[Cite as *State v. Cechura*, 2001-Ohio-3250.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 99 CO 74
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
LARRY A. CECHURA,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 99 CR 41.

JUDGMENT: Affirmed in part; Reversed in part and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Hon. Cheryl L. Waite

Dated: May 8, 2001

VUKOVICH, P.J.

{¶1} Defendant-appellant Larry A. Cechura filed this appeal after he was convicted of Sexual Imposition and Sexual Battery by a jury, sentenced to four years in prison and labeled a habitual sexual offender by the Columbiana County Common Pleas Court. For the following reasons, appellant's convictions are affirmed. However, the trial court's judgment entry which states that appellant must register as a habitual sexual offender is reversed and remanded.

STATEMENT OF FACTS

{¶2} Fourteen-year-olds Rose Wade and Melissa Gahagan were babysitting at a home in Salineville, Ohio on December 27, 1998. The owners of the home returned late with appellant who had been drinking alcohol with them. Rose alleged that when she went downstairs to get a glass of water, appellant touched her breast, thigh and buttocks. After this incident, she proceeded upstairs and was joined soon thereafter by Melissa. Melissa testified that she was awakened from sleep on the couch by appellant who had pulled her pajama pants and underwear down and was performing oral sex on her.

{¶3} Appellant gave a statement to police on December 31, 1998 in which he stated that he was extremely intoxicated on the night of the incident and that he did not remember seeing either of the alleged victims that night. As a result of Melissa's allegations, appellant was indicted for Sexual Battery, a third degree felony in violation of R.C. 2907.03(A)(3). With regards to Rose's allegations, appellant was indicted for Gross Sexual Imposition, a fourth degree felony under R.C. 2907.05(A)(1).

{¶4} The case went to trial on October 25, 1999. The court

granted appellant's directed verdict motion on the Gross Sexual Imposition charge as it found no evidence of force or threat of force. Instead, the court instructed the jury on Sexual Imposition, a third degree misdemeanor under R.C. 2907.06(A)(1). The jury found appellant guilty of Sexual Battery for the acts against Melissa and Sexual Imposition for the acts against Rose. A sentencing hearing was held on November 18, 1999. The court sentenced appellant to sixty days on the Sexual Imposition charge and four years on the Sexual Battery charge to run concurrently. The court also labeled appellant an habitual sexual offender. The within timely appeal resulted. We note that the state was given its second leave to file a brief by June 30, 2000. The state asked for no further extensions but filed its brief on September 1, 2000 without seeking leave to file a brief instanter.

ASSIGNMENT OF ERROR ONE AND FIRST SUBASSIGNMENT

{¶5} Appellant sets forth six assignments of error on appeal. The first assignment of error and the first subassignment thereunder provide as follows:

{¶6} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTIONS FOR A DIRECTED VERDICT OF ACQUITTAL AS TO BOTH COUNTS ONE AND TWO."

{¶7} "WHETHER THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT AS A MATTER OF LAW AS TO COUNT ONE, THE STATE HAVING FAILED TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT."

{¶8} Pursuant to Crim.R. 29(A), a trial court shall grant a motion for an acquittal only if after viewing the evidence in the light most favorable to the state, it determines that no rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *State v. Getsy* (1998), 84 Ohio St.3d 180, 193; *State v. Dennis* (1997), 79 Ohio St.3d 421, 430. The essential elements of Sexual Battery as relevant to the present case are: engaging in sexual conduct with another knowing

that the other person submits because he or she is unaware that the act is being committed. R.C. 2907.03(A)(3). If reasonable minds could reach different conclusions on these elements, then the evidence was sufficient and the court properly denied the motion for acquittal. *Getsy*, 84 Ohio St.3d at 193; *Dennis*, 79 Ohio St.3d at 430. See, also, *State v. Christian* (Aug. 27, 1999), Mahoning App. No. 97CA171, unreported, 2.

{¶9} Under the aforementioned subassignment, appellant basically argues that his motion for acquittal should have been granted as to Count One because Melissa's story was not plausible. He actually argues that her story is contrary to common sense because he was wearing a baseball hat and it would have been very awkward to perform oral sex wearing such a hat. There is no doubt that rational triers of fact could reach different conclusions on this issue. In fact, the issue is basically one of credibility which the court properly left to the jury to decide. See *State v. Goff* (1998), 82 Ohio St.3d 123, 139 (noting that the court does not engage in a determination of witness credibility in a review of the sufficiency of the evidence). Accordingly, this subassignment is overruled.

