[Cite as *State v. Jackson*, 2020-Ohio-7034.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 18CA7
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
NOTAY JACKSON,	:	
	:	
Defendant-Appellant.	:	**RELEASED: 11/4/2020**
	:	

APPEARANCES:

Steven H. Eckstein, Washington C.H., Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County First Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

Wilkin, J.

{¶1} This is an appeal from an Athens County Common Pleas Court judgment of conviction and sentence. After a five-day jury trial, Notay Jackson was found guilty of a single count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree, and sentenced to a mandatory 11-year prison term. On appeal, he contends that (1) he was denied a fair trial because the trial court failed to ensure that a hearing-impaired juror heard all of the proceedings; (2) he received ineffective assistance of counsel because

his attorney failed to challenge the hearing-impaired juror for cause or exercise a peremptory challenge to remove her from the panel; (3) he was denied due process because the trial court did not permit him to speak with his attorney during a break in his testimony at trial; (4) he was denied a fair trial as a result of the cumulative effect of the errors described in his first three assignments of error; (5) there was insufficient evidence to support his conviction; and (6) his conviction was against the manifest weight of the evidence.

{¶2} With regard to the first assignment of error, Appellant has not shown that the hearing-impaired juror was unable to perceive and understand all of the evidence presented at trial. To the contrary, the only reasonable inference from the record is that the court monitored the jury, recessed when it observed that the juror was having difficulty with her hearing aids, and resumed trial only after confirming that the issue with the hearing aids was fixed. As to the second assignment of error, Appellant cannot establish that he received ineffective assistance of counsel in violation of the Sixth Amendment because he has not shown that the juror's hearing impairment had any effect on the outcome of the trial. Appellant's third assignment of error is overruled because he does not possess an absolute right to speak with his attorney when he is testifying at trial. To the

contrary, under controlling Supreme Court precedent, a trial court has discretion to deny a defendant's request to speak with counsel during a break in his testimony where, as in this case, the break is short and denial of the request serves to protect the integrity of the defendant's testimony. Having overruled the first three assignments of error, Appellant cannot show that he was denied a fair trial as a result of any cumulative prejudice caused by those alleged errors. His fourth assignment of error is therefore overruled. With respect to the fifth and sixth assignments of error, we find there was sufficient evidence to support Appellant's conviction for rape and that the conviction was not against the manifest weight of the evidence. In sum, and as discussed in greater detail below, all six of Appellant's assignments of error are overruled and the trial court's judgment of conviction is affirmed.

BACKGROUND

{¶3} In the summer of 2016, H.L., the victim in this case, was a twenty-year-old junior at Ohio University studying moderate to intensive special education. She was living with her friend, Maggie Stotts, in an apartment in Athens County, Ohio. On July 27, 2016, H.L., Ms. Stotts and another friend named Catherine Stolar went to Paw Purr's bar in uptown Athens around 10 p.m. H.L. ordered a liquor pitcher at the bar and found a table to sit at when the bar became crowded.

{¶4} H.L. was dancing in the bar when KeVon Powell, an Ohio University student, approached her and started a conversation. Earlier that evening, Mr. Powell and Appellant had been hanging out at Mr. Powell's residence. Later, the two went to Paw Purr's bar where Mr. Powell met H.L. H.L. testified that she neither met nor interacted with Appellant at Paw Purr's bar. Appellant testified, however, that he intimately interacted with H.L. at the bar.

{¶5} It is undisputed that around 1:30 a.m., the lights came on at the bar. At that time, Ms. Stolar approached Appellant and began speaking with him. H.L. and Mr. Powell joined Ms. Stolar and Appellant. Mr. Powell asked if they wanted to leave the bar and go to his residence.

{¶6} When Mr. Powell told H.L. where he lived, she told him that she knew a short-cut and began to walk with him. Ms. Stolar and Appellant followed about ten to fifteen yards behind them. When they arrived at Mr. Powell's house, H.L. asked to go to the bathroom. Mr. Powell directed her upstairs. When she left the bathroom, Mr. Powell was standing outside the door. He reached his hand out to her and led her to his room.

