ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**Ohio Sup. Ct. Case No. 2013-0910**
	)	
Appellant	)	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
vs.	)	
	)	
	)	
JAMES TATE, II	)	
	)	**Court of Appeals No.: 97804**
Appellee	)	

MERIT BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND THE FACTS

In May 2011, Defendant-Appellee James Tate, II, ("Tate"), was indicted on two counts of Kidnapping, in violation of 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, in violation of 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 seven years. Tate appealed his conviction and on February 21, 2013, the Eighth District Court of Appeals reversed and vacated the judgment of the trial court. *State v. Tate II*, 2013-Ohio-570.

The State filed an *Application for Reconsideration and for En Banc Consideration* on March 1, 2013. After its applications were denied, the State filed notice of appeal to this Court. Upon consideration of the jurisdictional memoranda, this Court accepted the State's appeal. The record was filed on November 6, 2013.

Trial

On September 28, 2011, Tate signed a waiver of his right to a jury trial and elected to be tried by the court. The bench trial commenced on February 12, 2012.

The evidence educed at the bench trial was that fourteen-year-old B.P. had gone to the Euclid Public Library with her two female friends, T.W. and L.J. (Tr. 44). Before B.P. entered the building, she was approached by an adult male who gave B.P. his business card and said that he was promoting a study group that was scheduled to meet behind some nearby tennis courts.

(Tr. 108, 110-111, 126). The library's security camera captured video of Tate speaking to B.P. outside the library and walking away with the teen at approximately 11:30 A.M. (Tr. 109-110). The video was introduced into evidence and identified as "State's Exhibit 21."

At trial, B.P. testified that as they walked away, Tate began to make comments about her body and told her that "she could make a lot of money in one night." (Tr. 110-112). T.W. and L.J. observed B.P. walking away with the male they exited the library and called out to her. B.P. continued to walk with the male, but signaled for her friends to follow. (Tr. 44-45). T.W. testified that she and L.J. started to follow, but lost sight of B.P. and Tate when they walked behind a building. (Tr. 45-46).

Upon reaching the entrance to the Euclid Memorial Pool, Tate told B.P. that he wanted to "make sure she was committed to the business" and grabbed her arm. Tate then forced B.P. to her knees, unzipped his pants and exposed his penis, which "brushed against" B.P.'s hand. (Tr. 114-115). B.P. testified that she did not want to touch Tate's penis, and when he pulled her down he had a good grip on her arm. (Tr. at 123, 124).

B.P.'s cell phone rang and she told Tate that her mother was at the library and started back. (Tr. 115). B.P testified that when she walked out from behind the building, she saw her friends speaking to a police officer. (Tr. 115-117). T.W. and L.J stated that they were talking to a police officer when B.P. appeared from the pool area with a male who had papers in his hand. (Tr. 48, 78).

B.P. testified that as T.W. and L.J. walked toward them, the man said that her friends did not need to know what happened back at the pool entrance. (Tr. 115-117). T.W. and L.J. walked up and the male gave them business cards and fliers that were printed with his name and cell

phone number. T.W. testified that she informed the male that she had gone to the police because she could not find B.P., and that his response was that he did not care. (Tr. 48-49). According to T.W., B.P. was disturbed and wanted to walk faster toward the library to get away from the male. (Tr. 49-51).

Upon entering the library, B.P. told her friends what had happened at the pool entrance. T.W. and L.J. urged B.P. to report the incident and they accompanied B.P. to the nearby police station. (Tr. 49-51). As they were leaving the library, they observed the male in the library seated at a computer station.

Euclid Police Lieutenant Kevin Kelly testified that he was working the front window at the Euclid Police Department on February 12, 2011, when B.P. came in with two female friends. (Tr. 158). Kelly said that B.P. explained what occurred outside the library and at the entrance to the pool, and presented the business cards and fliers that the male had given to them outside the library.

Euclid Police Officer Beese went to the library to investigate. Once there, he observed that the male seated at a computer station appeared to be the same male whom he observed with B.P. and her friends on Milton Road earlier. (Tr. 161-172). At Beese's request, dispatch called the phone number that was on the fliers given to B.P. and her friends. When the male answered his cell phone, Beese approached and asked for permission to see the incoming call number. Tate consented, and Officer Beese observed that the most recent in-coming call was from the Euclid Police Department.

