[Cite as *State v. Hill*, 2021-Ohio-3327.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHRISTIANSON SEAN HILL,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0050

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 139

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecutor, 147-A West Main Street, St. Clairsville, Ohio 43950 and *Atty. J. Kevin Flanagan*, Assistant Prosecuting Attorney for Plaintiff-Appellee

Atty. John M. Jurco, P.O. Box 783, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: September 15, 2021

D'Apolito, J.

{¶1} Appellant, Christianson Sean Hill, appeals from the November 8, 2019 judgment of the Belmont County Court of Common Pleas convicting him for rape of his 12-year-old stepdaughter and sentencing him to an indefinite term of 25 years to life in prison, five years of mandatory post-release control, and designating him a Tier III sex offender following a jury trial. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} On May 3, 2017, the Belmont County Grand Jury indicted Appellant on one count of rape of a child under the age of 13, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b), with a specification that Appellant purposely compelled the victim, his stepdaughter, J.R.J. (d.o.b. 06-23-04), to submit to sexual conduct by force or threat of force. An offender guilty of the specification is sentenced pursuant to R.C. 2971.03(B)(1)(c), which mandates the imposition of an indefinite sentence of 25 years to life in prison, rather than R.C. 2971.03(B)(1)(a), which mandates a sentence of ten years to life. Appellant was appointed counsel, pleaded not guilty at his arraignment, and waived his right to a speedy trial.[1]

{¶3} A plea proceeding was held on February 16, 2018. The trial court dismissed the specification contained in the indictment. Appellant withdrew his former not guilty plea and entered a plea to the amended charge pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The court accepted Appellant's *Alford* plea, ordered a PSI, and deferred sentencing.

{¶4} On March 13, 2018, the trial court imposed a life sentence. Appellant filed an appeal with this court, Case No. 18 BE 0037. On September 20, 2019, this court found that Appellant's *Alford* plea was not knowingly and intelligently entered because the trial court did not inform him at his plea colloquy that he was waiving his right to a jury trial. *State v. Hill*, 7th Dist. 18 BE 0037, 2019-Ohio-4079, ¶ 1. As a consequence, this court

[1] Appellant had numerous appointed representatives throughout this case.

vacated Appellant's conviction and sentence and remanded the matter to the trial court for further proceedings. *Id.*

{¶5} A jury trial commenced on October 31, 2019. Appellee, the State of Ohio, presented ten witnesses: (1) Jennifer Wolford, M.D., a child abuse physician at Children's Hospital of Pittsburgh; (2) Yuliya Early, P.A., a physician assistant in the emergency department at Children's Hospital of Pittsburgh; (3) Winter Hill, Appellant's wife and the victim's mother; (4) Sara Devine, a DNA forensic scientist at the Ohio Bureau of Criminal Investigation ("BCI"); (5) Timothy Augsback, a DNA forensic scientist at BCI; (6) Carole Ann Marvin, the victim's guidance counselor at Bellaire Middle School; (7) the Victim, 15-year-old daughter of Mrs. Hill, who indicated that Appellant would hold her down and rape her; (8) Doug Cruse, a detective sergeant with the Belmont County Sheriff's Office; (9) Chanda Paczewski, a school-based therapist through Southeast, Incorporated; and (10) Nicole Couch, an investigator/supervisor with Belmont County Children's Services. Following the State's case, Appellant took the stand and testified in his own defense.

{¶6} The pertinent facts emanating from the record are as follows: the 12-year-old female victim reported to a friend at school on April 11, 2017 that Appellant, her stepfather, had raped her that morning before she left for school. Detective Cruse and Investigator/Supervisor Couch were contacted based on this allegation. The victim revealed she threw her underwear into the home trashcan that morning. The investigators went to the victim's residence and spoke with Appellant and Mrs. Hill. Mrs. Hill retrieved the victim's underwear from the trashcan. Mrs. Hill indicated that Appellant became upset during the investigation and cleaned the couch. Mrs. Hill also revealed that during a later jail telephone call with Appellant, he stated that he did the unthinkable.

