[Cite as *State v. Powers*, 2020-Ohio-7042.]

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

STATE OF OHIO,	:	
	:	Case No. 19CA3868
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
BRIAN POWERS,	:	
	:	
Defendant-Appellant.	:	

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for Appellant.

Shane Tieman, Scioto County Prosecutor, and Jay S. Willis, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal from a Scioto County Court of Common Pleas judgment entry convicting Appellant, Brian Powers, of three counts of rape, two counts of kidnapping, endangering children, intimidation of a victim, and illegal use of a minor in nudity-oriented material. On appeal, Appellant asserts eight assignments of error: (1) the trial court committed reversible error when it denied his motion for separate trials, (2) the trial court abused its discretion when it found the alleged child victim competent to testify as a witness, (3) Appellant's counsel was ineffective, (4) Appellant's

Confrontation Clause rights were violated when the alleged child victim was permitted to testify via closed circuit camera, (5) Appellant's convictions were against the manifest weight and sufficiency of the evidence, (6) improper hearsay evidence was admitted at Appellant's trial, (7) the State of Ohio made improper comments during closing arguments which should have resulted in a mistrial, and (8) cumulative errors occurred at trial warranting reversal of his convictions.

{¶2} After reviewing the record and the applicable law, we overrule all of Appellant's assignments of error, except we find that there was insufficient evidence to support Appellant's convictions for intimidating a victim and endangering children. Therefore, we affirm in part and vacate in part the trial court's judgment entry of conviction.

I. PROCEDURAL HISTORY

{¶3} On February 28, 2018, the State charged Appellant with three counts of rape in violation of R.C. 2907.02 with specifications, two counts of kidnapping in violation of R.C. 2907.01 with specifications, endangering children in violation of R.C. 2919.22, and intimidation of a witness in violation of R.C. 2921.04, with all of the charges pertaining to a four-year-old victim, A.C. In the same indictment, the State also charged Appellant with illegal use of a minor in nudity-oriented material or performance in

violation of R.C. 2907.323 for images of nude minors, some engaging in sex acts, that were found on Appellant's PlayStation 3 ("PS3").

{¶4} On September 25, 2018, the trial court held an in camera hearing to determine if A.C. was competent to testify because she was four years old at the time of the assault. The judge invited the parties to submit questions, but neither party did. The judge began by asking A.C. some preliminary questions, such as the date of her birthday, and if she had any brothers and sisters. The judge then asked A.C. whether she understood what telling the truth meant. She answered affirmatively. The judge then asked A.C. several questions in an attempt to ascertain whether she understood the concept of telling the truth. It appears that A.C. answered truthfully to the judge's questions, and further stated that she understood she should not lie, but should "tell the truth."

{¶5} On that same day, the court also addressed the State's motion for A.C. to testify via closed circuit video pursuant to R.C. 2945.481(E), as opposed to testifying in person in the courtroom. The court heard testimony from A.C.'s stepmother, Michelle Carver, and A.C.'s therapist. Both provided testimony suggesting that it would be traumatic for A.C. to testify in person in the courtroom in front of Appellant.

{¶6} On January 8, 2019, the court issued an entry granting the State's motion to permit A.C. to testify during the trial via closed circuit video pursuant to R.C. 2945.481(E). Specifically, the court found under the totality of the circumstances that if A.C. was required to testify live in court there would be a substantial likelihood that A.C. would suffer serious emotional trauma. Two days later, the court issued an entry finding A.C. competent to testify because she "has the ability to receive accurate impressions of fact, has the ability to accurately recollect the impressions, and has the ability to relate the impressions truthfully."

{¶7} The case went to trial in January 2019. The following facts were gleaned from the trial court's record. Brian Carver (hereinafter Brian) and Hanna Giles are the biological parents of A.C., the minor victim in this case. Michelle Carver is A.C.'s stepmother. Sheri Trout is A.C.'s maternal grandmother and Appellant, Brian Powers aka "Pappy Brian," (hereinafter Pappy Brian or Appellant) is her boyfriend. Because Hanna became incarcerated, Brian had sole custody of A.C., but Sheri had visitation rights.

{¶8} Upon A.C. returning from a visit with Sheri on July 20, 2017, Brian and Michelle noticed that she was covered with what appeared to be some sort of insect bites. Consequently, they decided to take A.C. to an urgent care facility in Portsmouth. Brian testified that while in the exam

room, A.C. made a gesture touching her breast and then running her hand to her crotch. Brian testified that he asked A.C. "where did you learn that?" Brian testified that A.C. stated "Peter done - - does that to her." Brian testified that Michelle then went to get the nurse, who recommended taking A.C. to Southern Ohio Medical Center in Portsmouth ("SOMC").

{¶9} Michelle testified that while they were at the urgent care facility, she asked Brian who Peter was but he did not know. Michelle testified that Brian asked A.C. who Peter was and A.C. responded that Sheri and Appellant had a fight and she (A.C.) had to go to Peter's house. Michelle testified that Brian then asked A.C. where Peter lived. She did not know, but did say that Peter had hurt her and touched her between her legs. Michelle testified that she told the doctor at the urgent care facility that she thought A.C. had been molested and the doctor recommended taking A.C. to SOMC in Portsmouth.

{¶10} Once they arrived at SOMC, the staff reported the assault to the Portsmouth Police Department, which dispatched Officer Irvin to the hospital to make a report. Officer Irvin's report indicated that he interviewed Brian. Brian's statement, as reflected in Officer Irvin's report, indicated that after returning from a visit with her grandmother (Sheri) and Appellant (Sheri's boyfriend), A.C. had bug bites on her legs, so he took her

to an urgent care facility. The report indicated that at the urgent care facility, A.C. told Brian that "a friend of Sheri Trout and (Brian) Powers named 'Peter' put his thumb in her Cha Cha."

{¶11} Officer Irvin then interviewed A.C. A.C.'s statements, as reflected in Officer Irvin's report, indicated that she told Officer Irvin that "Peter put his thumb in her 'cha cha.' " She also described numerous details pertaining to Peter, such as he played with his cats and dogs, built a fire, etc.

{¶12} The SOMC Emergency Department Emergency Record notes state: "Stepmother reports that the child told her that a man named Peter put his thumb in her 'private area.' Incident occurred in Sciotoville." The staff at SOMC told Brian and Michelle to take A.C. to Adena Health System in Chillicothe ("Adena") because it was better equipped to handle the assault.

{¶13} Brian and Michelle then took A.C. to Adena where Dr. Zoran Naumovski and Sexual Assault Nurse Examiner Ashley King examined A.C. Nurse King testified that when she told A.C. she was going to have to examine A.C.'s private parts, A.C. began to cry. Nurse King utilized a sexual assault kit during the exam to collect evidence from A.C. that included taking photos of A.C.'s injuries and swabbing her external body parts for DNA, including the anal and perianal area, which is between the anus and vagina. Nurse King described A.C.'s vaginal area as having

abrasions, redness, and swelling. She also testified that A.C. had what appeared to be bruising "where the leg and the buttocks or the thigh there, the hip area, all this comes together inside the legs." Nurse King testified that when she was swabbing, A.C. was crying and sat up and grabbed Nurse King's scrubs and said "and that's why I popped up when Peter did it, because it hurt so bad." Finally, Nurse King testified that A.C.'s hymen was red and swollen, which was not normal for a four-year-old. She testified that due to A.C.'s injuries, she referred A.C. to the "Child Protection Center."

