[Cite as *State v. Culler*, 2021-Ohio-4642.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANDREW CULLER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0030

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CR 72

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

JUDGMENT:
Affirmed.

Atty. Tammie M. Jones, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, 42 N. Phelps Street. Youngstown, OH 44503, for Defendant-Appellant.

Dated: December 17, 2021

Robb, J.

{¶1} Defendant-Appellant Andrew Culler appeals the decision of the Columbiana County Common Pleas Court finding him guilty of one count of sexual battery and two counts of gross sexual imposition. Four assignments of error are raised. The first two address witnesses' testimony as to what the child victim told them about the incidents. Appellant asserts the testimony violated the prohibition against hearsay and the Confrontation Clause. In the third assignment of error Appellant contends there was not sufficient evidence to support the convictions. The fourth assignment argues the failure to object to the testimony of the witnesses recounting of the statements the child victim told them about the incidents constituted ineffective assistance of counsel. For the reasons stated below, none of the arguments have merit. The convictions are affirmed.

Statement of the Case

{¶2} Appellant was indicted for one count of sexual battery in violation of R.C. 2907.03(A)(5), a third-degree felony and two counts of gross sexual impositions in violation R.C. 2907.05(A)(4), fourth-degree felonies. The offenses were alleged to have occurred between January 1, 2010 and July 10, 2016. The victim for all three offenses is the same child victim. The child victim was alleged to be under the age of 13 when the acts constituting gross sexual imposition were alleged to have occurred. The child victim is Appellant's biological daughter.

{¶3} Appellant waived his right to a speedy trial and his right to a jury trial; Appellant requested a bench trial. 2/24/20 Motions; 10/9/20 J.E.

{¶4} At the bench trial, the testimony indicated the child victim's parents are divorced. During visitation with Appellant, child victim was accused of selling or giving a Vape Pen to her cousin. An intense argument ensued, which resulted in the child victim's mother arriving to end the visitation and take the child victim home with her.

{¶5} Appellant called the police on his ex-wife. When the police arrived, child victim disclosed to the officer that Appellant on multiple occasions had touched her inappropriately. The child victim's mom was advised to leave the scene with child victim and to take her to the police station for a formal statement.

{¶6} Two days prior to this incident, child victim disclosed the inappropriate conduct to her boyfriend. The text messages between child victim and boyfriend were admitted at trial.

{¶7} Following the formal statement, child victim met with an intake investigator at Children Services, a social worker with the Akron Children's Hospital Child Advocacy Center, and a nurse practitioner at Akron Children's Hospital Child Advocacy Center. The intake investigator helped with scheduling the appointment with the Child Advocacy Center. Tr. 166. The social worker conducted a psychosocial assessment and a diagnostic interview; the nurse practitioner did a medical exam. Trial Tr. 247, 280. All three testified at trial.

{¶8} Child victim testified at trial and described the incidents with Appellant inappropriately touching her. She described incidents of digital penetration, fellatio, cunnilingus, touching her breasts, and Appellant using her hand to masturbate him. In one specific instance, she recalled Appellant giving her whiskey when she was sick. He then proceeded to take off her pants and his pants. There was no penal penetration due to his current wife calling for him from upstairs. Child victim also testified Appellant would watch shark videos with her and then he would turn on pornography and ask her if she would like him to do the things depicted to her. There were also text messages and Facebook messenger messages between Appellant and child victim. Many were of emojis, particularly a smiley face with a tongue sticking out. Child victim testified that Appellant would also text "tonight?". She took these messages to mean he wanted to engage in sexual activity.

{¶9} Appellant, his current wife, and his brother-in-law testified on his behalf. All contended the allegations were not true and were fabricated. Appellant contended child victim was upset because she was in trouble for selling or giving a Vape Pen to her cousin and because she wanted to see her boyfriend on their six-month anniversary, but was not allowed because Appellant had grounded her from seeing her boyfriend. Appellant argued evidence that the sexual abuse allegation was a fabrication was in a text message conversation between the boyfriend and child victim. Child victim indicated in the text messages that she had something to tell her boyfriend about what Appellant did. She

stated she was going to ruin Appellant. Boyfriend asked if she was going to pretend Appellant raped her and her response was "no not exactly." State's Exhibit 5.

