[Cite as *State v. Whiting*, 2019-Ohio-5471.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA3672
	:	
vs.	:	
	:	DECISION AND
RONALD LEE WHITING,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Allen Vender, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal from a conviction for rape, a first-degree felony in violation of R.C. 2907.02(A)(1)(b), and gross sexual imposition, a third-degree felony in violation of R.C. 2907.05. Appellant Ronald Whiting, contends 1) that he received ineffective assistance of counsel because his attorney failed to object to inadmissible hearsay; 2) that the trial court violated his rights to due process and a fair trial when, in the absence of sufficient evidence, it entered a judgment of conviction for rape; and 3) that the trial court erred by allowing the jury to hear his

recorded interview because, under the doctrine of corpus delicti, there was insufficient evidence of rape to permit his confession to be presented to the jury. Because we conclude the child's statements were admissible as excited utterances, Appellant did not receive ineffective assistance of counsel as a result of his trial counsel's failure to object to the admission of the statements. Therefore, his first assignment of error is without merit and it is overruled.

{¶2} Further, because we have determined that the State met its burden in establishing the corpus delicti of the crime, we conclude Appellant's confession was admissible at trial and, as such, the trial court did not err in allowing the jury to hear a recording of Appellant's recorded interview. Additionally, because Appellant's confession was properly admitted into evidence and because Appellant admitted in his interview that he digitally penetrated the child, his rape conviction was supported by sufficient evidence despite the lack of other evidence on this specific element of the offense of rape. Thus, we find no merit to Appellant's second and third assignments of error and they are also overruled. Accordingly, the judgment of the trial court is affirmed.

FACTS

(¶3) On November 3, 2017, Appellant was indicted on one count of rape, a first-degree felony in violation of R.C. 2907.02(A)(1)(b), and two counts of gross sexual imposition, both third-degree felonies in violation of R.C. 2907.05. A bill

of particulars filed in the matter alleged that Appellant, on or about September 22-23, 2017, engaged in sexual conduct with E.S., a minor child less than ten years of age who was not his spouse. The sexual conduct alleged included "digital penetration by inserting his finger into the vaginal opening of E.S. * * *." The bill of particulars further alleged that during the same time period Appellant had sexual contact with the same child by putting his mouth onto her vagina. Finally, the bill alleged Appellant had further sexual contact with the same child during the same time period in that the child touched Appellant's penis.

(¶4) A review of the record reveals that the child at issue, E.S., who was approximately six years old at the time, spent the night at her grandmother's house on September 22, 2017. Appellant, the child's grandmother's live-in boyfriend of eighteen years who was considered to be the child's grandfather, was also present in the home at the time. At trial, it was alleged that Appellant engaged in sexual conduct and sexual contact with the child the morning after she spent the night and that the sexual conduct/contact occurred on the living room couch before the child's grandmother was awake. The child initially reported the incidents to her mother later in the day after she was picked up on September 23, 2017. Appellant was interviewed by law enforcement on several occasions and finally on October 12, 2017, he admitted during a recorded interview that he pulled the child's underwear to the side and placed his mouth on her vagina. He admitted that he

then inserted his finger into her vagina, joint deep, for about one minute. He also admitted that just afterwards the child followed him into the bathroom and reached out and touched his exposed penis. Although Appellant was initially allowed to go home after the interview was concluded, he was arrested later in the day and was thereafter indicted as set forth above.

{¶5} The matter proceeded through the discovery process and was tried before a jury on April 24, 2019. The State presented several witnesses at trial, including the child, the child's mother, the sexual assault treatment nurse who cared for the child in the emergency room, the child abuse specialist who interviewed the child at the Ross County Child Protection Center, the physician who conducted a physical examination of the child at the Child Protection Center, and the detective who conducted the investigation into the incidents alleged by the child. The defense presented only one witness, the child's grandmother.

