[Cite as *State v. Jallah*, 2015-Ohio-1950.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101773

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID M. JALLAH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-583360-A

BEFORE: Boyle, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 21, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, David Jallah, appeals from a judgment convicting him of gross sexual imposition. He raises three assignments of error for our review:

> 1. The verdict finding defendant David Jallah guilty of gross sexual imposition was against the manifest weight of the evidence.
>
> 2. The trial court committed error when it denied defendant's motion to suppress his oral statements.
>
> 3. The trial court committed structural error and violated the defendant's due process rights when it gave the following jury instruction: The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of **any** essential element of the offense charged. [Emphasis sic.]

{¶2} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶3} In March 2014, Jallah was indicted on four counts: one count of rape in violation of R.C. 2907.02(A)(2), one count of attempted rape in violation of R.C. 2923.02 and 2907.02(A)(2), one count of gross sexual imposition in violation of R.C. 2907.05(A)(1), and one count of kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motivation specification. Jallah pleaded not guilty to the indictment.

Motion to Suppress

{¶4} Prior to trial, Jallah moved to suppress oral custodial statements that he made to Cleveland State University police before he had counsel. He argued that his statements should be suppressed because he did not knowingly, intelligently, and

voluntarily waive his Fifth Amendment rights. He did not claim that he was not given the *Miranda* warnings. Rather, he asserted that because he was a foreign student at Cleveland State University, and his country of origin is Liberia, he "was not in a position to fully comprehend the constitutional protections provided in this country." The following evidence was presented at the hearing on the motion to suppress.

{¶5} Officer Steve Stats of the Cleveland State University Police Department testified that he received a radio call that there was a possible sexual assault that had occurred at Fenn Tower. Another officer was interviewing the alleged victim on the first floor when he arrived. Officer Stats went to Jallah's room on the 15th floor to talk to him. Officer Stats was accompanied by Officer O'Malley and Officer Voskul. Officer Stats asked Jallah to step out in the hallway so that he could talk to him. Officer Stats recorded his interactions with Jallah with his lapel camera. The video was played in court.

{¶6} While standing in the hallway outside of Jallah's room, Officer Stats told Jallah that they had a complaint from one of the students about some "misconduct" involving him. Officer Stats further told Jallah that this student was complaining about some "activity" that went on between herself and Jallah. Officer Stats asked Jallah if he was aware of anything "like this." Jallah responded, "no sir."

{¶7} Officer Stats then asked Jallah two questions: (1) where were you today? and (2) did you come across any females today? Jallah told Officer Stats that he did not talk to any females and that he had class and had been to the store.

{¶8} At that point, Officer Stats told Jallah that he had to detain him for questioning because there were serious allegations against him. Officer Stats further told Jallah that he had to advise him of his rights because he was detaining Jallah for questioning. Officer Stats told Jallah:

> You have the right to remain silent, anything you say can be used against you in a court of law, you have the right to an attorney, you can end your questioning at any time, you are free to stop answering questions, OK? So basically what I am telling you is, you know, talk to us if you want, if not, you have the right to remain silent, OK?

{¶9} Officer Stats said that when he read the *Miranda* warnings to Jallah, Jallah "shook his head slightly, but he didn't make any verbal confirmation" that he understood the warnings. Officer Stats testified that he wrote a report stating that Jallah indicated he understood the *Miranda* warnings because Jallah nodded his head "yes" that he did. At that point on the video, only a small portion of Jallah's head can be seen, but it does appear that Jallah shook his head when Officer Stats said "ok?" But Officer Stats did not explicitly ask Jallah if he understood the *Miranda* warnings.

{¶10} Officer Stats then asked Jallah if he had identification. Jallah responded that it was in his room. Officer Stats told Jallah to get his identification. They allowed Jallah to go in his room to get his identification, but Officer Stats followed Jallah into the room while he retrieved it.

{¶11} Once they got back out into the hallway, the three officers, Jallah, and a resident assistant stood and waited for Sergeant Joe Hunt of the Cleveland State University Police Department to arrive. Officer Stats did not ask Jallah any other

questions, but one of the other officers placed Jallah in handcuffs while waiting. Officer Stats testified that he stated in his report that he placed Jallah in handcuffs because Jallah was "behaving erratically." Officer Stats said that Jallah's "eyes were very wide, he seemed very fidget[y], kind of moving back and forth[,] [and] he kept looking towards an exit." Officer Stats testified that he was concerned that Jallah would attempt to leave the scene. But Officer Stats agreed on cross-examination that he and the other officers had positioned themselves such that they were standing on each side of Jallah, so he "wasn't going anywhere."