{¶7} The next day, a forensic interview was held with the victim. The victim again disclosed that she had been raped by Appellant the prior day. The victim further alleged that this sexual abuse had been going on for years, first beginning when the family lived in Wheeling, West Virginia. The victim described numerous instances of different sexual assaults that Appellant allegedly committed against her, including Appellant pulling off her clothes, pushing her face down onto the couch, and putting his penis inside her. After each assault, the victim indicated that Appellant would threaten to kill her and hurt her mother and brother if she ever told anyone.

{¶8} Scientific analysis was conducted on the victim's underwear and Appellant's DNA was obtained following his arrest. The evidence was sent to BCI for testing. DNA forensic scientists Devine and Augsback revealed that seminal fluid was found in the victim's vaginal samples, sperm in her anal samples, and sperm in her underwear. BCI further indicated that the sperm and fluid found in the victim's rape kit all matched with Appellant.

{¶9} After the State rested, defense counsel made a Crim.R. 29 motion for acquittal which was denied. Appellant then took the stand and testified that he had masturbated on the date at issue. Thereafter, Appellant said he wiped his hands off in the dirty clothes hamper. Appellant also testified to grabbing a clean pair of underwear for the victim because she had asked him to. Although the victim's crotch area had a voluminous amount of seminal fluid, which was consistent with Appellant's DNA profile, he claimed he did not know how it got there. Appellant denied raping the victim.

{¶10} Following the jury trial, Appellant was found guilty of the rape charge and specification as contained in the indictment.

{¶11} On November 8, 2019, the trial court sentenced Appellant to an indefinite term of 25 years to life in prison, with 922 days of credit for time served, and designated him a Tier III sex offender. The court further notified Appellant that he shall be subject to a mandatory five-year period of supervision under post-release control.

{¶12} Appellant filed this appeal, Case No. 19 BE 0050, and raises nine assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN REFUSING TO STRIKE A JUROR FOR CAUSE.

{¶13} In his first assignment of error, Appellant argues the trial court abused its discretion in refusing to strike Juror No. 6 for cause because the juror had a first cousin that worked for the Belmont County Sheriff's Office.

{¶14} During voir dire, a trial court has broad discretion in determining a juror's ability to be fair and impartial, and the court's decision on a challenge for cause will not

be reversed unless the court clearly abused its discretion. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 73; *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 33. An abuse of discretion involves an attitude that is unreasonable, arbitrary, or unconscionable. *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 46. A decision is considered unreasonable if there is no sound reasoning process to support it. *Id.* The reviewing court defers to the trial court's decision where a prospective juror was challenged for bias as the trial judge has the opportunity to personally view and hear the prospective juror during voir dire. *Trimble*, *supra,* at ¶ 73.

{¶15} Crim.R. 24, "Trial jurors," states in part:

> (C) Challenge for Cause. A person called as a juror may be challenged for the following causes:
>
> * * *
>
> (10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

Crim.R. 24(C)(10).

{¶16} In addition, R.C. 2313.17, "Examination of jurors; causes for challenge," provides in part:

> (A) Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to the person's qualifications. A person is qualified to serve as a juror if the person is eighteen years of age or older, is a resident of the county, and is an elector or would be an elector if the person were registered to vote, regardless of whether the person actually is registered to vote.

> (B) The following are good causes for challenge to any person called as a juror:
>
> * * *
>
> (7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party[.]

R.C. 2313.17(A) and (B)(7).

{¶17} In this case, Appellant's claim that the State of Ohio is the "party" rather than the victim is unfounded. (11/3/2020 Appellant's Brief, p. 24). The record reveals the trial judge conducted an extensive discussion with Juror No. 6 and determined that Appellant's challenge was baseless. In fact, the juror indicated that her cousin's employment would have no effect on her ability to be fair and impartial. The trial court did not abuse its discretion in refusing to strike Juror No. 6 for cause.

{¶18} Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE OTHER ALLEGED RAPE/SEX OCCURRENCES.