{¶6} At trial, the child, E.S., testified that the last time she went to her grandmother's house the Appellant "licked [her] vagina." She specified that he used his tongue and that it happened in the living room. She testified that she understood her vagina to be her "private spot." She testified that her grandmother was in her room sleeping at the time. She further testified that she remembers telling her mother what happened when she was getting a bath at her home later

that day. When asked if she remembered if Appellant touched her with any other parts of his body that day E.S. stated no and then stated she did not remember.

{¶7} E.S.'s mother, S.S., also testified at trial. She testified that when she arrived to pick up E.S. from her mother's house, E.S. wanted to leave. She explained that this was unusual because normally the child "would beg to stay" and would ask her to "come back later." S.S. testified that just after she finished bathing the child after they returned home that day, the child told her "that Papaw told her a secret, it was their secret and she wasn't allowed to tell." S.S. testified that she asked the child about the secret and was told "that Papaw kissed her vagina." She testified that as she was telling her this, E.S. was actually "touching around that area herself." S.S. testified that E.S. told her that it happened when she was on the couch while her grandmother was asleep and that "she thought that he used his fingers on her [vagina]." At that point the child repeated the same information to her father. Thereafter, S.S. and her husband called S.S.'s mother, who essentially blamed the incident on the child.

{¶8} S.S. further testified they then took the child to the Adena Emergency Room to be examined and interviewed. S.S. testified that she next took E.S. to the Ross County Child Protection Center on September 25, 2017, where E.S. was interviewed. She testified that on the way home after the interview at the Child Protection Center, E.S. was in the back seat of the car and was rocking, which

prompted S.S. to ask her what was wrong. In response, E.S. stated that "Papaw made her touch his penis area, his private." Finally, S.S. testified that she spoke with Detective Roark from the Chillicothe Police Department the same day and relayed the child's statements to him.

{¶9} Julie Fairchild, Adena Medical Center sexual assault treatment nurse (SANE), also testified for the State. She testified, after reviewing her assault history documentation, that she provided care to E.S. in the emergency room and that E.S. referred to Appellant as "Papaw Ronnie." She further testified E.S. stated that Papaw Ronnie "put his mouth on [her] bad spot." When Fairchild asked the child what her "bad spot" was she pointed to her vaginal area and responded it was her "vagina." Fairchild further testified that E.S. reported that Appellant "tickled her bad spot with this finger," and "put his mouth on [her] bad spot." The Adena Medical Center emergency room records were admitted as evidence at trial as well.

{¶10} Ashley Muse Gigley also testified at trial. Gigley was working as a child abuse specialist at the Ross County Child Protection Center at the time of this incident and conducted an interview of E.S. She testified that the child disclosed to her that her Papaw Ronnie "put his mouth on her privates" and she clarified that when the child used the word "privates" she was referring to her vagina. She testified that E.S. disclosed Appellant used his mouth to touch her privates and also that he kissed her mouth. Regarding the incident being a secret, Gigley testified

that E.S. told her "that Papaw Ronnie told her that it was just for him and for her." When asked if Appellant touched her anywhere else on her body E.S. stated no.

{¶11} Dr. Christine McCallum also testified at trial. She performed a physical examination of E.S. at the child protection center. Her testimony was as follows:

Q: Did she [E.S.] describe any alleged sexual assaults to you at that point in time during the face-to-face?

A: Yes, she did.

Q: And what did she relay to you?

A: She relayed that her Papaw had pulled down her pants and underwear part way while they were on the couch and then proceeded to place his mouth on her vaginal area.

Q: Did you have the opportunity to ask her if he had touched -- if Papaw her Papaw [sic] had touched her with any other parts of his body?

A: Yes, I did.

Q: And what was her response on October Eleven?

A: She said no.

Q: Did you have occasion to ask her if she had touched any parts of his bare body?

A: Yes, I did.

Q: And what was her response on that same date?

A: She said no.