{¶12} The video shows Sergeant Hunt arriving to the scene. Sergeant Hunt asked Jallah if the other officers read him his rights. Sergeant Hunt then asked Jallah if he understood those rights. Officer Stats testified that when Sergeant Hunt asked Jallah those two questions, Jallah shook his head "yes." In the video (although it is not entirely clear because only part of Jallah can be seen), when Sergeant Hunt asked Jallah if the other officers read him his rights, Jallah first looked at Officer Stats and then it appeared that he shook his head, "yes." After being asked if he understood those rights, Jallah again appeared to shake his head "yes." Sergeant Hunt then asked Jallah if he wanted to talk to them about any criminal activity. Jallah responded, "yes, sir."

{¶13} Officer Stats testified that when Sergeant Hunt began questioning Jallah about the incident, Officer Hunt then decided that they needed to go to the station and interview Jallah there. Three officers walked Jallah down the hallway to the elevator. At one point on the elevator, Jallah asked, "am I ever coming back?" One of the officers

replied that they were going to the station where he could talk to the detectives.

{¶14} Scott Secor, a detective sergeant for the Cleveland State University police, testified that on March 6, 2014, he was called in to the station because of an alleged sexual assault allegation in one of the dormitories. He went to police headquarters where the defendant was already in custody. He, along with Officer Stats, interviewed Jallah at the station. The interview was recorded by a camera inside the interview room, as well as by Detective Secor's lapel camera. The video was played in court.

{¶15} Detective Secor stated that before interviewing Jallah, he read him his *Miranda* rights. Detective Secor told Jallah that he had the right to remain silent, that anything he said could and would be used against him in court, that he had the right to consult with counsel before he answered any questions, that he could have counsel present during any questioning, and that if he could not afford a lawyer one would be provided to him free of cost if he wanted one. Detective Secor then asked Jallah if he understood those rights that he just read to him. Jallah responded, "yes, sir."

{¶16} Detective Secor testified that he never noticed any language barrier between him and Jallah. Detective Secor never felt that he and Jallah had trouble communicating in any way throughout the questioning.

{¶17} Detective Secor agreed on cross-examination that he was not aware of Jallah's immigration status when he interviewed him.

{¶18} Jallah testified that he is from Liberia. He explained that Liberia was involved in a civil war that lasted for almost 20 years. Although the war officially ended

in "early 2000," it was still tense in Liberia. He explained that the political environment was still unstable.

{¶19} Jallah said that he first came to the United States when he was 9 years old; he was 21 years old at the time of the suppression hearing. He and his brothers came to the United States because of the war in Liberia. His father actually moved here when Jallah was young. When Jallah came to the states, he was placed in the fifth grade. He went to Euclid High School from 10th to 12th grade. When asked, "[d]o you have history classes there?" Jallah responded, "History? I don't really remember. I took history, every student has to take history."

{¶20} Jallah explained that in Liberia, children are taught to be submissive to their parents, teachers, and "the cops." He explained:

> At home, like my parents speak or something like that, I'm told to just sit there regardless of if you were wrong or right, just sit there and nod. Our school system, in school the teacher is allowed to hit you if you are being disruptive in class. We are not taught to speak out. It's that same mentality kind of transferred when I was arrested by the police. I thought if I — what's the word — if I cooperated, if I agreed with their request, it would allow me to go, which is what I did.

{¶21} Jallah testified that in Liberia, if you do not comply with the police, "they will just assault you worse than if you didn't say anything." Jallah said that although he was young when he was in Liberia, he has had family members tell him stories about police coming into their house at night and taking people and killing them.

{¶22} Jallah stated that when he asked the police officers on the elevator, "am I ever coming back," that he did not know what was happening. He said the "whole thing

seemed like a nightmare." Jallah stated that he did not know what "accusations" were, and he did not know why the police were reading him the *Miranda* warnings.

{¶23} On cross-examination, Jallah testified that he understood what "you have the right to remain silent" meant; he said it meant that he had the right "not to speak." He also said that he understood what "anything you say can and will be used against you" meant; he replied, "If I told you I didn't, I would be a liar." When asked again, "so you do understand that?" Jallah replied, "[t]hat's correct." When asked if English was his primary language, he responded, "somewhat."

{¶24} Jallah testified that there was another incident in 2010 where he was questioned by police, but he was not arrested.