{¶19} In his second assignment of error, Appellant contends the trial court erred in allowing evidence to go before the jury of other alleged rape/sex acts committed by him on the same victim since he was only charged on one count.

{¶20} Evid.R. 403, "Exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay," states:

> (A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

> (B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

Evid.R. 403(A) and (B).

{¶21} Evid.R. 404, "Character evidence not admissible to prove conduct; exceptions; other crimes," provides in part:

> (B) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Evid.R. 404(B).

{¶22} "'The admission of such (other-acts) evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice.'" *State v. Vance*, 7th Dist. Columbiana No. 17 CO 0015, 2018-Ohio-5409, ¶ 14, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

> The Ohio Supreme Court created a three-step analysis when reviewing the admissibility of a prior bad [act]:
>
> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show

> activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R. 403.

Vance, supra, at ¶ 15, quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶23} Appellant did not object to the introduction of the evidence at trial. Thus, he is limited to a plain error review on appeal. *Vance, supra,* at ¶ 11.

{¶24} The victim revealed in her statement to Harmony House, where the forensic interview was conducted, as well as in her testimony before the jury that Appellant had been sexually abusing her for years. Multiple acts of rape committed by Appellant first began when the family lived in Wheeling, West Virginia and continued through April 11, 2017. The victim explained that Appellant is her stepfather and had continual access to her through this relationship.

{¶25} Upon consideration, there is no question that the other acts evidence is relevant here under Evid.R. 401; the other acts evidence was presented for a permissible purpose under Evid.R. 404(B); and the probative value of the other acts evidence was substantially outweighed by the danger of any unfair prejudice under Evid.R. 403. Appellant cannot demonstrate that the introduction of the evidence was plain error.

{¶26} Appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN DENYING THE DEFENSE THE ABILITY TO CONDUCT ADDITIONAL CROSS-EXAMINATION PERTAINING TO SPERM.

{¶27} In his third assignment of error, Appellant maintains the trial court abused its discretion in denying defense counsel the ability to conduct further cross-examination of BCI DNA forensic scientist Devine pertaining to sperm.

{¶28} "The admission of evidence is within the discretion of the trial court and the court's decision will only be reversed upon a showing of abuse of discretion; a trial court enjoys broad discretion when determining the admissibility of evidence." *State v. Murray*, 7th Dist. Mahoning No. 18 MA 0031, 2019-Ohio-5459, ¶ 8, citing *State v. Barnes,* 94 Ohio St.3d 21, 23, 759 N.E.2d 1240 (2002); *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 21.

{¶29} Evid.R. 611, "Mode and order of interrogation and presentation," states in part:

> (A) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (B) Scope of Cross-Examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

Evid.R. 611(A) and (B).

{¶30} The record reveals that Devine testified under direct examination by the prosecutor, cross-examination by defense counsel, redirect by the prosecutor, and re-cross by defense counsel. (10/31/2019 Jury Trial T.p. 582-640). It is clear that the trial court allowed wide latitude to defense counsel regarding cross-examination on the issue of sperm. (*Id.* at 626-634). However, there came a point when the trial court believed this continuing line of questioning became irrelevant. The court recognized that the cumulative questions being asked of Devine by defense counsel served no additional purpose in assisting the jury. The court did not abuse its discretion in determining that further testimony regarding sperm became irrelevant. *See Murray, supra,* at ¶ 8; Evid.R. 611(A) and (B).

{¶31} Appellant's third assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY BY NOT FULLY DEFINING "FORCE."

{¶32} In his fourth assignment of error, Appellant asserts the trial court erred in instructing the jury by not fully defining "force."

{¶33} "An appellate court reviews a trial court's decision whether to give a particular jury instruction under an abuse of discretion standard." *State v. Williams*, 7th Dist. Mahoning No. 19 MA 0135, 2021-Ohio-1285, ¶ 24, citing *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143, ¶ 103.