{¶12} Finally, Detective Rourke testified on behalf of the State regarding the investigation he conducted regarding this matter. He testified that he obtained information from S.S. regarding the child's statements and that he also observed the child's interview at the Child Protection Center via closed circuit television from an adjacent room. He testified that he interviewed the child's grandmother as well as Appellant on September 25, 2017. He testified that Appellant's answers during that first interview mostly consisted of "I don't knows" followed up with a "suspicious chuckle." He further testified that he interviewed Appellant again on October 12, 2017, and portions of that recorded interview were played for the jury. The interview lasted for approximately forty-five minutes.

{¶13} Although Appellant initially denied the child's allegations, he eventually told Detective Rourke that E.S. climbed up on top of him while he was laying on the couch that morning and she started kissing him and was "trying to make out." Although Appellant stated he tried to get away from the child, he confessed that he pulled the child's underwear to the side and put his mouth on her bare vagina. He also confessed that he inserted his finger, up to the joint, into the child's vagina for about one minute. He further stated that the child touched his

bare penis because she followed him into the bathroom and when he turned around, she reached out and touched it. Appellant can also be heard on the recorded interview stating that "[i]f she would have come in the house and acted like a six-year-old it probably wouldn't have happened * * *." When asked to explain his statement, Appellant stated that "[s]he acts too mature." Detective Rourke testified that although Appellant was permitted to go home after the interview, he was taken into custody later that day.

{¶14} The State concluded its case after Detective Rourke's testimony and the defense made a Crim.R. 29(A) motion for acquittal as to the rape count, based upon an argument that because there was no evidence of vaginal penetration with the exception of Appellant's confession, the State had not established the corpus delicti of the crime. The defense further moved for judgment of acquittal on the gross sexual imposition counts, arguing that the State had failed to establish that the sexual contact was done for sexual gratification. The trial court denied the motions.

{¶15} Thereafter, the defense presented the child's grandmother, T.M., as its sole witness. T.M essentially testified that she had no knowledge of the allegations reported by the child and that the child did not tell her anything had happened while she was at the house. She testified that the child was with her nearly the entire time she spent the night, and that the child slept with her in her bedroom and

Appellant slept on the couch. However, she testified that when she awoke the next morning, she found E.S. in the kitchen with Appellant while he was cooking breakfast.

{¶16} The case was submitted to the jury for deliberation and Appellant was convicted on the rape count as well as one count of gross sexual imposition. It appears the jury acquitted Appellant on the gross sexual imposition count that alleged sexual contact occurred when the child touched Appellant's bare penis. Appellant was ultimately sentenced to a prison term of fifteen years to life on the rape charge and a prison term of sixty months on the gross sexual imposition charge, to be served consecutively. It is from these convictions and sentences that Appellant now brings his timely appeal, setting forth three assignments of error for our review.

ASSIGNMENTS OF ERROR

I. "RONALD WHITING RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO OBJECT TO INADMISSIBLE HEARSAY."

II. "THE TRIAL COURT VIOLATED RONALD WHITING'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT OF CONVICTION FOR RAPE."

III. "THE TRIAL COURT ERRED BY ALLOWING THE JURY TO HEAR THE INTERVIEW OF WHITING, BECAUSE UNDER THE DOCTRINE

OF CORPUS DELICTI, THERE WAS INSUFFICIENT EVIDENCE OF RAPE TO PERMIT WHITING'S CONFESSION TO BE PRESENTED TO THE JURY."

ASSIGNMENT OF ERROR I

{¶17} In his first assignment of error Appellant contends he received ineffective assistance of counsel because his attorney failed to object to inadmissible hearsay. More specifically, Appellant argues that his attorney should have objected to the child's mother's testimony regarding the out-of-court statements made by the child indicating Appellant made oral contact with the child's vagina, made digital contact with the child's vagina and made the child touch his penis. Appellant argues there was no strategic reason for defense counsel to fail to object to such prejudicial hearsay. The State counters by arguing that the statements at issue constituted excited utterances and were therefore admissible as an exception to the general rule against the admission of hearsay. The State further contends that even if the statements did not constitute excited utterances, other evidence in the record, including the child's statements to medical providers as well as the child's trial testimony, rendered any erroneous admission of the statements harmless.

