[Cite as *State v. Lewis*, 2018-Ohio-3784.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 17CA1055
vs.	:	
RUSSELL LEWIS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Adam Lee Nemann, Columbus, Ohio, for appellant.[1]

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-11-18
ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. Russell Lewis, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

[1]Different counsel represented appellant during the trial court proceedings.

CONSTITUTION."

SECOND ASSIGNMENT OF ERROR:

"THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR:

"THE EVIDENCE UPON WHICH APPELLANT'S CONVICTION IS BASED IS INSUFFICIENT AS A MATTER OF LAW."

{¶ 2} On September 1, 2016, an Adams County Grand Jury returned an indictment that charged appellant with (1) one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony, and (2) two counts of rape in violation of R.C. 2907.02(A)(1)(b), both first-degree felonies. Appellant entered a not guilty plea.

{¶ 3} On December 21, 2016, appellant filed a motion for *in camera* inspection of any school records, counseling records, and/or medical records of K.B., the ten year old victim. On December 28, 2016, the trial court ordered the records to be delivered to the court, under seal, for inspection. On April 19, 2017, appellant filed a motion for an *in camera* hearing pursuant to *State v. Boggs*, 63 Ohio St.3d 418, 588 N.E.2d 813 (1992). Appellant stated that "during the course of an in-camera inspection of the alleged victim's medical records the Court has advised that the alleged victim had made an accusation of inappropriate sexual contact/conduct by another individual and then subsequently recanted said allegation. As a result of the allegations and subsequent recantation, Defendant respectfully requests this Court to conduct an in-camera hearing to determine whether sexual activity was involved, and as a result, cross-examination on the accusation would be

prohibited by Ohio Revised Code 2907.02(D) or whether the accusation was totally unfounded and therefore could be inquired into pursuant to Evid.R. 608(B)."

{¶ 4} At the May 10, 2017 hearing, the trial court inquired of K.B.: "Okay and have you ever falsely accused someone of raping you," to which K.B. replied "No." Later, the court asked K.B. if she remembered speaking to a woman at Shawnee Mental Health. K.B. stated that she did. The court then asked K.B., "Okay and did you ever tell her that you had made a false accusation of rape against another?" K.B. replied, "No."

{¶ 5} On May 11, 2017, defense counsel filed a motion for a continuance and indicated that on May 10, counsel learned of a potential material witness who had moved to Italy. Counsel stated that he had attempted unsuccessfully to contact this potential witness, but needed more time. The trial court granted the motion and continued the trial to October 16-19, 2017. On May 8, 2017, appellant filed a notice of alibi.

{¶ 6} At trial, K.B. testified that she lived in Adams County with her grandmother and grandfather. K.B. testified that appellant is her uncle by marriage, and attended her 10th birthday party on Christmas Day 2013. K.B. stated that when she went outside to pen the chickens, one of her normal chores, appellant went with her. "We were walking back around to the front of the house and he stopped me at the side and I was up against the house and he took him [sic] hand and touched my butt and my breast and he started making out with me, put his tongue in my mouth." K.B. testified that she did not tell anyone right away because "I was confused * * * I was scared he was going to do something to me if I told."

{¶ 7} K.B. further testified that on Valentine's Day, when she was in 4th grade (February

14, 2014), she was in the kitchen with appellant playing cards and "he [appellant] took his hand and slid it up, like slid it up my leg and moved my shorts and my panties out of the way and put his fingers into my vagina." K.B. testified that other family members were in the house at the time, and that appellant whispered to her, "Don't tell my dad." K.B. stated that later that day, she and appellant were outside playing basketball and he "walked up behind me and he like pulled me closer to him and Jake [appellant] took his hand and slid it down my pants and stuck his fingers into my vagina."

{¶ 8} Finally, K.B. testified that around July 4, 2014, as she and appellant watched TV in the living room at her grandmother's residence, she sat on a couch and appellant sat in a recliner and "he walked over and he . . . well, Jake walked over and he got down on his knees and Jake took his tongue and started licking my vagina." At the time this happened, K.B. explained that her grandmother was mowing grass and her grandfather was on the front porch. K.B. stated that appellant stopped when he heard the lawnmower shut off and he returned to the recliner and sat down. K.B. also testified that appellant asked her to send him nude photographs. In response, K.B. texted to appellant three photographs in her bra and underwear or bra and shorts.