Officer Beese detained the male, who was identified as James Tate, II. Upon searching Tate, the police found identification cards from RTA and Clear Choice, bearing Tate's name and

photograph. (Tr. 172-177).

Officer Tchetter testified that while transporting Tate to jail, Tate made a number of statements, such as: "I didn't know she was underage," "I did the right thing – I got up and walked away," "no, she got up off her knees and I walked away," and "you know, she lured me there." Tchetter testified that he did not engage in the dialogue, however, Tate "kept blurting out statements." (Tr. 188).

Detective Novitski testified that Tate admitted in the course of a videotaped interview that he asked B.P. for oral sex. (Tr. 198-199; State's Exhibit 31).

Although Tate stated at trial that he did not initiate contact with B.P., video captured by a library's security camera contradicted his testimony. (State's Exhibit 21; Tr. 268). However, Tate did acknowledged that he asked B.P. about her age, that he walked away from the library to the pool area with B.P. Moreover, Tate admitted that he asked B.P. for oral sex once they reached the pool entrance. (Tr. 272-277; State's Exhibit 31).

The Eighth District's conclusion that "the state failed to present sufficient evidence of the perpetrator's identity to sustain any of the convictions" is contradicted by the record. *Id.* at ¶14.

Conviction and Sentence

At the conclusion of the bench trial, the court found Tate guilty on two counts of Kidnapping with Sexual Motivation and Sexual Violent Predator Specifications; one count of Importuning; one count of G.S.I.; and one count of Public Indecency. (Journal Entry, 10/06/2011). On December 5, 2011, Tate was sentenced to seven years in prison. (Journal Entry, 12/08/2011).

Direct Appeal

On January 5, 2012, Tate appealed raising six assignments of error: (1) insufficient evidence supported appellant's convictions for Kidnapping and Gross Sexual Imposition; (2) the manifest weight of the evidence did not support appellant's convictions; (3) defense counsel was ineffective for failure to suppress 404(B) evidence and the admission of an unlawfully presented photo array; (4) the trial court acted contrary to law imposing appellant's sentence without applying Ohio's allied offense statute; (5) the court erred in failing to inform appellant of court costs at sentencing, then imposing them in its sentencing entry; and (6) the trial court erred when it failed to make statutorily necessitated findings before imposing a seven year sentence of imprisonment.

The court of appeals found Tate's first assignment of error to be dispositive, writing: "[a]lthough 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. (Citations omitted). Our sufficiency analysis thus includes each of appellant's convictions." *Id.* at ¶14, fn. 1. In the end, the court of appeals concluded, "[i]n 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)." *Id.* at ¶22.

Notably, the court of appeals did not base its decision on any of the arguments raised by the Appellant. Instead, the court determined, *sua sponte*, that the trial court erred in denying appellant's Crim. R. 29 motion as to all counts, because:

> "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."[1] *State v. Tate II*, 2013-Ohio-570, ¶¶10-14.

Thus, the court simultaneously recites and ignores the holding in *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, stating that, "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." *Id.* at ¶ 13. If the appeallate court had acknowledged the evidence identifying Tate as the person about whom the witnesses were testifying, it would have been forced to reconcile its decision with the holding in *State v. Melton.* Because reconciliation was impossible, this evidence was ignored. See also *State v. Shinholster*, 9th Dist. No. 25328, 2011-Ohio-2244, ¶ 24.

Applications for Reconsideration and En Banc Consideration

Because the record was replete with evidence identifying James Tate, II as the accused, the State filed *Application for Reconsideration* and for *En Banc Consideration*, to call the court's attention to evidence such as the video recording of Tate's interaction with B.P., Tate's videotaped admissions, and his testimony at trial. The State also reminded the court of its previous holdings in *State v. Kiley*, 8th Dist. Nos. 86726 and 86727, 2006–Ohio–2469, that: "there is no general requirement that a defendant be visually identified by a witness in court; and that identification can be proved by circumstantial evidence, just like every other element the state must prove"; and in *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, that: "[t]he failure to conduct an in-court identification is not fatal to the state's case when the

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

circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying." *Id.*, ¶ 13. See also, *State v. Golden* 2007 WL 2008883, 3 (Ohio App. 8 Dist.) (Ohio App. 8 Dist.,2007); *State v. Cardwell* (Sept. 2, 1999), Cuyahoga App. Nos. 74496, 74497, 74498,

Because the court of appeals paid scant attention the evidence identifying Tate as the accused and ignored stare decisis, the State filed the instant appeal.