{¶7} Meanwhile, Ms. Stolar and Appellant went into another room upstairs. Appellant asked Ms. Stolar to play a song on her phone, which she did. At the end of the song, Appellant unbuckled his pants, unzipped them,

and said, "blow me." Ms. Stolar immediately told him "no," got up, grabbed her purse and began to leave. Appellant grabbed Ms. Stolar's left arm, but she broke away, quickly left the residence and went home. Appellant denied this version of events and testified that Ms. Stolar left because it was late and she had to work in the morning.

{¶8} H.L. did not know that Ms. Stolar had left the house. H.L. and Mr. Powell had begun talking and kissing in his room. Mr. Powell got up and turned off the lights. He returned to H.L., undressed her, and began having vaginal intercourse with her. H.L. asked him to stop and he did. Mr. Powell then left H.L. alone in his room. Sitting on the bed in the dark, H.L. sat up to get dressed and gather her belongings. She heard the door open and saw Appellant enter. She told Appellant to leave but he kept walking towards her. She asked where Ms. Stolar was. Appellant said she was downstairs, but that he only wanted H.L. As Appellant approached H.L., she moved backwards onto the bed to get farther away from him.

{¶9} Appellant went to kiss H.L. She again moved farther away. In a matter of few seconds, Appellant flipped H.L. over and penetrated her anally. H.L. screamed. She testified that it was the most painful thing that she had ever endured. H.L. screamed again and Appellant stopped. He told her, "Oh, I'm sorry baby, I didn't know it was the wrong hole, like, I'm a

virgin, I didn't know, I'm sorry baby." H.L. screamed and told him to get out. Appellant left. H.L. found her phone, turned on its flashlight and found the rest of her things.

{¶10} H.L. ran down the stairs and encountered a few men sitting in the family room. She asked them where Ms. Stolar was. They told her that Ms. Stolar had already left and that H.L. had left her dignity upstairs. Upset, H.L. left the residence and ran down the street. She stopped at a bench outside a Thai restaurant and called Ms. Stolar and Ms. Stotts for help, but they did not answer. H.L. was crying and in pain. She eventually exchanged text messages with Ms. Stolar, who told her to stay put and that she was coming to help. H.L. also received a text message from Ms. Stotts asking if everything was okay. H.L. texted that she had just been raped and that it was the worst night of her life. Ms. Stotts texted that she had contacted the police and was coming to meet H.L. at the restaurant.

{¶11} The police arrived shortly thereafter. Ms. Stolar assisted the officers in identifying the house where the rape occurred. Another officer took H.L., accompanied by Ms. Stotts, to the hospital to be treated for sexual assault. H.L. was escorted to a room where she was not allowed to eat or drink anything, could not go to the restroom, and was repeatedly asked to provide her statement—which she did.

{¶12} At approximately 5 a.m., a nurse administered a series of tests for H.L. H.L. removed her clothes and was photographed. Medical personnel took swabs of H.L.'s genital and anal area. She received shots and medication for contraception and nausea. After approximately four hours, H.L. left the hospital in medical scrubs—her own clothes having been kept for forensic purposes.

{¶13} On December 19, 2016, Appellant was indicted by an Athens County Grand Jury for one count of rape, a first-degree felony, in violation of R.C. 2907.02(A)(2). On January 13, 2017, Appellant was arraigned pursuant to the indictment. He pleaded not guilty and the trial court set bond at $100,000. The trial court further ordered that, if Appellant were to post bond, he was not have any contact with H.L. On January 20, 2017, Appellant posted bond and was released.

{¶14} On May 26, 2017, the State filed a notice of bond violation and requested a warrant for Appellant's arrest. The State alleged that Appellant committed a burglary at the Ohio University recreation center, which was also a violation of the court's no-contact order with H.L., who was an employee at the recreational center. On May 31, 2017, the trial court held a hearing where the State presented evidence that Appellant had used his brother's student identification to gain access to the recreation center where

H.L. worked. The trial court revoked Appellant's bond and set a new bond at $250,000.

{¶15} On February 13, 2018, the trial court convened a jury trial on the sole count of rape against Appellant. On February 22, 2018, the parties delivered their closing arguments and the court instructed the jury. The jury deliberated and returned a verdict of guilty. On May 16, 2018, the trial court entered a judgment of conviction and sentenced Appellant to eleven years in prison. This timely appeal of Appellant's conviction followed, in which he asserts the following assignment of error.