ASSIGNMENT OF ERROR ONE AND SECOND SUBASSIGNMENT

{¶10} The second subassignment under appellant's first assignment of error inquires:

{¶11} "WHETHER APPELLANT MET HIS BURDEN OF PROOF, BEING BY A PREPONDERANCE OF EVIDENCE, AS TO THE DEFENSE OF INTOXICATION, THUS REQUIRING A DIRECTED VERDICT AS A MATTER OF LAW AS TO COUNT ONE."

{¶12} The jury was instructed on the element of knowledge and the concept of voluntary intoxication. Appellant contends that the court should have granted his motion for acquittal rather than allow the case to proceed to jury deliberations because the evidence established that he was too intoxicated to knowingly commit Sexual Battery against Melissa. He focuses on the fact

that witnesses testified that he was drunk and that he was passed out within minutes of the alleged incident with Melissa.

{¶13} Technically, voluntary intoxication is not a defense to a crime. However, at the time of appellant's trial, the fact of extreme intoxication may be shown by a defendant to negate the element of specific intent. *State v. Otte* (1996), 74 Ohio St.3d 555, 564. In such cases, extreme intoxication may be relevant when a defendant is able to establish that he was so intoxicated that he was mentally unable to intend anything. Therefore, the level of intoxication could create a reasonable doubt as to the ability of a defendant to form the specific intent to commit the offense. *Id.*[1]

{¶14} Here, Melissa testified that appellant removed her pajama pants and pulled her underwear down while she was asleep. She testified that he began performing oral sex on her. (Tr. 156). When she awoke and pushed him away, he allegedly stated, "Let me taste you" and "come on, I'll teach you." (Tr. 159, 160). Viewing the evidence in the light most favorable to the state, reasonable minds could find that appellant was not so intoxicated that he was mentally unable to form the requisite intent. As such, this subassignment of error is overruled.

{¶15} The entire first assignment of error is overruled for the preceding reasons. Moreover, appellant failed to specifically seek acquittal on Count I in the trial court. The record below only contains a motion for acquittal and arguments regarding Count II. (Tr. 174, 218). As such, appellant is technically precluded

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[1]This was the law on intoxication as established by the Supreme Court at the time of appellant's trial. As an aside, we note that R.C. 2901.21 was amended, effective October 27, 2000, to state that voluntary intoxication may no longer be used to negate a mental state and may only be used to show that the defendant was physically incapable of performing the act (which is appellant's argument under subassignment number one).

from raising on appeal the question of sufficiency regarding Count I. See *State v. Roe* (1989), 41 Ohio St.3d 18, 25 (stating that in order to preserve the question for appeal, appellant must have timely raised the issue of sufficiency in a motion for acquittal). We also note that appellant mentions Count II in the text of the actual assignment of error but does not even touch upon it in the test or the body of the two subassignments.

ASSIGNMENT OF ERROR TWO

{¶16} Appellant's second assignment of error provides:

{¶17} "THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON SEXUAL IMPOSITION, A VIOLATION OF O.R.C. 2907.06(A)(1), A MISDEMEANOR OF THE THIRD DEGREE, AS A LESSER-INCLUDED OFFENSE OF COUNT TWO, GROSS SEXUAL IMPOSITION, A VIOLATION OF O.R.C. 2907.05(A)(1), A FELONY OF THE FOURTH DEGREE."

{¶18} The pertinent elements of Gross Sexual Imposition are as follows: purposely compelling another, by force or threat of force, to engage in or submit to sexual contact. R.C. 2907.05(A)(1). The relevant elements of Sexual Imposition are as follows: engaging in sexual contact with another knowing that the contact is offensive to the other or is reckless in regards to knowing. R.C. 2907.06(A)(1). In the case at bar, the court found no evidence of force or threat of force against Rose and thus granted appellant's renewed motion for acquittal on the Gross Sexual Imposition charge. The court instead instructed the jury on Sexual Imposition.

{¶19} Appellant argues that the court violated Crim.R. 7(D) which prohibits amendment of an indictment if the amendment changes the name or the identity of the crime. Appellant conceded that when the indictment charges an offense, the jury may be instructed and may find the defendant guilty of an offense of an inferior degree or a lesser included offense of the crime charged. R.C. 2945.74. See, also, Crim.R. 31(C). However, he claims that Sexual Imposition is not a lesser included offense of Gross Sexual

Imposition.