Ineffective Assistance of Counsel

{¶18} 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 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). *Accord Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1081, 1087–1088, 188 L.Ed.2d 1 (2014) (explaining that the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶19} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland* at 687; *State v. Obermiller*, 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶ 83; *State v. Powell*, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶20} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The

proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland* at 688. *Accord Hinton* at 1088. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial." ' " *Obermiller* at ¶ 85, quoting *State v. Pasqualone*, 121 Ohio St.3d 186, 2009–Ohio–315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Furthermore, " '[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.' " *Hinton* at 1088, quoting *Strickland* at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." (Citation omitted.) *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95. *Accord Hinton* at 1088, citing *Padilla* at 366; *State v. Wesson*, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶ 81.

{¶21} Moreover, when considering whether trial 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. Thus, "the defendant must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. Additionally, "[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, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, 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; *e.g.*, *Obermiller* at ¶ 84; *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶22} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that " 'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.' " *Hinton* at 1089, quoting *Strickland* at 694; *e.g.*, *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 13; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus (1989). " '[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.' " *Hinton* at 1089, quoting *Strickland* at 695. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to

affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592, 2002-Ohio-1597. As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. *E.g.*, *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014–Ohio–3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013–Ohio–2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012–Ohio–1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009–Ohio–6191, ¶ 68. *Accord State v. Powell*, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

{¶23} Initially, we observe that " '[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.' " *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999), quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). A defendant must also show that he was materially prejudiced by the failure to object. *Holloway* at 244. *Accord State v. Hale*, 119 Ohio St.3d 118, 2008–Ohio–3426, 892 N.E.2d 864, ¶ 233. Additionally, tactical decisions, such as whether and when to object, ordinarily do not give rise to a claim for ineffective assistance. *State v. Johnson*, 112 Ohio St.3d 210, 2006–Ohio–6404, 858 N.E.2d 1144, ¶ 139–140. As set forth above, however,

Appellant argues there was no strategic reason for defense counsel to fail to object to the statements at issue.

Standard of Review

{¶24} Generally, " '[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 87, quoting *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus (1987). "Thus, absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence." *State v. Leasure*, 2015-Ohio-5327, 43 N.E.3d 477, ¶ 32 (4th Dist.). " 'A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.' " *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. Although an abuse of discretion standard of review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court, an abuse of discretion includes a situation in which a trial court did not engage in a "sound reasoning process." *Darmond* at ¶ 34.

{¶25} However, as set forth above, Appellant's trial counsel failed to object to the admission of the child's statements through the testimony of the child's mother. Failure to object to an alleged error waives all but plain error. *State v.*

Canterbury, 4th Dist. Athens No. 13CA34, 2015–Ohio–1926, ¶ 15; *State v. Keeley*, 4th Dist. Washington No. 11CA5, 2012–Ohio–3564, ¶ 28. This failure is the basis of Appellant's ineffective assistance of counsel claim. Notice of Crim.R. 52(B) plain error must be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010–Ohio–3286, 934 N.E.2d 920, ¶ 6; *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus (1978). To find plain error, the outcome of trial must clearly have been otherwise. *State v. McCausland*, 124 Ohio St.3d 8, 2009–Ohio–5933, 918 N.E.2d 507, ¶ 15; *State v. Braden*, 98 Ohio St.3d 354, 2003–Ohio–1325, 785 N.E.2d 439, ¶ 50.

Excited Utterance

{¶26} " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802. The pertinent exception here is Evid.R. 803(2), the excited-utterance exception, which provides that "[a] statement relating

to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule.

{¶27} In Ohio, courts apply a four-part test to determine the admissibility of a statement as an excited utterance, as follows:

> "(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,
>
> (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,
>
> (c) that the statement or declaration related to such startling occurrence or the circumstances of such starling occurrence, and
>
> (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration."