{¶14} Dr. Naumovski, also from Adena, testified that he examined A.C. "from head to toe," and she was normal except for her genital area. He testified that A.C. was combative, tearful, and would not cooperate during the genital exam. He testified that her genital area was red and swollen indicating irritation, which could be "mechanical" or "trauma." He further testified that when he examined A.C. approximately two weeks later her genital area had healed.

{¶15} Both Brian and Michelle testified that while at Adena, A.C. disclosed to them that it was not Peter, but Pappy Brian (Appellant) who touched her genital area. Nurse King testified that A.C. mentioned to her that "Peter" was the perpetrator. The medical records from Adena also indicate that Peter was the assailant.

{¶16} Based on the recommendation from Nurse King, on August 2, 2017, Brian and Michelle took A.C. to the Child Protection Center in Ross County ("CPC"), which exists "to ensure that Ross County and surrounding county children who had been sexually or physically abused received appropriate attention." http://www.thechildprotectioncenter.org/. At CPC, Ashley Muse-Gigley[1] evaluated A.C., which was captured on video. During the video, A.C. indicated that Pappy Brian (Appellant) had "touched her pee-pee with his thumb" while her clothes were on. A.C. said that the touching occurred at Sheri's house. Ms. Muse-Gigley suggested a follow-up medical exam and mental health counseling.

{¶17} Cynthia Justice was a therapist for Mahajan Therapeutics who treated A.C. Ms. Justice saw A.C. weekly. After six months of treatment, she diagnosed A.C. with post-traumatic stress syndrome ("PTSD"). Ms. Justice explained that PTSD is "an illness that happens after someone has either been exposed to a trauma or exposed to a traumatic event where they feel that they've been threatened, life's been threatened, or someone else has been threatened." Justice testified that A.C. exhibited the following symptoms of PTSD: "irritable behavior, anger outbursts, sleep disturbances, nightmares, some avoidance of situations." Ms. Justice, reading from her

[1] Since her examination of A.C., Ashley Muse was married and her married name is Ashley Gigly.

notes taken during treatment, testified that during a treatment session A.C. blurted out "details of the alleged sexual abuse by her grandmother's boyfriend. [A.C.] stated, I yelled for Sheri to help and she came in and told me – or told him, referring to [Appellant], as she called him by name, to get off my daughter, referring to self, this is in parentheses, or I will smack you in the face." Ms. Justice testified that as A.C. made this statement she was anxious and avoided eye contact.

{¶18} Rachel Gray, a caseworker for Children's Services, was assigned to A.C.'s case. Her job was to investigate to make sure children are safe. Based on the report of abuse, Ms. Gray first called Brian to understand the situation, and then checked with Adena to ensure all proper medical steps were taken. After confirming there was no emergency situation because A.C. was safe from the perpetrator, she made two unannounced visits to Brian and Michelle's house, with the first visit on August 24, 2017. Ms. Grey testified that during her visit she asked why A.C. was so sad, and she said that A.C. apologized for fibbing: she said there was no Peter, it was "Papaw Brian."

{¶19} A.C. testified at trial via two-way closed-circuit video. After some preliminary questions to ensure A.C. understood the different female body parts, their locations, and the difference between being honest and

dishonest, the State asked A.C. if anyone had touched her, and she stated "Pappy Brian." When asked who "Peter" was, A.C. responded "he's not real." When she was asked who told her to say it was Peter, A.C. responded "Brian Powers." A.C. testified that after the incident, while she was at the store with her stepmother, she saw Pappy Brian and started to cry.

{¶20} Detective Crapyou, a detective with the Portsmouth Police Department, headed the investigation of the sexual assault of A.C. Detective Crapyou testified that as he was reading Officer Irvin's report of the sexual assault of A.C. on July 24, 2017, he received a call from Michelle who told him that the perpetrator of the sexual assault was not Peter, but Brian Powers, Sheri Trout's boyfriend. Consequently, Detective Crapyou went to see Sheri at her home on July 28, 2017. When he told Sheri of the allegations, she said "[Appellant] wouldn't have done this." On July 29, 2017, Appellant was arrested on a separate domestic violence charge and put in jail.

{¶21} After returning from vacation on August 28, 2017, Detective Crapyou received a call from Sheri stating that she needed to talk to him at once. When he arrived at her home, Sheri informed him that while she was watching movies on Appellant's PS3 she noticed images of nude young females, as well as a Google search history indicating searches that pertained

to sex and drugs. Detective Crapyou obtained a search warrant on September 5, 2017, to collect DNA from Powers. The next day Detective Crapyou executed the warrant, impounded the PS3, and sent it to the Ohio Bureau of Criminal Identification and Investigation ("BCI") for examination. He also went to the jail and swabbed Powers' mouth to collect a DNA sample.

{¶22} Dylan Waggy, a Computer Forensic Specialist for BCI, accessed the PS3's hard drive, and cloned it, i.e. he made a duplicate of what was on the hard drive. Mr. Waggy testified that a duplicate is preserved while the original material is removed from the PS3 and preserved on a computer so none of it can be lost. Mr. Waggy then ran the duplicated content though the PS3 and found 9 photos that he "screenshotted." The photos were identified as originating from the following websites: "Young Porn Safe Off, Teen Fuck Hardcore, Free Hardcore Teen, Free Teen Russian, X Videos Porn at Ultra Young Sex, and Triple X Infant Young Sex" among others. Mr. Waggy determined that all these photos were placed on the hard drive at approximately 10:00 p.m. on July 28, 2017.

{¶23} Timothy Augsback, a Forensic Scientist at BCI, analyzes evidence for the presence of DNA and then compares that DNA to known samples to see if they have a common source. Augsback created a DNA

profile for Appellant using DNA from the swabs provided by Detective Crapyou. Augsback determined that the swabs taken from A.C.'s anal and perianal areas contained human male DNA, but he could not match it specifically to Appellant's DNA profile. Augsback testified that the inability to compare the male DNA recovered from A.C. to Appellant's DNA could have occurred for any number of reasons, including that there wasn't enough DNA transferred from the assailant to the victim.

{¶24} The jury convicted Appellant on all counts. The court issued an entry that (1) merged counts 1 (rape), 3 (rape), 5 (kidnapping), and 6 (kidnapping) with count 4 (rape) and sentenced Appellant to a life sentence without the possibility of parole on count 4; (2) sentenced Appellant to 12 months in prison on count 2 for illegal use of minor in nudity-oriented material; (3) sentenced Appellant to 36 months in prison on count 7 for endangering children; and (4) sentenced Appellant to 36 months in prison on count 8 for intimidating a victim. All these sentences are to be served consecutively for an aggregate sentence of life, plus seven years. It is from this judgment that Appellant appeals, asserting eight assignments of error.

ASSIGNMENTS OF ERROR

1. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTIONS FOR SEPARATE TRIALS.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THE ALLEGED CHILD VICTIM COMPETENT TO TESTIFY AS A WITNESS.

3. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF THE APPELLANT.

4. APPELLANT'S CONFRONTATION CLAUSE RIGHTS WERE VIOLATED WHEN THE ALLEGED CHILD VICTIM WAS PERMITTED TO TESTIFY VIA CLOSED CIRCUIT CAMERA.

5. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDECE.

6. IMPROPER HEARSAY EVIDENCE WAS PRESENTED AT APPELLANT'S TRIAL.

7. THE STATE OF OHIO MADE IMPROPER COMMENTS DURING CLOSING ARGUMENTS WHICH SHOULD HAVE RESULTED IN A MISTRIAL.

8. CUMULATIVE ERRORS OCCURRED DURING THE APPELLANT'S TRIAL WHICH WARRANT REVERSAL OF HIS CONVICTIONS."

First Assignment of Error

{¶25} Appellant's first assignment of error asserts that the trial court committed reversible error when it denied his motion to sever count two, illegal use of a minor in nudity-oriented material, from the remaining charges (rape, kidnapping, endangering children, and intimidating a witness, victim, or attorney) for purposes of trial. Appellant argues that trying the illegal use of a minor in nudity-oriented material count with the other counts would prejudice his defense against the remaining charges of rape,

kidnapping, etc. Appellant cites *State v. Slaven*, 191 Ohio App.3d 340, 2010-Ohio-6400 (court erred in joining sexual assault of two different children because evidence in one case would not be admissible in the other) and *State v. Clements*, 98 Ohio App.3d 797, 649 N.E.2d 912 (2nd Dist. 1994 (error for court to join unrelated charges of burglary and robbery in the same trial) in support of his argument.

{¶26} In response, the State argues that Ohio law favors joinder of offenses that are of the same or similar character citing *State v. Hariston*, 4th Dist. Scioto No. 06CA3081, 2007-Ohio-3880. The State argues that the offense of illegal use of nudity-oriented material involving a minor is similar in character to sex offenses committed against A.C. because both involve child victims and criminal sexual behavior.

{¶27} The State also "submits that the evidence was admissible as 'other acts evidence.' " However, as the State recognizes, other acts evidence cannot be used to show that the defendant acted in conformity with his character, but may be admitted to show a defendant's scheme, plan, or system in doing an act. Although not made clear in its brief, the State appears to imply that Appellant's possession of nudity-oriented materials was evidence of a plan to commit the rape offenses against A.C.

1. Standard of Review

{¶28} " 'We review the trial court's decision on a motion to sever under an abuse of discretion standard.' " *State v. Evans*, 4th Dist. Jackson No. 10CA1, 2012-Ohio-1562, ¶ 35, quoting *State v. Heflin*, 6th Dist. Lucas No. L-10-1268, 2011-Ohio-4134, ¶ 12, citing *State v. Lott,* 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). "An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable." *Id*., citing *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶29} However, if a motion "for severance of counts due to prejudicial misjoinder" is not "renewed at the close of the state's case or at the conclusion of all the evidence," it is waived, and will be governed by a plain-error analysis. *State v. Miller*, 105 Ohio App.3d 679, 691, 664 N.E.2d 1309 (4th Dist. 1995), citing *State v. Strobel*, 51 Ohio App.3d 31, 554 N.E.2d 916 (1988), paragraph two of the syllabus, *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (1975), paragraph two of the syllabus, *State v. Cisternino*, 8th Dist. Cuyahoga No. 66387, 1994 WL 590523 (Oct. 27, 1994). "Crim.R. 52(B) allows this court to address plain errors or defects affecting substantial rights although they were not properly brought to the attention of the court. *Id.* But plain error "is to be taken with utmost

caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id.*, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶30} While Appellant filed a motion to sever count two in the trial court, which was denied, he did not renew his motion at the close of the State's case or at the close of all the evidence. Therefore, we review this assignment of error under a plain error analysis.

2. Severance

{¶31} Crim.R. 8(A) provides that: "[t]wo or more offenses may be charged in the same indictment, * * * in a separate count for each offense if the offenses charged * * * are of the same or similar character * * *." "Courts broadly construe the phrase 'of the same or similar character' so that joinder of similar offenses is generally the rule, not the exception." *State v. Parham*, 10th Dist. Franklin No. 16AP-826, 2019-Ohio-358, 121 N.E.3d 412, ¶ 24, citing *State v. Kennedy*, 1st Dist. Hamilton No. C-120337, 2013-Ohio-4221, 998 N.E.2d 1189, ¶ 26, *State v. Bennie*, 1st Dist. Hamilton No. C-020497, 2004-Ohio-1264, 2004 WL 535277, ¶ 17.

{¶32} "The law favors joining multiple criminal offenses in a single trial." *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991), citing Crim.R. 8(A), *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293

(1990). "This is because joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.' " *State v. Gordon*, 152 Ohio St.3d 528, 532, 2018-Ohio-259, 98 N.E.3d 251, ¶ 18, quoting *Bruton v. United States*, 391 U.S. 123, 134, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

{¶33} However, Crim.R. 14 states: "If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * for trial together, the court shall order an election or separate trial of counts * * * or provide such other relief as justice requires." Therefore, "a trial court should order separate trials pursuant to Crim.R. 14 if it appears the defendant is prejudiced by the joinder." *Gordon*, 152 Ohio St.3d 528, 533, 2018-Ohio-259, 98 N.E.3d 251, ¶ 20. A defendant claiming that a trial court erred in not severing charges "has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial * * *." *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), at the syllabus. "[C]laims of prejudice are less persuasive where the evidence is "amply sufficient to sustain each verdict, whether or not the indictments were tried together." *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008,

822 N.E.2d 1239, ¶ 73, citing *Torres,* 66 Ohio St.2d at 344, 421 N.E.2d 1288.

{¶34} The State has two methods it may use to negate any claims of prejudice caused by joinder: (1) it may argue that it could have introduced evidence of the separate count under the "other acts" portion of Evid.R. 404(B) as recognized in *State v. Lott,* 51 Ohio St.3d 160, 163, 555 N.E.2d 293, or (2) show that the evidence of each crime joined at trial is simple and direct as was recognized in *Torres*, 66 Ohio St.2d 340, 344, 421 N.E.2d 1288 (1981), *State v. Miller*, 105 Ohio App.3d 679, 691-692, 664 N.E.2d 1309 (4th Dist. 1995). " '[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B).' " *Id*. at 691, quoting *Lott,* 51 Ohio St.3d at 163, 555 N.E.2d at 297.

{¶35} In Appellant's one-page brief filed in the trial court, he alleged that "trying the two charges together would prejudice him in the eyes of the jury by portraying him in an unfavorable light." And in his appellate brief, Appellant alleges that the child pornography has no relevancy to the sexual assault allegations regarding A.C. He also alleges that the evidence supporting the child pornography was "speculative and weak."

{¶36} We find that Appellant did not satisfy his affirmative burden in the trial court showing that his rights were prejudiced because he didn't furnish the trial court with "sufficient information so that it [could] weigh the considerations favoring joinder against the defendant's right to a fair trial."

{¶37} In his appeal, Appellant submits there is no relevancy between the illegal use of a minor in nudity-oriented material and the sexual assault charges (rape, kidnapping). However, nowhere does he argue how trying all the charges together will result in *prejudice*. We also find that the cases Appellant cites (*Slaven* - court erred in joining sexual assault of two different children because evidence in one case would not be admissible in the other, and *Clements* - error for court to join unrelated charges of burglary and robbery in the same trial) are not particularly persuasive to the particular facts of this case. Accordingly, we find that Appellant has failed his burden of "affirmatively showing that his rights were prejudiced" in the trial court or on appeal, so there is no plain error.