{¶20} An offense may be lesser included of another if: (1) the lesser offense has a lighter penalty than the greater offense; (2) the greater offense cannot be committed without the lesser offense also being committed; (3) some element of the greater offense is not required to prove commission of the lesser offense. *State v. Deem* (1988), 40 Ohio St.3d 205, 209. In applying this three-prong test, we hold that Sexual Imposition is a lesser included offense of Gross Sexual Imposition.

{¶21} First, Sexual Imposition is a third degree misdemeanor and thus has a lighter penalty than Gross Sexual Imposition which is a fourth degree felony. Secondly, the charged section of Gross Sexual Imposition cannot be committed without also committing the type of Sexual Imposition as contained in the instructions. Pursuant to R.C. 2907.05(A)(1), Gross Sexual Imposition requires purposely compelling another to submit to sexual contact by force of threat of force. Under R.C. 2907.06 (A)(1), Sexual Imposition involves sexual contact while knowing or recklessly failing to know that the contact is offensive to the victim. The mental state of purposely includes all lesser mental states. R.C. 2901.22(E). Therefore, if Gross Sexual Imposition is committed, then technically the offender also committed Sexual Imposition. See, *e.g.*, *State v. Blackburn* (Aug. 28, 1998), Greene App. No. 97CA100, unreported, 3; *State v. Martin* (Dec. 2, 1994), Ashtabula App. No. 93A1830, unreported, 3; *State v. Didio* (May 19, 1988), Cuyahoga App. No. 53745, unreported, 20. Lastly, the element of force or threat of force is required to prove Gross Sexual Imposition and is not required to prove Sexual Imposition. Moreover, the higher mental state of "purposely" is required for Gross Sexual Imposition and not for Sexual Imposition. In accordance with the test of *Deem*, the trial court properly instructed the jury on Sexual Imposition as a lesser included offense of Gross Sexual Imposition. *Id.*

{¶22} Appellant points out that a defendant may not be convicted of Sexual Imposition solely upon the victim's testimony unsupported by other evidence. See R.C. 2907.06(B) and Committee Comment which states, "[s]ince the offense is of a type which may be particularly susceptible to abuse in prosecution, the section specifically provides that there can be no conviction based solely upon the uncorroborated testimony of the victim." One sentence under this assignment of error appears to complain that the court failed to instruct the jury on the rule of R.C. 2907.06(B). If this is, in fact, one of the arguments of appellant, we note that there is no objection in the record as to the court's failure to so instruct. Rather, this is only an objection to the instruction on the lesser included offense. (Tr. 271). Pursuant to Crim.R. 30(A), a party may not assign as error the failure to give an instruction unless the party lodges a specific objection before the jury retires for deliberations. Regardless, this would not have been a proper instruction as "[t]he corroboration requirement of R.C. 2907.06(B) is a threshold inquiry of legal sufficiency to be determined by the trial judge, not a question of proof, which is the province of the factfinder." *State v. Economo* (1996), 76 Ohio St.3d 56, 60.

{¶23} By submitting the charge of Sexual Imposition to the jury, the court apparently found sufficient evidence of corroboration. The court reviewed case law such as *Economo*. In that case, the Court held that records of a patient's visit to a doctor on the day claimed and the fact that the patient reported sexual contact by the doctor to another was sufficient corroboration of the victim's trial testimony. *Id.* at 60 (stating that the corroborating evidence need not be independently sufficient to convict the offender and need not go to every element but that "slight circumstances or evidence which tends to support the victim's testimony" will suffice). In the present case, appellant admitted to being drunk and to staying at the

house in question on the night of the alleged incident. The homeowner testified that Melissa and Rose woke her up to complain that appellant was "messing with them." (Tr. 182). As such, some circumstances exist to corroborate portions of Rose's testimony.

{¶24} Regardless, we need not delve further into the existence of corroboration as appellant does not specifically raise it as an assignment of error and does not actually argue a lack of corroboration. App.R. 12(A)(2); App.R. 16(A)(3), (7). It appears that the mention of corroboration under this assignment of error is only done in an attempt to argue that Sexual Imposition has an element which is not possessed by Gross Sexual Imposition and thus cannot be a lesser included offense. However, corroboration is not an element of the offense but is merely an ancillary evidentiary requirement, which the Supreme Court advocates abolishing. See *Economo*, 76 Ohio St.3d at 60-62. The fact that corroboration is not an element of Sexual Imposition can be seen in Supreme Court language which states, "The corroborating evidence * * * need not go to every essential element of the crime charged." *Id.* at 60 (discussing the corroborating evidence and the elements of the crime as distinct concepts).

