[Cite as *State v. Najar*, 2018-Ohio-5348.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106802

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NABIL NAJAR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-617751-A

BEFORE: Celebrezze, J., S. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 27, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Nabil Najar [1] ("appellant"), brings the instant appeal challenging his convictions and the trial court's sentence for rape and kidnapping. Specifically, appellant argues that he was denied his constitutional right to the effective assistance of counsel, the trial court's comments during trial deprived him of the right to a fair trial, his convictions were not supported by sufficient evidence and are against the manifest weight of the evidence, the trial court erred by denying his motion for a new trial, and his 11-year prison sentence is contrary to law. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} The instant matter arose from events that transpired between appellant and the victim, C.W., between February and March 2017. On February 27, 2017, C.W., who has a

history of alcohol and drug addiction, was dropped off at Lutheran Hospital for treatment. She did not check into the hospital at this time; rather, she walked down West 25th Street where she encountered appellant, who indicated that he could get alcohol for her.

{¶3} The victim remained with appellant for the next three weeks. During this period of time, appellant continued to provide alcohol to the victim. Furthermore, appellant and two of his friends (Caleb and Kenny) sexually abused the victim. Appellant took the victim to various places during the three-week span, including a shack in a homeless camp (February 27), an abandoned house on Train Avenue (February 28), and a house on West 48th Street.

{¶4} On March 19, 2017, the victim was able to call the police from the house on West 48th Street. First responders were able to locate the victim, and she was transported to MetroHealth Medical Center where she received treatment for the injuries she sustained from appellant. A rape-kit examination was also conducted.

{¶5} Appellant was ultimately arrested and charged for his conduct during the three-week period. On July 10, 2017, the Cuyahoga County Grand Jury returned a 14-count indictment charging appellant with nine counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(2) (Counts 1-5, 8, 9, 12, 13); gross sexual imposition, a fourth-degree felony in violation of R.C. 2907.05(A)(1) (Count 6); and four counts of kidnapping, first-degree felonies in violation of R.C. 2905.01(A)(4) (Counts 7, 10, 11, 14). Counts 7, 10, 11, and 14 contained sexual motivation specifications. Appellant was arraigned on July 13, 2017. He pled not guilty to the indictment.

{¶6} A jury trial commenced on November 27, 2017. At the close of the state's case, defense counsel moved for a judgment of acquittal pursuant to Crim.R. 29. The trial court

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[1] The record reflects that appellant also goes by the name "Nick" and the nickname "Nikolay." (Tr. 457, 618.)

granted the motion with respect to the rape offense charged in Count 8, and denied the motion as it pertained to all other counts.

{¶7} The defense presented the testimony of five witnesses. Thereafter, the defense rested and renewed the Crim.R. 29 motion, which the trial court denied.

{¶8} The jury returned its verdict on December 1, 2017. The jury found appellant not guilty on Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, and 11. The jury found appellant guilty on Counts 12, 13, and 14. The trial court ordered a presentence investigation report and set the matter for sentencing.

{¶9} On December 15, 2017, appellant filed a motion for a new trial, arguing that he was entitled to a new trial based on juror misconduct. The trial court held a hearing on appellant's motion on December 29, 2017. At the close of the hearing, the trial court denied appellant's motion for a new trial pursuant to Evid.R. 606(B).

{¶10} The trial court held a sentencing hearing on January 9, 2018. The trial court sentenced appellant to a prison term of 11 years on both rape counts and the kidnapping count. The trial court ordered the counts to run concurrently, for an aggregate prison term of 11 years. The trial court determined that appellant was a Tier III sex offender/child offender registrant, and reviewed appellant's reporting requirements.

{¶11} On February 7, 2018, appellant filed the instant appeal challenging the trial court's judgment. He assigns five errors for review:

> I. The guilty verdict cannot be upheld because the appellant received ineffective assistance of counsel thereby violating his Sixth Amendment right to counsel.
>
> II. The guilty verdict cannot stand because the trial court was not a neutral party, thereby violating appellant's constitutional rights.
>
> III. The guilty verdict cannot be upheld because the evidence and testimony

presented at trial did not establish the appellant guilty beyond a reasonable doubt as to Count(s) twelve (12), thirteen (13), and fourteen (14).

