

ORIGINAL

NO. 13-0910

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 97804

STATE OF OHIO,
Plaintiff-Appellant

-vs-

JAMES TATE, II,
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR IS A CASE OF GREAT PUBLIC OR GENERAL INTEREST

This felony case involves a substantial constitutional question or is a case of great public or general interest because sufficient circumstantial evidence was presented at trial identifying the accused as the perpetrator, including video in which the accused is shown with the victim and her companions at the time of the crime, the accused's video recorded confession, and the accused's testimony at trial that he walked away from the library with the victim and asked the victim for oral sex. Therefore, the absence of an in-court identification of the accused should not preclude his conviction where sufficient evidence is presented at trial identifying the accused as the person about whom the witnesses are testifying.

STATEMENT OF THE CASE AND THE FACTS

In May 2011, James Tate II was indicted on two counts of Kidnapping, pursuant to R.C. 2905.01(A)(2) and R.C. 2905.01(A)(4), with sexual motivation and sexually violent predator specifications; one count of Abduction under R.C. 2905.02(A)(1); one count of Importuning, under R.C. 2907.07(B); one count of Gross Sexual Imposition ("G.S.I."), under R.C. 2907.05(A)(1); and one count of Public Indecency, under R.C. 2907.09(A)(1). On December 5, 2011, the trial court found Tate guilty of two counts of Kidnapping, one count of Importuning, one count of G.S.I., and one count of Public Indecency and sentenced Tate to prison for an aggregate of seven years. Tate appealed, and on February 21, 2013, his convictions were reversed and vacated. *State v. Tate II*, 2013-Ohio-570. On March 1, 2013, the State filed an application for reconsideration and en banc consideration of the court of appeals' decision, followed by the instant memorandum in support of jurisdiction.

At trial, evidence was presented that on February 12, 2012, 14 year old B.P., (*victim*), went to the Euclid Public Library with two female companions, T.W. and L.J. T.W. and L.J. entered the library while B.P. remained outside. B.P. was approached by an adult male who told her that there was a study group located away from the library, behind the nearby tennis courts. Believing that she was going to be shown the location of the study group, B.P. walked away from the library with the man who soon began talking to B.P. about her body, telling her that “she could make a lot of money in one night.”

T.W. and L.J. observed B.P. walking away from the library with the man and called out to her. But rather than return, B.P. signaled for her friends to follow. The man led B.P. to an area behind the entrance to the Euclid Memorial Pool where he told her that he wanted to make sure she was “committed to the business” and grabbed B.P.’s arm and pulled her to her knees. The man unzipped his pants, removed his penis and rubbed B.P.’s hand against it. B.P.’s phone buzzed at this point and she got off the ground claiming that her mother was at the library. B.P. and the man walked back toward the library and encountered T.W. and L.J. The man told B.P. that her friends did not need to know what had occurred. Afterward, the man gave B.P. and her companions his business card and fliers bearing the name James Tate, and a cell phone number. B.P., T.W. and L.J. then walked back to the library with the man following some distance behind.

Once inside the library, B.P. recounted the events to her companions who urged her to report the incident to the police. The three females left the library for the Euclid Police Station, noting that the man was seated at a computer inside the library.

B.P. and her companions reported the incident to Euclid Police who responded to the

library and observed the male described by the females still seated at a computer. Police dispatch called the phone number listed on the flier that the man had given to the three females and the suspect male answered. The male was subsequently identified as James Tate, II.

As stated, the trial court found Tate guilty of two counts of Kidnapping, one count of Importuning, one count of G.S.I., and one count of Public Indecency and sentenced him to an aggregate prison sentence of seven years. Tate appealed, and on February 21, 2013, the Eighth District Court of Appeals reversed the trial court's judgment and vacated Tate's conviction, stating as follows:

*"As in Cleveland Metroparks however, the witnesses who had direct contact with the perpetrator, B.P., T.W. and L.J., were never asked to identify the appellant in court and never viewed a photo array in which they identified the appellant as the perpetrator. As such, the trial court erred in denying appellant's Crim. R. 29 motion as to all counts."*¹ *State v. Tate II*, 2013-Ohio-570, at ¶14.