{¶25} The court also questioned Jallah. Jallah told the court that in Liberia, every tribe had their own language. The court asked, "but isn't [Liberia] a country where slaves, they spoke English?" Jallah responded, "broken English." The court asked, "when you started school, were you taught English in Catholic school?" Jallah responded, "Oh — I guess so, I don't remember. I was like 5 or 6." Jallah further explained that when he came to the United States, he was in "the second language class" until middle school. He agreed that he spoke "some English" when he came to the United States. He further told the court that he speaks English in his home "sometimes." Jallah stated that he also speaks "Bondi." The court asked, "Now, in Liberia, is English the primary or secondary language?" Jallah responded, "It's primary, I suppose." He further told the court that most people speak English in Liberia, "but it's

not like the way we speak it."

{¶26} At the close of the hearing, the trial court denied Jallah's motion.

Jury Trial

{¶27} The case proceeded to a jury trial where the following evidence was presented.

{¶28} Barbara Gifford, a sexual assault nurse examiner, testified that the victim, S.A., came to the hospital around 9:00 p.m. on March 6, 2014, but she did not begin examining the victim until around 10:40 p.m. She stated that she reports a victim's statement exactly as the victim describes the incident. She explained that she asks the victim about the incident to find out where the victim is injured, and to collect evidence for the victim's case. In this case, the victim told Gifford:

> My friend Hannah was over. David stopped over to ask me if I talked to my friend at AT&T. Hannah left, then David started asking me if I had a boyfriend and if I was faithful. I told him yes. He asked, all the time, and I said yes. Then he said he just bought some condoms. Do you want to help me use them? I said no. Then he said why don't you just give me some head. I told him no. He tried to push my head down and I pushed it away from him. I was trying to call my friend Hannah to come back, but she put me on hold. Then David stuck his hands in my pants and stuck his finger inside me. He kept saying you're so wet, you want me. I told him to get off me. I got a hold of my friend James and told him to come over, I needed help. After I told James to come over right now, David let me go. He stormed out and went back to his room.

Gifford found no visible injuries on S.A.

{¶29} S.A. testified that on March 6, 2014, she was 17 years old and a sophomore at Cleveland State University. She lived in Fenn Tower on the 15th floor. Jallah lived beside her, in an adjacent room. S.A. testified that she had previously hung out with

Jallah one time prior to the incident. She said that one time she invited him to her room to hang out. When Jallah came to her room that previous time, they were alone for about 10 to 15 minutes, and then another friend joined them. S.A. said that she also helped Jallah purchase an iPhone for his cousin from S.A.'s friend who worked at AT&T. S.A. testified that she was never interested in Jallah "romantically," and he never expressed an interest in her romantically. S.A. considered Jallah more of an acquaintance, rather than a friend. S.A. said that she had never had an issue with Jallah prior to the incident on March 6, 2014.

{¶30} As to the March 6 incident, S.A. testified that her friend, Hannah, had been in her room around 6:15 or 6:30 p.m. When Hannah was leaving, Jallah was standing outside her door. S.A. said that Jallah smelled like marijuana. S.A. and Jallah began talking about phones because Jallah had broken his and wanted a phone from her friend at AT&T. While S.A. and Jallah were still talking about phones and Jallah was still standing in the hallway, he said, "so can I ask you a question?" She replied, "yes." He then asked her if she had a boyfriend. She told him that she did. He asked, "are you always faithful to your boyfriend?" She said that she was. He asked, "like always?" She said, "yes." He said, "so you currently have a boyfriend?" She replied, "yes."

{¶31} At some point when Jallah was asking her about her boyfriend, she asked Jallah if he was drunk or high. Jallah laughed and told her that he was not drunk or high. Jallah then told her that he had just "got some condoms," and asked her, "do you want to help me use them?" S.A. replied, "I have a boyfriend and I'm faithful." At

that point, S.A. attempted to close her door, but Jallah stopped her from doing so by putting his hands up to block the door from closing. Jallah said, "wait, can I ask you a favor?" S.A. replied, "no," at first, but then said, "what?" He asked her if she would give him "head." She replied, "no, you should go." Jallah then "kind of put his foot in the door," and said, "well, I'll make you a deal. I'm going to show it to you. If you like what you see, then you can give me head. If you don't, then I'll leave." She responded, "I would rather you not. I would rather you just go to your room."

{¶32} S.A. explained, "[a]t that point, he was in my room in front of the door, he closed the door and he pulled down his pants, he started feeling on himself." He told her that he was "so high" right then and "so horny" and that he wanted her "so badly." S.A. said that Jallah then grabbed the back of her head and "tried to make [her] give him oral sex." S.A. was able to get away from him. She called Hannah and asked her if she was going to come back upstairs, but then Hannah said that her dad was calling and that she would have to call her back. At that point, S.A. testified that Jallah had her arms behind her back and "was trying to shove his hands in the front of [her] underwear to [her] vagina." S.A. said that she had crossed her legs "so he couldn't get in there." Jallah then stuck his hands in the back of her "pants into [her] panties and was like grabbing on [her] butt." S.A. testified that Jallah then stuck his hands back in the front of her pants and even though she was still trying to keep her legs crossed, he got past her legs and "stuck his finger in [her] vagina."

