasonable probability that but for standby counsel's actions, the jury would have acquitted him.").

{¶50} As we have already noted, both the state and Gillard used evidence of drug usage and exchanges without objection during the trial. It is apparent from the facts presented at trial, however, that Gillard cannot demonstrate a reasonable probability that but for the admission of the evidence of his drug usage or exchanges, the jury would have acquitted him of two counts of rape and one count of attempted rape. Further, we find beyond a reasonable doubt, that the admission of the evidence of drug usage or dealing did not contribute to Gillard's conviction. *See, State v. Aeschilmann*, 5th Dist. Stark No. 2013 CA 00192, 2014-Ohio-4462, 2014 WL 5018857, ¶95-96.

{¶51} Gillard's Second Assignment of Error is overruled.

{¶52} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By Gwin, P. J.,

Wise, J., and

Delaney, J., concur