IV. The trial court erred by failing to grant the appellant's motion for a new trial.

V. The trial court's sentence was contrary to law.

II. Law and Analysis

A. Ineffective Assistance of Counsel

{¶12} In his first assignment of error, appellant argues that he was denied his constitutional right to the effective assistance of counsel.

{¶13} In order to establish a claim of ineffective assistance of counsel, a defendant must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where one prong of this test is not satisfied, a reviewing court need not address the other. *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), citing *Strickland* at 697. A properly licensed attorney enjoys a presumption of competence, and the person alleging ineffective assistance of counsel has the burden of establishing the deficiency. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988).

{¶14} In the instant matter, appellant argues that his trial counsel provided ineffective assistance during the state's opening statement. Specifically, appellant contends that counsel's performance was deficient for failing to object to the prosecutor's assertion that he had "a prolonged period of incarceration following the period of time relevant in this case." Appellant's brief at 18.

{¶15} During opening statements, the prosecutor asserted, in relevant part,

> You'll hear from the officers that apprehended [appellant] on March 31[, 2017]. [The victim's 911] call was made on March 19th; [appellant] was arrested on March 31st.
>
> You'll also hear that at some point, [the victim] went missing again; from the period of time of June 26th to July 10th, after [appellant] had been in custody for a period of a few months.

(Tr. 369.)

{¶16} As an initial matter, we note that the decision of whether to object is a "tactical decision." *State v. Frierson*, 2018-Ohio-391, 105 N.E.3d 583, ¶ 25 (8th Dist.), citing *State v. Johnson*, 7th Dist. Jefferson No. 16 JE 0002, 2016-Ohio-7937, ¶ 46. "Accordingly, 'the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel.'" *Frierson* at *id*., quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 103. Furthermore, the trial court instructed the jury that opening and closing statements were not evidence and that "evidence does not include any statement of counsel made during trial." (Tr. 934.)

{¶17} Nevertheless, after reviewing the record, we find no merit to appellant's ineffective assistance claim. Appellant contends that based on the prosecutor's assertion that appellant "had been in custody for a period of a few months," and counsel's failure to object thereto, the jury "believed that despite the lack of credibility of the witnesses, [appellant] *must* be convicted of something, as he has been incarcerated for the prolonged period of time." (Emphasis sic.) Appellant's brief at 18-19. We disagree.

{¶18} The record reflects that appellant's ineffective assistance claim fails under the second *Strickland* prong because he cannot establish a reasonable probability that but for counsel's failure to object to the prosecutor's opening statement, the outcome at trial would have been different. As set forth in further detail in the analysis of appellant's third assignment of

error, the victim testified in detail about the rape and kidnapping offenses charged in Counts 12, 13, and 14.

{¶19} Based on the foregoing analysis, appellant's first assignment of error is overruled.

B. Impartiality of Trial Court

{¶20} In his second assignment of error, appellant argues that his constitutional rights were violated because the trial court was not an impartial, neutral party.

> **{¶21}** When exercising its duty to interrogate witnesses under Evid.R. 614(B), "the judge must be cognizant of the effect of his [or her] comments upon the jury[.]" *State v. Wade*, 53 Ohio St.2d 182, 187, 373 N.E.2d 1244 (1978), *vacated on other grounds*, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978).
>
> [I]t is incumbent upon the judiciary to remain detached and neutral in any proceeding before it. *State v. Hardy*[, 11th Dist. Portage No. 96-P-0129, 1997 Ohio App. LEXIS 4588 (Oct. 10, 1997)]. When determining whether or not a trial judge's comments were appropriate, a reviewing court must decide whether the remarks were prejudicial to a defendant's right to a fair trial. *Wade* at 188; *Hardy* at 20.

State v. Blazer, 8th Dist. Cuyahoga No. 93980, 2010-Ohio-6367, ¶ 49.

{¶22} In the instant matter, appellant takes issue with a statement the trial court made during defense counsel's opening statement. Defense counsel asserted that the evidence would show that the victim made up the allegations against appellant in order to account for her extended absence from her family, her failure to complete treatment, and/or the fact that she was not sober. The following exchange took place:

> [Defense counsel]: I just want to take a brief moment to tell you about what happens when an accusation is made, even a false one. The Cleveland police and the State of Ohio treat allegations of sex crimes —
>
> THE COURT: Just one moment.
>
> [Defense counsel]: Sure.
>
> THE COURT: Let's move on. I don't think there is going to be evidence on this.

[Defense counsel]: No problem.

(Tr. 380.) Defense counsel continued,

> [Defense counsel]: False allegations are damaging for the wrongfully accused and the truly victimized alike. False allegations are corrosive and cancerous —
>
> THE COURT: I don't think we're going to have any evidence on that. Let's go to the evidence in this case.

(Tr. 382.)

{¶23} Appellant argues that the trial court's assertions that "I don't think there is going to be evidence on this" and "I don't think we're going to have any evidence on that" constituted an expression of the court's opinion of the evidence that violated his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and deprived him of a fair and impartial jury trial. Appellant contends that the trial court's statements "very clearly outlin[ed] for the jury that there would be no evidence to support a consent defense, and thereby violat[ed] [the court's] duty to remain a neutral party through the course of the trial." Appellant's brief at 21. Finally, appellant argues that the trial court's comments informed the jury that there would be no valid defense of consent.

{¶24} As an initial matter, we note that defense counsel did not object to the trial court's statements as being prejudicial to appellant's constitutional rights. Accordingly, appellant has waived all but plain error.

{¶25} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Reviewing courts should invoke the plain error doctrine with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Jenks*, 61 Ohio St.3d 259, 282, 574 N.E.2d

492 (1991); *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Plain error does not exist unless but for the error, the outcome of the proceeding would have been different. *Jenks* at 282; *Long* at paragraph two of the syllabus.

{¶26} After reviewing the record, we find no basis upon which to conclude that the trial court's remarks were inappropriate, prejudicial, or deprived appellant of a fair trial. Appellant's argument is premised entirely on the following two assumptions. First, appellant assumes that the trial court's statement — "I don't think we're going to have any evidence on *that*" — was referring to false allegations made by the victim, rather than the manner in which the police or prosecution handle allegations of sex crimes. Second, appellant assumes that the trial court's statement — "I don't think we're going to *have any evidence*" — was an indication that the evidence did not exist (in other words, that there was no evidence that the victim made up the allegations against appellant) rather than meaning that such evidence would not be admitted at trial. These assumptions are unsupported by the record.

{¶27} The trial court provided the following instruction to the jury following closing arguments: "if the Court said or did anything that you took to be my view of the facts, I instruct you to disregard it because this case is solely yours to decide." (Tr. 1042.) A jury is presumed to follow the trial court's instructions. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995).

{¶28} Based on the foregoing analysis, we cannot conclude that the trial court displayed any bias against appellant, and appellant has not met his burden of showing that plain error occurred in this case. Appellant's second assignment of error is overruled.

C. Sufficiency and Manifest Weight of the Evidence

{¶29} Appellant's third assignment of error challenging his convictions encompasses

both sufficiency and manifest weight issues, which involve different standards of review. A careful review of appellant's arguments, however, reflects that he is primarily challenging his convictions on manifest weight grounds. Nevertheless, we will apply both standards.

{¶30} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶31} Appellant argues that "there was no evidence to support a finding that [he] raped [C.W.], both vaginally and anally, and kidnapped her, between the dates of March 12, 2017 and March 19, 2017." Appellant's brief at 22. Appellant's argument is unsupported by the record.

{¶32} The victim testified that appellant took her to an abandoned house on West 48th Street. She was at this house the night before she was found by first responders on March 19, 2017. Appellant left her in a closet inside the house and made sure that no one looked at or spoke with her. The victim testified that on the night of March 18, appellant raped her anally and vaginally. She confirmed that she did not want appellant to perform either the anal or vaginal sex acts, and that she tried to physically resist appellant.

{¶33} The victim testified that appellant restrained her by slamming her head into the wall, grabbing her left arm, twisting her arm around her back, and holding her arm down on her back. The victim explained that she started yelling, but appellant covered her mouth and pressed her head into the floor.

{¶34} The victim provided the following description regarding the manner in which appellant was able to remove her pants before he anally raped her:

> [w]hen we were in the closet and we were struggling, [appellant] was yelling. He turned me around and pulled my pants down and I tried fighting. He grabbed my arm and he pulled it behind my back and he pressed down. My head was a little bit out of the [closet] doorway, and I started yelling, and crying and he covered my mouth.

(Tr. 600.)

{¶35} The victim's testimony, if believed, is sufficient to establish that appellant committed the rape and kidnapping offenses charged in Counts 12, 13, and 14. Accordingly, appellant's convictions were supported by sufficient evidence. Appellant's third assignment of error is overruled in this respect.

{¶36} Appellant also challenges his convictions on manifest weight grounds.

> In contrast to a challenge based on sufficiency of the evidence, a manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion. [*Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, at ¶ 13]. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a "thirteenth juror" and may disagree "with the factfinder's resolution of * * * conflicting testimony." [*Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541], citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Weight of the evidence involves "the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility and determine whether, in resolving conflicts in the evidence, the trier of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at *id*., quoting *Martin* at *id*.

State v. Bradford, 8th Dist. Cuyahoga No. 105217, 2017-Ohio-8481, ¶ 28.

{¶37} In the instant matter, appellant argues that there is no evidence of rape or kidnapping because the victim's testimony was wholly unreliable and unbelievable. Specifically, regarding the victim's credibility, appellant emphasizes that she (1) suffers from severe mental health issues, (2) was not taking her medications to address these issues, (3) suffers from addiction, and (4) was abusing various substances during the relevant time period. Appellant further contends that the victim's testimony was not credible because she had access to her iPhone and iPad, but did not use them to try and escape from appellant, nor did she try and escape during the multiple occasions that she and appellant were in public places.

{¶38} The record reflects that appellant would occasionally take the victim with him to various public places during the relevant time period. For instance, appellant took the victim to the Clark Recreation Center (February 27, 2017) and St. Malachi Church to use the shower facilities. Appellant also took the victim to Scrap Mart on more than one occasion (February 28, 2017; March 2, 2017; and March 9, 2017) where he would "cash in" metal, pipes, and other items he took from abandoned houses. (Tr. 452-453.)

{¶39} The victim did try to escape from appellant and the shack in which he was keeping her. She attempted to flee on foot at nighttime, but she stepped into a "rabbit hole" and cut her foot. (Tr. 528.)

{¶40} When defense counsel suggested that the victim could have escaped from appellant when they separated to use the men's and women's shower facilities at St. Malachi, the victim testified that appellant "was telling people to watch [her], look over [her]." (Tr. 531.) She explained that she did not end up taking a shower at St. Malachi because she had a panic attack. (Tr. 530.)

{¶41} The victim explained why she did not scream for help or try to run away at the Clark Recreation Center or Scrap Mart: "[e]very place that we had gone to everyone seemed to know [appellant] and they were speaking in a different language and laughing, and he would tell me that if I went anywhere that there were people who would hurt me worse." (Tr. 581.) Furthermore, regarding the fact that she did not attempt to escape from appellant's captivity, the victim testified that she suffers from anxiety and an overactive central nervous system, and as a result, "[s]ometimes [she] can't walk, [her] legs get numb, [her] fingers get numb. [She] can't move." (Tr. 581.)

{¶42} The victim testified that when she left the treatment center, she had her iPad and iPhone in her backpack. She explained that her iPhone was charged, but her iPad was not. The victim used her iPhone to call her father and 911 on February 28, 2017. She also used her iPhone to call 911 on March 19, 2017, the day she was found. She did not make any other phone calls. The victim did not have access to her backpack and cell phone at all times between February and March 2017. She explained that when appellant took her to the house on West 48th Street, her bag was in the house on Train Avenue.

{¶43} Appellant also contends that the victim's testimony was contradicted by other evidence. Michael Good, appellant's neighborhood friend, testified that he saw appellant and the victim together on several occasions. Good described the behavior of appellant and the victim as "[b]oyfriend-girlfriend[.]" (Tr. 874.) Appellant argues that Good's testimony contradicts the victim's testimony that she was scared of appellant and that he was holding her against her will.

{¶44} The victim testified that appellant used a knife to cut an "X" on her wrist. Appellant argues that the victim's testimony is not credible because Jessica Feichtner, a sexual

assault nurse examiner at MetroHealth Medical Center, did not document any such injury during her examination of the victim.

{¶45} The victim testified that she could not remember whether she told Feichtner about the cut appellant made on her wrist. However, she testified that she did show the cut to Cleveland Police Detective Richard Tusing. Detective Tusing confirmed that appellant "cut [the victim's] hand, the letter "X" on her hand." (Tr. 733.)

{¶46} The record reflects that the victim's testimony about the rape and kidnapping offenses that occurred at the West 48th Street house was supported by the testimony of Jacklin Vannoy, Feichtner, Detective Tusing, and the DNA evidence.

{¶47} First, Vannoy who is employed by the city of Cleveland as a paramedic, testified that when she first encountered the victim, the victim was able to walk with some difficulty, and "she had some old bruising down her lower extremities and some on her arms, and she looked undernourished, tired, and severe stress, emotional distress." (Tr. 389.) She explained that as soon as they got the victim into the ambulance, the victim was crying and shaking. The victim became more emotional when she started telling her story. Vannoy testified that the victim gave her account of the incident involving appellant as they transported her to the hospital. She explained that as they got closer to the hospital, the victim became "profusely incontinent." Vannoy opined that this was a sign that the victim had been under emotional distress and experienced some stressful event. (Tr. 393.) The victim was concerned because she did not know where appellant was. Vannoy assured her that the police and hospital security would protect her, but the victim was "very concerned about it and was crying about it." (Tr. 395.)

{¶48} Second, Feichtner examined the victim on March 19, 2017. The victim advised Feichtner that her assailant's name was "Nick" and his nickname was "Nikolay." (Tr. 618.)

{¶49} Feichtner testified about the information the victim provided to her:

> I asked [the victim] if there was vaginal penetration by the assailant's fingers; she stated yes. With his penis; she stated yes. With an object; she stated no. If there is anal penetration by the assailant's fingers, she stated no. Penis; she stated yes. Object; she stated no.
>
> Oral penetration by the assailant's fingers; she stated no. Penis; she stated yes. Assailant's mouth on [victim's] genitals; she stated yes. Ejaculation; she stated yes. I asked her where. She said "in me."
>
> Lubrication including saliva; she stated yes. I asked her where; she stated on my vagina. On vagina.
>
> Strangulation; she stated yes.

(Tr. 618-619.) Regarding the time frame of the assaults the victim reported, Feichtner testified that "in [the victim's] specific case, I believe this was something that was ongoing." (Tr. 619.)

{¶50} The victim provided the following narrative, in relevant part, to Feichtner during the March 19 examination:

> "[Victim] states: 'Today I was at H's house.' Clarified he is [appellant], 'Has been keeping me there for a few days. * * *
>
> "[Victim] states: '[Appellant] was kissing, licking, and biting my right breast. Every time he got up, he pushed my chest.'
>
> "[Victim] states: 'He was on top of me and assaulted me.' Clarify with [victim]: Rectal penetration.
>
> "[Victim] states: 'He would twist my arm and hold it behind my back.'
>
> "[Victim] states: 'He told me: Give it a kiss, b[****]. Suck it, b[****].'
>
> "[Victim] states: 'I charged my phone enough to call for help so the police could find me.'"

(Tr. 624.) Feichtner documented in her report that the victim's emotional status was "tearful and shaking." (Tr. 625.)

{¶51} Third, Detective Tusing testified that he attempted to interview the victim on

March 19, but she was "too emotionally upset" to speak with him. (Tr. 706.) He explained that the victim was shaking, crying, and appeared to be in pain. He was able to interview her on March 30. During this interview, the victim identified appellant from the photo lineup with "one hundred percent positivity." (Tr. 721.)

{¶52} Fourth, Jeffrey O'Block, a DNA analyst in the Cuyahoga County Regional Forensic Science Laboratory, testified that he tested the victim's rape kit, comparing the samples collected during the rape-kit examination to a reference swab containing appellant's DNA. O'Block asserted that the victim's vaginal swabs contained a mixture of DNA from appellant and the victim. (Tr. 695.) He stated that the victim's rectal swabs contained a mixture of DNA from appellant and the victim. (Tr. 698.)

{¶53} After reviewing the record, we cannot say that this is "an exceptional case" in which the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's convictions were against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The victim testified in detail about her substance abuse issues, the fact that she was abusing alcohol and drugs between February and March 2017, and her mental health conditions. The jury had sufficient information to judge the victim's credibility, and the credibility of each witness, and the jury "was free to believe all, part, or none of the testimony of each witness." *State v. Colvin*, 10th Dist. Franklin No. 04AP-421, 2005-Ohio-1448, ¶ 34; *State v. Smith*, 8th Dist. Cuyahoga No. 93593, 2010-Ohio-4006, ¶ 16. The jury was in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections that are critical observations in determining the credibility of a witness and his or her testimony. *State v. Clark*, 8th Dist. Cuyahoga No. 94050, 2010-Ohio-4354, ¶ 17, citing

State v. Hill, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996), and *State v. Antill*, 176 Ohio St. 61, 66, 197 N.E.2d 548 (1964).

{¶54} The evidence in this case does not weigh heavily against appellant's convictions. The important aspects of the victim's testimony remained largely consistent over time, including the identity of appellant as one of her attackers and his role in the rapes and kidnapping that occurred in the West 48th Street house.

{¶55} Appellant's third assignment of error is overruled in this respect.

D. Motion for New Trial

{¶56} In his fourth assignment of error, appellant argues that the trial court erred by denying his motion for a new trial.

{¶57} This court reviews a trial court's ruling on a motion for a new trial for an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995). An abuse of discretion indicates that the trial court's ruling was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶58} Appellant filed his motion for a new trial on December 15, 2017. Therein, he argued that he was entitled to a new trial "due to recently discovered misconduct by a juror during deliberations." Specifically, appellant alleged that one of the jurors, juror M.L., had medical experience as a former emergency department nurse and influenced the jury in regards to the cause of some of the victim's bruises and whether the bruises appeared to be newer or older.

{¶59} Appellant submitted two affidavits from jurors in the criminal trial in support of his motion for a new trial. First, the affidavit of juror S.C. averred, in relevant part,

> 2. * * * the jury members were split about [appellant's] guilt as to Counts 12 through 14.

> 3. One juror who advocated for a guilty verdict on the last three counts was [M.L.], an oncology nurse at a University Hospitals of Cleveland. [M.L.] told my fellow jurors and me that she previously had worked as an emergency room nurse and that she had a lot of experience seeing bruises in the emergency room, especially from domestic violence situations.
>
> 4. [M.L.] told members of the jury that, based on her experience, some of the bruises on the body of [the victim] were old and others were new. Also, [M.L.] said that, based on her experience, certain bruises in photographs of [the victim's] body were caused from someone grabbing her.

Affidavit of juror S.C., filed on January 8, 2018.

> **{¶60}** Second, the affidavit of juror M.G. averred, in relevant part,
>
> 3. * * * I wasn't 100% convinced that any of the [victim's] bruises were new (meaning caused the same day as the photographs were taken), but juror [M.L.] was very insistent that the bruises were from [appellant] holding [the victim] down from behind. Since [M.L.] had a medical background, I believed her opinion, and this led to me voting guilty on Counts 12, 13, and 14.

Affidavit of juror M.G., filed on December 28, 2017.

{¶61} The trial court held a hearing on appellant's motion for a new trial, but the hearing was limited to arguments by both sides on their written filings. At the close of the hearing, the trial court enforced Evid.R. 606(B) and denied appellant's motion for a new trial. Furthermore, the trial court opined that juror M.L.'s conduct was not improper. (Tr. 1094.)

{¶62} "A firmly established common-law rule flatly prohibits the admission of juror testimony to impeach a jury verdict." *State v. Hessler*, 90 Ohio St.3d 108, 123, 734 N.E.2d 1237 (2000), citing *State v. Robb*, 88 Ohio St.3d 59, 79, 723 N.E.2d 1019 (2000). This principle is reflected by Evid.R. 606(B), also known as the "aliunde rule," which governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict. *Id*. Evid.R. 606(B) provides,

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.

The *Hessler* court went on to explain,

> [t]he purpose of the aliunde rule is to maintain the sanctity of the jury room and the deliberations therein. *State v. Rudge* (1993), 89 Ohio App.3d 429, 438-439, 624 N.E.2d 1069, 1075-1076. The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties. The rule requires a foundation from nonjuror sources. Thus, we have held that "the information [alleging misconduct] must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75, 564 N.E.2d 54, 61.

Hessler at 123.

> "Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." That principle "protects the privacy of a jury's deliberations from inquiry and promotes the finality of jury verdicts." Exceptions exist when an "extraneous influence" is involved. Thus, under Evid.R. 606(B), a juror can testify about a threat, bribe, or attempted threat or bribe, or improprieties by a court officer.

State v. Jester, 8th Dist. Cuyahoga No. 83520, 2004-Ohio-3611, ¶ 40, quoting *Tanner v. United States*, 483 U.S. 107, 117, 127, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), *State v. Mason*, 82 Ohio

St.3d 144, 167, 694 N.E.2d 932 (1998), and *State v. Adams*, 141 Ohio St. 423, 48 N.E.2d 861 (1943).

{¶63} After reviewing the record, it is evident that the affidavits appellant submitted in support of his motion for a new trial do not offer evidence of any improper extraneous influence, such as a threat, bribe, attempted threat or bribe, or any improprieties of an officer of the court. The affidavits also do not offer evidence that a juror relied on racial stereotypes or animus to convict a defendant. *See Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017). As such, the exceptions to Evid.R. 606(B) are inapplicable in this case.

{¶64} Based on the foregoing analysis, we find no basis upon which to conclude that the trial court's judgment denying appellant's motion for a new trial based on purported juror misconduct was unreasonable, arbitrary, or unconscionable. Accordingly, appellant's fourth assignment of error is overruled.

E. Trial Court's Sentence

{¶65} In his fifth assignment of error, appellant argues that the trial court's 11-year prison sentence is contrary to law.

{¶66} This court reviews felony sentences under the standard set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. R.C. 2953.08(G)(2) provides that when reviewing felony sentences, a reviewing court may increase, reduce, or modify a sentence, or it may vacate and remand the matter for resentencing, only if we clearly and convincingly find that either the record does not support the sentencing court's statutory findings or the sentence is contrary to law. *State v. Martin*, 8th Dist. Cuyahoga No. 104354, 2017-Ohio-99, ¶ 7. A sentence is contrary to law if the sentence falls outside the

statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13.

{¶67} As an initial matter, we note that defense counsel filed a sentencing memorandum arguing that Counts 12, 13, and 14 should merge as allied offenses for sentencing purposes. The trial court ultimately rejected defense counsel's argument and did not merge these counts at sentencing. Appellant does not challenge the trial court's determination that the counts did not merge in this appeal.

{¶68} Appellant argues that the trial court's 11-year prison sentence is contrary to law because "the record does not support a finding that this sentence complies with [R.C.] 2929.11." Appellant's brief at 29. Specifically, pursuant to R.C. 2929.11(B), appellant contends that his 11-year sentence is not consistent with the sentences imposed for similar crimes committed by similar offenders. He appears to argue that he should have received the minimum three-year prison sentence. Appellant also argues that his sentence is contrary to law pursuant to R.C. 2929.11(A) because the 11-year sentence is not the minimum sanction that would accomplish the purposes of protecting the public and punishing him.

{¶69} In sum, appellant argues that his sentence is contrary to law because the trial court failed to consider the sentencing factors set forth in R.C. 2929.11. After reviewing the record, we disagree.

{¶70} "R.C. 2929.11 and 2929.12 are not fact-finding statutes, and a trial court is not required to make specific findings on the record regarding its consideration of those factors nor state its reasons for imposing a maximum sentence or a particular sentence within the statutory

range." *State v. Delp*, 2017-Ohio-8879, 100 N.E.3d 1194, ¶ 41 (8th Dist.), citing *State v. Seith*, 8th Dist. Cuyahoga No. 104510, 2016-Ohio-8302, ¶ 12, and *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 11. In fact, unless the defendant affirmatively shows otherwise, it is presumed that the trial court considered the relevant sentencing factors under R.C. 2929.11 and 2929.12. *Keith* at *id.* This court has held that a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under R.C. 2929.11 and 2929.12. *State v. Paulino*, 8th Dist. Cuyahoga No. 104198, 2017-Ohio-15, ¶ 37.

{¶71} In the instant matter, the trial court's 11-year sentences on the first-degree felony rape and kidnapping counts are within the permissible statutory range set forth in R.C. 2929.14(A)(1). The trial court's sentencing journal entry provides, in relevant part, "[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Aside from this notation in the trial court's sentencing entry, the record reflects that the court did, in fact, consider both R.C. 2929.11 and 2929.12 when sentencing appellant.

{¶72} During the sentencing hearing, the trial court stated that it considered the seriousness and recidivism factors set forth in R.C. 2929.12. (Tr. 1138.) Regarding the applicable R.C. 2929.12(B) factors that indicated appellant's conduct was more serious than conduct normally constituting the offenses, the trial court explained that (1) the victim's physical and mental injuries caused by appellant's conduct were exacerbated by her history of mental health problems, and (2) the victim suffered serious psychological harm as a result of the rape and kidnapping offenses. Regarding the applicable R.C. 2929.12(C) factors that indicated

appellant's conduct was less serious than conduct normally constituting the offenses, the trial court considered that the victim induced or facilitated some of the offenses.

{¶73} Regarding the applicable R.C. 2929.12(D) and (E) factors indicating whether appellant is likely to reoffend in the future, the trial court found there are no factors indicating that recidivism was unlikely and that at least two factors indicated that appellant was likely to reoffend in the future — appellant's extensive history of criminal convictions, including some offenses of violence, and the fact that appellant has not responded favorably to sanctions imposed for criminal convictions.

{¶74} The trial court also stated that it considered the R.C. 2929.11 sentencing factors during the sentencing hearing. The court explained,

> [t]he court emphasizes that it is not basing its sentence today upon [appellant's] race, ethnic background, gender, or religion. But rather, I address the overriding purposes of felony sentencing, which is to punish the offender, and to protect the public from future crimes. And of course to do those things without imposing an unnecessary burden on state or local government resources.

(Tr. 1141.) The trial court found that there was "a great need to incapacitate [appellant]" emphasizing that he has a long history of criminal conduct, suffers from addiction, and has committed violent crimes in the past.

{¶75} After thoroughly reviewing the factors under R.C. 2929.11 and 2929.12, the trial court imposed 11-year prison sentences on each count, concluding that the sentences are "commensurate with the seriousness of [appellant's] conduct and its impact on the victim, and I also believe consistent with sentences imposed for similar crimes. And certainly the sentence is not demeaning to the seriousness of his conduct." (Tr. 1142.)

{¶76} Based on the foregoing analysis, we find that the trial court's 11-year prison sentence is not contrary to law. The 11-year sentence is within the permissible statutory range

under R.C. 2929.14(A)(1), and the trial court considered the principles and purposes of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. Appellant's sentence is not contrary to law simply because he disagrees with the way in which the trial court weighed the R.C. 2929.11 and 2929.12 factors and applied these factors in crafting an appropriate sentence. *See State v. Mock*, 8th Dist. Cuyahoga No. 105060, 2017-Ohio-8866, ¶ 21.

{¶77} Appellant's fifth assignment of error is overruled.

III. Conclusion

{¶78} After thoroughly reviewing the record, we affirm appellant's convictions and the trial court's sentence. Appellant was not denied his constitutional right to the effective assistance of counsel; the trial court's comments during opening statements did not deprive appellant of his right to a fair trial; appellant's convictions were supported by sufficient evidence and not against the manifest weight of the evidence; the trial court did not err in denying appellant's motion for a new trial; appellant's sentence is not contrary to law.

{¶79} Judgment affirmed.

It is ordered that appellee recover from appellant 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 convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR