[Cite as *State v. Koster*, 2024-Ohio-57.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 21CA12
v.	:	
SHAWN KOSTER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Gene Meadows, Wellston, Ohio, for appellant[1].

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Andrea M. Kratzenberg, Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:1-3-24
ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Shawn Koster, defendant below and appellant herein, guilty of (1) 30 counts of unlawful sexual conduct with a minor, and (2) 15 counts of pandering obscenity involving a minor.

{¶2} Appellant assigns three errors for review:

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

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY SENTENCING THE DEFENDANT-APPELLANT TO 54 MONTHS IN COUNTS 1-30 OF THE INDICTMENT WHEN HE WAS ADVISED DURING THE FINAL PRETRIAL/FINAL OFFER THAT THE MAXIMUM PENALTY FOR EACH COUNT IN COUNTS 1-30 THAT THE MAXIMUM PENALTY FOR EACH COUNT WAS 3 YEARS (36 MONTHS)."

SECOND ASSIGNMENT OF ERROR:

"THE DEFENDANT-APPELLANT WAS DENIED HIS EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE 6TH AMENDMENT OF THE US CONSTITUTION FOR FAILING TO ARGUE FOR MERGER OF THE SENTENCES FOR COUNTS 1-30 OF THE INDICTMENT PURSUANT TO R.C. 2941.25."

THIRD ASSIGNMENT OF ERROR:

"THE CONVICTION FOR COUNTS 31-45 OF THE INDICTMENT, PANDERING OBSCENITY INVOLVING A MINOR, IN VIOLATION OF RC 2907.321(A)(1), A FELONY OF THE SECOND DEGREE, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 1 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶3} In September 2020, a Lawrence County Grand Jury returned an indictment that charged appellant with (1) 30 counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(3), third-degree felonies (Counts 1-30), and (2) 15 counts of pandering obscenity involving a minor in violation of R.C. 2907.321, second-degree felonies (Counts 31-45). Appellant pleaded not guilty to

all charges.

{¶4} The evidence adduced at the jury trial reveals that on August 24, 2020, Lawrence County Sheriff's Department Sergeant Steve Cartmell arrived at Opal Koster's residence after Cartmell learned that Opal's daughter (A.S.) informed her mother in a letter that her step-father (appellant) had raped her. Cartmell took the letter and heard the victim describe events that had transpired over the years.

{¶5} A.S. testified she is 16 years old, lives with her younger brother, mother, and her mother's boyfriend, and met appellant at age five or six when he married A.S.'s mother, Opal. The biological son of appellant and Opal is A.S.'s younger (half) brother. Opal moved in with another man when A.S. was approximately eight years old and "bad things happened." A.S. then resided part-time with appellant, "[i]t was kind of like he had me for a week, and she would have me for a week."

{¶6} When A.S. was in the sixth grade, a boy at school told her he wanted a "BJ." A.S. testified that when she asked appellant what a "B.J." is, he "used it to his advantage." Appellant removed his clothes, exposed his penis and had A.S. touch him. On other occasions, and "over a hundred" times, appellant and A.S. performed oral sex. Appellant also inserted his penis into A.S.'s vagina "a hundred or more" times and twice inserted his penis into her

rectum. Appellant also made A.S. watch pornography on her brother's old phone, a white Samsung phone with stickers on the back.

{¶7} When A.S. was approximately 15 years old, appellant took photos of A.S. on the Samsung phone. The state also produced sex toys that appellant purchased and used on A.S. "fifty or more, probably close to one hundred" times. A.S. testified that the abuse continued until she turned 16. The day before her sixteenth birthday, she told her boyfriend about the abuse and he told her to tell her mother. On her sixteenth birthday, she wrote the letter to tell her mother about the abuse.

{¶8} Before the abuse started, A.S. testified that appellant took her to 4-H and scout meetings and "was a good father figure." In her letter, A.S. wrote that appellant also told her, "if I ever spoke up that I was going to end up having to live with my real father * * * I didn't want to go back to that, I didn't want to be starved and beaten." Although A.S.'s biological father was not currently involved in her life, she said he was "very abusive * * * physically and mentally." A.S. testified, however, that only appellant had sexually abused her.

{¶9} Lawrence County Sheriff's Detective Jason Newman testified that he obtained a search warrant for appellant's home to retrieve the Samsung phone and a blue bag filled with sex toys,

condoms and condom wrappers. Newman spoke with appellant and recorded his statements, both before and after the search, and appellee played the statements for the jury. Those statements revealed that, after appellant had been advised of his *Miranda* warnings, he denied the allegations and denied that the items described in the search warrant could be found in his home. However, after Newman executed the search warrant and found the described items, he again spoke with appellant. Appellant then blamed the allegations on the victim's mother and said the sex toys originated from a different relationship. Appellant also informed Newman that A.S. "[s]tarted flirting around, I don't, like I said I don't know how to explain the flirting, I really don't. She started flirting, she started asking questions at 14. * * * She asked me what I looked like. * * * We were laying [sic.] on the couch one day and she touched it, and she was 14 years old. * * * I didn't even expect it. I didn't know she was going to do that, it took me by surprise." Appellant also denied that he took photos of the victim. Appellant did ask Newman what the "scenarios" might be, meaning possible charges and prison time. Also, when asked whether the victim or appellant could be described as "more of the promoter of it," appellant said "She was."

{¶10} After Detective Newman informed appellant that he faced rape charges, appellant stated, "I will talk to you. * * * she came

on to me and things went too far." Appellant stated that this first occurred when the victim was 14½ years of age - "She stuck her hand down my pants, we were sitting there watching tv and . . . things went too far. It happened a couple of times, I don't know how many." Appellant also acknowledged that he put his penis in the victim's vagina and said they had sex less than 50 times, but he could not say the exact number. Appellant also stated that the victim performed oral sex on him, and he did the same. However, appellant maintained that the sex toys belonged to the victim and that any photos involved the victim's boyfriend, not appellant. Newman explained that, later in the interview, appellant claimed he felt ill and an ambulance transported him to a hospital. According to Newman, appellant did not appear distressed "until we told him he was going to go to jail."

{¶11} Detective Newman further testified that, in addition to the Samsung phone, he took two other phones from appellant. On cross-examination, Newman acknowledged that, although the victim said that appellant took her nude photos on the Samsung phone, Newman could not personally identify who actually took the photos. When asked if he took a statement from anyone other than appellant, Newman stated, "No sir, 'cause he admitted to it."

{¶12} Lawrence County Sheriff's Department Detective Brad Layman testified that he extracted from a white Samsung smartphone

15 nude images of the victim. Layman determined that the phone had been used to take the images, and that someone had attempted to delete those images.

{¶13} Appellant testified that he met Opal when A.S. was three years old and he considered her to be his daughter. When A.S. was "about eight or nine years old," appellant and Opal separated and agreed that their biological son and A.S. would reside at his home for one week, then at Opal's home for one week. Appellant stated that, during those visits, he, A.S., and her brother attended community events, including county commission meetings, political dinners, 4H meetings, scouts and hunting events.

{¶14} Appellant further testified that, when Detective Newman questioned him, he felt "shock, confusion, * * * at some points, pure fear." When asked if he remembered his taped conversation with Newman, appellant said he remembered talking to him, but did not remember saying those things and "[t]he only thing I can figure that the only reason I would say something like, like that is I was scared." Appellant surmised that friction over requiring A.S. to do chores and to follow rules prompted her to make these allegations. Appellant also stated that A.S. has had "more than one boyfriend," and sent nude photos to boyfriends. Appellant said he deleted pictures from the Samsung phone and "reset the phone back to factory because I didn't want any chance of her being able

to pull those photos back up." When asked if he had seen photos of A.S. on that phone, appellant replied, "Uh, a couple, enough to irritate me and I didn't look at all of them so, you know, as of yet today, I didn't see them, I don't want to." Appellant denied that he took any of the photos and further denied that he engaged in any sexual conduct with the victim.

{¶15} After hearing the evidence, the jury found appellant guilty as charged on all counts. At sentencing, the trial court (1) ordered appellant to serve a 54-month prison sentence on each of Counts 1-30, a minimum 7-year prison sentence on each of Counts 31-45, along with the potential for a discretionary and indeterminate sentence of up to one-half of the minimum stated prison term for a total of up to 10½ years, (2) ordered the sentences for Counts 1 through 8 to be served consecutively for a total of 432 months, or 36 years in prison, (3) ordered appellant subject to a potential discretionary and indefinite or indeterminate sentence of up to one-half of the minimum stated prison term related to Counts 31-45, any one of which is a qualifying offense, for the possibility of an additional 3½ years in prison, (4) gave appellant S.B. 201 advisements, (5) ordered appellant to register as a Tier Two Sexual Offender, and (6) ordered appellant be subject to a mandatory 5-year post-release control term. This appeal followed.

I.

{¶16} In his first assignment of error, appellant asserts that the trial court's sentence (to serve 54 months on each Count 1-30), when the state advised him during the final pretrial hearing that the maximum penalty for each count in Counts 1-30 is 3 years (36 months), constitutes reversible error.

{¶17} In general, appellate courts review felony sentences using the standard of review outlined in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22.

{¶18} R.C. 2953.08(G)(2) provides that appellate courts may increase, reduce, modify or vacate a sentence when the court clearly and convincingly finds that, either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *See, also, State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28; *Gwynne, supra*, ¶ 16. Clear and convincing evidence is evidence that "will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to

determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross*, 161 Ohio St. at 477, 120 N.E.2d 118.

{¶19} In the case sub judice, appellant was convicted of 30 counts of violating R.C. 2907.04, unlawful sexual conduct with a minor. Appellant waived the reading of the indictment at his September 30, 2020 arraignment. At his July 7, 2021 final pretrial hearing, appellee, in addition to reciting the maximum penalty for Counts 32-45, indicated that Counts 1-30 "are all Unlawful Sexual Conduct with a Minor, uh all felonies of the third degree, all within the same date range of August 24, 2017 thru [sic.] August 23 of 2020. Each count carries *three years*, each count uh are on separate dates in that date range, so each can be ran consecutive for a *total of ninety years*." (Emphasis added.)

{¶20} At the August 2, 2021 sentencing hearing, appellee indicated, "[T]he State is recommending the court sentence the defendant to *five years* on each count, 1-30. We would ask that you run each count consecutive with each other, uh, for a total of a *hundred and fifty years (150*) on counts 1-30." (Emphasis added.) After consideration, the trial court sentenced appellant to serve 54 months (4.5 years) on each count of Counts 1-30. The court further noted that the sentence for Counts 1 through 8 shall be served consecutively to each other, for a total of 432 months, or

36 years, in prison.

{¶21} Counts 1-30 involve violations of R.C. 2907.04, unlawful sexual conduct with a minor. R.C. 2929.14(A)(3)(a) provides instruction on the appropriate prison term:

> (3)(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, 2907.05, 2907.321, 2907.322, 2907.323, or 3795.04 of the Revised Code or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

Thus, the trial court's sentence in the case at bar fell within the range of terms provided in the statute. Appellant, however, contends that because he received incorrect information during his final pretrial hearing "it will be impossible to determine if the correct information would have made a difference in the decision by the Defendant to decline the final offer. Therefore, the Defendant-Appellant should receive the benefit of the trial court being limited to a maximum penalty of 36 months."

{¶22} After our review, we find no prejudice. At arraignment, appellant waived "the reading of the indictment along with the penalties associated therewith." Moreover, at the pretrial hearing any incorrect statement of the penalty came from the appellee, not the trial court. More important, on the morning of trial the state

indicated "[t]he defendant is charged with thirty counts of Unlawful Sexual Conduct with a Minor, uh, each of those counts carries a maximum of five years in the appropriate penal institution."

{¶23} Consequently, on the day of trial, and before the court seated the jury, appellant knew the maximum possible sentence. Counsel stated, "I would like to ask Mr. Koster if he understands what the total maximum penalty involves. Do you understand that if you are found guilty of everything, and the court imposes the maximum sentence, you would be looking at two hundred and twenty to two hundred and twenty-four years?" Appellant replied, "Yes." Thus, in light of the foregoing information we believe that appellant had been sufficiently informed of the possible sentence prior to his decision to proceed to trial. Furthermore, at sentencing, although appellee requested a 5-year prison term for each of Counts 1-30, appellant received less than the actual potential maximum (4.5 years) on each count.

{¶24} In *State v. Good*, 3d Dist. Auglaize No. 2-21-02, 2021-Ohio-4560, ¶ 20, which involved a plea rather than a trial, the defendant argued he suffered a manifest injustice because the trial court failed to properly advise him of the correct maximum penalties before he changed his plea. The court of appeals concluded, however, that the defendant failed to demonstrate that

the trial court's error prejudiced him because he received a sentence less than the actual potential maximum and within the range that the trial court stated. Once again, however, we point out that the case at bar does not involve a plea agreement. Instead, after the jury found appellant guilty of all charges, the trial court sentenced him to serve a prison term within the applicable statutory range of sentences.

{¶25} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶26} In his second assignment of error, appellant asserts that his trial counsel failed to argue for merger of sentences for Count 1-30 pursuant to R.C. 2941.25 and, thus, denied him effective assistance of counsel as guaranteed by the Sixth Amendment. In particular, appellant argues that (1) the indictment contained identical language, including the date range, for each count for unlawful sexual conduct with a minor (1-30); and (2) the conduct that occurred in those 30 counts is not dissimilar in import or significance, committed with the same animus and motivation, and acts not committed separately because no testimony separated the dates of any of the "incidents." Thus, appellant contends, because the issue of merger and allied offenses must be raised at sentencing, trial counsel should have argued that appellant's

sentences should have merged.