{¶33} S.A. testified that throughout the entire time, she told Jallah to "stop" and

"get the fuck out of her room." Jallah had his hand "down there" and told her "you are so wet, your vagina is so open, you want me so badly." She replied, "no, I don't. I have a boyfriend." Jallah said, "your pussy is so wet." She said she was "still telling him to get the fuck off [her]." She said that she did not yell or scream, but she did raise her voice. She "made if very clear [she] wanted him to get off [her]."

{¶34} S.A. testified that she got one arm free and was able to call her boyfriend, James Jackson. Jackson worked at Rascal House Pizza, which was near her dorm. She told Jackson that she needed help and to come to her room. While she was talking to Jackson, she was yelling at Jallah to get "the fuck off [her]" and to get "the fuck out of [her] room." Jallah said, "I just had my finger in your pussy, I just fingered you, you want me, you want me." Jackson said that he would come, and Jallah left.

{¶35} After Jallah left, S.A. saw that Jallah had left his food in her room by her door. She said that she kicked it to the front of his door. He opened the door and asked her to put it in the refrigerator. She told him "no," and then went back to her room, and locked the door. Jackson arrived about three minutes after Jallah left.

{¶36} S.A. said that she texted Hannah about what happened. She and Hannah called her R.A., but could not reach him. So she called another R.A. who was on call, Mike. Mike and Erica then came to Fenn Hall to talk to her. S.A. could not remember how long it took for the police to get there. But she said that Jackson had to go back to work because he had taken a break to come to her room when she called him.

{¶37} S.A. gave the police a handwritten statement about what happened. The

police took her to MetroHealth Hospital to meet with a sexual assault nurse examiner.

{¶38} S.A. said that she "wasn't really scared of [Jallah], she was more annoyed and pissed off," because she had told him "no." She said that she was mad because Jallah disrespected her, her body, and her personal space. She said that at first, she asked him nicely to leave and go back to his room. When he did not do so, she was "really, really annoyed with him and really pissed off at the situation."

{¶39} On cross-examination, S.A. agreed that she never screamed to try to get someone's attention. She also agreed that when she called Hannah, she did not express fear to Hannah or tell Hannah that she needed help.

{¶40} S.A.'s friend, Hannah Simon, testified. She corroborated S.A.'s testimony regarding the events that involved her. Hannah said that she did not know Jallah. She recalled a man coming to S.A.'s room when she was leaving, but said that she could not identify him in court. She did recall that the man smelled like marijuana.

{¶41} Erica Henkin testified that she was a resident assistant at Cleveland State University. She assisted S.A. after S.A. reported the incident to her R.A.

{¶42} James Jackson testified that when S.A. called him on March 6, 2014, she he had a sense of anger and urgency in her voice. He heard S.A. say, "get the fuck off me, David," and "David, get the fuck out of my room."

{¶43} Officer Steve Stats testified when he got to Fenn Hall around 7:40 p.m., the alleged victim was on the first floor talking to Officer Madej. Officer Madej told Officer Stats to go to the 15th floor to detain Jallah for questioning. Officer Stats had

two other part-time officers with him. Jallah was in his room and came to his door. Officer Stats told Jallah that a female had alleged he committed "misconduct" against her. Officer Stats asked him where he had been that day and if he had any contact with any females. Jallah said that he had been to class and the store and that was it; he denied having contact with any females.

{¶44} Officer Stats testified that he placed Jallah in handcuffs after the initial questioning because he exhibited "erratic behavior," making lots of "gestures" and was kind of "shaky." Officer Stats was concerned that Jallah would leave because it appeared as if he kept looking for an exit.

{¶45} Officer Stats stated that he asked Jallah one more time if he had made any advancements on a female. Jallah's answer was the same. Officer Stats then waited for Sergeant Hunt to arrive to question Jallah about the incident.

{¶46} Sergeant Joseph Hunt testified that when he arrived at Cleveland State, Officer Madej gave him a brief description about what the victim alleged. Sergeant Hunt talked to the victim briefly about going to the hospital and then he went up to the 15th floor to talk to Jallah.