{¶34} The trial judge instructed the jury on the element of "force" as follows:

> "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.
>
> "Threat" includes a direct or indirect threat. The victim need not prove physical resistance to the defendant.
>
> When the relationship between the victim and the defendant is one of child and stepparent, the element of force need not be openly displayed or physically brutal. It can be subtle, slight, and psychological and/or emotionally powerful. Evidence of an express threat of harm or evidence of significant physical restraint is not required.
>
> If you find beyond a reasonable doubt that under the circumstances in evidence, the victim's will was overcome by fear, duress and/or intimidation, the element of force has been proved.

(10/31/2019 Jury Trial T.p. 912-913).

{¶35} The victim testified as to her age (12 years old) and as to the relationship she had with Appellant (stepdaughter/stepfather) on the date of the offense (April 11, 2017). (*Id.* at 690-698). Contrary to Appellant's position, the trial court's jury instruction regarding "force" was complete. We fail to find any error.

{¶36} Appellant's fourth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE SPECIFICATION BY NOT INCLUDING THE AGE REQUIREMENT.

{¶37} In his fifth assignment of error, Appellant references R.C. 2941.1419 in arguing that the trial court erred in instructing the jury on the specification by not including the age requirement.

{¶38} R.C. 2941.1419, "Attempted rape specification; victim under ten years of age," has no applicability to the facts presented in this case. Rather, as stated, the victim here was 12 years old at the time of the offense. Appellant was indicted on one count of rape of a child under the age of 13, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b), with a specification that Appellant purposely compelled the victim, his stepdaughter (d.o.b. 06-23-04), to submit to sexual conduct by force or threat of force. An offender guilty of the specification is sentenced pursuant to R.C. 2971.03(B)(1)(c), which mandates the imposition of an indefinite sentence of 25 years to life in prison, rather than R.C. 2971.03(B)(1)(a), which mandates a sentence of ten years to life.

{¶39} R.C. 2907.02, "Rape," states in part:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

R.C. 2907.02(A)(1)(b).

{¶40} The record reveals the State proved the requisite elements of the rape offense: that Appellant engaged in sexual conduct with another (his stepdaughter, not his spouse), the victim was 12 years old (less than 13 years of age), and the separate specification (that Appellant purposely compelled the victim to submit to sexual conduct

by force or threat of force). Contrary to Appellant's position, the facts in this case did not require the State to prove any additional elements, including proving that Appellant was at least 16 years old.[2] Thus, there was no requirement for the trial court to give any further instructions regarding this issue.

{¶41} Appellant's fifth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 6

THE PROSECUTION ERRONEOUSLY MISSTATED THE LAW IN REBUTTAL ARGUMENT, TO THE DETRIMENT OF THE APPELLANT.

ASSIGNMENT OF ERROR NO. 7

THE PROSECUTOR IMPROPERLY COMMENTED IN CLOSING ARGUMENT ON THE APPELLANT'S CREDIBILITY AS A WITNESS.

{¶42} In his sixth assignment of error, Appellant alleges the prosecutor misstated the law during rebuttal. In his seventh assignment of error, Appellant asserts the prosecutor improperly commented on his credibility. Because both of these assignments focus on alleged errors committed by the prosecutor during closing argument, we will address them together.

> A prosecutor is afforded wide latitude during closing argument and it is within the trial court's sound discretion to determine whether a comment is improper. *State v. Williams,* 7th Dist. Jefferson No. 11 JE 7, 2013-Ohio-2314, ¶ 10, citing *State v. Benge*, 75 Ohio St.3d 136, 661 N.E.2d 1019 (1996). When reviewing a comment made by the state, we must first determine whether the remark was proper. *State v. Peeples*, 7th Dist. Mahoning No. 07 MA 212, 2009-Ohio-1198, ¶ 74, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). If the remark appears to be improper, we must then determine whether it prejudicially affected the defendant's substantial rights. *Id.*

[2] Appellant was 33 years old at the time of trial. (10/31/2019 Jury Trial T.p. 838)

* * *

"An attorney may not express a personal belief or opinion as to the credibility of a witness." *State v. Myers,* 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145, citing *State Williams,* 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). However, "(t)he prosecutor may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument." *State v. Treesh,* 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001), citing *State v. Smith,* 80 Ohio St.3d 89, 111, 684 N.E.2d 668 (1997). When reviewing a prosecutor's comments, a court must view the state's closing argument in its entirety. *Treesh, supra,* at 466, citing *State v. Moritz,* 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1980). Although a prosecutor should avoid voicing a personal opinion as to a defendant's guilt, a comment on guilt is not *per se* improper. *State v. Zehenni,* 12th Dist. Warren No. CA2016-03-020, 2016-Ohio-8233, ¶ 46.

State v. Graffius, 7th Dist. Columbiana No. 18 CO 0008, 2019-Ohio-2714, ¶ 16, 19.

{¶43} Prior to closing arguments, the trial judge stated the following:

You have heard me use the word "evidence" in these instructions. And at this time I want to explain what the word means and includes and what it does not include.

Evidence is the testimony received from the witnesses and the exhibits admitted into evidence during the trial in this case.

Evidence may be direct or circumstantial. * * *

The opening statements and closing arguments of counsel are designed to assist you, but they are not evidence. * * *

(10/31/2019 Jury Trial T.p. 913-914).

{¶44} Appellant argues that the prosecutor misstated the law. In closing argument, defense counsel stated:

> No expert in this case ever rendered an opinion to say that [Appellant] raped [the victim]. Dr. Wolford, an expert who told you about treating someone who came in saying that they were raped. She offered no opinion whether or not [Appellant] raped that girl. She offered no opinion as to whether or not she believed the girl was raped.

(*Id.* at 932-933).

{¶45} In rebuttal closing argument, the prosecutor stated:

> It started with a physician rendering an opinion as to rape and why one was not garnered. Respectfully, I will simply put forth: One cannot be garnered. One is not permitted to be garnered. The trier of fact in this case is you. Not Dr. Wolford. It is not proper for her to opine as to whether or not a rape has occurred. That would have been objected in the first two seconds before it came out of her mouth.
>
> With that said, you and you alone, as the judge has indicated, are the triers of fact in this case. So the fact that an opinion was not elicited, please do not take anything of that, except that we were following the Court rule; not that we wanted an opinion, but could not get it. That is absolutely, 100 - - that is absolutely not true.

(*Id.* at 944-945).

{¶46} The record reveals no basis for the claim that the prosecutor misstated the law. The prosecutor merely repeated what the witness, Dr. Wolford, had said during her testimony. At trial, Dr. Wolford had testified about vaginal penetration with penis and fingers, ejaculation, and no condom use. Specifically, the prosecutor indicated that Dr. Wolford's testimony did not encompass and could not encompass an opinion regarding whether or not the victim had been raped by Appellant. The prosecutor made it clear that the particular decision was the ultimate question in the trial and that it was left to the sole discretion of the impaneled jury to decide.

{¶47} Appellant also argues that the prosecutor improperly commented on his credibility by specifically stating:

> Today, [Appellant] got to tell you what he wants you to believe.
>
> * * *
>
> * * * He told you a story that makes no sense whatsoever. * * * None of it makes any sense.
>
> * * *
>
> To believe - - to believe, to buy into the credibility of [Appellant], you would have to essentially suspend belief and fall into a world where disbelief rules.

(*Id.* at 923-925).

{¶48} Regarding witness credibility, the prosecutor properly drew reasonable inferences from the evidence presented at trial, and properly commented on those inferences during closing argument. *Graffius, supra,* at ¶ 19.

{¶49} Viewing the State's closing argument in its entirety, we fail to find any error. The prosecutor was afforded wide latitude during closing argument. *Id.* at ¶ 16. Upon review, the prosecutor's comments were proper. *Id.* Even assuming arguendo that they were improper, no prejudice to Appellant's substantial rights resulted. *Id.*

{¶50} Appellant's sixth and seventh assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 8

THE APPELLANT'S SENTENCE SHOULD BE OVERRULED AND REVERSED BECAUSE THE SENTENCE IS IN VIOLATION OF AND CONTRARY TO LAW.

{¶51} In his eighth assignment of error, Appellant maintains his sentence is contrary to law.

{¶52} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's

findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶53} R.C. 2953.08(G) states in pertinent part:

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2)(a)-(b).

{¶54} Again, Appellant was indicted and tried on one count of rape of a child under the age of 13, a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b), with a specification that Appellant purposely compelled the victim, his stepdaughter (d.o.b. 06-23-04), to submit to sexual conduct by force or threat of force. An offender guilty of the specification is sentenced pursuant to R.C. 2971.03(B)(1)(c), which mandates the imposition of an indefinite sentence of 25 years to life in prison, rather than R.C. 2971.03(B)(1)(a), which mandates a sentence of ten years to life.

{¶55} Appellant was found guilty of the charge itself as well as the specification of "force." Appellant's sentence was in accord with R.C. 2971.03 which states in part:

> (B)(1) Notwithstanding section 2929.13, division (A) or (D) of section 2929.14, or another section of the Revised Code other than division (B) of section 2907.02 or divisions (B) and (C) of section 2929.14 of the Revised Code that authorizes or requires a specified prison term or a mandatory prison term for a person who is convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, if division (A) of this section does not apply regarding the person, and if the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, the court shall impose upon the person an indefinite prison term consisting of one of the following:
>
> * * *
>
> (c) If the offender purposely compels the victim to submit by force or threat of force, or if the offender previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of section 2907.02 of the Revised Code or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of that section, or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, a minimum term of twenty-five years and a maximum of life imprisonment.

R.C. 2971.03(B)(1)(c).

{¶56} Based on the facts presented, the trial court's sentencing was mandated by R.C. 2971.03(B)(1)(c). As a result, Appellant's sentence of 25 years to life in prison is not contrary to law.

{¶57} Appellant's eighth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 9

THE APPELLANT'S CONVICTION SHOULD BE REVERSED DUE TO CUMULATIVE ERROR AND POTENTIAL INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶58} In his ninth assignment of error, Appellant stresses his conviction should be reversed because of "cumulative error" and "potential" ineffective assistance of counsel.

> Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of error during a trial deprives a defendant of a fair trial even though each of the alleged instances of error do not individually constitute cause for reversal. *State v. DeMarco,* 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987). An error-free, perfect trial does not exist, and is not guaranteed by the Constitution. *State v. Hill,* 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996). In order to find cumulative error, a record must contain multiple instances of harmless error. *State v. Austin,* 7th Dist. Mahoning No. 16 MA 0068, 2019-Ohio-1185, ¶ 64. When an appellate court determines no error has occurred, the doctrine cannot apply. *State v. Lyons,* 7th Dist. Jefferson No. 16 JE 0008, 93 N.E.3d 139, 2017-Ohio-4385, ¶ 46.

State v. Italiano, 7th Dist. Mahoning No. 19 MA 0095, 2021-Ohio-1283, ¶ 35.

{¶59} As we find no error in any of Appellant's assignments, his final assignment based on cumulative error clearly has no merit. *Id.* Likewise, Appellant's empty allegation concerning a "potential" ineffective assistance of counsel claim also has no merit. The record fails to establish that trial counsel was ineffective and Appellant clearly fails to demonstrate the two-part test for ineffective assistance of counsel, namely: (1) that trial counsel's performance fell below an objective standard of reasonable representation; and (2) that prejudice arose from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶60} Appellant's ninth assignment of error is without merit.

CONCLUSION

{¶61} For the foregoing reasons, Appellant's assignments of error are not well-taken. The judgment of the Belmont County Court of Common Pleas convicting Appellant for rape of his 12-year-old stepdaughter and sentencing him to an indefinite term of 25 years to life in prison, five years of mandatory post-release control, and designating him a Tier III sex offender following a jury trial is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.