{¶38} Even assuming arguendo that trying count two with the remaining charges did result in prejudice, because there is evidence "amply sufficient to sustain each verdict, whether or not the indictments were tried together," Appellant's claim of prejudice from trying the sexual assault

claims with the illegal use of nudity-oriented material is less persuasive. *Sapp*, 105 Ohio St.3d at ¶ 73.

{¶39} We also find that the evidence in this case supporting both the illegal use of nudity-oriented material and the sexual assault charges against A.C. is "simple and direct" and therefore trying them together was not reversible error. *See State v. Craig*, 11th Dist. Lake No. 2016-L-113, 2017-Ohio-8939, ¶ 29-31. In *Craig*, the defendant was charged with numerous criminal counts, including rape of his daughter and pandering obscenity involving a minor for possessing "749 photographs/videos of child pornography, with many of pictures featuring girls appearing to be the same age [as the victim]." *Id*. at ¶ 10.

{¶40} The defendant in *Craig* appealed the trial court's denial of his motion to sever the pandering obscenity involving a minor charge from the rape charge, alleging it denied him a fair trial. *Id.* at ¶ 22. While the court found that the images from the pandering charge were not admissible in regard to the rape charge under Evid.R. 404(B), it went on to find that "[g]iven the nature of the basic elements of the eleven counts, the provocable evidence necessary to prove those counts is simple and direct." *Id.* at ¶ 30. The court of appeals found that the trial court did not abuse its discretion in denying the defendant's motion to sever.

{¶41} Similar to *Craig*, Appellant was convicted of illegal use of a minor in nudity-oriented material based images of naked juveniles, some engaging in sex acts, that were recovered from Appellant's PS3, and his rape conviction was based on physical evidence of injury to A.C.'s genital area together with her testimony identifying Appellant as the perpetrator. We find the evidence of both charges was "simple and direct" evidence. Therefore, even assuming arguendo that trying both charges together could have resulted in prejudice, the simple and direct evidence supporting both charges dictates the trial court's refusal to sever the charges is not plain error. *State v. Miller*, 105 Ohio App.3d 679, 690-692, 664 N.E.2d 1309 (4th Dist. 1995) (Simple and direct evidence negates any prejudice).

{¶42} For all the aforementioned reasons, under these facts, we find no plain error because the trial court's refusal to sever count two did not affect Appellant's substantial rights so as to create a manifest miscarriage of justice. Therefore, we overrule Appellant's first assignment or error.

Second Assignment of Error

{¶43} In his second assignment of error, Appellant alleges that the trial court abused its discretion when it found that A.C. was competent to testify.

{¶44} Appellant argues that his defense counsel's failure to participate in the in camera competency hearing created an appearance of impropriety, citing *State v. McMillan*, 62 Ohio App.3d 565, 568, 577 N.E.2d 91 (9th Dist. 1989). Appellant also alleges that the competency hearing was deficient. Finally, Appellant asserts the trial judge should have asked A.C. open-ended questions to determine her competency, rather than leading questions.

{¶45} In response, the State argues that counsel has no right to participate in a child competency hearing citing *State v. Wilson*, 156 Ohio St. 525, 529, 103 N.E.2d 552. The State also argues that the trial judge properly used open-ended questions when testing A.C.'s competence.

1. Participation of Counsel in a Competency Hearing

{¶46} In *McMillan*, the defendant was charged with gross sexual imposition involving an eight-year-old victim. The court held an in camera hearing to determine the competency of the victim with only the victim, the judge, and a court reporter present. The court found the victim competent to testify and ultimately Appellant was convicted.

{¶47} On appeal, Appellant argued that the trial court violated the defendant's confrontation rights by excluding defendant's counsel from the competency hearing. The court of appeals overruled Appellant's argument because it found that the Confrontation Clause guarantees only an

opportunity to cross examine a witness, but did state that even absent prejudice "the appearance of the judge and a witness closeting themselves without a representative of the defendant is one which raises the specter of impropriety. It should be avoided." *McMillan*, 62 Ohio App.3d 565, 568, 577 N.E.2d 91, 93.

{¶48} While we afford "due consideration and respect to decisions in other appellate districts, we are not bound to follow them." *See Phillips v. Phillips*, 5th Dist. Stark No. 2014CA00090, 2014-Ohio-5439, 25 N.E.3d 371, ¶ 32. We are not persuaded by the Ninth District's decision in *McMillan* because it fails to cite any statute or source of authority in concluding that it is improper to exclude counsel from a competency hearing. Moreover, in *State v. Wilson*, 156 Ohio St. 525, 529, 103 N.E.2d 552, precedent we must follow, the court stated: "[w]hen the child is presented in court and the fact is revealed that the age of ten has not been reached, it is the duty of the *trial judge* to immediately examine the child, *without* the *participation* or interference *of counsel*, to determine the child's competency to testify." (Emphasis added.). Therefore, we reject Appellant's argument that the trial court erred in not having counsel present at the in camera competency hearing.

2. Competency Determination of A Child Under the Age of 10

a. Standard of Review

{¶49} Determining the competency of a juvenile is "within the sound discretion of the trial judge." *State v. Frazier*, 61 Ohio St.3d 247, 251, 574 N.E.2d 483 (1991). An "abuse of discretion" requires more than an error of judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Merryman*, 4th Dist. Athens No. 12CA28, 2013-Ohio-4810, ¶ 1.

b. Determining Competency

{¶50} "When a witness is under the age of ten, the trial judge has a duty to conduct a voir dire examination to determine the child's competency to testify." *State v. Rickard*, 3rd Dist. Mercer No. 10-91-5, 1992 WL 239325, *2 (Sept. 25, 1992), citing *Frazier*, 61 Ohio St.3d at 250-51, 574 N.E.2d 483 (1991). In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity, and (5) the child's appreciation of his or her responsibility to be truthful. *Frazier*, 61 Ohio St.3d at 251, 574

N.E.2d 483(1991), citing Annotation (1988), Witnesses: Child Competency Statutes, 60 A.L.R.4th 369.

{¶51} The trial court tested A.C.'s ability to accurately perceive, recollect, and communicate impressions of fact. For example, A.C. properly answered that the sun is out during the day and the moon is out at night. She also stated that she had an older sister named Bree. She named several television shows that she watched.

{¶52} The court also tested A.C.'s ability to tell the truth. The judge asked A.C. if she knew what it meant to tell a lie. She answered yes. The court tested A.C.'s ability to understand the truth by asking her whether the court saying it was dark outside was the truth or a lie. She answered a lie. The judge also asked A.C. if a file that he was holding was red. She answered no. A.C. also stated that she understood she should not lie, but should "tell the truth."

{¶53} In sum, based on our review of these responses and the competency transcript as a whole, we find that the judge considered the five factors from *Frazer*. Consequently, we find that the court was not unreasonable, arbitrary, or unconscionable in finding that A.C. was competent to testify. Therefore, we overrule Appellant's second assignment of error.

Third Assignment of Error

{¶54} In his third assignment of error, Appellant argues that his counsel was ineffective. "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 him of a fair trial." *State v. Lamb*, 4th Dist. Scioto No. 17CA3796, 2018-Ohio-1405, 110 N.E.3d 564, ¶ 11, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001), *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). " 'In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.' " *Id*., quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95.