LAW AND ARGUMENT

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, Tate argued, *inter alia*, that the State failed to present sufficient evidence at trial to support his convictions for Kidnapping and Gross Sexual Imposition. The court of appeals agreed that the evidence presented at trial was insufficient, but for different reasons than those argued by the appellant. Instead, the reviewing court found, *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. In defense of this decision, the court of appeals wrote:

> "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.

Note that in *State v. Melton*, 8th Dist. No. 87186, 2006–Ohio–5610, the Eighth District held that "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. At trial, the State presented clear and convincing evidence that Tate was the person about whom the witnesses were testifying, which included the following:

- Security video from Euclid Public Library, in which James Tate II is seen interacting with B.P. at or around the time of the offense; (Tr. 104-110; State's Exhibit 21).
- B.P. identified Tate's business card and a flier printed with Tate's name and cell phone number as the materials that she received from "the guy" in the video; (Tr. 104-109, 110-111, 125-126).
- 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? (Tr. 137).
- B.P. responded, "Yes" after Tate's trial counsel asked on cross-examination, "[A]fter you got in the library, was Mr. Tate, the defendant, in the library also." (Tr. 137, 173-174).
- T.W. and L.J. identified the fliers printed with Tate's name and cell phone number as papers that "the man" had given to them outside the library; (Tr. 50, 73).
- T.W. and L.J. identified Tate's Clear Choice Picture ID as the card that Tate had shown to them outside the library; (Tr. 110-111, 125-126).
- Euclid Police Officer Beese identified Tate as the male whom he observed outside the library with B.P., T.W., and L.J. at or around the time of the offense; (Tr. 161, 173-174, 178).
- Officer Beese testified at trial that when he saw Tate in the library and asked the police dispatcher to call the phone number listed on the flier that B.P., T.W. and L.J. testified the male have given them, the male's phone rang and the male answered. (Tr. 172).
- Officer Beese testified that he approached the male and asked for permission to see who the call was from. The male consented and Beese observed that the call was from the Euclid Police Department dispatch number. (Tr. 174).
- During the search incident to arrest, Officer Beese recovered an RTA Fare Card and a Clear Choice I.D., which contained the name James Tate, II, and Tate's photograph; (Tr. 177).
- 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. This video confession was admitted into evidence at trial. (Tr. 198-199; State's Exhibit 31).

- 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. (Tr. 272, 274, 277; State's Exhibit 31).

The record is replete with evidence, including the appellant's own testimony, that he was the person about whom the witnesses were testifying. Despite the evidence, and the case law stating that an in-court identification is not required where sufficient evidence of the accused's identity is presented at trial, the court reversed Tate's conviction based solely on the absence of an in-court identification by the victim and her friends.

Stare decisis

This Court "adheres to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 (2003). The doctrine of stare decisis "embodies a policy favoring the application of a principle of law stated in a judicial decision in all future cases where the facts are substantially the same, and is founded on the belief that like cases should be decided alike in order to maintain stability and continuity in the law." Am. Jur. 2d, Courts § 129.

In the case at bar, the court of appeals did not reconcile its decision in *State v. Tate*, 2013 -Ohio- 570 with the decisions from prior cases in which the facts were essentially the same. By doing this, the court creates an impediment to predictability and continuity and prevents the administration of justice.

The State asks this Court to reconcile the instant matter and to establish a consistent and predictable rule of law to prevent the arbitrary administration of justice in the future. *Shay*

v. Shay, 113 Ohio St. 3d 172, 2007-Ohio-1384, 863 N.E.2d 591 (2007).

Metroparks v. Lawrence

In its decision in *Metroparks v. Lawrence*, 2012 -Ohio- 5729, the Eighth District Court of Appeals stated: "[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. The court found the conditions in the instant case to be identical to those in *Metroparks*, stating: "In the case sub judice, 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." *Tate* at ¶13.