(Emphasis sic.) *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 166, quoting *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus, followed and approved by *State v. Taylor*, 66 Ohio St.3d 295, 612 N.E.2d 316, fn. 2 (1993). The rationale of the rule is that circumstances surrounding the excited statement prevent the declarant from using reflective processes to fabricate a statement.

{¶28} As explained in *State v. Jones*, *supra*:

> "There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be a result of reflective thought.
>
> Therefore, the passage of time between the statement and the event is relevant but not dispositive of the question. '[E]ach case must be decided on its own circumstances, since it is patently futile to attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be termed a spontaneous exclamation.' " (Emphasis sic.) *State v. Jones*, *supra,* at 168, quoting *State v. Taylor*, *supra*, 303, quoting *State v. Duncan*, 53 Ohio St.2d 215, 219-220, 373 N.E.2d 1234 (1978).

{¶29} Furthermore, this Court has observed that in the context of young children who are the victims of sexual assault, the requirements for an excited utterance are tempered by the recognition of their limited reflective powers. *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 55 (4th Dist.). This is so because their " '[i]nability to fully reflect makes it likely that the statements are trustworthy.' " *Id.*, quoting *State v. Taylor*, *supra*, at 304. We also recognized in *Felts* that " 'children are likely to remain in a state of nervous excitement longer than would an adult in cases involving hearsay statements by a child declarant.' " *Felts* at ¶ 56, quoting *State v. Taylor* at 304. As a result, "courts have upheld the application of the excited-utterance exception even where several days or weeks have elapsed since the startling event." *Id*., citing *State v. Wilson*, 4th Dist. Scioto No. 13CA3542, 2015-Ohio-2016, ¶ 90, and cases cited there, including *In re C.C.*, 8th Dist. Cuyahoga Nos. 88320 and 88321, 2007-Ohio-2226, ¶ 53 (concluding that children's statements made 27 days after incident qualified as excited utterances).

{¶30} Additionally, as we explained in *Felts*, "[o]ther relevant factors generally indicating whether the declarant was in a sufficient state of excitement or stress when making the statement include outward indicia of emotional state, like tone of voice, accompanying actions, and general demeanor. *Felts* at ¶ 57; citing *State v. F.R.*, 2015-Ohio-1914, 34 N.E.3d 498, ¶ 28, (10th Dist.).

Legal Analysis

{¶31} Here, at issue are several out-of-court statements made by a five-year-old child to her mother indicating Appellant touched her vaginal area with his mouth and also his fingers. Also at issue is a statement the child made indicating Appellant made her touch his penis. The first two statements were made within a few hours after the child got home after spending the night with her grandmother. As set forth above, Appellant has been the live-in boyfriend of the child's grandmother for eighteen years and the child considers him to be her grandfather. At trial, the child's mother testified the child was acting abnormally just prior to making the statements at issue. For instance, she was eager to leave her grandmother's house at pickup time, contrary to her usual behavior. Further, just after the child got home from her grandma's house and immediately after her bath, she told her mother that she had a secret she wasn't supposed to tell. When questioned by her mother the child stated Appellant had kissed her vagina and "she thought that he used his fingers on her." The child then repeated the statements in a consistent manner to her father. Finally, on the way home in the car after being examined and interviewed at the Child Protection Center a few days later, the child was rocking back and forth while sitting in the back seat. When her mother asked her what was wrong, she stated "that Papaw made her touch his penis area, his private."

{¶32} Appellant argues that the child's statements cannot be considered spontaneous and instead indicate the child was fully capable of reflective thought at the time she made the statements, because she made the statements only after her mother inquired about the secret to which she was referring. However, the Supreme Court of Ohio has held that:

> "The admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties." *State v. Felts*, [*supra*, at] ¶ 59, quoting *State v. Wallace*, 37 Ohio St.3d 87, 524 N.E.2d 466 (1988), paragraph two of the syllabus (involving the questioning of a child by her mother); *State v. Jones*, *supra*, at ¶ 170.