ASSIGNMENTS OF ERROR

I. "THE TRIAL COURT ERRED AND DENIED DEFENDANT-APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT FAILED TO PROPERLY ENSURE A HEARING-IMPAIRED JUROR HEARD ALL OF THE PROCEEDINGS AS SHE ARRIVED AT COURT WITHOUT HER HEARING-AID, STATED SHE HAD NOT HEARD ALL OF THE PROCEEDINGS, AND MISSED SOME OR POSSIBLY ALL OF THE DEFENDANT-APPELLANT'S TESTIMONY."

II. "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16, OF THE OHIO CONSTITUTION."

III. "THE TRIAL COURT ERRED AND DENIED DEFENDANT-APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT INTERFERED WITH AND FAILED TO REMEDY AN INTERFERENCE WITH THE ATTORNEY-CLIENT PRIVILEGE."

IV. "THE CUMULATIVE NATURE OF THE ERRORS IN ASSIGNMENTS OF ERROR ONE THROUGH THREE DENIED DEFENDANT-APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW."

V. "THE TRIAL COURT ERRRED IN DENYING DEFENDANT-APPELLANT'S CRIM.R. 29 MOTION FOR ACQUITTAL AS THE EVIDENCE PRESENTED WAS INSUFFICIENT TO CONCLUDE THAT GUILT HAD BEEN PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

VI. "THE TRIAL COURT ERRED IN ENTERING A FINDING OF GUILTY BECAUES SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[,] FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

ASSIGNMENT OF ERROR I

{¶16} In his first assignment of error, Appellant contends that he was denied a fair trial because the trial court failed to ensure that a hearing-impaired juror heard all of the proceedings. The State argues that the trial court did not commit any such error and that the caselaw relied upon by Appellant is distinguishable on its facts. In addition, the State notes that Appellant failed to object to the court's accommodation of the hearing-impaired juror at trial. Consequently, the State argues, Appellant waived any error committed by the trial court. As discussed below, we find that

Appellant has not shown that the trial court committed any plain error in its accommodation of the hearing-impaired juror and therefore overrule his first assignment of error.

LEGAL STANDARD

{¶17} The Supreme Court of Ohio has held that "[t]he right to a fair trial requires that all members of the jury have the ability to understand all of the evidence presented, to evaluate that evidence in a rational manner, to communicate effectively with other jurors during deliberations, and to comprehend the applicable legal principles as instructed by the court." *State v. Speer*, 124 Ohio St. 3d 564, 2010-Ohio-649, 925 N.E.2d 584, syllabus, paragraph 2. Accordingly, "[a]n accommodation made to enable a physically impaired individual to serve as a juror must afford the accused a fair trial." *Id.*

{¶18} The Supreme Court of Ohio explained that "[a] hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable the juror to perceive and evaluate the evidence, the accused is deprived of a fair trial." *Id.* at syllabus, paragraph 3. If a trial court determines that there are no reasonable accommodations that will enable the impaired juror "to

perceive and evaluate all relevant and material evidence," then the juror must be excused for cause. *Id.*

{¶19} Because Appellant did not object to the hearing-impaired juror's service in the trial court, we review this assignment of error only for plain error. To prevail, Appellant must show that an error occurred, that the error was plain, and that but for the error the outcome of the trial clearly would have been otherwise. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69.

ANALYSIS

{¶20} In this case, Appellant has not shown any plain error in the determination that the hearing-impaired juror could serve on the jury nor in the trial court's management of her service. In its initial instruction to the prospective jurors, the trial court stated:

> Is there anyone here that has any physical problems that it will make it difficult to sit for approximately eight hours a day or for as many days as necessary to complete the trial?

In response to this question, the hearing-impaired juror did not raise her hand or notify the court of her impairment. The trial court spoke to a few prospective jurors and then asked for a show of hands of who would have an unusual hardship by serving. Again, the hearing-impaired juror did not raise her hand.

{¶21} She first brought her impairment to the court's attention after the State began its voir dire. The following exchange occurred:

> [Juror]: I can't hear very well.
>
> [Prosecutor]: Do you think the fact that you, if you can't hear very well it would be difficult for you to listen to testimony and other evidence in this case?
>
> [Juror]: It might, yes.
>
> [Prosecutor]: Is there anything that you think would, that the Court could do to improve that for you?
>
> [Juror]: I do have a hearing aid. It's getting fixed. It should be done today.
>
> [Prosecutor]: Okay. Alright. Have you been able to hear everything I've said from the podium back here?
>
> [Juror]: Most of it, yes.