{¶27} 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. To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) counsel rendered a deficient performance, and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a defendant must prove that counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. Additionally, a court need not analyze both Strickland test prongs if it can resolve the claim under one prong. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000); *State v. Bowling*, 4th Dist. Jackson No. 19CA2, 2020-Ohio-813, ¶ 12-13.

{¶28} When examining whether counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689, 466 U.S. 668, 104 S.Ct. 2052. Moreover, because a properly licensed attorney is presumed to execute all duties ethically and

competently, *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, to establish ineffectiveness, a defendant must demonstrate that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland* at 687, 466 U.S. 668, 104 S.Ct. 2052.

R.C. 2941.25 addresses multiple offenses:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶29} In general, appellate courts apply a de novo standard of review in an appeal that challenges a trial court's determination of whether offenses constitute allied offenses of similar import that must be merged under R.C. 2941.25. *State v. Williams,* 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28; *State v. Cole,* 4th Dist. Athens No. 12CA49, 2014-Ohio-2967, ¶ 7. Merger is a sentencing issue, and a defendant bears the burden to establish entitlement to the protection of R.C. 2941.25. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18; *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 52 (4th Dist.).

Appellant cites *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, in support of his argument that the trial court should have merged Counts 1-30 because, he maintains, they constitute allied offenses of similar import. *Ruff* instructed courts to consider three factors to determine whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25 - the conduct, the animus, and the import. *Ruff*, paragraph one of the syllabus. In addition, "[t]wo or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus. Finally, *Ruff* explains that pursuant to R.C. 2941.25(B), a defendant whose conduct supports multiple offenses "may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *Id.*, paragraph three of the syllabus. Thus, when courts consider whether allied offenses must merge into a single conviction under R.C. 2941.25(A), courts "must first take into account the conduct of the defendant." *Ruff* at ¶ 25. Further, "a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each

offense is separate and identifiable from the harm of the other offense." *Id.* at ¶ 26.

{¶30} In *State v. Neal*, *supra,* 2016-Ohio-64, 57 N.E.3d 272, this court determined that two counts of unlawful sexual conduct with a minor did not constitute allied offenses of similar import, thus not subject to merger for sentencing purposes, because the offenses had been committed separately and with separate animus. We observed that, although the crimes concerned different forms of sexual conduct, the acts "cannot be described as one continuous course of conduct given their discrete ending and beginning, which occurred over a considerable passage of time and unrelated conduct." *Id.* at ¶ 54.

{¶31} In the case sub judice, the victim testified at trial that, when in the sixth grade and sometime after August 24, 2017, appellant showed her his penis. On other occasions that followed, appellant engaged in oral sex with A.S. "over a hundred" times. A.S. also testified that vaginal sexual conduct occurred "a hundred or more" times" and anal sex "twice." In addition, A.S. testified about appellant's use of sex toys on her "a couple of times a week until towards the end because I kept telling him no, I don't want to, I don't want to, this isn't right."

{¶32} In addition to the victim's testimony and her written letter, appellant admitted in his recorded confession that he "had

intercourse" with the victim, "performed oral sex" on the victim, and had "anal sex with the child." Further, appellant acknowledged it occurred "multiple times." When pressed, appellant stated this misconduct occurred "less than 50 times." The evidence adduced at trial also revealed that these multiple incidents of sexual offenses occurred over a three-year period.

{¶33} After hearing the evidence, the jury found appellant guilty of 30 counts of unlawful sexual conduct with a minor. After our review, we agree with the trial court's conclusion that these acts cannot be described as one continuous course of conduct, "given their discrete ending and beginning, which occurred over a considerable passage of time and unrelated conduct." *Ruff* at ¶ 54. *See, e.g., State v. Carpenter*, 6th Dist. Erie No. E-00-033, 2002-Ohio-2266, ¶ 78 (crimes not allied offenses of similar import when involved different sexual activities). Consequently, the trial court did not err by failing to merge the offenses. Because these offenses do not constitute allied offenses of similar import, appellant's counsel's failure to raise this issue at trial does not constitute ineffective assistance of counsel.

{¶34} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III.

{¶35} In his final assignment of error, appellant asserts that

his convictions for Counts 31-45, pandering obscenity that involved a minor in violation of R.C. 2907.321(A)(1), are against the manifest weight of the evidence in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1 and 16, Article I of the Ohio Constitution.