{¶55} Appellant first argues his counsel was ineffective because he failed to participate in the competency hearing. As we recognized in addressing Appellant's second assignment of error, counsel has no right to

participate in the competency hearing. Therefore, counsel's failure to participate in the competency hearing was not deficient performance.

{¶56} Appellant also argues that his counsel was ineffective because he did not renew his motion to sever count two at the close of the evidence in this case. Had Appellant renewed his motion to sever at the close of the evidence, our standard in reviewing Appellant's first assignment of error would have been abuse of discretion, as opposed to plain error. *State v. Evans*, 4th Dist. Jackson No. 10CA1, 2012-Ohio-1562, ¶ 35. But, even under an abuse of discretion standard of review, we find that the outcome of Appellant's motion to sever would not have changed because the trial court did not abuse its discretion in denying Appellant's motion to sever. The trial court's denial was not an abuse of discretion because Appellant did not sustain his burden of proving that a failure to sever would result in prejudice to him, and even assuming arguendo the trial court's denial of Appellant's motion to sever would result in prejudice, any such prejudice was negated because there was evidence "amply sufficient to sustain each verdict," and the evidence supporting the charges was direct and simple. In other words, but for counsel's error, the result of the proceeding would *not* have been different, and absent such prejudice, Appellant's claim for ineffective assistance of counsel fails. Accordingly, we reject Appellant's third

assignment of error that his counsel was ineffective for not requesting to participate in the competency hearing and not renewing Appellant's motion to sever.

Fourth Assignment of Error

{¶57} In his fourth assignment of error, Appellant argues that his confrontation rights were violated when the trial court permitted A.C. to testify via closed-circuit camera. Appellant alleges a Confrontation Clause violation. However, we have already rejected a Confrontation Clause challenge to permitting a minor victim of a sex offense to testify via closed-circuit video under R.C. 2945.481(E) in *State v. Knauff*, 4th Dist. Adams No. 10CA900, 2011-Ohio-2725.

{¶58} In the body of his brief, it appears that Appellant's actual argument is that the trial court did not make the necessary findings under R.C. 2945.481(E) that would permit A.C. to testify by closed-circuit video. He argues that the evidence presented under R.C. 2945.481(E) was too "speculative" to permit A.C. to testify via closed-circuit video.

{¶59} The State argues that evidence adduced at the R.C. 2945.481 hearing supported permitting A.C. to testify via closed circuit video because the trial court made a finding that requiring A.C. to testify in the courtroom would have been "emotionally damaging."

{¶60} Initially, we note that the trial court's entry permitting A.C. to testify via closed circuit video states that "This matter came before the Court by *agreement* of the parties, upon the Motion for Closed Circuit Television made by the State of Ohio." Thus, it appears that Appellant agreed to permit A.C. to testify via closed circuit video, raising the question of waiver. However, because that issue was not raised by the State, we will proceed to analyze the merits of Appellant's assignment of error.

1. Standard of Review

{¶61} The standard of review in determining whether a trial court has made sufficient findings under R.C. 2945.481 to permit a child to testify via closed-circuit video is whether those findings are "supported by competent, credible evidence." *State v. Hammond*, 4th Dist. Ross No. 18CA3662, 2019-Ohio-4253, ¶ 21, citing *State v. Self*, 56 Ohio St.3d 73, 80, 564 N.E.2d 446 (1990) (interpreted R.C. 2907.41, the predecessor to R.C. 2945.481).

2. R.C. 2945.481

{¶62} Under R.C. 2945.481, a judge may issue an order that permits a juvenile crime victim under the age of 13 to testify via closed-circuit video "if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of

the defendant, for one or more of the reasons set forth in division (E) of this section." These reasons include:

> (1) The persistent refusal of the child victim to testify despite judicial requests to do so;
>
> (2) The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
>
> (3) The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

R.C. 2945.481(E).

{¶63} At the R.C. 2945.481 hearing, A.C.'s stepmother, Michelle Carver, testified that after A.C. was assaulted, she and A.C. were at a store when A.C. "stopped dead in her tracks" and was "pale white, shaking all over," and crying. Michelle testified that she asked "[A.C.], what is it? What is it?" Michelle testified that A.C. said she saw Appellant and that he was going to hurt her. Michelle testified that she could not get A.C. calmed down, and she was "hysterical" even after they left the store. Michelle testified that only after she called the jail to confirm that Appellant was still in jail did A.C. begin to calm down.

{¶64} Cynthia Justice testified that she was a therapist who treated mental health disorders at Mahajan Therapeutics where she treated A.C. Ms. Justice testified that A.C. was referred to her by Ross County Child Protection Center. Ms. Justice testified that she eventually diagnosed A.C. with PTSD, which is an "illness that occurs after someone has either witnessed something that was life threatening or they felt was life threatening or severely traumatic, you know, they witnessed it or it happened to themselves" and can cause "anger, outbursts, and cognitive distortions" when they encounter a "trigger." Ms. Justice testified that A.C. had serious sleep disturbances, irritability, anger outbursts, [and] nightmares. Ms. Justice testified that sexual abuse could cause PTSD. Ms. Justice testified, based upon a reasonable degree of certainty in her practice area, that testifying in the presence of Appellant would result in serious emotional trauma to A.C.

{¶65} After the hearing, the trial judge issued an entry permitting A.C. to testify via closed circuit video, finding that R.C. 2945.481(E)(2) and (3) had been met, and that requiring A.C. to testify live in the courtroom in the presence of the defendants would cause her "serious emotional trauma."

{¶66} We hold that in concluding that A.C. could testify via closed circuit video, the trial court made the appropriate findings in that if A.C. was

required to testify live in the courtroom she would have been unable to communicate about the rape due to extreme fear and there was a substantial likelihood she would suffer serious emotional trauma and those findings are supported by competent, credible evidence. Therefore, we overrule Appellant's fourth assignment of error.

Fifth Assignment of Error

{¶67} In his fifth assignment of error, Appellant asserts that his convictions for Rape, Illegal Use of a Minor in Nudity-Oriented Material, Kidnapping, Endangering Children, and Intimidation of a Victim are not supported by sufficient evidence and are against the manifest weight of the evidence.

1. The Law

    a. Sufficiency of the Evidence

{¶68} "When reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court's role is to examine the evidence admitted at trial to determine whether the evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Simms*, 165 Ohio App.3d 83, 86, 844 N.E.2d 1212 (4th Dist. 2005), ¶ 9, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The question is "whether, after

viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id*., citing *Jenks*. In a sufficiency review, the reviewing court does not "weigh the evidence." *Id*.

b. Manifest Weight of the Evidence

{¶69} In a manifest-weight-of-the-evidence review, the court examines "the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Simms*, 165 Ohio App.3d 83, 844 N.E.2d 1212, ¶ 17 (4th Dist. 2005), citing *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541. However, "[i]n making this review, the appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence." *Simms* at ¶ 18, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus (1967). " 'A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven

beyond a reasonable doubt.' " *Simms*, at ¶ 19 quoting *State v. Eskridge*, 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus (1988).

2. Criminal Convictions

a. Rape

{¶70} R.C. 2907.02 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. (Emphasis added.)