{¶25} Finally, in a footnote, the Supreme Court states that the *Economo* case arose out of an indictment for Gross Sexual Imposition but when the state failed to prove the element of force, "the case proceeded on the lesser included offense of sexual imposition." *Id.* at 65, fn. 1. By so stating, the court implicitly held that Sexual Imposition is a lesser included offense of Gross Sexual Imposition and thus that corroboration is not an element of Sexual Imposition. For all of the foregoing reasons, this assignment of error is overruled.

{¶26} ASSIGNMENT OF ERROR THREE

{¶27} Appellant's third assignment of error provides:

{¶28} "THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE VERBAL TESTIMONY AS TO PORTIONS OF

APPELLANT'S TAPE-RECORDED STATEMENT RATHER THAN THE ENTIRE TAPE ITSELF, DESPITE DEFENSE OBJECTION."

{¶29} During the investigation, appellant was interviewed on tape by Detective Young. Prior to trial, appellant filed a motion *in limine* which requested that the jury hear the tape of his statement with some redactions rather than read a typed transcript of the statement or listen to Detective Young testify and paraphrase the statement. This motion mentioned that the tape is the best evidence available. The court postponed ruling on the issue until it arose at trial.

{¶30} At trial, Detective Young testified that he interviewed appellant. He stated, "I asked him had he been drinking, he indicated he had. I asked how much. I believe his reply was an excessive amount." At this point, defense counsel objected to the "paraphrasing" and stated, "They have a tape recorded statement that they could play for the jury." (Tr. 109). The court sustained the objection. The state then asked if the detective maintained control over the taped statement. The detective responded affirmatively and noted that the tape is in the custody of the Columbiana County Sheriff's Office.

{¶31} After an off-the-record discussion, the state submitted a transcript of appellant's statement which was generated by the detective. The detective testified that the transcript is an accurate representation of the contents of the tape. Defense counsel objected stating that "there are places on there that aren't exactly as on the tape." The court stated that defense counsel could cross-examine on that issue. The court then found that the transcript could be used to refresh the detective's recollection and to allow for more precise answers. Note that the court thought that the officer used the word "excessive" to express his opinion on the amount appellant revealed that he drank; however, it was later revealed that the word "excessive"

was specifically used by appellant to describe the amount he drank. (Tr. 110-111).

{¶32} The following questions and answers were read by the detective from the transcribed tape:

{¶33} "How much would you say you had to drink?

{¶34} [Appellant:] Excessive amount.

{¶35} Okay. Do you consider that you would have been intoxicated at that time?

{¶36} [Appellant:] To an extreme yes.

{¶37} The night at the house, do you recall where you went to sleep?

{¶38} [Appellant:] On the couch. I either woke up on the couch, or next to the couch.

{¶39} Do you recall seeing Rose at the house that night?

{¶40} [Appellant:] No, I don't.

{¶41} Do you recall seeing Missy there that night?

{¶42} [Appellant:] No, I don't."

{¶43} Interspersed between these quoted portions of the transcribed tape, the detective also testified about the interview without reading from the transcript. Defense counsel did not cross-examine on any of the alleged discrepancies between the transcript and the tape but instead utilized quotes from the transcript herself. Subsequently, the state did not seek to admit the transcript of the taped statement into evidence.

{¶44} On appeal, appellant argues that the taped statement would have been more reliable than the officer's testimony as to his recollection. He points out that playing the tape would allow the jury to hear his voice inflection during the statement.

Appellant argues that under the best evidence rule, if the state wishes to introduce evidence of his statement to the detective, it should be required to present the whole statement.

{¶45} The best evidence rule provides that in order to prove the contents of a recording, the original is required except as otherwise provided by rule or statute. Evid.R. 1002. Although a duplicate of the original is usually admissible, a transcript of a recording is not a duplicate. Evid.R. 1001; Evid.R. 1003. The Supreme Court has stated that Evid.R. 1002 is irrelevant where the transcript is submitted but not admitted into evidence. *State v. Waddy* (1992), 63 Ohio St.3d 424, 445-446. However, that case is distinguishable since the transcript in *Waddy* was only used as an aid for jurors as they listened to the actual recording. In the case at bar, the jurors were not played the actual recording but were merely read portions of a transcript of the recording.