{¶ 9} Prior to K.B.'s cross-examination, the trial court excluded the jury and spectators and examined a Shawnee Mental Health Center record authored by Melinda Abbott, LPCC on December 26, 2014. Only the prosecutor, defense counsel and appellant were present. The court indicated that the record was allegedly produced as a result of a counseling session. It stated: "[K.B.] and her grandmother again had a confrontation over the holiday and an uncle spanked her because [K.B.] told her grandmother to 'shut up.' This started because she told an aunt that the step-grandfather had sexually abused her. When I asked her about this she was clear that she had made up this

information." The court stated that it would allow K.B. to be brought into the courtroom and the court would allow counsel "to posture the question in regard to the alleged false sexual activity allegation. Depending upon response then the Court will move forward with the allowance or disallowance."

{¶ 10} Shortly thereafter, K.B. returned to the courtroom accompanied by an Adams County Prosecutor's Office representative who acted as a victim crime coordinator. The jury continued to be excluded at this time. The trial court reminded K.B. that she was still under oath. At this point counsel stated: "You had the opportunity in the past to use mental health or the supervision or direction of mental health counselors in the past have you not?" K.B.: "Yes." Counsel: "When did you start mental health counseling?" K.B.: "At the age of 10." After a few other foundational questions, counsel asked: "Do you remember having a session with Ms. Abbott shortly after Christmas in December of 2014? If I were to suggest to you the date was December 26th of 2016 [sic] does that mean anything to you?" K.B.: "Something like that, yeah." Counsel: "Okay, in the course of that counseling session with her do you remember or did you make an accusation that your Grandpa Buddy had performed, had sexually molested you?" K.B.: "No." Counsel: "I'm sorry, no, you never said that or, no, you don't remember?" K.B.: "No, I never said that."

{¶ 11} Counsel then asked to approach the witness with the document, and the state objected. The trial court overruled the objection and allowed counsel to review the document with K.B. She recalled telling the counselor that her uncle spanked her and that she told her grandmother to shut up, but when asked "But you don't have any recollection of the fact, you don't have any recollection about telling Ms. Abbott about your grandfather molesting you?" K.B.: "No." Finally, counsel asked "Did you ever tell a lie that your grandfather molested you?" K.B.: "No." At that time, the

trial court allowed K.B. to depart the courtroom.

{¶ 12} The court stated, "Under the analysis of *Boggs*, if counsel inquires of an alleged rape victim as to whether she had made any prior false accusations of rape and the victim answers no, which is what occurred here, then the trial court would have the discretion to determine whether and to what extent defense counsel could proceed with cross examination. What would be your proposed proferring of cross-examination on this issue?" Defense counsel indicated that under Evid.R. 608(b) he believed that he should be permitted to cross-examine K.B. in front of the jury. Then, due to the unavailability of the writer of the report, counsel indicated that his only recourse if K.B. answered in the negative would be to show K.B. the document and question her about the document. Counsel stated that Abbott had moved to Italy, is no longer working as a licensed professional counselor, and that counsel attempted to find Ms. Abbott, but could not reach her. The prosecutor stated, however, that he did not believe that the document was reliable and, because counsel had not met their burden, the Rape Shield statute prohibited any inquiry concerning sexual activity.

{¶ 13} The trial court then conducted an analysis, citing *Boggs*, 63 Ohio St.3d 418, and *State v. Minton*, 4th Dist. Adams No. 15CA1006, 2016-Ohio-5427, 69 N.E.3d 1108, and noted an electronic signature on the mental health record. The parties agreed to allow counsel to ask K.B. in front of the jury, "did you ever make a false allegation toward your grandfather?" The court indicated, however, that it would not permit defense counsel to use the document to impeach K.B.'s testimony. The court then concluded the *Boggs* hearing and brought the jury into the courtroom.

{¶ 14} Defense counsel continued his cross-examination of K.B.: "[H]ave you ever made an accusation against your grandfather for sexually molesting you?" After a sidebar, where the

prosecutor challenged the phrase "sexually molesting" rather than "abuse," the court allowed it. After the sidebar concluded, the court told K.B.: "You can answer the question, * * * Do you remember the question?" K.B.: "Yes. No." The court: "You remembered the question and your answer was no, is that correct?" K.B.: "Yes." Defense counsel then indicated that he had no further questions.