Here, there is no indication the child's mother's questions were coercive or leading. Instead, the evidence indicates the child's mother was simply inquiring about the secret the child had spontaneously mentioned. Further, there is no indication that the child's mother's inquiry destroyed the domination of the nervous excitement over the child's reflective faculties. This is true especially in light of the fact that, as discussed above, in the case

of child declarants such a state of nervous excitement may last for a prolonged period of time. Further, the timeframe at issue here was simply a matter of hours after the startling event occurred and then just after a medical examination and interview had taken place. Thus, the fact that the child made the statements at issue in response to being asked a question by her mother does not preclude the admission of the statements into evidence as an excited utterance.

{¶33} Contrary to Appellant's arguments, a review of the record indicates that it appears the child was still in a state of nervous excitement at the time she made the statements, and thus her statements were spontaneous and unreflective, as contemplated under the four-part test set forth above. A sexual assault certainly constitutes an occurrence startling enough to produce nervous excitement in a child and the caselaw is clear that a state of nervous excitement from such a startling event may last hours, days or even weeks in a child victim. Furthermore, the statements made by the child directly related to the startling occurrence and the child was certainly a first-hand observer of the events at issue as she was the victim. As such, we conclude that all four elements of the four-part test have been met here. Thus, even if Appellant's trial counsel had objected to the admission of the statements, we cannot conclude the trial court erred, let alone committed plain error, in admitting these statements, as they can be properly classified as excited

utterances and are an exception to the general rule prohibiting the admission of hearsay.

{¶34} Furthermore, because the statements were properly admitted into evidence, we cannot conclude counsel was ineffective for failing to object to the admission of these statements. Additionally, as argued by the State, even if these statements had not constituted excited utterances, the child's statements indicating Appellant had not only made oral contact, but digital contact, with her vaginal area would have been admissible through the testimony of the hospital personnel as statements made for purposes of medical treatment or diagnosis. These statements were also documented in the medical records that were admitted as exhibits at trial. Moreover, the child actually testified at trial as to Appellant's oral contact with her vagina. As such, we find any objection made by trial counsel would very likely have been futile. Counsel's failure to object did not affect the outcome of the trial in light of the other evidence properly admitted at trial demonstrating Appellant's guilt, including Appellant's confession, which will be discussed more fully under his second and third assignments of error. Accordingly, we find no merit to Appellant's first assignment of error and it is overruled.

ASSIGNMENTS OF ERROR II AND III

{¶35} For ease of analysis, we address Appellant's second and third assignments of error together. In his second assignment of error, Appellant

contends the trial court violated his rights to due process and a fair trial when, in the absence of sufficient evidence, it entered a judgment of conviction for rape. He contends the issue under this assignment of error is whether his confession, in and of itself, is sufficient to sustain a conviction for rape. In his third assignment of error, Appellant contends the trial court erred by allowing the jury to hear his recorded interview because, under the doctrine of corpus delicti, there was insufficient evidence of rape to permit his confession to be presented to the jury. He contends that the issue to be determined under this assignment of error is whether there was sufficient corroborating evidence of rape to allow his confession to be presented to the jury. The arguments contained in both of these assignments of error hinge on whether the State established the corpus delicti of the offense of rape.

{¶36} "A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Blanton*, 2018-Ohio-1278, 110 N.E.3d 1, ¶ 12 (4th Dist.), citing *State v. Wickersham*, 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756, ¶ 22; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt." *Blanton* at

¶ 12, citing *Thompkins* at syllabus. "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." *Blanton* at ¶ 12; citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). "Furthermore, a reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *Blanton* at ¶ 12, quoting *Thompkins*, *supra*, at 390.