{¶10} Appellant was found guilty of all counts. 10/22/20 J.E. The trier of fact explained the child victim provided intimate and experiential details of the acts of sexual contact. 10/22/20 J.E. Appellant was sentenced to consecutive terms of 42 months for sexual battery and 18 months for each gross sexual imposition for an aggregate term of 78 months. 10/30/20 J.E. He was additionally designated a Tier III offender. 10/30/20 J.E.

First Assignment of Error

"The trial court erred in allowing into evidence sexual assault examiner testimony that was truth propensity testimony in disguise in violation of Evid.R. 702 as well as U.S. Const. Amend. VI and XIV."

{¶11} This assignment of error concerns "sexual assault examiner testimony." In this assignment of error, Appellant focuses on Monique Malmer's testimony; she was the nurse practitioner from the Child Advocacy Center who examined child victim. Appellant admits there was no objection to the testimony and as such, we review his argument under a plain error analysis.

{¶12} The arguments under this assignment of error encompass both Evidence Rule 702, regarding expert testimony, and the Confrontation Clause. As to Evidence Rule 702, Appellant asserts the testimony as to what the victim told the examiner about the sexual assaults should not have been allowed. The witness should have only testified to "things medical." He argues while an expert's opinion testimony on whether there was sexual abuse is allowed because it aids jurors in making their decision, the expert cannot give an opinion on the veracity of the statements made by the victim. As to the Confrontation Clause, he contends statements made primarily for a forensic or investigative purpose are testimonial and inadmissible, while statements made for medical diagnosis and treatment are nontestimonial and admissible. In looking at the evidence, he asserts there were no physical or behavioral findings on which to render a scientific opinion. Further, he contends although a bench trial occurred in this instance, this does not alter the outcome because the trial court specifically issued a decision noting it considered the sexual assault examiner's testimony. Therefore, the general rule that in

a bench trial it is presumed even if testimony was erroneously admitted the trial court did not consider it does not apply.

{¶13} The state agrees with Appellant's recitation of the law on expert witnesses and that an expert cannot give an opinion about the veracity of the victim. The state asserts under Evidence Rule 702, the expert is permitted to conclude the victim is the victim of sexual abuse. This is precisely what Ms. Malmer did. It also asserts there is no Confrontation Clause violation because child victim testified. The state argues Appellant cannot show error, plain or otherwise. Alternatively, it contends even if it was error, the outcome would not have been different. It asserts the trial court's decision relied on multiple factors including the testimony of child victim coupled with the corroborating Facebook and text messages. The state contends nothing in the record suggests the trial court considered anything other than competent, credible evidence in reaching its verdict.

{¶14} There were no objections to Ms. Malmer's testimony. In arguing this assignment of error, Appellant does not cite to specific testimony that constitutes violations of the Confrontation Clause and/or Evidence Rule 702. There are no quotes from the transcript or citations to page references.

{¶15} To constitute plain error, the error must be obvious. *State v. Fowler*, 7th Dist. Columbiana No. 20 CO 0002, 2021-Ohio-2854, ¶ 44, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Plain error exists when it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Issa*, 93 Ohio St.3d 49, 56, 752 N.E.2d 904 (2001), citing *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990). "[T]he plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099 (1997).

{¶16} Ms. Malmer's testimony constitutes 34 pages of the transcript. She is a nurse practitioner at the Child Advocacy Center and is currently enrolled in a nursing doctorate program that focuses on sexual abuse. Tr. 277. Without objection, the court

deemed her to be an expert in the area of child sex abuse and child sexual abuse examinations. Tr. 279.

{¶17} Ms. Malmer explained she did not conduct the interview, but rather watched it so that she would know what type of medical exam to perform and how detailed it needed to be. Tr. 281, 296. Her testimony indicated during the interview it was disclosed there was sexual contact that occurred years prior to the evaluation. Tr. 285-286. She explained delayed disclosure is typical, and this was a delayed disclosure. Tr. 286-288, 291. She also explained grooming. Tr. 288-289. She stated during the interview, the victim's voice was monotone to the point of it sounding like the victim did not want to hear the details again. Tr. 289. She indicated child victim relayed experiential details; experiential details are descriptions of feelings or visuals the victim had when the event was occurring. Tr. 290. These details are not likely to be something made up. Tr. 290. Child victim in this case described the "ejaculation or the feelings she got, whether it was pain, or the position of her legs, or a description of what was being worn. Those are events that are descriptions that still remain with them from the traumatic event that they experienced." Tr. 290.