{¶36} In determining whether a defendant's conviction is against the manifest weight of the evidence, an appellate court must examine "the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *State v. Anderson*, 4th Dist. Washington No. 03CA3, 2004-Ohio-1033, ¶ 32, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We must remember, however, that the jury, "as the original trier of fact, was in the best position to judge the credibility of witnesses and the weight to be given to the evidence." *Id.*, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. This is because "[t]he fact finder 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered

testimony.' " *State v. Picklesimer*, 4th Dist. Pickaway No. 14CA17, 2015-Ohio-1965, ¶ 9, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶37} Consequently, even when "conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the testimony presented by the state." *State v. Harper*, 4th Dist. Lawrence No. 14CA19, 2015-Ohio-671, ¶ 12, citing *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 21. "The jury can simply reject the defendant's defense and find the evidence in the state's case-in-chief more persuasive." *Id.* Accordingly, "[a] reviewing court should not disturb the fact-finder's resolution of conflicting evidence unless the fact-finder clearly lost its way." *State v. Newman*, 2015-Ohio-4283, 45 N.E.3d 624, ¶ 56 (4th Dist.)(overruled on other grounds), citing *State v. Davis*, 4th Dist. Washington No. 09CA28, 2010-Ohio-555, ¶ 16-17; *State v. McKenzie,* 4th Dist. Scioto Nos. 19CA3892 & 19CA3893, 2021-Ohio-536, ¶ 10.

{¶38} In the case sub judice, in addition to the 30 counts of unlawful sexual conduct with a minor, the jury also found appellant guilty of 15 counts of pandering obscenity that involved a minor. The statute provides "(A) No person, with knowledge of the character of the material or performance involved, shall * * * (1) Create, reproduce, or publish any obscene material that has a minor

or impaired person as one of its participants or portrayed observers."

{¶39} At trial, appellee produced 15 nude photographs of A.S. discovered on a cell phone found in appellant's home. A.S. testified that appellant took the photographs at his residence, and at his direction, when she was approximately 15 years old. Although the photographs had been deleted "a couple of months" afterward, investigators extracted them from the device. As appellee also observes, before Detective Newman executed the search warrant to obtain the cell phone, he first asked appellant if he could locate the phone in his residence. After appellant denied the existence of the phone, Newman did find the phone in the location that A.S. told him he would find it and the state extracted the photos.

{¶40} When conflicting evidence is presented at trial, " ' "a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." ' " *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 17, quoting *State v. Mason*, 9th Dist. No. 21397, 2003-Ohio-5785, ¶ 17, quoting *State v. Gilliam*, 9th Dist. No. 97CA006757, 1998 WL 487085 (Aug. 12, 1998). Instead, a reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily

against the conviction.' " *State v. Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. *Accord State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000); *State v. Waller,* 4th Dist. Scioto Nos. 15CA3683 & 15CA3684, 2016-Ohio-3077, ¶ 20.

{¶41} In the case at bar, although appellant contends "conflicting testimony" exists, the conflicting testimony came from appellant, who denied taking the photos. Thus, the question of whether appellant took the photographs hinges upon the credibility of either the victim or the appellant, which the trier of fact is in the best position to assess. *State v. Kibble*, 9th Dist. Lorain No. 20CA011630, 2020-Ohio-5560, ¶ 15 ("[T]his Court is mindful of the well-established principle that a trier of fact enjoys the best position to assess the credibility of witnesses.").

{¶42} Here, the jury obviously opted not to believe appellant's testimony that some other person took the photographs. The jury's determination does not result in a manifest miscarriage of justice and we will not substitute our credibility determination for that of the jury. *See State v. Frashuer*, 9th Dist. Summit No. 24769, 2010-Ohio-634, ¶ 18 ("[T]he mere fact that the jury chose to disbelieve much of [the defendant's] testimony does not equate to a manifest miscarriage of justice."); *State v. Lipkins*, 10th Dist. Franklin No. 16AP-616, 2017-Ohio-4085, ¶ 39 (a conviction is not

against the manifest weight of the evidence because the trier of fact may believe the state's version of events over the defendant's version). In the case at bar, the jury, after hearing the evidence, could reasonably disbelieve appellant's self-serving testimony and opt to believe the victim's testimony.

{¶43} Accordingly, based upon the foregoing reasons, we conclude that the jury did not clearly lose its way in finding appellant guilty of 15 counts of pandering obscenity involving a minor so as to create a manifest miscarriage of justice that appellant's convictions must be reversed and a new trial granted. Thus, we overrule appellant's final assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence 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 60 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 days, the stay will terminate as of the date of such dismissal.

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

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

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