{¶47} When Sergeant Hunt got to the 15th floor, he asked Jallah if the officers had read him his rights and if he understood them. Sergeant Hunt stated that Jallah replied "yes" to both questions. Sergeant Hunt then asked Jallah if he wanted to talk, which Jallah replied that he did. Sergeant Hunt told Jallah that someone was accusing him of rape. Sergeant Hunt then asked Jallah if anything like that happened. Jallah replied

that he talked to his friend, S.A., and that things "got physical." Sergeant Hunt asked Jallah what he meant by physical. Jallah replied, "I thought she wanted me to do stuff and it's college, something like that." Jallah told Sergeant Hunt that the victim had told him that she did not want it to continue, so he left. Sergeant Hunt suggested they go to the station to talk so that they could be in a more private setting.

{¶48} Detective Scott Secor testified that he got involved in the case sometime in the evening of March 6, 2014. Detective Secor interviewed Jallah around 9:30 p.m. at the police station on the night of the incident. The video was recorded by Detective Secor's lapel camera. Detective Secor stated that the audio on the video is not that good, but he listened to it with "Bose high definition" headphones and wrote down everything that Jallah said.

{¶49} Detective Secor read Jallah his rights and asked him if he understood those rights. Detective Secor informed Jallah that there was a complaint against him made by S.A. Detective Secor asked Jallah if he knew S.A. Jallah explained how he knew her. Detective Secor then asked Jallah if he wanted to talk to him about it. Detective Secor testified that Jallah said, "I mean, I was feeling horny or whatever so I went over, you know, and tried to get, you know, get her to give me a blow job and she didn't want to, so she told me to leave, then I left." Jallah further stated, "I mean, like we liked to talk and stuff, you know. I thought, why not. I mean, she knows I like her."

{¶50} Jallah told Detective Secor that S.A. was flirting with him and "playing with" him, so that is why he "pulled out" his "junk." Jallah said that after he pulled out

his “junk,” S.A. was “still giggling,” so he went up to her and she pushed him away. Jallah responded by telling S.A., “come on, you know you want to.” Detective Secor asked Jallah if he ever attempted to put his hands down S.A.’s pants. Jallah responded, “I tried, but she wouldn’t let me.” Detective Secor asked Jallah if he ever got his penis in S.A.’s mouth; Jallah responded, “No, no, God, no. Oh, my God, I mean, I mean, like I wish.” Jallah did admit that his penis was exposed the entire time he was in S.A.’s room. Detective Secor asked Jallah again if he put his hands down S.A.’s pants. Jallah said “that’s what I was trying to do. She was like, stop.” Jallah also admitted that he tried to push S.A.’s head towards his penis for a blow job, but that S.A. said, “no.”

{¶51} On cross-examination, Detective Secor stated that he asked Jallah if he inserted a finger in her vagina. Jallah responded, “Oh, God, oh, God, yeah, yeah, I think, it felt like it, but I don’t think I put it in.”

{¶52} At the close of the state’s case, Jallah moved for a Crim.R. 29 acquittal that the trial court denied.

{¶53} Jallah testfied on his own behalf. Jallah testified that he had a “speech impediment” because he stuttered sometimes. Jallah explained that during stressful situations, his speech impediment is worse. It was also worse when he was younger.

{¶54} Jallah explained that he was from Liberia, but that he had been in the United States since February 18, 2002. Jallah was 9 years old when he came to the United States; he was 21 years old at the time of trial. Jallah testified that his English was “very fluent.”

{¶55} Jallah started at Cleveland State University and then transferred to Ohio University during his sophomore year, but then transferred back to Cleveland State during his junior year for financial reasons. He moved into his dorm room at Fenn Tower sometime after the semester started. He met S.A., his next door neighbor, at a Halloween party. Sometime before Christmas, he went to her dorm room to watch a movie with her.

{¶56} On March 6, 2014, Jallah stated that he was done with classes around 3:00 p.m. He said that he smoked some marijuana and then went to get Chinese food. When he came back, he was walking to his room and when he passed S.A.'s room, he heard what he thought was S.A. talking on the phone. He admitted that he was "high" at this point. He heard S.A. talking about a sexual encounter with "some dude." This conversation led him to knock on S.A.'s door. When he did, S.A. opened the door "and greets me with like, I think that flirty look that she always has." He did not recall seeing Hannah Simon coming out of S.A.'s room.

{¶57} Jallah said that when S.A. came to the door, he told her that he was "high as the F word" and that he wanted to "do something crazy." He walked in and "dropped [his] Chinese food." Jallah stated that he remembered walking in her room and his "junk" was out and he realized the door was still open and that anyone could see him. He said he removed his penis because of what he heard S.A. saying on the phone before he knocked on her door. He took his penis out "just to see what she would do." A guy he worked with told him that pulling your penis out is called "dropping anchor." This

same guy told him that some guys do it all the time.