{¶ 15} Andrea Powers, Social Worker and Forensic Interviewer at the Mayerson Center at Cincinnati Children's Hospital, also testified about interviewing K.B. on July 17, 2015, when K.B. was 11 years old. Powers stated that K.B. informed her that appellant would "squeeze her breast with his hand under and on top of her clothes. And he squeezed her butt under her clothes. He told her not to tell, that he would go to prison. And he would have * * * her give him a lap dance which she described as her sitting on his lap and his dick which was the penis on the drawing, these anatomically correct drawings, touched her butt and he would grab her waist and he would move her closer on him. And hers and his clothes were on. He also told her to send him a picture of her in bra and panties which she said did occur."

{¶ 16} Sandra Lewis, K.B.'s paternal grandmother, testified that appellant is her stepson and K.B. is her granddaughter. Lewis stated that on July 9, 2015, K.B. was crying and she said to Buddy, her late step-grandfather, "Your son raped me." When appellant came to the house, Lewis confronted appellant and he came inside to "get this straightened up." Lewis testified that K.B. was screaming and telling Lewis and Buddy what appellant had done to her, and appellant responded repeatedly "Don't call the law. You will ruin me." When Lewis asked appellant if the allegations were true, he twice ignored the question and continued to say "Don't call the law, you'll ruin me. You'll ruin me." Lewis then asked appellant to leave and her husband, appellant's father, told

Lewis to call the sheriff's department.

{¶ 17} Kenneth Dick, investigator for the Adams County Prosecutor's Office, testified that K.B. and Lewis came to the prosecutor's office on July 10, 2015 and reported that K.B.'s great-uncle [sic., uncle], appellant, who was 56 years old at the time of the investigation, had sexually abused K.B. several times at her grandmother's residence. Dick testified that K.B. showed him the three photographs on her cell phone that she sent to appellant. Dick took the phone and "attempted to do what's called a reverse sting. I sent messages to Mr. Lewis using [K.B.'s] phone in an attempt to get some admissions." This resulted in a return text asking "Who is this?" After that, Dick collected K.B.'s phone as evidence. Dick also testified that during the execution of a search warrant at appellant's home, he collected appellant's cell phone and submitted both phones to BCI.

{¶ 18} Jonathan Robbins, computer forensic specialist for the Ohio Bureau of Criminal Investigation, then testified concerning the appellant and K.B.'s cell phones and the photographs. At the close of the state's case, appellant made a Rule 29 motion for judgment of acquittal that the trial court overruled.

{¶ 19} Nita Lewis testified for the defense and stated that she is appellant's ex-wife. She recalled that appellant was at her home around 8:00 or 8:30 a.m. on December 25, 2013, and stayed for a couple of hours. Tamera Palmer testified that she is a district supervisor at United Dairy Farmers and had known appellant for 15 or 16 years. Palmer testified that appellant spent Thanksgiving and Christmas of 2012 and 2013 at her residence. She testified that appellant arrived at her house around 2:00 p.m. and stayed until around 6:00 or 6:30 p.m. After the defense rested, appellant once again made a Rule 29 motion for judgment of acquittal that the trial court again overruled.

{¶ 20} After the four-day trial, the jury returned verdicts of (1) guilty on count I [gross sexual imposition in violation of R.C. 2907.05(A)(4)], (2) guilty on count II [rape in violation of R.C. 2907.02(A)(1)(b)], and found that the appellant committed the offense of rape in count II by compelling the victim to submit by force or threat of force. The jury also found appellant not guilty of count III [rape in violation of R.C. 2907.02(A)(1)(b)].

{¶ 21} The trial court sentenced appellant to (1) serve three years in prison on count I, (2) serve a mandatory term of life without parole on count II (concurrent with count I for a total term of incarceration in both counts of life in prison without eligibility for parole), (3) pay a $10,000 fine for count II, and (4) pay all costs of prosecution plus any fees permitted under R.C. 2929.18(A)(4). The court further adjudicated appellant a Tier III sex offender child victim offender registrant as it related to count II, subject to community notification pursuant to R.C. 2950.11(F)(2). This appeal followed.

I.

{¶ 22} In his first assignment of error, appellant asserts that he was denied effective assistance of trial counsel. In particular, appellant contends that his trial counsel failed to properly pursue the cross-examination of the victim in light of the rape shield protections.