{¶37} This test raises a question of law and does not allow us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 174, 485 N.E.2d 717 (1983). Rather, the test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. We reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact. *State v. Thomas*, 70 Ohio St.2d 79, 79–80, 434 N.E.2d 1356 (1982); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus (1986). However, we review a trial court's decision as to whether the State established the corpus delicti of a crime under a manifest weight-of-the-evidence standard. *See In re W.B. II*, 4th Dist. No. 08CA18–2009–Ohio 1707, ¶ 31 and 32.

Thus, we will uphold the trial court's decision as long as the record contains some competent and credible evidence independent of the defendant's confession to establish that a crime occurred. *See, e.g., State v. Maranda*, 94 Ohio St. 364, 114 N.E. 1038, paragraphs one and two of the syllabus (1916); *W.B.* at ¶ 32.

{¶38} This Court has explained in detail the corpus delicti requirement several times in recent years. *See In re W.B., II*, *supra*, at ¶ 33-34; *State v. Puckett*, 2010-Ohio-6597, 947 N.E.2d 730, ¶ 16 (4th Dist.); *State v. Young*, 4th Dist. Washington No. 12CA14, 2013-Ohio-3418, ¶ 27. As most recently observed in *State v. Young*, " '[t]he corpus delicti of a crime is essentially the fact of the crime itself.' " *Young* at ¶ 27, quoting *State v. Hofer*, 4th Dist. Adams No. 07CA835, 2008-Ohio-242, ¶ 36; *see also State v. Haynes*, 130 Ohio App.3d 31, 34, 719 N.E.2d 576 (1998). The corpus delicti of a crime "is comprised of '(1) the act [and] (2) the criminal agency of the act.' " *Young* at ¶ 27, quoting *State v. Maranda*, *supra*, at paragraph one of the syllabus; *see also State v. Edwards*, 49 Ohio St.2d 31, 34, 358 N.E.2d 1051 (1976), vacated on other grounds, 438 U.S. 911, 98 S.Ct. 3147 (1978); *State v. Van Hook*, 39 Ohio St.3d 256, 261, 530 N.E.2d 883 (1988). As the Supreme Court of Ohio noted in *State v. Maranda, supra*, "[i]t has long been established as a general rule in Ohio that there must be some evidence outside of a confession, tending to establish the corpus delicti, before such confession is admissible." *Maranda* at paragraph two of the syllabus; *see*

also Young at ¶ 27. Thus, a court may not admit an extrajudicial confession unless the State has produced independent evidence of the corpus delicti of a crime. *Miranda* at paragraph two of the syllabus; *Hofer* at ¶ 36; *Young* at ¶ 27.

{¶39} Further, as explained in *Maranda*:

> The quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case. It is sufficient if there is some evidence outside of the confession that tends to prove some material element of the crime charged. *Maranda* at paragraph two of the syllabus; *see also State v. Edwards*, *supra*, at ¶ 34; *State v. Young*, *supra*, at ¶ 27.

{¶40} Further, the outside or extraneous evidence may be direct or circumstantial. *Young* at ¶ 27, citing *Maranda* at 371; *see also State v. Nicely*, 39 Ohio St.3d 147, 154-155, 529 N.E.2d 1236 (1988) and *State v. Clark*, 106 Ohio App.3d 426, 431, 666 N.E.2d 308 (1995).

{¶41} In *Edwards*, *supra*, the Supreme Court of Ohio noted the historical origins of the corpus delicti rule were designed to protect an accused from being convicted of a crime that never occurred. *Edwards*, *supra*, at 35. The court stated that, in light of the "vast number of procedural safeguards protecting the due-process rights of criminal defendants, the corpus delicti rule is supported by few

practical or social-policy considerations." *Id*. at 35–36. Accordingly, there is "little reason to apply the rule with dogmatic vengeance." *Id.*; *see also State v. Ferris*, 4th Dist. No. 00CA12, 2001 WL 243424 (Jan. 29, 2001), *6. In *Edwards*, the Court described the State's burden of providing "some evidence of the corpus delicti" to be "minimal." *Edwards* at 36, citing *Maranda*, *supra*.