{¶58} Jallah stated that he"tried to motion [S.A.'s] head down," but not forcefully. He recalled that S.A.'s head did not go down at all. S.A. moved away and said, "I'm not that kind of girl." S.A. then said, "you need to leave." Jallah said that he never intended to force S.A. to do anything. He was "standing there like playing with [himself]" and wanted S.A. to "give [him] head," but it never happened.

{¶59} Jallah said that he was "horny," and it seemed to him that S.A. did not know what to do. S.A. told him that she and her boyfriend broke up. S.A. made a phone call, but Jallah did not pay attention to what she was saying. But he did not think it had anything to do with him. While she was on the phone, he tried to put his hand in the front of her pants to see what she would do. S.A. "kind of flicks my right hand off." Jallah then tried to put his hand in the back of her pants, and that is when she said, "Stop, you need to leave." At that point, he realized she was serious and he left. Jallah said that he was not successful at putting a hand in S.A.'s pants, nor did he put his finger in her vagina.

{¶60} Jallah said that he went back to his room to take a nap. While he was in his room, S.A. knocked on his door. He said, "the door is open." S.A. opened his door. He thought she was there to check on him to make sure he was not mad at her. She gave him his Chinese food and left.

{¶61} Jallah testified that he thought that S.A. got mad at him, so she made up the story, without realizing how serious the accusations were.

{¶62} On cross-examination, Jallah testified that he did not think that he did anything wrong; he was just being persistent.

{¶63} At the close of his case, Jallah renewed his Crim.R. 29 motion for acquittal that the trial court denied.

{¶64} The jury found Jallah not guilty of rape, attempted rape, and kidnapping, but found him guilty of gross sexual imposition, a fourth-degree felony.

{¶65} The trial court sentenced Jallah to 158 days in jail, giving him credit for 123 days already served. It further sentenced Jallah to nine months of community control sanctions.

Manifest Weight of the Evidence

{¶66} In his first assignment of error, Jallah contends that his conviction is against the manifest weight of the evidence.

{¶67} Unlike sufficiency of the evidence, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id*., citing *State v. Robinson*, 162 Ohio St. 486, 487, 124 N.E.2d 148 (1955).

{¶68} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror." *Id.* In doing so, it 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶69} Jallah was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which provides that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force." Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶70} Jallah argues that the evidence against him was not credible in establishing gross sexual imposition. Jallah argues that there was no physical evidence of sexual assault. He points to the following facts that he asserts show that no sexual assault occurred. S.A. was able to make two phone calls during what she called a "sexual assault." S.A.'s friend, Hannah, testified that S.A. "warmly" entered into a conservation with Jallah as Hannah was leaving. Hannah further testified that when S.A. called her ten minutes after she left, S.A. did not seem panicked. S.A. testified that she was never afraid of Jallah. Jallah testified that when S.A. told him to leave, he did. Jallah

concludes that the evidence simply does not support a finding that he forced S.A. to do anything.

{¶71} In this case, the jury obviously believed Jallah that he never inserted a finger into S.A.'s vagina, never attempted to force S.A. to give him oral sex, and did not restrain S.A.'s liberty in any way. But the jury did believe S.A. that Jallah touched her buttocks against her will, thus supporting the gross sexual imposition conviction. As the trier of fact, the jury was free to believe all, part, or none of any witness's testimony. Moreover, "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury rejected the defendant's version of the facts and believed the testimony presented by the state." *State v. Hall*, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶ 28.

{¶72} After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we do not agree with Jallah that "in resolving conflicts in the evidence, the jury clearly lost its way and created a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387.

{¶73} Jallah's first assignment of error is overruled.

Motion to Suppress

{¶74} In his second assignment of error, Jallah contends that he was not properly advised of his *Miranda* rights. He further contends that he did not knowingly, voluntarily, or intelligently waive those rights.

{¶75} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In ruling on a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶76} "The Fifth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution guarantee that no person in any criminal case shall be compelled to be a witness against himself." *State v. Jackson*, 2d Dist. Greene No. 02CA0001, 2002-Ohio-4680, ¶ 19, citing *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In adopting the Fifth Amendment, the framers were concerned that "coerced confessions are inherently untrustworthy." *Id.* Suspects may waive their constitutional right against self-incrimination "provided that waiver is voluntary." *Id*. at ¶ 20, citing *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

{¶77} In *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d

694 (1966), the Supreme Court of the United States held that before questioning a suspect in custody, law-enforcement officials must inform the suspect (1) that he or she has the right to remain silent, (2) that his or her statements may be used against him or her at trial, (3) that he or she has the right to have an attorney present during questioning, and (4) that if she or she cannot afford an attorney, one will be appointed.