{¶ 23} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean that a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To

establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. In any case that involves an ineffectiveness of counsel claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Thus, to show deficient performance, a defendant must prove that counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815,848 N.E.2d 810, ¶ 95. Moreover, courts need not analyze both prongs of the *Strickland* test if a claim can be resolved under only one prong. See *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52, *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 17.

{¶ 24} When determining whether counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Therefore, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Because a properly licensed attorney is presumed to execute his duties in an ethical and competent manner, *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland* at 687.

{¶ 25} The case sub judice involves a balancing of R.C. 2907.02(D), Ohio's rape shield law, and Evid.R. 608(B). As the Supreme Court of Ohio wrote in *Boggs*, 63 Ohio St.3d 418, 588 N.E.2d 813, "[t]he rights to confront witnesses and to defend are not absolute and may bow to accommodate

other legitimate interests in the criminal process." *Boggs* at 422, citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Generally, appellate courts review a trial court's R.C. 2907.02(D) rape shield ruling under the abuse of discretion standard of review. *State v. Minton*, 4th Dist. Adams No. 15CA1006, 2016-Ohio-5427, 69 N.E.3d 1108, ¶ 19, citing *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶ 44. A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 19. However, appellate courts use a de novo standard to review alleged violations of a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment. *Minton* at ¶ 19, *Nguyen* at ¶ 44, citing *State v. Osman*, 4th Dist. Athens No. 09CA36, 2011-Ohio-4626, ¶ 78.

{¶ 26} Ohio's Rape Shield Statute, R.C. 2907.02, provides:

> (D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
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> * * *
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> (E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

Evidence Rule 608(B) addresses the handling of specific instances of conduct of a witness, and provides:

> (B) Specific Instances of Conduct. Specific instances of the conduct of a witness, for

> the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

{¶ 27} In *Boggs*, the Supreme Court of Ohio considered the issue of whether the R.C. 2907.02(D) rape shield provisions prohibit a defendant from cross-examining an alleged rape victim about prior false rape accusations that she is alleged to have made. The court noted that a "threshold determination required in this case is whether an alleged victim in a sexual assault case can be cross-examined as to prior false accusations of rape. If the answer to that question is in the affirmative, then the next logical inquiry is to what extent cross-examination may be permitted. A related question is whether the defendant may bring in extrinsic evidence that the victim has made prior false accusations of sexual assault. Therefore, the issues in this case must be addressed in light of Evid.R. 608(B), which provides in pertinent part: 'Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, * * **may not be proved by extrinsic evidence.* They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness * * *.'" *Boggs* at 421.

{¶ 28} "Thus, if defense counsel inquires of an alleged rape victim as to whether she has made any prior false accusations of rape, and the victim answers no, the trial court would have the

discretion to determine whether and to what extent defense counsel can proceed with cross-examination. However, if the alleged victim answers in the affirmative, the trial court would have to conduct an *in camera* hearing to determine whether sexual activity had been involved. If the trial court determined that the accusations were entirely false (that is, that no sexual activity had been involved) the trial court would then be permitted to exercise its discretion in determining whether to permit defense counsel to proceed with cross-examination of the alleged victim. We therefore hold that where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an *in camera* hearing to ascertain whether sexual activity was involved and, as a result, would be prohibited by R.C. 2907.02(D), or whether the accusation was totally unfounded and therefore could be inquired into on cross-examination pursuant to Evid.R. 608(B)." *Id.* at 421-422. The court further instructed: "When the defense seeks to cross-examine on prior false accusations of rape *the burden is upon the defense to demonstrate that the accusations were totally false and unfounded*. *Hence the initial inquiry must be whether the accusations were actually made by the prosecutrix.* Moreover, the trial court must also be satisfied that the prior allegations of sexual misconduct were actually false or fabricated. That is, the trial court must ascertain whether any sexual activity took place, *i.e.*, an actual rape or consensual sex. If it is established that either type of activity took place, the rape shield statute prohibits any further inquiry into this area. Only if it is determined that the prior accusations were false because no sexual activity took place would the rape shield law not bar further cross-examination." (Emphasis added.) *Id.* at 423. "Therefore, we hold that before cross-examination of a rape victim as to prior false rape accusations may proceed, the trial judge shall hold an *in camera* hearing to ascertain whether such testimony involves sexual activity and thus if inadmissible under R.C. 2907.02(D), or is totally

unfounded and admissible for impeachment of the victim. It is within the sound discretion of the trial court, pursuant to Evid.R. 608(B), whether to allow such cross-examination." *Id.* at 424.