{¶42} In this matter, we find the State carried its minimal burden of proving independent evidence of the corpus delicti of the crime of rape. As set forth above, Appellant was convicted of the rape of a child under the age of thirteen, in violation of R.C. 2907.02(A)(1)(b), and gross sexual imposition, in violation of R.C. 2907.05. Appellant only challenges the evidence supporting his conviction on the rape charge under this assignment of error. R.C. 2907.02 defines the offense of rape and provides, in pertinent part, as follows:

> (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. 2907.01 defines "sexual conduct" as follows:

> vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

{¶43} As set forth above, Appellant confessed to putting his mouth on the child's vagina and to inserting his finger up to his joint into her vagina for about one minute. In his confession he also stated that after committing these acts, the child reached out and touched his exposed penis when he was in the bathroom. Appellant argues that aside from his confession, there was no other evidence he actually penetrated the child's vagina with his finger. Thus, he argues the corpus delicti of the crime was not established at trial and that, as a result, his confession should not have been admissible as evidence at trial.

{¶44} However, removing Appellant's confession from consideration, there was other independent evidence that the crime was committed. As set forth above, the child's statements to her mother were properly admitted as excited utterances at trial and the child's statements for purposes of medical treatment and diagnosis were also properly admitted. Furthermore, the child testified at trial. This testimony collectively indicated that Appellant put his mouth on this five-year-old

child's vagina and touched her vagina with his fingers. The testimony further indicated these acts took place on a couch in the living room of the child's grandmother's house while the child's grandmother was sleeping, after the child had spent the night at the house. Despite the fact that the child did not allege that penetration occurred, there was other competent, credible evidence introduced at trial to establish the corpus delicti of the alleged crime in this matter. *See State v. Cook*, 3d Dist. Allen No. 1-11-66, 2013-Ohio-5081, ¶ 26 (in absence of physical evidence corroborating crime of rape trial court found corpus delicti of offense established by child's statement that defendant "touched his bad spot to her bad spot" and statement that defendant had "messed" with her); *State v. Moats*, 7th Dist. Monroe No. 14MO0006, 2016-Ohio-7019, ¶ 18, 23 (finding that corpus delicti of rape was established by the child's testimony regarding an ongoing pattern of sexual conduct by defendant despite the child's denial that digital penetration occurred), relying on *State v. Schauer*, 4th Dist. Pickaway No. 99CA17, 2000 WL 670304 (May 15, 2000) (holding evidence satisfied the corpus delicti requirement relative to a rape charge of digital penetration despite the fact that victim recanted her prior statement that defendant inserted his finger into her vagina, where the victim's sister testified she heard the victim screaming and where the victim stated defendant "made her remove her underpants as he read a sexually explicit letter she had written to her boyfriend."); *State v. Morgan*, 12th

Dist. Clermont No. CA2013-03-021, 2014-Ohio-250, ¶ 21 (explaining that "[a]lthough there was no independent evidence regarding the specific act of digital penetration, the state is not required to produce evidence related to each element of the charged offense to satisfy the corpus delicti rule."), citing *State v. Van Hook*, *supra*, at 261.

{¶45} In light of the foregoing, we conclude that the State introduced competent and credible evidence independent of Appellant's confession to establish that the crime of rape occurred and therefore the trial court's determination that the corpus delicti of the crime had been established was not against the manifest weight of the evidence. Furthermore, and as a result, we find no error or abuse of discretion in the trial court's allowance of Appellant's recorded confession to be admitted into evidence. Moreover, having found that the State properly established the corpus delicti of the crime and that Appellant's confession was properly admitted into evidence, we conclude Appellant's conviction was supported by sufficient evidence. Therefore, Appellant's second and third assignments of error are both overruled.

{¶46} Having found no merit in any of the assignments of error raised by Appellant, they are all overruled. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross 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 the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith
Presiding 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.