{¶46} The Supreme Court recently stated that "[t]ape recordings are the best evidence of their contents, not transcripts prepared from them." *State v. Coleman* (1999), 85 Ohio St.3d 129, 142. The Court also stated that "[a]n authenticated tape is much more likely to be free from error that the words of a witness testifying from memory." *Id.* at 141-142, quoting *State v. James* (1974), 41 Ohio App.2d 248, 250. However, in *Coleman*, the Court was responding to a defendant's argument that a tape should not have been admitted.

{¶47} We conclude that although a tape is more likely to be free from error than a witness testifying from memory, when a person testifies from memory about a conversation they had with a defendant that just so happened to be recorded, they are not attempting to prove the contents of a recording. See *State v. Turvey* (1992), 84 Ohio App.3d 724, 735 (holding that the best evidence rule was not violated because an officer's testimony and a written confession were not secondary to or dependent upon the

taped interview containing the oral confession). See, also, *Fairfield Commons Condo. Assn. v. Stasa* (1985), 30 Ohio App.3d 11, 16; *James*, 41 Ohio App.2d at 249-250. Thus, the best evidence rule was not applicable when the officer initially began testifying as to his memory of what appellant stated to him during an interview.

{¶48} In *James*, the Second Appellate District stated:

> **{¶49}** "Where proof of a conversation has been of two different kinds, namely, a recording thereof and testimony by witnesses who overheard it, it has been argued that both the recording and the testimony were the best evidence; however, the courts have not relegated either to a secondary position, but have held that both types of evidence are equally competent primary evidence, and that one is not to be excluded because of the existence of the other." *Id.* at 250 (holding that both a dispatcher's testimony and a 911 tape are primary evidence).

{¶50} As aforementioned, the officer began testifying from memory. Appellant objected to his "paraphrasing" and argued that the tape should be played instead. This objection should have been overruled because the officer's testimony from memory was competent primary evidence. However, the court sustained the objection and allowed the state to submit the transcript of the tape to the detective to refresh his memory and give more precise answers. Rather than merely use it to refresh his memory, he read portions of it.[2] This is where the best evidence rule was violated as a recording is primary evidence and a transcript of a recording is secondary evidence.

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[2]Pursuant to Evid.R. 612, a writing can be used to refresh a witness's memory; this is known as present recollection refreshed. However, this writing may not be quoted by the witness as he testifies. Under Evid.R. 803(5), a past recollection recorded can be read by the witness where his memory is incomplete. However, the transcript in this case was not actually a recorded recollection but was a transcription of a taped statement. Moreover, the detective's memory was already refreshed.

{¶51} Regardless, a reviewing court shall not reverse evidentiary errors dealing with the admission or exclusion of evidence unless the defendant's substantial rights are affected. Evid.R. 103(A). See, also, Crim.R. 52(A). In the absence of prejudice to the defendant, violations of the best evidence rule do not require reversal. *State v. Rogan* (1994), 94 Ohio App.3d 140, 163 (stating that where guilt is proven by evidence other than the problem transcript and the defendant points to no specific inaccuracies, the error in admitting the transcript is harmless). See, also, *State v. Jones* (1996), 114 Ohio App.3d 306, 323 (finding no prejudicial error where the court refused to allow introduction of a videotape but allowed the transcript of the video to be read).

{¶52} Appellant makes no allegation of prejudice other than the fact that the jury was unable to hear his voice inflection as he made his statement. Appellant's statement was not a confession. The portions of the transcribed statement read by the detective were not inculpatory. In fact, the portions read basically just assist in demonstrating that appellant was drunk on the night of the incidents and that he did not remember seeing either victim. This questioning actually serves to benefit appellant's use of the voluntary intoxication doctrine.

{¶53} We reiterate that only portions of the transcript were read and the transcript was not admitted into evidence. Appellant's counsel had the opportunity to point out any of the alleged discrepancies between the transcript and the tape. She did not do so at trial or on appeal. See *State v. Murphy* (1992), 65 Ohio St.3d 554, 580. Appellant's counsel had the opportunity to and did point out those portions of the statement that could be construed as favorable to appellant. Appellant also could have played the tape himself. He claims that this would place him in a "catch-22" situation as he would waive his objection. However, he

did not object to the tape's admissibility. Rather, he asked that it be played with certain redactions.