R.C. 2907.01(A) provides:

> "*Sexual conduct*" *means* 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. (Emphasis added.)

{¶71} Appellant questions A.C.'s credibility and argues that even if she can be believed, her testimony can only prove sexual contact, as opposed to sexual conduct, which is required for rape because her testimony did not allege penetration.

{¶72} The State argues that the physical evidence of injury to A.C.'s genital area, including her hymen, as well as the testimonial evidence identifying Appellant as the assailant, was sufficient to support Appellant's conviction and to show that his conviction is not against the manifest weight of the evidence.

{¶73} Under a sufficiency review, with regard to whether penetration occurred, there is at least some evidence that Appellant's thumb penetrated A.C.'s vagina and there is a significant amount of evidence that A.C. suffered physical injuries to her genital area, including "abrasions, redness, and swelling in her vaginal area, and her hymen was "beefy red in appearance and swollen," which was "not normal." Further, there was male DNA recovered from A.C.'s genital area. Finally, A.C. identified Appellant as the perpetrator. Viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the

essential elements of the rape, including sexual conduct (i.e. penetration), beyond a reasonable doubt.

{¶74} With regard to the manifest weight of the evidence review, there is testimonial evidence that Appellant merely "touched" A.C. over clothing in her genital area, but there is also evidence that Appellant put his thumb "in" A.C.'s vagina. A.C. initially identified the perpetrator as a man named Peter, but later identified Appellant as the perpetrator. However, the physical injuries suffered by A.C. are undisputed and support more than an innocent touching of A.C.'s vagina. After carefully considering this critical evidence, as well as the remainder of the record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and resolving those conflicts in the evidence, we conclude that the jury did not clearly lose its way so as to create a manifest miscarriage of justice that Appellant's conviction must be reversed and a new trial ordered.

{¶75} Accordingly, we reject Appellant's argument that his rape conviction is not supported by sufficient evidence, or is against the manifest weight of the evidence.

b. Illegal Use of a Minor in Nudity-Oriented Material

{¶76} Appellant was convicted of illegal use of a minor in nudity-oriented material under R.C. 2907.323(A)(3), which provides that "No

person shall do any of the following: " * * * Possess or view any material or performance that shows a *minor* or impaired person who is not the person's child or ward in a state of nudity, unless" one of the enumerated exceptions applies, which are not applicable in this case. (Emphasis added.)

{¶77} Appellant argues the State failed to prove that the images found on his PS3 were minors, and therefore his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. In response, the State argues that the age of the persons in the images found was a question of fact for the jury to determine.

{¶78} Although R.C. 2907.323 does not define "minor," under Ohio law, a minor is anyone under 18 years of age. R.C. 3109.01. "Where the title, the text, the visual representation, and other factors gleaned from the material or performance represent or depict the person as a minor, the trier of fact may infer that the person is an actual minor." *State v. Kraft*, 1st Dist. Hamilton No. C-060238, 2007-Ohio-2247, ¶ 88.

{¶79} The jury was apparently able to view the images from Appellant's PS3. Further, the evidence shows that some of the images are titled "Teen Panty Pics," and the websites visited include "Teen Fuck Hardcore," "Free Hardcore Teen," "Free Teen Russian," "X Videos Porn at Ultra Young Sex," etc. We find that there was sufficient evidence to support

Appellant's conviction from which the jury could infer that Appellant possessed images of minors.

{¶80} Furthermore, after weighing the evidence and considering all reasonable inferences, we find that there is substantial evidence upon which the court could reasonably conclude that the persons in the images are minors. Therefore, we also find that Appellant's convictions for illegal use of a minor in nudity-oriented material was not against the manifest weight of the evidence.

{¶81} Accordingly, we reject Appellant's argument that his conviction for illegal use of a minor in nudity-oriented material is not supported by sufficient evidence, or is against the weight of the evidence.

c. Kidnapping

{¶82} The State charged Appellant with kidnapping under R.C. 2905.01(A)(4), which provides that:

> No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * (4) To engage in sexual activity, as

defined in section 2907.01 of the Revised Code, with the victim against the victim's will * * *.

{¶83} Appellant argues that there is no evidence that A.C.'s liberty was restrained. In response, the State argues that the apparent bruising, and that the "touching" by Appellant, is evidence that A.C. was restrained during the rape.

{¶84} Initially, we note that we have already held that Appellant's rape convictions were not against the manifest weight of the evidence, and "by definition, inherent in every act of rape is a kidnapping offense." *State v. Stewart*, 4th Dist. Ross No. 44331, 1982 WL 5952, at *5. Moreover, we agree with the State that the bruising could be considered evidence of restraint that occurred during the rape.

{¶85} Therefore, we find that there is sufficient evidence to support Appellant's kidnapping conviction, and in reviewing the entire record, we do not find that the jury lost its way so as to create a manifest injustice justifying a reversal of his kidnapping conviction. Accordingly, we reject Appellant's arguments that his kidnapping convictions are not supported by sufficient evidence or are against the weight of the evidence.

d. Endangering Children

{¶86} Appellant was convicted of endangering children under R.C. 2919.22 (A), which in pertinent part provides: "No person, who is * * * *in loco parentis* of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support * * *." (Emphasis added.)

{¶87} Appellant argues that there is no evidence he was *in loco parentis* to A.C., and therefore he could not be charged with endangering children. Appellant argues that as merely Sheri Trout's live-in boyfriend, he was not *in loco parentis* to A.C.

{¶88} In response, the State argues that there is evidence that Sheri Trout had a visitation order and Appellant lived in the same house when A.C. would come to visit. The State argues that A.C. suffered trauma as the result of inaction by Sheri and the action of Appellant.

{¶89} R.C. 2919.22 does not define the term "*in loco parentis*." However, the Supreme Court has defined the term "*in loco parentis*" as being "charged, factitiously, with a parent's rights, duties, and responsibilities." *State v. Noggle*, 67 Ohio St.3d 31, 33, 1993-Ohio-189, 615 N.E.2d 1040, citing *Black's Law Dictionary* (6th Ed.1990) 787, superseded by statute on other grounds. "A person *in loco parentis* has assumed the same duties as a guardian or custodian, only not through a legal proceeding."

Id.

{¶90} Appellant was not married to Sheri. He was merely her live-in boyfriend, which does not, in and of itself, create an *in loco parentis* relationship with A.C. And the State points us to no evidence in the record indicating that Appellant was "charged, factitiously with parental rights, duties, and responsibilities" regarding A.C.

{¶91} Accordingly, we find that even viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found that Appellant was *in loco parentis*, and therefore absent evidence of that required element, a jury could not convict Appellant of endangering children. Therefore, we sustain Appellant's argument that there was insufficient evidence supporting his conviction for endangering children.

e. Intimidation of a Victim

{¶92} Appellant was convicted of intimidating a witness under R.C. 2921.04(B)(1), which provides, "No person, knowingly and by force or by unlawful threat of harm to any person or property or by unlawful threat to commit any offense or calumny against any person, shall attempt to influence, intimidate, or hinder * * * the victim of a crime * * * in the filing or prosecution of criminal charges * * *."

{¶93} Appellant argues that even if A.C. believed that Appellant told her to lie and say that Peter assaulted her, there is insufficient evidence to support his conviction for intimidation of a witness. Appellant argues that there is no evidence that Appellant attempted to prevent A.C. from filing charges. Therefore, he argues, there is insufficient evidence to support his conviction.