{¶ 29} Appellant asserts in the case sub judice that, while defense counsel initially sought a ruling from the court prior to the trial regarding K.B.'s prior alleged false accusation of rape, the trial court did not issue a ruling and the defense apparently abandoned the request for a pre-trial ruling, without explanation. Appellant argues that the parties apparently later agreed that a *Boggs* determination regarding the issue would be made during an *in camera* interview of K.B.'s testimony mid-trial, outside the presence of the jury.

{¶ 30} For the following four reasons, appellant contends a reasonable probability exists that had counsel been effective, the trial's outcome would have been different. Thus, appellant seeks reversal of the judgment and a remand for new trial. First, appellant asserts that defense counsel should have sought an *in limine* ruling, prior to the start of the trial, to determine whether another form of evidence needed to be presented to impeach K.B. regarding the alleged prior false accusation. Second, appellant argues that counsel should have demonstrated to the court that sexual activity did not, in fact, take place between K.B and her grandfather. Appellant contends that counsel should have produced a witness to authenticate the Shawnee Mental Health record and introduce it as impeachment evidence in the form of a prior false accusation. Third, appellant maintains that had counsel properly introduced the evidence as suggested above, the rape shield law would not have barred further cross examination of the issue, and most important, would have been considered as impeachment evidence. Finally, appellant points to the state calling Andrea Powers, forensic interviewer from Cincinnati Children's Hospital, to testify about her assessment and treatment recommendations for K.B. During her testimony, Powers testified regarding her written

report, that she referenced in lieu of the recorded interview, due to a recording malfunction during major portions of the interview. Appellant contends that the admission of this evidence exacerbated the importance that the Shawnee Mental Health record would have had on the jury regarding K.B.'s credibility.

{¶ 31} First, with regard to appellant's argument that trial counsel abandoned his motion *in limine*, we observe that trial counsel did file a motion *in limine* and spent weeks attempting to locate the document's author, even seeking, and being granted, a continuance to do so. The court also indicated that it had been involved in another trial for three of the four weeks preceding the trial and had been unavailable the other week, so typically the motion would have been resolved pretrial. However, between the search for the defense witness and the court's docket, the court could not resolve the matter prior to trial. We, however, find no abuse of discretion here regarding the timing of the trial court's decision. The court gave the parties ample opportunity to fully address the issue and the court gave the matter full consideration. The timing of the motion and ruling did not impact the result.

{¶ 32} With regard to the *Boggs* hearing, the state argues that a defendant may inquire into a prior accusation at trial only when the prior accusation is "totally unfounded." *Boggs* at 423. Thus, the initial inquiry must be whether the accusations were actually made by the witness. The trial court must also be satisfied that the prior allegations of sexual misconduct were actually false or fabricated. *Id.* At the May 10, 2017 *in camera* hearing, K.B. was asked: "[H]ave you ever falsely accused someone of raping you?" K.B.: "No." At the *Boggs* hearing mid-trial, counsel had the opportunity twice to question K.B. regarding the prior alleged accusation. Both times, K.B. testified that she did not make a prior allegation of sexual misconduct. *Boggs* does not mandate that trial

courts permit *in camera* questioning of a victim regarding false allegations of sexual activity in the complete absence of evidence that the victim made such an accusation. *State v. McKinney,* 10th Dist. Franklin No. 13AP-211, 2013-Ohio-5394, ¶ 37. In this case, appellant failed to prove that K.B. made a prior allegation of sexual misconduct.

{¶ 33} As for appellant's argument that he should have been able to authenticate a Shawnee Mental Health record that purported to include the victim's alleged accusation of sexual assault, this is not permitted under *Boggs*. "[P]rior false allegations of sexual assault do not tend to prove or disprove any of the elements of rape, nor do they relate to issues of consent. Hence, they are an entirely collateral matter which may not be proved by extrinsic evidence." *Boggs*, 63 Ohio St.3d at 422. Thus, even if the document's author had been available for trial, *Boggs* would not provide support for the argument that the author could testify regarding the contents of the document. See Evid.R. 608(B). Only a victim may be cross-examined regarding false allegations and no extrinsic evidence is permitted.