{¶54} We therefore hold that prejudice is lacking. As aforementioned, violation of an evidentiary rule is harmless if the defendant's guilt is proven by other evidence. *State v. Keenan* (1998), 81 Ohio St.3d 133, 142. In the case at bar, the portions of the transcript read by the defendant did not assist in proving appellant's guilt. Appellant's guilt was proven through the victims' testimony and other corroborating evidence. Thus, any error in allowing the detective to read parts of the transcript was harmless. As such, this assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR

{¶55} Appellant's fourth assignment of error contends:

{¶56} "THE TRIAL COURT ERRED IN NOT SENTENCING APPELLANT TO THE MINIMUM SENTENCE."

{¶57} The court sentenced appellant to sixty days on the Sexual Imposition charge to run concurrently to a sentence of four years for the Sexual Battery charge. Sexual Battery is a third degree felony with a possible sentence of one, two, three, four or five years. Appellant complains that a four-year sentence on this charge is excessive. He notes that he presented three character witnesses and that he has a good work history. He praises himself for having no criminal record, other than three DUIs. He states that his alcohol problem would be better cured in a rehabilitation program. Lastly, he downplays the court's consideration of the impact of the crimes upon the fourteen-year-old victims and insists that he "deserved a minimum sentence."

{¶58} A sentencing court must adhere to the overriding purposes of felony sentencing set forth in R.C. 2929.11. These purposes are punishment and protection. In accomplishing these purposes, the court must consider the applicable factors outlined in R.C.

2929.12 which relate to seriousness and recidivism. The court may also consider any other factor relevant to the purposes aforementioned. The court possesses broad discretion to generally weigh the statutory factors and to specifically assign various weights to particular factors. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215; *State v. Fox* (1994), 69 Ohio St.3d 183, 193.

{¶59} Appellant cites R.C. 2929.14(B) for the proposition that the court must sentence an offender to the minimum sentence if that offender has not previously served time in prison. However, appellant ignores the remainder of the sentence which qualifies the rule with "unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender or others." The Supreme Court has stated that as long as the record from the sentencing hearing reflects that the court found that a minimum sentence will demean the seriousness of the offense or will not protect the public, then the court may deviate from the minimum. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 326 (also stating that the sentencing court need not give its reasons for finding that a minimum sentence will demean the seriousness of the offense). Although appellant did not previously serve time in prison, the trial court stated on the record that a minimum sentence of one year on the Sexual Battery charge would demean the seriousness of the offense and even proceeded to give its reasons such as psychological impact on young victims. (Sent. Tr. 20). Hence, this argument is without merit.

{¶60} As for the court's weighing of the sentencing factors, we hold that the court did not abuse its discretion. The judgment entry provides that the court considered the principles and purposes of sentencing contained in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12. The court considered a presentence investigation report and victim impact

statements. At the sentencing hearing, the court opined that the psychological impact of the sexual crimes on the victims was exacerbated by their young age of fourteen. (Sent. Tr. 18-20). See R.C. 2929.12(B)(1) and (2). The age of the victims is an important criteria in sentencing to which the court can attach great weight. *Arnett*, 88 Ohio St.3d at 215, 216. The court also noted that appellant appears to have an alcohol problem for which he has not received treatment and for which he can receive treatment in prison. (Sent. Tr. 17). The court did not sentence appellant to the maximum as requested by the state. There is no indication that the court abused its discretion in sentencing appellant to four years on the charge of Sexual Battery. Therefore, this assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE

{¶61} Appellant's fifth assignment of error provides:

{¶62} "THE COURT ERRED IN DETERMINING APPELLANT TO BE A 'HABITUAL SEXUAL OFFENDER'."

{¶63} At the sentencing hearing, the state only characterized appellant as a sexually oriented offender with a ten-year reporting requirement. The state did not seek to label appellant an habitual sexual offender or a sexual predator. When appellant's attorney learned of this from the court, she decided not to present any argument on the issue since the requirement for at least a ten-year registration period is automatic upon conviction of a sexually oriented offense. (Sent. Tr. 10). After pronouncing sentence from the bench, the court stated that it was designating appellant as a sexual offender and notified him that he will have to register for twenty years. (Sent. Tr. 22). The court's November 19, 1999 judgment entry noted that the state recommended that appellant be classified as a sexually oriented offender. However, the court then classified appellant as an habitual sexual offender.