On March 1, 2013, the State filed an application with the Eighth District Court of Appeals for reconsideration and en banc consideration of its decision. On April 26, 2013, the State's applications were denied, and the instant appeal to the Ohio Supreme Court followed.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law I. In-court identification of the accused is not required to secure a conviction where sufficient circumstantial evidence was presented at trial identifying the accused as the person about whom the witnesses were testifying.

On appeal, Appellant, Tate argued that the state had failed to present sufficient evidence at trial to support his convictions. The court of appeals did not find the evidence insufficient for any of the reasons assigned and argued by the Appellant; however, it did find, *sua sponte*, that "there

was not sufficient evidence, circumstantial or otherwise, that the appellant was “the man” repeatedly referenced in the testimony of the victim and her two friends.” *State v. Tate*, 2013 - Ohio- 570, at ¶13. Specifically, the court stated:

“There is absolutely no explanation on the record for the state’s failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.” *Id.*, ¶13.

The court of appeals cited its decision in *State v. Melton*, 8th Dist. No. 87186, 2006–Ohio–5610, (holding that “[t]he failure to conduct an in-court identification is not fatal to the state’s case when the circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying”). *Id.* at ¶13. Moreover, the trial record is replete with evidence that Tate was the person about whom the witnesses were testifying; for example:

- Security video provided by the library, which shows James Tate II interacting with B.P., T.W., and L.J at or around the time of the offense;
- The victim, B.P., identified Tate’s business card and a flier bearing Tate’s cell phone number as the materials that she received from “the guy” in the video;
- On cross-examination, Tate’s attorney asked B.P., “[A]fter you got in the library, was Mr. Tate, the defendant, in the library also? B.P. answered, “Yes.”;
- T.W. and L.J. identified fliers bearing Tate’s cell phone number as the papers that “the man” handed to them outside the library;

1 *Cleveland Metroparks v. Lawrence*, 2012-Ohio-5729, at ¶ 13.

- T.W. and L.J. identified Tate's Clear Choice Picture ID Card as the card that Tate had shown to them outside the library;
- Euclid Police Officer Beese identified Tate as the male he observed outside the library with B.P., T.W., and L.J. on Saturday, February 12, 2011;
- Officer Beese testified that when he later went into the library, and upon seeing the male, asked the police dispatcher to call the phone number listed on the fliers given to B.P., T.W., and L.J., the male's phone rang and the male answered.
- Beese testified that when he approached and asked the male for permission to see who the call was from, the male consented, and Beese observed that the last call had been from the police dispatch number.
- When Tate was searched incident to arrest, Officer Beese recovered an RTA Fare Card and a Clear Choice ID Card, which bore Tate's name and photograph;
- In a video-taped interview with Detective Novitski, James Tate II confessed that he had been outside the library with B.P. and that he had asked B.P. for oral sex. Tate's video confession was admitted into evidence at trial.
- At trial, Tate admitted that he walked away from the library with B.P. to the area around Memorial Pool where he asked B.P. for oral sex.

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, 1997-Ohio-52, 678 N.E.2d 541. Despite the breadth of evidence identifying Tate as the man about whom the witnesses were

testifying, the court of appeals concluded that the finder of fact clearly lost its way. *State v. Jackson*, 8th Dist. No. 86542, 2006-Ohio-1938, ¶ 29.

Notwithstanding the evidence cited above, which includes Tate's own testimony identifying himself as the person about whom the victim and her companions were testifying, the court of appeals found that the evidence of Tate's identity was insufficient. This, in effect, indicates that the Eighth District Court of Appeals has determined that a conviction cannot be obtained without an in-court identification of the accused, irrespective of the evidence produced at trial as to the accused's identity.

The decision in, *Metroparks v. Lawrence*, 2012 -Ohio- 5729, which the appellate court cited in its decision, is very similar to the instant case. In *Metroparks*, like the case sub judice, the reviewing court outwardly acknowledges the proposition that "[t]he failure to conduct an in-court identification is not fatal to the state's case when the circumstances of the trial indicate that the accused is indeed the person about whom the witnesses are testifying" *State v. Melton*, 2006-Ohio-5610; *State v. Shinholster*, 2011-Ohio-2244. *Id.* at ¶15. And like the case at bar, the Court in *Metroparks* concluded that "[i]n this case, there was not sufficient evidence, circumstantial or otherwise, that the appellant was the person whom Miss Rowland and Miss Difiore claim menaced them." *Id.* ¶16. As a result, the court determined that because "Miss Rowland and Miss Difiore were never asked to identify the appellant in court, they never viewed a photo array in which they identified the appellant and, other than pointing out a specific vehicle, a rather common Chevy Malibu, they did not make any further identification of the appellant to the ranger at the scene, appellant's conviction is vacated and [defendant] is ordered discharged." *Id.* ¶17-18. Except for the

party names, the appellate court's language in the *Metroparks* decision is virtually identical to its language in the instant matter.