From this exchange and her responses to subsequent questioning, it is evident that the juror had only a moderate hearing impairment. In the remaining portion of the voir dire, she responded appropriately to several other questions posed by the court and the parties' counsel. Thus, it was reasonable for the court to conclude that, with her hearing aids, she would be able to hear and understand all of the proceedings at trial.

{¶22} Neither the State nor Appellant challenged the juror for cause or exercised a peremptory challenge to excuse her from service. Ultimately,

she was seated on the jury. Her hearing impairment was not raised again until the fifth day of trial shortly after the State began its cross-examination of Appellant. The following exchange with the court occurred:

[Judge]: Hold on for one second there. Juror number Eight (8), is there an issue involving a hearing aid right now? Ma'am? Is that what it is?

[Juror]: It's not working. I'm sorry.

[Judge]: Okay, well my concern is are you able to hear right now? Is your hearing aid malfunctioning?

[Juror]: I had to (inaudible).

[Judge]: Okay, is that something you're able to do here or is that something that you would have to take it somewhere in order to do that?

[Juror]: Yeah, can I step out here and adjust it?

[Judge]: Okay, is that something able to just take a few minutes? You can do that now? Okay. That would be fine. We're going to take a brief recess. We do have – just for the record – please rise – juror number eight is having an issue regarding a malfunction in her hearing aid. So we'll need a brief recess.

(JURY EXITS.)

(JURY ENTERS.)

> [Judge]: Okay, please be seated. Okay. We are back on the record in 16CR485, with all parties, counsel, and the jury present. And again, to make it clear for the record, there was a small issue involving a hearing aid regarding juror number eight, and the Court did ask, and she did confirm that the issue has been resolved. And again, there is certainly no cause for any sort of embarrassment. The most important thing is that you and everyone is able to hear.

{¶23} Appellant surmises from this exchange that the juror might not have heard material portions of the evidence at trial. The record, however, does not support this supposition.

{¶24} The only reasonable inference is that, but for a brief moment during the fifth day of trial, the juror was able to hear all of the trial proceedings. On the fifth day, the court promptly recognized that the juror was having difficulty and took a recess for her to fix her hearing aids, which she did. In order for Appellant to establish plain error, he must show there was an obvious defect in the proceedings—namely, in this case, that it was obvious that the hearing-impaired juror was unable to perceive and evaluate the evidence. *See State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) (plain error requires "an 'obvious' defect in the trial proceedings"). He has not carried that burden.

{¶25} Appellant heavily relies on the Supreme Court of Ohio's decision in *Speer*, but the facts in that case are distinguishable from the facts here. In *Speer*, the defendant was convicted of aggravated vehicular homicide and involuntary manslaughter. On appeal, he argued that the trial court abused its discretion in denying his challenge for cause of a hearing-impaired juror. During voir dire, the juror had said that the only way she could understand what someone was saying was to see their face and read their lips. She also did not understand sign language. The trial court denied the challenge for cause. To accommodate the juror's impairment, the court placed her in the front row and asked counsel to turn toward her when speaking so that she could read their lips.

{¶26} The appellate court found these accommodations insufficient to ensure the defendant received a fair trial. Its decision hinged on the fact that both the state and the defense relied on the recording of a 911 call as evidence relevant to whether defendant committed the charged offenses. *Id.* at ¶ 27. The state specifically argued that defendant's "calm tone" and "demeanor on the 9–1–1 tape" provided evidence of his guilt. *Id.* Obviously, even seated in the front row of the jury box, the juror was unable to perceive the tone and inflection of the voice on the 911 tape. The

appellate court therefore reversed the defendant's conviction. The Supreme Court of Ohio affirmed on the same grounds.

{¶27} In this case, the juror's impairment was not as severe as the impairment in *Speer*. There is no evidence that the juror in this case was unable to perceive a certain kind of evidence regardless of any accommodation that might be provided. Instead, the record is that, with functioning hearing aids, she could understand all of the testimony, evidence, argument of counsel, and instructions from the court. For that reason, *Speer* is not controlling in this case.