As in *Metroparks*, the appellate court in the instant case held that, "there was not sufficient evidence, circumstantial or otherwise that the accused was the person about whom the witnesses were testifying." The court did not mention the security video from the library, (Tr. 104-110; State's Exhibit 21); Tate's videotaped confession, (Tr. 198-199; State's Exhibit 31); or Tate's testimony at trial that he walked away from the library with B.P. and asked B.P. for oral sex. (Tr. 272, 274, 277; State's Exhibit 31). Because the court of appeals did not address this evidence in its opinion, it is apparent that the court's decision was based on the absence of an in-court identification.

Here, the court of appeals placed undue emphasis on in-court identification. As the Sixth District Court of Appeals 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.

Further, this Court has said 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, ¶7. In the instant case, the court of appeals discounted the evidence identifying Tate as the person about whom the witnesses were testifying.

Regarding the failure to challenge the absence of an in-court identification in the trial court, 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. The appellate court found his argument to be meritless, however, 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, the an issue regarding in-court identification was not raised at the trial level. Therefore, the matter should not have been raised for the first time on appeal.

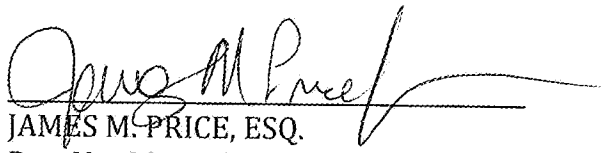
CONCLUSION

Tate did not challenge his identification as the accused on appeal. Security video from the library showed Tate interacting with B.P. This corroborated Officer Beese's observations. Tate admitted in a video-taped interview with Detective Novitski, that he had been outside the library with B.P. and asked B.P. for oral sex. Tate also testified at trial that he walked away from the library with B.P. to the area around Euclid Memorial Pool and asked B.P. for oral sex. The court of appeals did not address the evidence identifying James Tate II as the accused. And the court cited *State v. Melton* without an explanation of why *Melton* did not apply to the case at bar.

Therefore, the State respectfully asks this Honorable Court to reverse the lower court's decision and find that an 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, and to remand the matter for the court of appeals to address any remaining assignments of error.

Respectfully submitted,

TIMOTHY J. MCGINTY, ESQ.
Cuyahoga County Prosecuting Attorney



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I certify that a copy of this Merit Brief of Appellant was sent via ordinary U.S. mail to Defendant-Appellee, James Tate II, through counsel, Cullen Sweeney, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.

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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

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, entered February 21, 2013. The State filed a timely motion for reconsideration, en banc on March 1, 2013. On April 26, 2013, the Eighth District denied the motion for reconsideration, en banc. The State is appealing the opinion and judgment entry announced on February 21, 2103, which the Eighth District declined to reconsider on April 26, 2013. S.Ct. Prac. R. II, §2(A)(5)(a).

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

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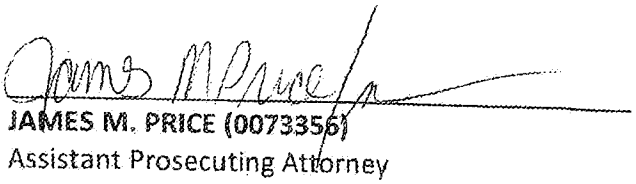
CUYAHOGA COUNTY PROSECUTOR

BY: 

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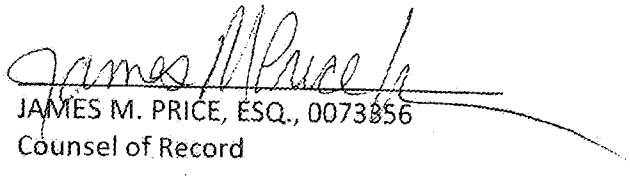
CERTIFICATE OF SERVICE

I certify that a copy of this *Notice of Appeal* was sent via ordinary U.S. mail to 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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[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 idenfication 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.

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[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

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[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

RULE 29. Motion for Acquittal

(A) **Motion for judgment of acquittal.** The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) **Reservation of decision on motion.** If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) **Motion after verdict or discharge of jury.** If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

[Effective: July 1, 1973.]