The dissent in the *Metroparks* case is helpful inasmuch as it recognizes a need to reiterate the law to the court, despite its being cited in the opinion, stating: "[t]he failure to conduct an in-court identification is not fatal to the state's case when the circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying. *State v. Melton*, 8th Dist. No. 87186, 2006–Ohio–5610, ¶ 13; *State v. Shinholster*, 9th Dist. No. 25328, 2011–Ohio–2244, ¶ 24.

In the instant case, like *Metroparks*, the state presented competent credible evidence identifying the accused as the person about whom the witnesses were testifying at trial. In both cases, the Eight District reversed and vacated the decisions without overruling or distinguishing *State v. Melton*, 8th Dist. No. 87186, 2006–Ohio–5610.

Here, the Eighth District Court of Appeals assigned undue weight to the absence of an in-court identification of the accused and discounted other competent credible evidence of the accused's identity. As the sixth district held in *State v. Bridge*, 60 Ohio App.3d 76, 77, 573 N.E.2d 762, "there is no general requirement in criminal cases that the defendant must be visually identified in court by a witness. Any type of direct or circumstantial evidence may be used to establish the identity of the person that committed the crime. In fact, an in-court identification is a less reliable indicator of identity than many other types of identification:

Both experience and psychological studies suggest that identifications consisting of non-suggestive lineups, photographic spreads, or similar identifications, made reasonably soon after the offense, are more reliable than in-court identifications." Citing *State v. Reaves* (1998), 130 Ohio App.3d 776,

783, 721 N.E.2d 424, fn. 6, quoting comments to F. Evid. R. 801(d)(1)(C), 1975 Report of the Senate Committee on the Judiciary; *Irby*, 2004 WL 2521406, ¶15.

Additionally, it has been noted by this Honorable Court that: “ninety percent of the total meaning of testimony is interpreted through nonverbal behavior, such as voice inflection, hand gestures, and the overall visual demeanor of the witness. The witnesses’ choice of words accounts for only ten percent of the meaning of their testimony. Rasicot, *New Techniques for Winning Jury Trials* (1990).” *State v. Evans*, 67 Ohio St.3d 405, ¶17.

In *State v. Irby*, 2004 -Ohio- 5929, (Ohio App. 7 Dist.), appellant argued that the trial court erred as a matter of law by overruling his Crim. R. 29 motion. But the appellate court found his argument to be meritless based on his failure to object to the lack of an in-court identification when asserting his motion to acquit; “[i]f he had the trial court might have ruled differently or addressed the problem at that time.” *Id.* at ¶9. In the instant case, Tate never challenged his identification as the accused. To the contrary, he admitted at trial that he walked away from the library with the victim to the area around Euclid Memorial Pool where he asked the victim to perform oral sex on him. The Eighth District’s insistence on in-court identification or an explanation for its absence is contrary to the case law cited in its own opinion and is followed throughout Ohio.

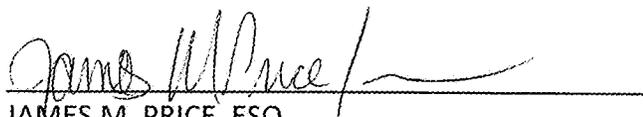
The record in this case contained sufficient evidence identifying the accused as James Tate II. The court of appeals did not distinguish or overrule its holding in *Melton* that the absence of an in-court identification of the accused was not “fatal to the State’s case when the circumstances of the trial indicate that the accused is indeed the person about whom the witnesses are testifying.” *Melton*, 2006–Ohio–5610, at ¶16.

CONCLUSION

Therefore, the State respectfully asks this Honorable Court to grant jurisdiction and to allow this case so that these important issues may be reviewed on the merits.