{¶28} Moreover, the record does not support Appellant's contention that the juror did not hear his testimony. The juror's issue with her hearing aids occurred shortly after the State began its cross-examination of Appellant. She did not indicate any problem with her hearing aids during Appellant's testimony on direct examination, after which the court recessed for a ten-minute break. After the break, the State had asked only background questions regarding Appellant's enrollment at Ohio University and where he had been staying when the trial court interrupted to address the juror. After the juror fixed the issue, the State recapped its prior examination regarding Appellant's residence and moved forward. Thus, to

the extent the juror missed any testimony, it was not material to the determination of Appellant's guilt.

{¶29} As Appellant has not shown any plain error by the trial court, his first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶30} In the second assignment of error, Appellant argues that he received ineffective assistance of counsel because his attorney did not object for cause or exercise a peremptory challenge to the hearing-impaired juror. In response, the State contends that Appellant has not shown that his counsel's performance was deficient and, even if so, the alleged deficient performance did not affect the outcome of the case. Since Appellant cannot show that his counsel's performance during voir dire affected the outcome of trial, his second assignment or error is overruled.

LEGAL STANDARD

{¶31} "To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial." *State v. Barnhart*, 4th Dist. Meigs Nos. 18CA8 and 18CA15, 2019-Ohio-1184, 2019 WL 1422870, ¶ 64, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Failure to

satisfy either part of the test is fatal to the claim." *State v. Gillian*, 4th Dist. Gallia No. 16CA11, 2018-Ohio-4983, ¶ 12, citing *Strickland* at 697, 104 S.Ct. 2052.

{¶32} The Supreme Court of Ohio has "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.' " *State v. Mundt*, 115 Ohio St. 3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1988). "Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors." *Miller v. Francis,* 269 F.3d 609, 620. (6th Cir. 2001).

> The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. * * * [T]he selection process is more an art than a science, and more about people than about rules." *Romero v. Lynaugh,* 884 F.2d 871, 878 (5th Cir. 1989).

For these reasons, the Supreme Court of Ohio has recognized that "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy*, 91 Ohio St.3d 516, 539, 747 N.E.2d 765 (2001).

ANALYSIS

{¶33} As discussed in our analysis of Appellant's first assignment of error, the record does not establish that the hearing-impaired juror was unable to perceive and understand the trial proceedings. As a result, Appellant cannot show that his counsel's decision not to object to that juror on the basis of her impairment had any effect on the outcome of the trial. *See Gillian* at ¶ 12. His second assignment of error is accordingly overruled.

ASSIGNMENT OF ERROR III

{¶34} In the third assignment of error, Appellant argues that the trial court violated his Sixth Amendment right to counsel because it did not permit him to speak with his attorney during a break in his testimony. The State argues that Appellant does not have an absolute right to consult with his attorney while he is on the witness stand. Moreover, the State contends the trial court was within its discretion when it declined Appellant's request to consult with his attorney during the brief recess taken during his testimony. The State's understanding of the relevant caselaw is correct. Accordingly, we overrule Appellant's third assignment of error.

LEGAL STANDARD

{¶35} Under the Sixth Amendment, a criminal defendant has a right to the effective assistance of counsel. A criminal defendant is denied this right

if his counsel provides deficient performance that prejudices his defense. *See Strickland*, 466 U.S. at 686; *see also Barnhart*, 2019-Ohio-1184 at ¶ 64. In addition, the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.*, citing *Geders v. United States*, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592] (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 [95 S.Ct. 2550, 45 L.Ed.2d 593] (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612–613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358] (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593–596 [81 S.Ct. 756, 768–770, 5 L.Ed.2d 783] (1961) (bar on direct examination of defendant).

{¶36} If a criminal defendant is subject to the " '[a]ctual or constructive denial of the assistance of counsel altogether,' " then prejudice is not required to establish a violation of his Sixth Amendment rights. *Perry v. Leeke*, 488 U.S. 272, 280, 109 S. Ct. 594, 600, 102 L. Ed. 2d 624 (1989), quoting *Strickland* at 692. However, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry* at 280. "He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have

the testimony interrupted in order to give him the benefit of counsel's advice." *Id*.