{¶ 34} Accordingly, after our review of this matter we conclude that trial counsel did not provide ineffective assistance and followed the trial court's ruling and the rules of evidence. Consequently, we overrule appellant's first assignment of error.

II.

{¶ 35} In his second assignment of error, appellant asserts that the verdicts are against the manifest weight of the evidence. Appellant argues that the record does not support the verdicts of gross sexual imposition and rape because the victim witness lacked credibility. Appellant points out that the jury heard no testimony from law enforcement officers, crime scene analysts, lab analysts, and the state did not call any corroborating witnesses to verify the date and times of the purported

misconduct.

{¶ 36} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Minton*, 4th Dist. Adams No. 15CA1006, 2016-Ohio-5427, 69 N.E.3d 1108. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541. Generally, the trier of fact must determine evidence weight and witness credibility. *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. Thus, appellate courts will defer to the trier of fact on evidentiary weight and credibility issues because the trial of fact is in the best position to gauge witness demeanor, gestures, and voice inflections, and to use these observations to weigh credibility. *Id.*

{¶ 37} In the case sub judice, the jury had the opportunity to observe all of the witnesses, including K.B., and the jury, as the trier of fact, was in the best position to assess and weigh K.B.'s credibility, as well as the credibility of all other witnesses. *See Minton* at ¶ 80. Our review reveals that K.B. chronicled each offense in detail. The jury also heard from a social worker who interviewed K.B. about the offenses, a computer forensic specialist who testified about the two cell phones that contained the revealing images, the victim's grandmother who testified as to what occurred when appellant was confronted with the allegations, an investigator from the Adams County Prosecutor's Office, the appellant's ex-wife, and appellant's supervisor.

{¶ 38} After our review of the evidence adduced at trial, we conclude that ample competent, credible evidence supports the jury's determination. The evidence adduced at trial, if believed, fully supports the conclusion that the trier of fact did not lose its way in this matter. We recognize that appellant has expressed concern with the fact that the proof of the elements of the crimes primarily relies upon K.B.'s testimony. However, to prove the elements of a crime no numerical comparison is required. One witness, if believed, may provide the trier of fact with competent, credible evidence to support its determination. We will not substitute our judgment for that of the jury.

{¶ 39} Accordingly, after having reviewed the testimony and evidence, we do not believe that the verdicts are against the manifest weight of the evidence. Therefore, we overrule appellant's second assignment of error.

III.

{¶ 40} In his final assignment of error, appellant asserts that the evidence upon which appellant's conviction is based is insufficient as a matter of law. Appellant contends that the evidence presented at trial would not convince the average mind of appellant's guilt beyond a reasonable doubt.

{¶ 41} During the trial, at the close of the state's case and again at the conclusion of all of the evidence, appellant moved for judgment of acquittal under Crim.R. 29(A) and argued that the state presented insufficient evidence. Under Crim.R. 29(A), a defendant is entitled to acquittal on a charge against him "if the evidence is insufficient to sustain a conviction * * *." Whether a conviction is supported by sufficient evidence is a question of law that we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Allah*, 4th Dist. Gallia No.

14CA12, 2015-Ohio-5060, ¶ 8. When making this determination, we must decide whether the evidence adduced at the trial, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 12. "The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.*, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Finally, a reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbets*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶ 42} In the case sub judice, appellant was charged with two counts of rape and one count of gross sexual imposition. In count I for gross sexual imposition, R.C. 2907.05(A)(4) provides: "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: * * * (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person." In counts II and III for rape, R.C. 2907.02(A)(1)(b) provides: "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: * * * (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2901.01(A)(1) defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶ 43} In the case at bar, the evidence adduced at trial established that the victim was 10 years old when the offenses occurred. K.B. testified and detailed multiple instances of sexual conduct and contact that involved appellant, the victim's 56 year old uncle at the time of the investigation. K.B. testified that she felt "confused" and "scared he was going to do something to me if I told," following the encounters. Appellant also told the victim not to tell anyone or "he would go to prison." However, most telling is the appellant's reaction during the confrontation with family members.

{¶ 44} After our review, and viewing all of the evidence in a light most favorable to the prosecution, we readily conclude that sufficient evidence exists that appellant used force, or the threat of force, to compel sexual conduct and that any rational trier of fact could have found all of the essential elements of the offenses beyond a reasonable doubt.

{¶ 45} Accordingly, we overrule appellant's final assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.