Respectfully submitted,

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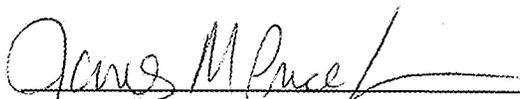
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CERTIFICATE OF SERVICE

I certify that a copy of this *Memorandum in Support of Jurisdiction* was sent via ordinary U.S. mail to Defendant-Appellee, James Tate II, through counsel, Rick L. Ferrara, Esq., 2077 East 4th Street, 2nd Floor, Cleveland, Ohio 44114; and Donald R. Murphy, Esq., 12800 Shaker Blvd., Cleveland, Ohio 44120, on this 5TH day of June, 2013.



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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
97804

LOWER COURT NO.
CP CR-550840

COMMON PLEAS COURT

-vs-

JAMES TATE, II

Appellant

MOTION NO. 462921

Date 04/26/13

Journal Entry

Application by Appellee for en banc consideration is denied. See separate journal entry of this same date (motion no. 462921).

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[Signature]
MELODY J. STEWART
Administrative Judge

VOL 771 PG 888

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

State of Ohio

Appellee

COA NO.
97804

LOWER COURT NO.
CP CR-550840

COMMON PLEAS COURT

-vs-

James Tate II

Appellant

MOTION NO. 462921

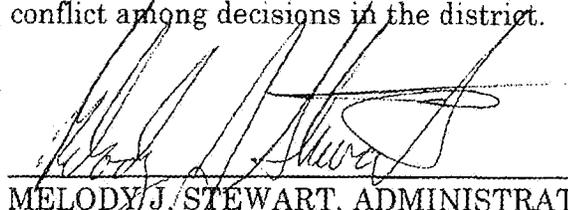
Date 04/26/2013

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

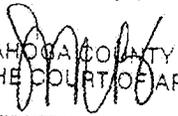
We find no conflict between the panel's decision here and the decisions in *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, 2006 Ohio App. LEXIS 5625; *State v. Kiley*, 8th Dist. Nos. 86726 and 86727, 2006-Ohio-2469, 2006 Ohio App. LEXIS 2335; *State v. Cardwell*, 8th Dist. No. 74496, 74497, and 74498, 1999 Ohio App. LEXIS 4077 (Sept. 2, 1999); and *State v. Golden*, 8th Dist. No. 88651, 2007-Ohio-3536, 2007 Ohio App. LEXIS 3248. The panel here found insufficient evidence of the appellant's identity as the perpetrator, "circumstantial or otherwise." The state's disagreement with this assessment asserts an error in the panel's decision, not a conflict among decisions in the district.

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MELODY J. STEWART, ADMINISTRATIVE JUDGE

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By  Deputy

Concurring:

PATRICIA A. BLACKMON, J.
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,

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LARRY A. JONES, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

SEAN C. GALLAGHER, J., DISSENTS
WITH SEPARATE OPINION, joined by
EILEEN T. GALLAGHER, J.,
KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J.

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision not to en banc this decision. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed. I believe this matter meets that requirement.

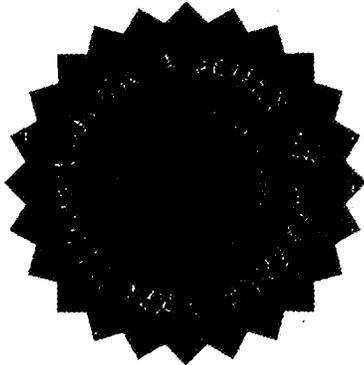
Although inartfully stated by the prosecution in their request for en banc, I believe the issue at play is, what are the "circumstances of the trial" that would support a conviction under the standard outlined in *Melton* where a formal in-court identification is lacking? *Melton* held that the "[t]he failure to conduct an in-court identification is not fatal to the State's case when the circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying." *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610; *State v. Kiley*, 8th Dist. Nos. 86726 and 86727, 2006-Ohio-2469; *State v. Cardwell*, 8th Dist. Nos. 74496, 74497, and 74498, 1999 Ohio App. LEXIS 4077 (Sept. 2, 1999); and *State v. Golden*, 8th Dist. No. 88651, 2007-Ohio-3536.

In this instance, the prosecution asserts there are ten instances in the record where the "circumstances of the trial" establish Tate's identity. The majority opinion summarily dismisses this evidence, noting "there was not sufficient evidence, circumstantial or otherwise, that the appellant was 'the man' repeatedly referenced in the testimony of the victim and her two friends." My dissent should not be viewed as second-guessing the majority's view of the quality of the state's evidence, but I do feel the principle of law at issue, that is, what constitutes the "circumstances of the trial" that meet the standard for a conviction, should be developed and stated for the benefit of our local legal community.