{¶94} In response, the State argues that there is evidence of intimidation in that Appellant had hit A.C. in the *past*. The State argues that the impact of Appellant's abuse, as well as telling A.C. to lie, is evident.

{¶95} In *State v. Muniz,* the Eighth District Court of Appeals found that "where a defendant is charged with intimidation of a 'victim of crime,' an essential element of the charge is that the underlying crime occurred and thus created a victim." *Muniz*, 8th Dist. Cuyahoga No. 93528, 2010-Ohio-3720, ¶ 20. As such, the court reasoned that *Muniz* was "entitled to notice of the predicate crime in the indictment" because "[t]he charge of intimidation of a crime victim presupposes an earlier crime has been committed." *Id.* at ¶ 19-20 (also explaining that these types of cases are "analogous to cases in which a defendant is charged with a crime that has its foundation on unindicted predicate acts"). Finding that "the record [was] unclear as to the nature of the predicate offense[,]" the *Muniz* court ultimately held that "[t]he

state's failure to give notice of the underlying predicate acts in the indictment [rendered] it defective from the outset, and therefore fatal to her conviction." *Id.* at ¶ 21, 23.

{¶96} Nine years later, the Eighth District Court of Appeals revisited this issue in an en banc decision involving the crime of intimidation of a witness, as opposed to intimidation of a victim. *State v. Sanders,* 2019-Ohio-2566, -- N.E.3d --. The court reversed course somewhat, holding that "the fact that an underlying criminal or delinquent act occurred is not an essential element of the crime of intimidation of a witness." *Id.* at ¶ 5. In reaching its decision, the court reviewed its prior holding in *Muniz*, noting that in *Muniz* it was not clear from the record that an underlying criminal act had occurred or the nature of the criminal act. *Id*. at ¶ 17. The *Sanders* court qualified its decision with respect to its prior holding in *Muniz*, stating as follows:

> Nothing in this en banc opinion shall be construed to undermine the holding of *Muniz*, with respect to notice requirements. We maintain that a defendant is entitled to adequate notice of the crimes against which they must defend themself.

Sanders at ¶ 8.

{¶97} Ultimately, the *Sanders* court held that "[a] charge of intimidation does not require a conviction on the underlying offense." *Id*. at ¶ 9. However, the court explained that the State must prove as follows:

> A charge of intimidation does not require a conviction on the underlying offense. Had that been the legislature's intent, it could easily have used the words "criminal conviction" or "delinquent adjudication" rather than "criminal or delinquent act." Instead, the state need only prove that the intimidation victim had knowledge about a fact or facts concerning the underlying criminal or delinquent act, and that the defendant knowingly and by force or threat of harm intimidated the victim because of the victim's knowledge of facts concerning the matter.

Id.

{¶98} In support of its reasoning, the court stated as follows:

> While a defendant must be apprised of the nature of the underlying criminal or delinquent act, that act is not a separate element of the offense that must be proven beyond a reasonable doubt. In holding that the occurrence of the underlying act is an essential element

> of intimidation, this court imposed an unworkable burden on the state. In making a case for intimidation, a prosecutor is not required to establish beyond a reasonable doubt that the predicate act occurred. Such a requirement, particularly in cases where the underlying offense may have been committed by someone other than the defendant in the intimidation case, would require a trial within a trial that we do not believe was intended or contemplated by the legislature in enacting R.C. 2921.04.

Id.

{¶99} Here, there was no evidence in the record and nothing in the indictment indicating a crime had occurred at the time Appellant allegedly intimidated the victim. More specifically, there is no evidence indicating at times Appellant may have "hit" the child in the "past" or that any criminal act related to the current case had occurred yet. Furthermore, telling A.C. to lie does not constitute intimidation of a victim of a crime.

{¶100} Therefore, even after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could not have found that there was evidence of a "threat of harm" to influence or intimidate A.C. pertaining to the charges against Appellant. Accordingly,

we sustain Appellant's argument that his conviction for intimidating a victim is not supported by sufficient evidence.

{¶101} We overrule Appellant's fifth assignment of error, except to the extent that we find that his convictions for endangering children and intimidating a victim are not supported by sufficient evidence. Therefore, those two convictions are vacated.

Sixth Assignment of Error

{¶102} In his sixth assignment of error, Appellant asserts the trial court impermissibly permitted hearsay testimony from Detective Crapyou:

> Prosecutor: "What happened on the 24th?"
>
> Detective Crapyou: "Before I could get through the entire [police] report [regarding A.C.'s assault] I had a phone call. It was from a person who identified herself as Michelle, who is Brian Carver's wife, or told me at the time she was his wife, and stated the person mentioned in the report is not the person. It was the - - perpetrator was actually [Appellant]."

Defense counsel objected on hearsay grounds, but the trial court overruled his objection. Appellant argues that permitting the hearsay testimony violated his right to confront witnesses.

{¶103} In response, the State argues the detective's testimony was not hearsay. The State argues that the detective was merely relating the subject of the phone call he received.

1. Standard of Review

{¶104} A " 'trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception.' " *State v. Hiles*, 4th Dist. Ross No. 08CA3080, 2009-Ohio-6602, ¶ 6, quoting *State v. Dever*, 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436 (1992). An "[a]buse of discretion is more than an error of law or judgment; rather, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id*. at ¶ 7, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940.

2. Hearsay/Confrontation Clause

{¶105} "Hearsay is defined as '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.' " *State v. Betts*, 4th Dist. Pickaway No. 02CA26, 2004-Ohio-818, ¶ 32, quoting Evid.R. 801(C). " 'Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence.' " *State v. Canada*, 10th Dist. Franklin No. 14AP-523, 2015-Ohio-2167, 2015 WL 3540402, ¶ 27, quoting *State v.*

L.E.F., 10th Dist. Franklin No. 13AP-1042, 2014-Ohio-4585, 2014 WL 5306840, ¶ 5.

{¶106} "A law enforcement officer can testify about a declarant's out-of-court statement for the nonhearsay purpose of explaining the next investigative step." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186, citing *State v. Thomas,* 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980), *State v. McIntosh*, 4th Dist. Gallia No. 17CA14, 2018-Ohio-5343, ¶ 29. Testimony offered to explain police conduct is admissible as nonhearsay only if it satisfies three criteria: (1) "the conduct to be explained [is] relevant, equivocal, and contemporaneous with the statements," (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) "*the statements cannot connect the accused with the crime charged*." (Emphasis added.) *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186, *State v. Ricks,* 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, *McIntosh* at ¶ 29.

{¶107} Detective Crapyou's testimony was that Michelle informed him that the accused's name in the police report was incorrect, and it was in fact Appellant who raped A.C. The statement clearly connected Appellant with the crimes charged against him. Therefore, we find that his testimony

involved hearsay. However, Appellant had already been identified as the perpetrator several times by numerous witnesses, including A.C., prior to the detective's testimony. Therefore, because the hearsay was merely cumulative evidence, its admission was not prejudicial. *See In re Sturm*, 4th Dist. Washington No. 05CA35, 2006-Ohio-7101, ¶ 4 (a detective's testimony that the defendant's mother had stated that the defendant "had huffed gas and gone to his grandmother's house," was hearsay, but it's admission was not prejudicial because this same evidence was properly admitted through other means). Accordingly, we find that the trial court's admission of Detective Crapyou's statement was not reversible error.