{¶37} The Supreme Court explained the reasoning behind this rule as follows:

> The reason for the rule is one that applies to all witnesses—not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.
>
> In other words, the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.' Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than

> inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney. "Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *Perry* at 281-83, quoting *United States v. DiLapi*, 651 F.2d 140, 151 (2nd Cir. 1981) (Mishler, J., concurring).

{¶38} In *Perry*, a jury convicted the defendant of participating in a murder, kidnapping and sexual assault. *Id*. at 274. The defendant testified in his own defense at trial. At the conclusion of his direct testimony, the trial court "declared a 15-minute recess, and, without advance notice to counsel, ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break." *Id.* After the recess, defendant's counsel moved for a mistrial. The trial court denied the motion on the grounds that the defendant "was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination." *Id.* On appeal, the Supreme Court of South Carolina affirmed the defendant's conviction.

{¶39} The federal district court granted a writ of habeas corpus, however, finding the defendant's Sixth Amendment right to counsel had been violated. The court of appeals reversed that decision and the Supreme

Court granted certiorari. The Supreme Court acknowledged its decision in *Geders*, in which it held that a trial court violated a defendant's constitutional right to counsel when it ordered him not to have any communications with counsel during an overnight, 17-hour recess taken during his testimony at trial. *See Geders*, 425 U.S. at 80. The Supreme Court distinguished the brief, 15-minute recess taken during the defendant's testimony, however, with the extended recess in *Geders*. It held that, while a court cannot deny a defendant all access to counsel over such a long period, it does have the "power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Id.* at 283–84. The Supreme Court further explained that the Constitution "does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." *Id*. at 284-85.

ANALYSIS

{¶40} The facts in this case are analogous to the facts in *Perry*. On the first day of trial, Appellant's counsel asked for the separation of witnesses. After discussion with the parties, the court granted the request, with the exception that H.L., the victim, would be allowed to remain in the

courtroom for the entire trial. During the recess taken to permit the juror to fix her hearing aids, a deputy sheriff prevented Appellant from speaking with his counsel. Defense counsel approached the bench and objected to being denied access to his client. The State argued that Appellant was testifying as a witness and therefore subject to the court's order directing the separation of witnesses. The trial court did not resolve the objection but informed the parties that it would not take another recess until after Appellant finished testifying.

{¶41} The recess occurred shortly after the State had begun its cross-examination—the same timing as the recess taken in *Perry*. The juror said that she would be able to fix her hearing aids in a "few minutes." Thus, it was similar in duration to the brief, 15-minute recess in *Perry*. Appellant was denied access to his counsel—pursuant to the separation-of-witnesses order—to ensure that the story he presented on direct was "measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *DiLapi,* 651 F.2d at 151.

{¶42} In sum, *Perry* is indistinguishable from this case in any material respect. Its holding therefore controls. The trial court had the power to deny defense counsel's request to speak with Appellant during the brief recess

taken during his testimony to allow a juror to fix her hearing aids. Appellant's third assignment of error is accordingly overruled.

ASSIGNMENT OF ERROR IV

{¶43} In the fourth assignment of error, Appellant contends the cumulative effect of his previously asserted errors denied him a fair trial and due process of law. "The cumulative-error doctrine states that a conviction will be reversed if the cumulative effect of all the errors in a trial deprive a defendant of the constitutional right to a fair trial, even though each alleged instance of error may not individually constitute cause for reversal." *State v. Lykins*, 4th Dist. Adams No. 18CA1079, 2019-Ohio-3316, ¶ 117-119, citing *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995); *State v. Jackson*, 4th Dist. Pickaway App. No. 11 CA20, 2012-Ohio-6276, at ¶ 51.

{¶44} We have not found any merit to any of Appellant's assignments of error. The cumulative-error doctrine therefore does not apply. Appellant's sixth assignment of error is overruled.

ASSIGNMENTS OF ERROR V AND VI

{¶45} Appellant contends in his fifth and sixth assignments of error that his conviction was against the sufficiency and manifest weight of the evidence, respectively. As neither contention has merit, we overrule Appellant's final assignments of error.

{¶46} "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). "The court must defer to the trier of fact on questions of credibility and the weight assigned to the evidence." *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶ 27, citing *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132.