The State of Ohio, }
Cuyahoga County. } ss.

I, [REDACTED] Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry, volume 771 page 888 dated: 4/26/2013 CA 97804 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry, vol. 771 pg. 888 dated: 4/26/2013 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 29th

day of APRIL A.D. 20 13

[Signature] Clerk of Courts

By _____ Deputy Clerk



[Cite as *State v. Tate*, 2013-Ohio-570.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97804

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES TATE II

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-550840

BEFORE: E.A. Gallagher, J., Boyle, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: February 21, 2013

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EILEEN A. GALLAGHER, J.:

{¶1} James Tate II appeals from his conviction in the Cuyahoga County Court of Common Pleas of two counts of kidnapping, importuning, gross sexual imposition and public indecency. We reverse the judgment of the trial court and vacate the appellant's convictions.

{¶2} The facts presented at a bench trial were that on February 12, 2012, B.P., a female 14 years of age at the time, went to the Euclid Public Library with two female friends, T.W. and L.J. T.W. and L.J. entered the library while B.P. stood outside alone. B.P. was approached by an adult male who told her about a study group located away from the library, behind nearby tennis courts. Under the guise of being shown the location of the study group, B.P. walked away from the library with the man who began talking to her about his business. The man eventually began talking to B.P. about her body, telling her that "she could make alot of money in one night."

{¶3} T.W. and L.J. observed B.P. walking away from the library with the man and B.P. did not respond to their attempts to call to her other than to signal behind her back for them to follow her. The man led B.P. behind the entrance to Euclid's Memorial Pool where he told her that he wanted to make sure she was "committed to the business." The man grabbed B.P.'s arm and she was pulled to her knees on the ground. The man unzipped his zipper, removed his penis and used his grip on B.P. to rub her

hand against his penis. B.P.'s phone buzzed at this point and she got off the ground claiming that her mother was at the library. B.P. and the man walked back toward the library and encountered T.W. and L.J. The man told B.P. that her friends did not need to know what had occurred and gave the three girls fliers for his business. B.P., T.W. and L.J. walked back to the library with the man walking some distance behind them.

{¶4} Once inside the library, B.P. recounted the events to T.W. and L.J. who encouraged her to report the incident to the police. The three girls departed the library for the Euclid police station but not before seeing the same man inside the library, seated at a computer.

{¶5} The girls recounted the incident to Euclid police who responded to the library and arrested appellant after his phone rang when the police dispatch called the phone number on the fliers presented by the girls.

{¶6} Following a bench trial, the trial court found appellant guilty of two counts of kidnapping, importuning, gross sexual imposition and public indecency. The trial court imposed a prison term of seven years for each count of kidnapping, eighteen months for each count of importuning and gross sexual imposition and six months for public indecency. All terms were ordered to be run concurrently.

{¶7} In his first assignment of error, Tate argues that the state failed to present sufficient evidence to support his convictions. In his second assignment of error, Tate contends that his convictions are against the manifest weight of the evidence. We

consider the assignments of error together because they are related.

{¶8} At the close of the state's case, appellant moved, pursuant to Crim.R. 29, for the charges against him to be dismissed. The trial court denied the motion. A Crim.R. 29 motion challenges the legal sufficiency of the evidence. The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio- 3598, ¶ 12. 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, 1997-Ohio-52, 678 N.E.2d 541.

{¶9} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Byrd*, 8th Dist. No. 98037, 2012-Ohio-5728, ¶ 27. When considering a manifest weight challenge, a reviewing court reviews the entire record, weighs the evidence and all reasonable inferences therefrom, considers the credibility of the witnesses and determines whether the finder of fact clearly lost its way. *State v. Jackson*, 8th Dist. No. 86542, 2006-Ohio-1938, ¶ 29. A reviewing court may reverse the judgment of conviction if it appears that 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. *Id.*

{¶10} The record before the court is devoid of any testimony from the victim or either of her two friends identifying the appellant as the perpetrator.