{¶78} To use a statement made by the accused during a custodial interrogation, the prosecution must show: (1) the accused was given the *Miranda* warnings before any interrogation, (2) upon hearing the warnings, the accused made an "express statement" that he or she desired to waive his or her constitutional rights, and that (3) the accused effected a voluntary, knowing, and intelligent waiver of those rights. *State v. Edwards*, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976) (overruled on other grounds), citing *Miranda*. Contrary to the second prong in *Edwards*, however, the United States Supreme Court held in recent years that the prosecution "does not need to show that a waiver of *Miranda* rights was express. An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." *Berghuis v. Thompkins*, 560 U.S. 370, 384, 130 S.Ct. 2250, 176 L.Ed. 2d 1098 (2010). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id*. at 384. That is because "the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."

Id.

{¶79} To determine whether a valid waiver occurred, a court must "consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment, and the existence of threat or inducement." *Edwards* at paragraph two of the syllabus.

{¶80} Normally, if a defendant "challenges a confession as involuntary, the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of the evidence." *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 34. But here, because Jallah was accused, inter alia, of rape and attempted rape and both of Jallah's interrogations were electronically recorded, his statements are presumed to be voluntary. R.C. 2933.81(B) (effective July 2010). This statute also shifts the burden to Jallah to prove that the statements were not voluntary. *Id*.

{¶81} We note at the outset that the issue of whether Jallah was in custody is not in dispute as the state never disputed that Jallah was not in custody. Moreover, the issue of whether the officers gave Jallah *Miranda* warnings is also not in dispute as Jallah did not assert in his motion to suppress or at the oral hearing on his motion that he was not given his *Miranda* rights. Nonetheless, a confession made after *Miranda* warnings may still be inadmissible if the waiver of rights was not made voluntarily, knowingly, and intelligently. Thus, the sole issue in this appeal is whether Jallah voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.

{¶82} In his written motion to suppress, Jallah argued that "as a foreign student at the university, whose country of origin is Liberia, [he] was not in a position to fully comprehend the constitutional protections provided in this country that are not provided in his own homeland." Thus, he maintained that "[h]is ability to fully grasp his rights calls into question whether [his] waiver was in fact a knowing, intelligent and voluntary act[.]" At the hearing on Jallah's motion to suppress, defense counsel argued at the outset that "the crux of our argument pertains not necessarily to whether or not the officers in this case properly read the *Miranda* warnings to my client prior to him making a statement[.]" Defense explained that "[i]t has more to do, Your Honor, with my client's understanding of the *Miranda* warnings that were read to him in the context of his personal situation." Accordingly, this court must determine whether Jallah understood his rights such that he was able to voluntarily, knowingly, and intelligently waive them.

{¶83} After the hearing on Jallah's motion, the trial court denied Jallah's motion to suppress. The trial court found that based on the totality of the circumstances, Jallah knowingly, voluntarily, and intelligently waived his rights to counsel and chose to speak to police. The court found that English is the official language of Liberia, and that Jallah had spoken English his entire life. The court further found that Jallah had been educated in the United States since he was nine years old. The court considered the fact that Jallah had a prior incident with police, where he was not arrested. The court found that the officers did not act "inappropriately or particularly aggressive." The court noted that the officers even allowed Jallah to go back in his dorm room, uncuffed, to look for

his identification. The court found that Jallah spoke English well, based on the court's observations. The court found that Jallah was college educated. The court found that "the officer went over his rights, then broke it down in the most simple and straightforward language," and that Jallah "nodded yes" that he understood his rights and then chose to speak to police. The court concluded that on both occasions, first to Officer Stats and then "even more so" to Detective Secor, that Jallah knowingly, voluntarily, and intelligently waived his rights after the officers read him his *Miranda* rights.

{¶84} After reviewing the totality of the circumstances, we find that the record supports the trial court's finding that Jallah voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. The interrogations were videotaped. The police were polite and accommodating to Jallah in every respect. At the time of the interrogations, Jallah was 21 years old and in his third year of college. He had prior experience with the criminal justice system, where he was questioned by police and not arrested. According to the videos, the police detained Jallah in the hallway outside his room for approximately 40 minutes before taking him to the police station; the interrogation at the police station lasted less than 20 minutes. Indeed, Jallah admitted on cross-examination that he understood what "you have the right to remain silent" meant; he said that it meant he had the right "not to speak." He also said that he understood what "anything you say can and will be used against you" meant; he replied, "If I told you I didn't, I would be a liar." When asked again, "so you do understand that?" Jallah

replied, "[t]hat's correct."