{¶47} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. "We will not reverse a trial court's judgment as against the manifest weight 'if it is

supported by some competent, credible evidence.' " *Hardert v. Neumann*, 4th Dist. Adams No. 13CA977, 2014-Ohio-1770, ¶ 18, quoting *Nolen v. Rase*, 4th Dist. Scioto No. 13CA3536, 2013-Ohio-5680, ¶ 9, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 14.

{¶48} "Although a court of appeals may determine that a judgment is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland* at ¶ 132. The trier of fact is free to believe all, part, or none of the testimony of any witness, and we defer to the trier of fact on evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Dillard* at ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

ANALYSIS

{¶49} Appellant was convicted of rape under R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "Sexual conduct" 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).

{¶50} In this case, H.L. testified that Appellant forced himself onto her, held her down, and anally penetrated her despite the fact that she told him to leave and tried to move away from him. Appellant did not stop the assault until H.L. screamed twice. This testimony alone is sufficient to support Appellant's conviction under R.C. 2907.02(A)(2). As we have previously noted, "a rape conviction may rest solely on the victim's testimony, if believed, and that '[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction.' " *State v. Lykins*, 4th Dist. Adams No. 18CA1079, 2019-Ohio-3316, ¶ 48 (Aug. 12, 2019), quoting *State v. Horsley*, 4th Dist. No. 16CA3787, 2018-Ohio-1591, 110 N.E.2d 624, ¶ 74.

{¶51} In addition, " 'there is no requirement that testimonial evidence of sexual abuse must be corroborated by physical or other evidence.' " *State v. Maloney*, 2018-Ohio-316, 104 N.E.3d 973 (2nd Dist.), ¶ 61; *State v. Thomas*, 9th Dist. Summit No. 27580, 2015-Ohio-5247, ¶ 31 (stating that "physical evidence is not required to support a rape conviction against a

manifest weight challenge"). In this case, however, there was corroborating physical and other evidence.

{¶52} Ms. Stolar and Ms. Stotts each testified regarding the events surrounding the rape. They confirmed that H.L. contacted them that night and told them that she had been raped. They also corroborated H.L.'s testimony regarding the impact of the rape on her mental state that evening and in the days that followed. The emergency room doctor testified that when H.L. presented at the hospital he saw abrasions to her posterior fourchette. The doctor explained that there was more likely to be an injury to that area, "especially if someone's not ready to have sex." He also recalled H.L. being distraught and "felt very strongly that this is someone who just had something very bad happen to them." A forensic scientist with the Ohio Bureau of Criminal Investigation testified that Appellant's DNA was present as the contributor to the non-sperm fraction in the anal samples from H.L.'s rape kit.

{¶53} The State also presented text messages between Mr. Powell and Appellant on the night of the rape. They included vulgarities that Appellant directed toward H.L., which supported her testimony that he sexually assaulted her.

{¶54} Based on the above evidence, a rational trier of fact could have reasonably found all of the essential elements of rape proven beyond a reasonable doubt. Appellant's conviction also was not against the manifest weight of the evidence. The evidence presented was both competent and credible. As mentioned above, H.L.'s testimony was sufficient in itself to support a conviction, but in this case was also corroborated by substantial evidence. The location of Appellant's DNA on H.L. was consistent with her testimony. The jury was free to reject Appellant's version of events as implausible, as argued by the State on cross-examination. Having found that the State's evidence was neither insufficient nor against the manifest weight, Appellant's fifth and sixth assignments of error are overruled.

CONCLUSION

{¶55} In summary, we overrule all six of Appellant's assignments of error. The first assignment of error is overruled because Appellant has not shown that the trial court committed any plain error in its accommodation of the hearing-impaired juror. The second assignment of error is overruled because Appellant also cannot show that the inclusion of the hearing-impaired juror on the panel prejudiced his defense. The third assignment of error is overruled because Appellant did not have a right to consult his counsel during the brief recess taken during his testimony at trial. Having

found no merit to Appellant's first three assignments of error, he necessarily cannot show that the cumulative effect of those purported errors denied him a fair trial. Accordingly, we overruled Appellant's fourth assignment of error. Appellant's fifth and sixth assignments of error are overruled because there was competent and credible evidence supporting Appellant's rape conviction. This evidence included H.L.'s testimony, the testimony of her friends and medical personnel, and evidence obtained from the rape kit performed on the night of the assault. As none of Appellant's assignments of error have merit, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.