{¶108} With regard to Appellant's alleged Confrontation Clause violation, the Sixth Amendment "requires only that the defendant have an opportunity to cross-examine the adverse witness." *State v. Neyland,* 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 181. Because Appellant had the opportunity to cross examine all these witnesses who discussed the identity of the assailant and, in particular, during cross-examination of Michelle, confirmed that A.C. initially identified "Peter" as the assailant but subsequently identified Appellant as the assailant, Appellant's Confrontation Clause argument lacks merit.

{¶109} Accordingly, because the detective's testimony did not result in prejudice and because it did not violate Appellant's confrontation rights, we overrule Appellant's sixth assignment of error.

Seventh Assignment of Error

{¶110} In his seventh assignment of error, Appellant alleges the State of Ohio made improper comments during closing arguments which should have resulted in a mistrial. Appellant cites the following passage from the State's rebuttal closing argument:

> Did they put any evidence up there saying she was not injured? None. Not touching an erogenous zone, nothing like that. She was injured. Secondly, she said that it was Pappaw - - Pappy Brian or whatever. What evidence has been put in dispute that that was the normal course of events in disclosure of the injury – in disclosure of trauma PTSD? What evidence did they put forward?

{¶111} Defendant objected, which the court sustained, and then it gave the following instruction: "Members of the jury, I'm - - I'm just going to give you what's sort of called a curative instruction here. The Defendants have no burden to provide any evidence or to prove any evidence, and the burden is entirely on the State of Ohio to prove this case."

{¶112} Appellant argues that the prosecutor's comments violated Appellant's right to remain silent and shifted the burden of proof to Appellant. He also asserts that a reading of the transcript in this matter leads to the conclusion that the curative instruction was clearly insufficient to remedy the issue raised by the State of Ohio.

{¶113} In response, the State argues that the verdicts in this case were not against the manifest weight of the evidence. The State further argues that in considering the totality of circumstances and the comments in the context of the trial, Appellant has failed to show beyond a reasonable doubt that, absent the prosecutor's conduct, the jury would not have found Appellant guilty.

1. Standard of Review

{¶114} "The grant or denial of a motion for mistrial rests within the sound discretion of the trial court." *State v. Murphy*, 4th Dist. Scioto No. 9CA3311, 2010-Ohio-5031, ¶ 83, citing *State v. Sage,* 31 Ohio St.3d 173,182, 510 N.E.2d 343. "An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary." *Id.* at ¶ 55, citing *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992).

2. Prosecutorial Misconduct

{¶115} "During closing arguments, the prosecution is given wide latitude to convincingly advance its strongest arguments and positions." *Wellston v. Horsley,* 4th Dist. Jackson No. 05CA18, 2006-Ohio-4386, 2006 WL 2457392, citing *State v. Phillips*, 74 Ohio St.3d 72, 90, 656 N.E.2d 643 (1995). A prosecutor may not comment on a defendant's failure to testify. *Wellston v. Horsley*, 4th Dist. Jackson No. 05CA18, 2006-Ohio-4386, ¶ 24, citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), *State v. Fears*, 86 Ohio St.3d 329, 336, 715 N.E.2d 136(1999). But "it is long-standing precedent that the state may comment upon a defendant's failure to offer evidence in support of its case." *State v. Collins*, 89 Ohio St.3d 524, 527, 2000-Ohio-231, 733 N.E.2d 1118, citing *State v. D'Ambrosio*, 67 Ohio St.3d 185, 193, 616 N.E.2d 909 (1993), *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986), *State v. Petro*, 148 Ohio St. 473, 498, 76 N.E.2d 355 (1948), *State v. Champion*, 109 Ohio St. 281, 289-290, 142 N.E. 141 (1924). "Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent. *Id.*, citing *State v. Thompson*, 33 Ohio St.3d 1, 4, 514 N.E.2d 407 (1987).

{¶116} "To determine whether comments made by a prosecutor during closing argument amount to misconduct warranting a mistrial, a court must examine 'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.' " *Murphy*, 4th Dist. Scioto No. 9CA3311, 2010-Ohio-5031, ¶ 84, quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty." *State v. Benge,* 75 Ohio St.3d 136, 141, 661 N.E.2d 1019, 1996-Ohio-227.

{¶117} Despite appellant's challenge to the prosecutor's comments, he nevertheless acknowledged they were "somewhat ambiguous in nature." The prosecutor's comments do not expressly raise appellant's failure to testify, but instead address his failure to present evidence to challenge the *State's* evidence, which may not come under the purview of *Collins,* because *Collins* permits the State to discuss the "defendant's failure to offer evidence in support of *its* case." *Collins* at 527. (Emphasis added).

{¶118} The prosecutor's comment that Appellant's failure to present evidence to challenge's the *State's* case could have been interpreted by the jury to mean that Appellant had a burden to rebut the State's evidence. However, to the extent that the prosecutor's comments were interpreted in

that manner, any potential prejudice was mitigated because the judge sustained Appellant's objection to the comments and then gave the jury a limiting instruction informing them that the State, not Appellant, had the burden of proving its case. *State v. Huffman*, 38 Ohio App.3d 84, 87, 526 N.E.2d 85 (1987) (A "limiting instruction protect[s] against the jury's wrongful use of that evidence."). And, "[a] jury is presumed to follow the instructions, including curative instructions, given it by a trial judge." *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). Moreover, in his instructions of law to the jury prior to their deliberation, the judge again explained that the State of Ohio had the burden of proving the defendant guilty beyond a reasonable doubt, which further mitigated any prejudice by the prosecutor's comments. *State v. Lenard*, 8th Dist. Cuyahoga No. 105998, 2018-Ohio-3365, ¶ 24.

{¶119} Accordingly, we find that even if the prosecutor's comments were improper, in light of the court's instructions, it is beyond doubt that even absent the prosecutor's comments, the jury would have still found Appellant guilty. The trial court did not abuse its discretion in denying Appellant's motion for a mistrial. Therefore, we overrule Appellant's seventh assignment of error.

Eighth Assignment of Error

{¶120} In his eighth assignment of error, Appellant alleges that cumulative errors justify reversal of his convictions.

{¶121} "Under the cumulative-error doctrine, 'a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal.' " *State v. Hammond*, 2019-Ohio-4253, ¶ 10, quoting *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). However, "[e]rrors cannot become prejudicial by sheer weight of numbers." *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996).

{¶122} We found that there was insufficient evidence to support Appellant's convictions for endangering children and intimidating a victim, and ordered these convictions vacated. However, vacating those convictions in no way diminishes or undermines the evidence supporting Appellant's other convictions, and the mere existence of two errors does not "become prejudicial by sheer numbers." Accordingly, we overrule Appellant's eighth assignment of error.

Conclusion

{¶123} We overrule all of Appellant's assignments of error, except that we find that his convictions for endangering children and intimidation of a victim were not supported by sufficient evidence. Therefore, we affirm the trial court's judgment entry of conviction with the exception of Appellant's convictions for endangering children and intimidation of a victim, which we vacate.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART AND VACATED IN PART. Costs shall be divided equally between the parties.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto 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. and Hess, J. concur in Judgment and Opinion.

For the Court,

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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.