{¶11} “A long-established principle of criminal law is that the prosecution must prove ‘beyond a reasonable doubt’ the identity of the accused as the person who actually committed the crime.” *Cleveland Metroparks v. Lawrence*, 8th Dist. No. 98085, 2012-Ohio-5729, ¶ 13, quoting *In re K.S.*, 8th Dist. No. 97343, 2012-Ohio-2388. In-court identification of the defendant by a victim or witness may be the most common method of establishing such identity, but it is not mandatory. *Id.*

{¶12} The failure to conduct an in-court identification is not fatal to the state’s case when the circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying. *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, ¶ 13; *State v. Shinholster*, 9th Dist. No. 25328, 2011-Ohio-2244, ¶ 24.

{¶13} In the case subjudice, there was not sufficient evidence, circumstantial or otherwise, that the appellant was “the man” repeatedly referenced in the testimony of the victim and her two friends. There is absolutely no explanation on the record for the state’s failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.

{¶14} As in *Cleveland Metroparks* however, the witnesses who had direct contact with the perpetrator, B.P., T.W. and L.J., were never asked to identify the appellant in

court and never viewed a photo array in which they identified the appellant as the perpetrator. As such, the trial court erred in denying appellant's Crim.R. 29 motion as to all counts.¹

{¶15} Although we find appellant's first assignment of error to be meritorious and dispositive of the present appeal, we briefly address the Evid.R. 404(B) issue raised in appellant's third assignment of error. In light of our reversal of appellant's convictions as a result of his first assignment of error we need not address his argument that his trial counsel provided ineffective assistance of counsel by way of cumulative error due to his failure to object to inadmissible other-acts evidence under Evid.R. 404(B). However, we do briefly note that the evidence in question, which was admitted without objection at trial, was clearly in violation of Evid.R. 404(B).

{¶16} The state presented the testimony of Heather Culver who described an encounter with a man outside the Euclid public library on February 2, 2012. Culver was eighteen years of age at the time. She testified that after a man began conversing with her outside the library and asked for her phone number she ran inside the library and reported the interaction to the library administration and eventually the Euclid Police Department. At trial she identified the appellant as the man who approached her.

¹ Although appellant's first assignment of error presents arguments challenging the sufficiency of the evidence supporting only his convictions for kidnapping and gross sexual imposition, the failure of the state to present sufficient evidence of the perpetrator's identity to sustain *any* of the convictions amounts to a denial of due process and plain error. *Cleveland v. Tisdale*, 8th Dist. No. 89877, 2008-Ohio-2807, ¶ 22; *State v. Feaster*, 9th Dist. No. 26239, 2012-Ohio-4383, ¶ 5. Our sufficiency analysis thus includes each of appellant's convictions.

{¶17} Under well-established Ohio law it is ordinarily presumed that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *State v. Eley*, 77 Ohio St.3d 174, 181, 672 N.E.2d 640 (1996), citing *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987). The trial court in the present instance denied a belated objection by appellant’s counsel to the testimony of Culver. The court noted that Culver’s testimony had been addressed at a pretrial where the prosecution indicated its intent to present it and appellant’s counsel had offered no objection.²

{¶18} R.C. 2945.59 states that “[i]n any criminal case in which the defendant’s motive * * *, intent, * * * absence of mistake or accident * * *, scheme, plan, or system in doing an act is material,” other acts that tend to prove these things are admissible into evidence.

{¶19} Additionally, Evid.R. 404(B) states that:

evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶20} Culver’s testimony plainly did not qualify as relevant Evid.R. 404(B) testimony as Culver’s brief interaction with the appellant did not involve in any manner a request for sex, an attempt to lure her away from the library by deception, or any other

² Prior to trial the state filed a notice of intent to use 404(B) evidence of prior acts. That motion, however, pertained to completely unrelated evidence and did not address Culver’s testimony.

criminal activity. Furthermore, Culver, unlike B.P., was eighteen years of age at the time of the encounter.

{¶21} We recognize that the record reflects that appellant's counsel failed to properly object to this testimony and address it solely to note that her testimony was not relevant to the alleged crimes and should not have been admitted at trial.

{¶22} In light of our disposition of appellant's first assignment of error, we overrule the remaining assignments of error as moot. *See* App.R. 12(A)(1)(c).

{¶23} Appellant's conviction is vacated and he is ordered discharged.

It is ordered that appellant recover from appellee 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.

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

EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
MARY EILEEN KILBANE, J., CONCUR