{¶64} An habitual sexual offender is one who is convicted of a sexually oriented offense and who previously has been convicted of a sexually oriented offense. R.C. 2950.01(B). Appellant's present felony conviction for Sexual Battery in violation of R.C. 2907.03 is a sexually oriented offense. R.C. 2950.01(D)(1). Appellant's present misdemeanor conviction for Sexual Imposition in violation of R.C. 2907.06 is not a sexually oriented offense. See R.C. 2950.01(D)(1)-(7). Regardless, the habitual sexual offender category requires a "previous" conviction for a sexually oriented offense, and the court found that appellant has no prior convictions except for three DUIs. Hence, the court's November 19, 1999 judgment entry improperly classified appellant as an habitual sexual offender and improperly imposed twenty years of registration upon appellant.

{¶65} Subsequently, on August 31, 2000, the court filed a *nunc pro tunc* judgment entry which deleted the first reference to appellant as an habitual sexual offender and instead stated that he was a sexually oriented offender with a ten-year reporting requirement. Although the court attempted to correct its error, it did not completely do so. For instance, the judgment entry still states that the sheriff shall provide a written explanation of the duties to register as an "habitual sexual offender." Moreover, R.C. 2950.09(E) requires the court to specifically state that appellant is not an habitual sexual offender. Accordingly, this case must be remanded with orders to correct the line of the judgment entry that states that appellant has a duty to register as an habitual sexual offender and to specifically state that appellant is not an habitual sexual offender.

ASSIGNMENT OF ERROR SIX

{¶66} Appellant's sixth assignment of error contends:

{¶67} "THE PRACTICE BY THE PROSECUTING ATTORNEY OF QUESTIONING THE STATE'S WITNESSES IN A GROUP FOR LENGTHY PERIODS OF TIME WAS IMPROPER AND DENIED APPELLANT DUE

PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO CONFRONTATION OF WITNESSES."

{¶68} Defense counsel claims confrontation violations resulting in counsel's inability to prepare due to the fact that state witnesses refused to be interviewed. However, there is no allegation that the state instructed the witnesses to refuse to speak to defense counsel. A witness has the right to choose not to be interviewed by a defendant in a criminal case prior to trial. *State v. Zeh* (1987), 31 Ohio St.3d 99, 102. Additionally, appellant had the opportunity to confront the witnesses during trial. See *State v. Woodburn* (June 24, 1998), Columbiana App. No. 94CO82, unreported, 2.

{¶69} Appellant alleges that the prosecutor improperly interviewed Melissa, Rose and Rose's sister together. However, this fact is not clear from the testimony. For instance, defense counsel asked Rose, "And you were all together and then the prosecutor would bring in other people and ask them in front of you, questions?", to which Rose responded, "Yes." (Tr. 149). Counsel did not delve into what other people were asked questions in front of Rose. Rose was interviewed by the prosecutor on three occasions, and it appears that it was only on the last occasion that others were present. Further, Rose's sister testified that she was not in the prosecutor's office with Rose and Melissa until after she had been questioned alone. (Tr. 127-128). Melissa testified that she talked to the prosecutor three times, stating, "I came in and told him what happened, and then I'd sit outside there with my mom or he'd go talk to my mom, or talk to her and we'd all wait outside." (Tr. 169).

{¶70} As aforementioned, appellant had the opportunity to clarify the characteristics of the interviews and to attack the credibility of the witnesses. The questions posed by counsel were not clearly developed. The phrase "you all" is used in a manner

that makes it unclear about who exactly he was inquiring. Furthermore, the witnesses admitted that they talked about the incidents amongst themselves at home.

{¶71} Finally, although the prosecutor discussed with Rose what would happen at trial, the prosecutor is free to prepare witnesses and review the expected testimony. *State v. Bowen* (Dec. 8, 1999), Columbiana App. No. 96CO68, unreported, 14. The prosecutor asked Rose if anyone told her what to say. (Tr. 151). The jury had the opportunity to hear the witnesses's testimony about their interviews and was free to believe that the witnesses were testifying independently without tailoring their stories. This is the province of the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. Accordingly, this assignment of error is overruled.

{¶72} For the foregoing reasons, appellant's convictions of Sexual Imposition and Sexual Battery are affirmed. The trial court's reference to appellant as an habitual sexual offender is reversed with instructions upon remand to specifically state in a new sentencing order that appellant is not an habitual sexual offender.

Donofrio, J., concurs.
Waite, J., concurs.