{¶85} Jallah came to this country when he was nine years old, already speaking English. Although he slightly stuttered (which according to Jallah, was more of an issue when he was younger), he clearly spoke and understood English very well. Further, the police did not employ improper techniques when questioning Jallah. The police never subjected Jallah to threats or physical abuse or deprived him of food, sleep, or medical treatment. Nor did the police make any promises to Jallah in return for his cooperation.

{¶86} To the extent that Jallah contends in his brief that Officer Stats did not properly advise him of his *Miranda* rights because he failed to advise him that if he could not afford an attorney one would be provided to him, we find that Jallah failed to raise this issue in either his written motion or at the oral hearing below. Accordingly, he has waived all but plain error on this issue. *State v. Peagler*, 76 Ohio St.3d 496, 499-501, 668 N.E.2d 489 (1996). We find no plain error. Even though Officer Stats failed to advise Jallah that an attorney would be provided to him if he could not afford one, Detective Secor fully advised Jallah of his rights and Jallah still chose to tell the police his version of what happened in the victim's dorm room.

{¶87} Accordingly, Jallah's second assignment of error is overruled.

Jury Instructions

{¶88} In his third assignment of error, Jallah raises an issue with one word of the jury instructions that the trial court read incorrectly to the jury. Jallah, however, failed to object to the given jury instruction. Pursuant to Crim.R. 30(A), the failure to object to a

jury instruction in a timely manner generally constitutes a waiver of any claimed error relative to the instructions unless the error amounts to plain error. Crim.R. 30 ("On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection"). Jallah contends, however, that the trial court committed structural error, which he asserts defies the harmless error analysis, by giving the following jury instruction: "The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of **any** essential element of the offense charged." (Emphasis sic.)

{¶89} In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court explained structural error as follows:

> In *Arizona v. Fulminante* (1991), 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302, 306-312,the United States Supreme Court denominated the two types of constitutional errors that may occur in the course of a criminal proceeding — "trial errors," which are reviewable for harmless error, and "structural errors," which are per se cause for reversal. *See State v. Esparza* (1996), 74 Ohio St.3d 660, 661-662, 1996-Ohio-233, 660 N.E.2d 1194. "Trial error" is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-308, 111 S. Ct. 1246, 113 L. Ed. 2d 302. "Structural errors," on the other hand, "defy analysis by 'harmless error' standards" because they "affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself." 113 L.Ed.2d at 309 and 310, 499 U.S. 279, 111 S.Ct. 1246. Consequently, a structural error mandates a finding of "per se prejudice." *See Campbell v. Rice* (C.A.9, 2002), 302 F.3d 892, 900 ("We * * * conclude that [the relevant error] amounted to a structural error, mandating a finding of prejudice per se").

Fisher at ¶ 9.

{¶90} If an error is assigned concerning a jury instruction, the reviewing court cannot take one portion of the instruction in isolation and review it without viewing it in the context of the entire jury charge. *State v. Price*, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979), paragraph four of the syllabus.

{¶91} Crim.R. 30(A) requires the court to "reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record." R.C. 2945.10(G) also mandates that "[w]ritten charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case." In this case, the record indicates that the written jury instructions were provided to the jury and are part of the record on appeal.

{¶92} After review, we do not agree with Jallah that the trial court's misreading of one word — in 38 pages of written jury instructions and over 20 pages of transcript — amounts to structural error.

{¶93} First, the written jury instructions, which the jury has with them in deliberations, stated the burden of proof properly. It stated: "The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged."

{¶94} Second, the trial court properly informed the jury with respect to each of the four offenses (rape, attempted rape, gross sexual imposition, and kidnapping) that the

state must prove "all the essential elements of the offense" as charged. It further informed the jury with respect to each offense: "If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of the offense * * *, the verdict must be not guilty according to your findings."

{¶95} Further, with respect to informing the jury about "multiple counts," the trial court again stated: "If you find that the state proved beyond a reasonable doubt all the essential elements of any one of the offenses charged in the separate counts of the indictment, your verdict must be guilty as to such offense or offenses, according to your findings." It then stated: "If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of any one of the offenses charged in the separate counts in the indictment, your verdict must be not guilty as to such offense or offenses."

{¶96} Finally, the jury acquitted Jallah of three of the offenses that he was charged with: rape, attempted rape, and kidnapping. The jury most certainly understood that the state must prove each element of the offense beyond a reasonable doubt before it could find Jallah guilty.

{¶97} Accordingly, we overrule Jallah's third assignment of error.

{¶98} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having

been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY