

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 107777  
 v. :  
 :  
 DON M. HEARD, :  
 :  
 Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: July 18, 2019**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-17-624270-A

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*Appearances:*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Marcus A. Henry, Assistant Prosecuting Attorney, *for appellee*.

Mark A. Stanton, Cuyahoga County Public Defender, and Francis Cavallo, Assistant Public Defender, *for appellant*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Don Heard, appeals from his rape conviction following a jury trial. He raises the following assignments of error for review:

1. There was insufficient evidence produced at trial to support a finding of guilt on all counts.

2. Appellant's convictions were against the manifest weight of the evidence.

3. Appellant was denied his Sixth Amendment right to the effective assistance of counsel in his trial.

4. The cumulative errors committed during trial deprived appellant of a fair trial.

{¶ 2} After careful review of the record and relevant case law, we affirm Heard's conviction.

### **I. Procedural and Factual History**

{¶ 3} In December 2017, Heard was named in a six-count indictment, charging him with three counts of rape in violation of R.C. 2907.02(A)(2), and three counts of kidnapping in violation of R.C. 2905.01(A)(4), each with a sexual motivation specification. The matter proceeded to a jury trial in July 2018, where the following evidence was adduced.

{¶ 4} In 2017, Heard, then 22 years old, began a romantic relationship with K.D. ("Mother"), who had two minor daughters, L.D. and E.D. During her relationship with Heard, K.D. was involved in divorce proceedings with her ex-husband, El.D. ("Father"). Father was designated as the children's residential parent and Mother was granted visitation rights. Father's fiancée, L.G., testified that Mother was experiencing financial difficulties during 2017, and periodically lived in hotel rooms.

{¶ 5} E.D. (d.o.b. 02/10/03) testified that in the summer of 2017, she was 14 years old. During this relevant time period, Mother did not have permanent

housing and “would bounce around going from motels, my grandmother’s house, or [my oldest] sister.” E.D. testified that she and L.D. frequently spent nights in hotel rooms during their scheduled visits with Mother. However, when Mother could not stay at a family member’s home or could not afford a hotel room for the evening, they would sleep in Mother’s van. E.D. testified that she first met Heard in December 2016. E.D. stated that she liked Heard and that they shared common interests given their relative proximity in age.

{¶ 6} E.D. testified that over time, Heard began doing things that made her feel “uncomfortable.” On the first occasion, Heard asked E.D. if she was wearing underwear while they were together at a mall. On the second occasion, Heard was alleged to have “touched [E.D.’s] vagina with his hand” while they were in Mother’s van one evening. E.D. testified that Mother was sleeping in the back of the van at the time of the incident. When asked to describe Heard’s specific actions, E.D. stated that Heard placed his hand inside her underwear and penetrated her vagina with his fingers. The incident lasted approximately 45 seconds and E.D. “stayed still” because she was “in shock of what was happening.” Once Heard removed his hand, he “grabbed the back of [E.D.’s] neck and pushed [her] head down” towards his penis. E.D. testified that Heard made her “give him oral until he ejaculated.” E.D. stated that she did not fight back or tell Heard “no” because she was scared.

{¶ 7} On a third occasion, E.D. was staying overnight with L.D., Mother, and Heard in a hotel room located in Westlake, Ohio. Earlier in the evening, Heard and Mother went to a nightclub together and had been drinking. E.D. testified that

when Heard returned to the hotel room, he approached her as she was sleeping in a bed with L.D. Heard then “pulled the blanket off of [E.D.] and [gave her] oral.” E.D. explained that Heard’s “mouth touched her vagina.” The following morning, E.D. was washing her face in the hotel room sink when Heard “grabbed her” and “moved her” into the bathroom. Heard then pulled down E.D.’s sweatpants and inserted his penis into her vagina until he ejaculated. E.D. stated that she did not fight Heard off or tell him to stop because she was scared her sister would see or hear what was occurring. She further stated that she was afraid and “felt like [she] couldn’t talk, move, or anything.”

{¶ 8} E.D. testified the she did not immediately tell anyone about the incident because she was “nervous to say something about it” and did not “want to explain what happened.” Eventually, however, E.D. told Mother about what had occurred. E.D. stated that Mother began crying and went to confront Heard. However, when Mother returned from speaking with Heard, she was angry with E.D. and left to spend the evening with Heard. Several days later, E.D. told her younger sister, L.D., about what Heard had done to her in the hotel room bathroom. L.D. testified that E.D. warned her “not to tell anyone.” Despite E.D.’s request, however, L.D. eventually told father’s fiancée about the incident, who immediately filed a police report. L.D. testified that she told L.G. “because it was the right thing to do.”

{¶ 9} Det. Rosanna McCoy of the city of Westlake Police Department was assigned to investigate the sexual assault allegations levied against Heard. In the

course of her investigation, Det. McCoy separately interviewed Mother, L.G., L.D., E.D., and Heard. Det. McCoy testified that she conducted her first interview of E.D. at her high school. Det. McCoy stated that E.D. was initially “stubborn” and unwilling to provide any information. Ultimately, however, E.D. disclosed to Det. McCoy that Heard had sexually assaulted her in a hotel room. She then memorialized her statement in writing.

{¶ 10} Following the initial interview at E.D.’s high school, Det. McCoy met with E.D. at the police department. Det. McCoy testified that E.D. wanted to share additional information that she did not provide in her initial statement. On this occasion, E.D. discussed the incidents where Heard had sexually abused her in Mother’s van and in her hotel bed the evening before the alleged vaginal rape occurred.

{¶ 11} Det. McCoy testified that she interviewed Heard after he was arrested on a warrant issued in connection with this case. Det. McCoy testified that Heard acknowledged spending time with E.D., but denied touching E.D. He further denied ever spending the night with Mother and E.D. in the hotel located in Westlake, Ohio.

{¶ 12} Mother testified on behalf of the defense. In contrast to the testimony provided by E.D., Mother testified that Heard was never left alone with her children. Mother stated that she did not believe E.D.’s accusations because “[she] never left [E.D.] alone.” Mother further testified that E.D. never told her about the alleged incidents of sexual assault. Mother explained that she indirectly learned about the allegations based on what E.D. had communicated to Mother’s oldest daughter. She

testified that if E.D. would have told her about the sexual assaults, she would have done something about it and would have notified Father.

{¶ 13} At the conclusion of trial, the jury found Heard guilty of rape in violation of R.C. 2907.02(A)(2), to wit: vaginal penetration, as charged in Count 5 of the indictment. He was found not guilty of all remaining charges. Heard was sentenced to six years in prison.

{¶ 14} Heard now appeals from his conviction.

## **II. Law and Analysis**

### **A. Sufficiency of the Evidence**

{¶ 15} In his first assignment of error, Heard argues his convictions were not supported by sufficient evidence.

{¶ 16} When assessing a challenge to the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶ 17} It is well established that the elements of an offense may be proven by direct evidence, circumstantial evidence, or both. *See State v. Durr*, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991). Direct evidence exists when “a witness testifies about a matter within the witness’s personal knowledge such that the trier of fact is not required to draw an inference from the evidence to the proposition that it is offered to establish.” *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 13. Circumstantial evidence, on the other hand, is evidence that requires “the drawing of inferences that are reasonably permitted by the evidence.” *Id.* *See also State v. Hartman*, 8th Dist. Cuyahoga No. 90284, 2008-Ohio-3683, ¶ 37 (“Circumstantial evidence is the proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind.”).

{¶ 18} In this case, Heard was found guilty of rape in violation of R.C. 2907.02(A)(2). The rape statute provides that “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” R.C. 2907.02(A)(2).

{¶ 19} On appeal, Heard argues there was insufficient evidence to prove “that the sexual conduct alleged between [Heard] and E.D. was forcible.” Heard contends that “the state offered no evidence to show either physical or psychological compulsion sufficient to overbear E.D.’s will.” Heard notes that E.D. testified that she did not tell Heard to stop and did not “do anything to indicate she was anything other than a willing participant.”

{¶ 20} “The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other.” *State v. Eskridge*, 38 Ohio St.3d 56, 58, 526 N.E.2d 304 (1988). “Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.” *State v. Fowler*, 27 Ohio App.3d 149, 154, 500 N.E.2d 390 (8th Dist.1985).

{¶ 21} In this case, E.D. testified that she did not want to have vaginal sex with Heard. Nevertheless, Heard “grabbed” E.D. by her arm, “moved” her into the bathroom, “pushed” her against the wall, and “pulled” her sweatpants down to facilitate the vaginal rape. We recognize that E.D. did not attempt to fight Heard off or verbally tell him to stop. However, E.D. explained that she “froze” in that moment because she was “afraid.” She testified that she felt like she could not “talk, or move, or anything.” Viewing this testimony in a light most favorable to the prosecution, we find a rational trier of fact could conclude beyond a reasonable doubt that E.D.’s will was overcome by fear. Accordingly, we find Heard’s rape conviction is supported by sufficient evidence.

{¶ 22} Heard’s first assignment of error is overruled.

### **B. Manifest Weight of Evidence**

{¶ 23} In his second assignment of error, Heard argues his convictions were against the manifest weight of the evidence.

{¶ 24} A manifest weight challenge questions whether the state met its burden of persuasion. *State v. Freeman*, 8th Dist. Cuyahoga No. 106374, 2018-Ohio-3587, ¶ 18. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 388, 678 N.E.2d 541. An appellate court will reverse a conviction as against the manifest weight of the evidence only in the most exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶ 25} Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is best able “to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24.

{¶ 26} In challenging the weight of the evidence supporting his conviction, Heard argues that E.D.’s testimony “was rife with inconsistencies, represented by variances between her trial testimony and the several other accounts she had given

to investigators.” Relying on the jury’s finding of not guilty on all other counts, Heard contends that the record conclusively demonstrates that E.D.’s allegations were factually unsound and lacked an indicia of credibility.

{¶ 27} After careful consideration, we are unable to conclude that this is the exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice such that a new trial should be ordered. In this case, defense counsel thoroughly and effectively cross-examined E.D. regarding statements she made to the police during the investigation that were inconsistent with her testimony at trial. For instance, defense counsel developed testimony that E.D. was often inconsistent with her timeline of events and never told the police about certain aspects of her trial testimony, including the alleged incident in the mall or the oral sex committed in Mother’s van. In addition, the record reflects that defense counsel carefully attempted to impeach E.D.’s credibility by questioning her about how Mother and L.D. could have slept through these alleged instances of sexual assault that were committed in their “close proximity.” Thus, it is evident that the trier of fact had all relevant and necessary information before it when assessing the credibility of E.D.’s trial testimony.

{¶ 28} This court has routinely held that in assessing the credibility of proffered testimony, “the jury may take note of any inconsistencies and resolve them accordingly, ‘believ[ing] all, part, or none of a witness’s testimony.’” *State v. Burks*, 8th Dist. Cuyahoga No. 106639, 2018-Ohio-4777, ¶ 48, quoting *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio

St. 61, 67, 197 N.E.2d 548 (1964). In our view, the fact that Heard was found not guilty of other rape offenses does not invalidate the weight of the evidence supporting the vaginal rape conviction. Rather, it only demonstrates that the jury carefully considered the evidence and the weight of the testimony in rendering its verdict. Deferring to the jury's assessment of credibility, we find Heard's conviction is supported by the manifest weight of the evidence.

{¶ 29} Heard's second assignment of error is overruled.

### **C. Ineffective Assistance of Counsel**

{¶ 30} In his third assignment of error, Heard argues defense counsel rendered ineffective assistance of counsel by failing to adequately prepare for trial. Heard contends that defense counsel (1) "appears to have neglected any effort to interview the main witnesses against Heard," and (2) called Mother as a defense witness without speaking to her until the trial was already well underway.

{¶ 31} To establish ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonable representation and (2) that he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 32} In deciding a claim of ineffective assistance, reviewing courts indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, and defendants must therefore overcome the presumption that the challenged action might be considered sound trial strategy. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland*.

{¶ 33} After a thorough review of the record in this case, we are unable to conclude that defense counsel was unprepared to try the case. While defense counsel made a conscious effort to disclose that he had not interviewed or previously met the state's witnesses before trial, it appears this was a tactical decision and not an act of neglect as Heard suggests. From this record, it is clear that defense counsel was attempting to demonstrate that his cross-examination was not predicated on any prior conversations with the witnesses, but instead relied solely on the perceived inconsistencies in the testimony they presented to the jury. Unquestionably, defense counsel had a full understanding of the witnesses' prior statements to police officials and effectively used cross-examination and closing arguments to highlight any variances between these prior statements and the evidence introduced at trial. As reflected in the jury's not guilty verdict on Heard's remaining offenses, defense counsel's strategy proved successful, at least in part. Under these circumstances, we cannot say counsel was ineffective for failing to interview state witnesses prior to trial.

{¶ 34} Moreover, we are unpersuaded by Heard's suggestion that counsel rendered deficient performance by calling Mother as a defense witness. In our view,

Mother's testimony that she never left E.D. alone with Heard and that she did not believe E.D.'s allegations against Heard, can only be interpreted as beneficial to Heard's defense. We recognize that Mother provided unfavorable testimony during her cross-examination regarding past injuries she had sustained as a result of Heard's physical abuse. However, viewing the record in its entirety, we are unable to conclude that this portion of Mother's testimony undermined the confidence of the jury verdict.

{¶ 35} Based on the foregoing, we find Heard has failed to establish that his trial counsel was ineffective or that he was prejudiced by any deficient representation by counsel. Heard's third assignment of error is overruled.

#### **D. Cumulative Error**

{¶ 36} In his fourth assignment of error, Heard argues the cumulative errors committed during the trial deprived him of a fair trial. He contends that "even if this court were to find that none of the errors presented individually amounted to reversible error, the combination of these prejudicial errors as outlined above casts doubt on the impartiality of the jury and undermines the necessary confidence in the outcome of the trial."

{¶ 37} Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623. The doctrine of cumulative error, however, does not apply "when the alleged errors

are found to be harmless or nonexistent.” *State v. Allen*, 8th Dist. Cuyahoga No. 102385, 2016-Ohio-102, ¶ 53, citing *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 48.

{¶ 38} Because this court has found Heard’s assigned errors to be meritless, we find the cumulative error doctrine is inapplicable. Accordingly, Heard’s fourth assignment of error is overruled.

{¶ 39} 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 of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending 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.

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EILEEN T. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and

LARRY A. JONES, SR., J., CONCUR