{¶18} Following the interview, Ms. Malmer conducted a head to toe examination; she testified there were not any physical findings of sexual abuse. Tr. 293. However, she indicated she did not expect to find any because the statistics show that less than 10% of females of all ages have a physical finding of sexual abuse. Tr. 293. Further, from the described experiential details the child victim provided she explained she was not expecting to find physical findings of sexual abuse. Tr. 293.

{¶19} Considering everything (the whole encounter from "the history of present illness, the intake, the evaluation and the closing"), she rendered the opinion that this case is highly concerning for sexual abuse; child victim described the events and timeline in a manner that "showed significant concern for sexual abuse." Tr. 290, 293, 302.

{¶20} During the direct examination, Ms. Malmer does not state what the victim said specifically in the interview with the social worker. As can be seen from above, Ms. Malmer utilizes the tone of the victim's voice, her ability to recall experiential details, and the physical exam to give her medical opinion of sexual abuse. Furthermore, on cross-

examination she reiterated this is for medical purposes – "for diagnostic purposes for the medical exam." Tr. 299.

{¶21} Starting with Evidence Rule 702, this rule provides that a witness may testify as an expert if (1) the witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons, (2) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and (3) the witness' testimony is based on reliable scientific, technical, or other specialized information.

{¶22} In the area of sexual abuse, the Ohio Supreme Court has explained "an expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision," and is thus admissible under Evidence Rule 702. *State v. Stowers*, 81 Ohio St.3d 260, 262-263, 690 N.E.2d 881 (1998); *State v. Gersin*, 76 Ohio St.3d 491, 494, 668 N.E.2d 486 (1996); *State v. Boston*, 46 Ohio St.3d 108, 129, 545 N.E.2d 1220 (1989).

{¶23} The Eleventh Appellate District has aptly explained this area of the law:

> In *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989), the Ohio Supreme Court held that "an expert's opinion testimony on whether there was *sexual abuse* would aid the jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." (Emphasis added.) However, "[a]n expert may *not* testify as to the expert's opinion of the *veracity of the statements of a child* declarant" who claims she has been raped. (Emphasis added.). *Id*. at syllabus. In *State v. Stowers*, 81 Ohio St.3d 260, 261, 690 N.E.2d 881 (1998), the Supreme Court clarified its syllabus in *Boston*, and held "[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with the behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." *Stowers* at 261, 690 N.E.2d 881. "'Most jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse.'" *Id*. at 262, 690 N.E.2d 881, quoting *Boston* at 128, 545 N.E.2d 1220. Such expert testimony is permitted "to

> counterbalance the trier of fact's natural tendency to assess * * * delayed disclosure as weighing against the believability and truthfulness of the witness." *Stowers* at 263, 690 N.E.2d 881.

State v. Ross, 2018-Ohio-452, 105 N.E.3d 355, ¶ 49 (11th Dist.).

{¶24} We have previously found that a physician should not have been permitted to testify to his opinion that the child was a victim of sexual abuse where his opinion was based solely on the child's narrative as this was essentially an opinion on the child's credibility. *State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, ¶ 98-100, citing *State v. Schewirey,* 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, ¶ 50-51 ("When an expert bases their diagnosis on nothing more than what the child tells them, then their 'diagnosis' is nothing more than an opinion on the child's veracity."). In rendering that holding, we recognized that "an expert does not need physical findings to reach a diagnosis. If the expert relies on other facts in addition to the child's statements, then the expert's opinion will not be an improper statement on the child's veracity." *Id.,* citing *Schewirey* at ¶ 50 (such as where the child acts in a certain manner).

{¶25} In considering our *Schewirey* decision, the Sixth Appellate District explained:

> Therefore, an expert in child sexual abuse can testify as to his or her opinion on whether the child was abused, but the expert may not testify as to the veracity of the child's statements. A difficulty arises, however, where the expert bases his or her opinion that a child was sexually abused solely on the child's statements. In those cases, the expert's "'diagnosis' is nothing more than an opinion on the child's veracity." *State v. Schewirey,* 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, 2006 WL 3849292, ¶ 50. Thus, for the expert's opinion to be admissible, "'there simply has to be something other than the child's unsupported allegations that assisted the expert in arriving at his or her opinion. This would obviously include physical evidence, but could also involve the expert's observations of the child's demeanor or other indicators tending to show the presence of sexual abuse.'" *Id.* at ¶ 48, quoting with approval *State v. Plymale,* 11th Dist.

> Portage No. 99–P–0012, 2001 WL 1388424 (Nov. 2, 2001) (Christley, J., dissenting).

State v. Coleman, 2016-Ohio-7335, 72 N.E.3d 1086, ¶ 27-29 (6th Dist.).

{¶26} Ms. Malmer did not explicitly testify to child victim's truthfulness. *See State v. Terry*, 6th Dist. Lucas No. L-19-1082, 2020-Ohio-6872, ¶ 26 (stating the SANE nurses' testimony was not testimony regarding the truthfulness of the victim). Her testimony establishing her opinion that there was significant concern for sexual abuse was not based solely on the accusation by child victim, but rather was based on child victim's ability to relay experiential details, her voice, and demeanor. Her opinion was based on the observations of the child's demeanor or other indicators tending to show the presence of sexual abuse. *Coleman*, 2016-Ohio-7335 at ¶ 29.

{¶27} Consequently, for those reasons this court concludes Ms. Malmer's testimony did not violate Evidence Rule 702 and accordingly there was no error, plain or otherwise.

{¶28} However, even if we were to conclude there was error regarding Evidence Rule 702, it does not amount to plain error. The outcome of the trial would not have been different had Ms. Malmer's testimony not been considered. This was a bench trial. The general rule in a bench trial is the trial court is presumed to rely on only relevant, material evidence in arriving at its judgment. *State v. Rouzier*, 1st Dist. Hamilton No. C-200039, 2021-Ohio-1466, ¶ 19, citing *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968). The presumption can be rebutted. *Id*. However, in this case, it is clear the trial court did not only rely on Ms. Malmer's testimony in reaching its conclusion.

{¶29} The trial court offered extensive reasoning for its decision. 10/22/20 J.E. The decision does discuss Mr. Malmer's testimony, but it explains other reasons why it found the child victim's accusations credible:

> The Defendant denied any and all sexual activity with the C.V. [child victim]. But against this denial, the C.V. provided details, some of which were corroborated. For example, the C.V. testified that the Defendant's acts occurred after her mother left for work. During at least the time period of her marriage to the Defendant, [mom] testified to her nighttime or overnight work schedule at Wal*Mart [sic] until 4 or 6 a.m. The C.V. testified that the

Defendant showed her shark videos and then pornography. The Defendant admitted that he likes to watch shark videos. The C.V. was able to describe the location of some of the Defendant's acts that took place on the living room floor and another one of his acts that occurred while they were sitting close by one another on a living room couch. The C.V. testified that the Defendant provided her with "whiskey" one time, which the Defendant denied. Although [step mom] testified that no whiskey was kept at 91 South Market Street, [mom] testified that during her marriage to the Defendant she found whiskey bottles in the garage and the basement. She also testified that the Defendant's "consumption of alcohol" was at times "an issue" in their marriage. The C.V. also testified that the Defendant messaged her emoji images that she interpreted as his desire for and/or intention of continuing sexual activity with her. A number of messages from the Defendant to the C.V. are of an emoji face with tongue out.

* * *

Also significant is the timing of the C.V.'s separate disclosure to her boyfriend, * * *. Importantly, this disclosure was made on July 17, 2018, some two days before the disclosure to East Palestine Police Officer Brian Moore on July 19, 2018. In her text message to [boyfriend], the C.V. wrestles with "keeping it in" because it "kills her" and her "terror" if her younger sister * * * is left alone with the Defendant. In the words of the C.V. "I don't want her going through that shit." That the C.V. did not tell [boyfriend] "everything" at an earlier time, I believe, simply reflects her inner turmoil and anguish over the hellish situation the Defendant put her in.

The explanation of the Defendant is not credible when measured by the weight of the evidence opposed to it. The C.V.'s disclosure to Police Officer Brian Moore on July 19, 2018, was not motivated by her being in trouble for having earlier sold a vape pen to her cousin or her desire to spend time with [boyfriend] the next day, on July 20, 2018, the 6-month anniversary of the first date between the C.V. and [boyfriend]. The C.V. testified that she

> would not "lie or make this up" and the many details she provided, including intimate and experiential details of the Defendant's numerous acts, convinces me that she is not lying. The C.V. could have embellished the Defendant's acts but did not. For example, if the C.V. wanted to lie or even embellish, she could have testified the Defendant's penis penetrated her vagina on July 16, 2018. Her testimony clearly is that it did not.
>
> If the disclosure on July 19, 2018, was a fabrication motivated by fear or a 6-month anniversary, there would have been no need for the C.V. to make a disclosure two days earlier to [boyfriend] on July 17, 2018. Moreover, at the time of her disclosure on July 17, 2018, the C.V. was already grounded and knew, therefore, she would be unable to see or spend time with [boyfriend] on July 20, 2018. Because she was already grounded, as early as July 16 2018, the C.V. had to ask the Defendant for permission to even allow [boyfriend] to come to the house to pick up money for a new phone card. To believe the denial of the Defendant, I must overlook the Defendant's own emoji message to the C.V. Finally, I must disregard the testimony of [mom]. She testified to more than whiskey that the Defendant kept at the residence during their marriage. [Mom] was present at 91 South Market Street when the C.V. made her disclosure to Police Officer Moore, having gone there a short time before in response to a video text message from her daughter [child victim's sister] * * *, who was also at the residence. [Mom] testified that when the Defendant heard the disclosure of the C.V. on July 19, 2018, his "face appeared like he had been caught."

10/22/20 J.E.

{¶30} This reasoning establishes the outcome would not have been different. If there was error regarding Evidence Rule 702, the error does not rise to the level of plain error.

{¶31} As to the Confrontation Clause arguments, these arguments also fail. The Ohio Supreme Court has explained, "The Sixth Amendment's Confrontation Clause provides, 'In all criminal prosecutions, the accused shall enjoy the right * * * to be

confronted with the witnesses against him * * *.' The United States Supreme Court has interpreted this to mean that admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness." *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 34, citing *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S.Ct. 1354 (2004).

{¶32} The child victim testified in this case. Tr. 323-414. Appellant had the opportunity and did cross examine the child victim. Thus, any testimony by Ms. Malmer that were statements child victim made to her or to the social worker did not violate the Confrontation Clause.

{¶33} For the above reasons, this assignment of error is meritless.

Second Assignment of Error

"The trial court erred in allowing into evidence lay recapitulations of a child witness's narrative in violation of the general prohibition against hearsay and against the confrontation clauses of the U.S. Const. Amend. VI and XIV."

{¶34} In this assignment of error, Appellant argues the lay witnesses recounted the allegations child victim made and this recounting violated the Confrontation Clause and the prohibition against hearsay. Appellant admits he did not object to the testimony that violated the Confrontation Clause and/or the prohibition against hearsay. He, however, does not cite to the portions of the testimony he alleges violated the Confrontation Clause and/or the prohibition against hearsay. He also does not identify which witnesses this argument pertains to other than to state lay witnesses.

{¶35} The state counters, asserting the Confrontation Clause was not violated because child victim testified and was subject to cross examination. As to hearsay, not knowing which witness the arguments were directed to, the state discusses the testimony of Officer Moore, the boyfriend, Detective Haueter, and social worker Courtney Wilson and explains why each is not hearsay.

{¶36} Considering the entire record, the witnesses Appellant is probably referring to are the two police officers, the boyfriend, the social worker and the intake investigator

from the Child Advocacy Center. This assignment of error is reviewed for plain error because there were no objections to the testimony.

{¶37} The analysis begins with the Confrontation Clause. As the state asserts and Appellant's recitation of the law recognizes, there is no Confrontation Clause violation because child victim testified and was subject to cross examination. The Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination. *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930 (1970). Therefore, all Confrontation Clause arguments fail for that reason alone.

{¶38} Also, the Confrontation Clause is not implicated when the testimony is not hearsay. *Crawford*, 541 U.S. at 59, citing *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078 (1985); *Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, at ¶ 131. Here, as discussed below, the majority of the testimony clearly did not qualify as hearsay.

{¶39} Evid. R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶40} Officer Brian Moore arrived at Appellant's house after Appellant called him because his ex-wife had arrived. Child victim exited the residence and told the officer the sexual abuse allegation. Officer Moore testified to what she said. Tr. 22-24. There were no objections to this testimony. However, even if there were, it would have properly been overruled. While the officer's testimony was an out of court statement, it was not offered to prove the truth of the allegation. Rather, it was used to show background information and to show how the investigation proceeded. *See State v. Bound,* 5th Dist. Guernsey No. 03 CA 21, 2004-Ohio-6530, ¶ 34 (information officer discovered as a result of his conversation with witness was merely part of his criminal investigation and not hearsay).

{¶41} The boyfriend testified next. His testimony included an explanation of the text message sent between himself and child victim where she disclosed the sexual abuse allegation. Tr. 60-73. He also testified about their in-person conversation about what she told him about the sexual abuse; he testified this conversation occurred months later. Tr. 74-75.

{¶42} Concerning the text message testimony, at the outset it is noted Appellant is probably not contending these messages were hearsay and could not be admitted. Appellant's theory of the case was the allegation was a fabrication and the conversation between child victim and boyfriend was part of what he was using to raise reasonable doubt as to the whether the allegations were true. As stated above, in the text messages child victim states she is going to ruin Appellant. Boyfriend asks if she is going to pretend Appellant raped her. She responds, "no not actually." State's Exhibit 5.

{¶43} Regardless, the state is correct that the statements are not hearsay. "Pursuant to Evid. R. 801(D)(1)(b), a statement is not hearsay if '[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive.'" *State v. Wolff*, 7th Dist. Mahoning No. 07 MA 166, 2009-Ohio-2897, ¶ 75. *See also State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 110 (Allegation of recent fabrication allows the state to introduce witness' prior consistent statements.).

{¶44} Regarding the testimony about what child victim told him months after the disclosure, this possibly was hearsay. However, even if it was hearsay, it does not rise to the level of plain error. As stated in the first assignment of error, this was a bench trial. It is presumed the trial court relies on only relevant, material evidence in arriving at its judgment. *Rouzier*, 1st Dist. Hamilton No. C-200039, 2021-Ohio-1466 at ¶ 19, citing *White*, 15 Ohio St.2d at 151. The trial court did not rely on the boyfriend's testimony concerning what child victim told him a month later. The court relied on the timing of the initial disclosure to the boyfriend. 10/22/20 J.E.

{¶45} Detective Haueter testified at trial and his testimony did cover the disclosures child victim made at the Child Advocacy Center during the interview. Tr. 188-190. Detective Haueter observed the interview. Tr. 187. Following his testimony about what child victim disclosed, Detective Haueter was asked what he did knowing that information. Tr. 190. He then explained his investigation proceeded to capture the Facebook messages and text messages between child victim and Appellant. Tr. 191. Accordingly, similar to Officer Moore's testimony, Detective Haueter's testimony is not hearsay because the statements of the victim as relayed by Detective Haueter were not

offered to prove the truth of the matter asserted. His testimony explained how the investigation proceeded. *See Bound,* 5th Dist. Guernsey No. 03 CA 21, 2004-Ohio-6530, at ¶ 34.

{¶46} Courtney Wilson, the social worker from the Child Advocacy Center, testified at trial. She conducted the psychosocial assessment and diagnostic interview of child victim. Tr. 247. She explained that the diagnostic interview is a fact-finding non-leading conversation. Tr. 248. Ms. Wilson did relay the information child victim disclosed to her during the interview. Tr. 254-258, 262. This type of testimony is not hearsay. The First Appellate District has explained statements made by a child victim to a social worker may be admissible under Evidence Rule 803(4) as statements for purposes of medical diagnosis or treatment. *In re C.A. Children*, 1st Dist. Hamilton No. C-200172, 2020-Ohio-5243, ¶ 9. *See also, State v. Schentur*, 8th Dist. Cuyahoga No. 108448, 2020-Ohio-1603, ¶ 50. It stated, "In determining whether a child's statements were made for the purpose of medical diagnosis or treatment, the trial court should consider (1) whether the child was questioned in a leading or suggestive manner; (2) whether the child had a motive to lie, such as a pending custody battle; (3) whether the child understood the need to tell the truth; (4) the child's age; and (5) whether the child's statements were consistent." *Id*., citing *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 49.

{¶47} The Intake Investigator, Ms. Tina Deal-Hendon, from Children Services was another witness. Tr. 162-180. She explained she observed the forensic interview. She testified child victim stated the abuse started when she was 9 or 10 and the last incident was in 2016. Tr. 170. This was the only testimony indicating what child victim stated. At the conclusion of the investigation, she found the child abuse allegation was substantiated. Tr. 173. The Intake Investigator's testimony is equivalent to either a social worker or a police officer doing an investigation and as such is not hearsay. However, even if it was hearsay, in this case the one statement regarding what age the sexual abuse began and ended did not rise to the level of plain error. The reasoning of the trial court at the bench trial did not rely on that one piece of information.

{¶48} Ms. Malmer's testimony was discussed under the first assignment of error for purposes of the Confrontation Clause and expert testimony. Hearsay, however, was not addressed or raised in the first assignment of error. Thus, out of an abundance of

caution, Ms. Malmer's testimony is also reviewed for hearsay. Ms. Malmer observed the interview and during her testimony she did relay the information the child victim disclosed in the interview. For many of the reasons discussed under the first assignment of error, Ms. Malmer's testimony relaying the information child victim stated during the interview is not hearsay. The statements were made for purposes of medical diagnosis or treatment pursuant to Evidence Rule 803(4) and as such, are not hearsay. However, even if we were to dissect that testimony and find portions of it to be hearsay, as explained under the first assignment of error, it does not amount to plain error. The trial court referenced Ms. Malmer's testimony primarily in the context of delayed disclosure and grooming, part of her area of expertise.

{¶49} The remaining two witnesses for the state were child victim and child victim's mother. In reviewing child victim's mother's testimony, it does not appear she testified to any statement child victim made to her about the allegation of sexual abuse. Tr. 108-162.

{¶50} For the above stated reasons, this assignment of error lacks merit. There were no Confrontation Clause violations because child victim testified and was subject to cross-examination. As to hearsay, from the record it appears there may be a few instances of hearsay testimony. However, those instances did not rise to the level of plain error because given the trial court's reasoning, the outcome would not have been different.

Third Assignment of Error

"The trial court erred in allowing a conviction in the face of insufficient evidence in violation of U.S. Const. Amend. VI and XIV."

{¶51} Appellant argues the conviction is supported by insufficient evidence because the only admissible testimony was child victim's and she could not "identify the time of any alleged occurrence." The state counters asserting the evidence provided a range of dates for the alleged sexual assaults. Thus, there was sufficient evidence.

{¶52} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution to ascertain whether any rational

juror could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). The rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *See State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). For a sufficiency review, the question is merely whether "any" rational juror could have found the contested element satisfied beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979).

{¶53} Appellant was convicted of sexual battery and gross sexual imposition. The contested element here is not the per se statutory elements of those offenses. Rather, the contested element is the date that the offenses occurred. The indictment asserted the offenses occurred "on or about the 1st day of January, 2010 through the 10th day of July, 2016". 2/13/19 Indictment. A date range for when the offense occurred does not cause an issue, especially when the victim is a young child abused by a parent. *State v. Triplett,* 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, at ¶ 77, citing *State v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-4101, ¶ 15-25 (each offense need not be differentiated by date).

{¶54} The child victim in this case did provide evidence the offense occurred during the period of time set forth in the indictment. The evidence provided child victim's date of birth. Child victim testified some of the occurrences began when her parents were still married and other instances occurred after they divorced. Tr. 336-337. Child victim testified the occurrences began between the ages of 7 to 10, but she could not remember her exact age. Tr. 336. Child victim's mother testified she and Appellant divorced in 2013. Tr. 109. Child victim specifically testified to the date of the last incident, July 10, 2016. Tr. 344. She relayed specific details of this encounter. Tr. 344-346. Her testimony also sets forth separate instances of sexual abuse although she could not specify a specific date for each occurrence. Tr. 339-342.

{¶55} This testimony provides sufficient evidence that at least two instances of gross sexual imposition and one instance of sexual battery occurred between January 1, 2010 and July 10, 2016. In other words, viewing the evidence in the light most favorable

to the prosecution any rational juror could have found the offenses occurred between those two dates.

{¶56} The third assignment of error is overruled.

Fourth Assignment of Error

"The trial court erred in allowing a conviction from proceedings infected with ineffective assistance of counsel in violation of U.S. Const. Amend. VI and XIV."

{¶57} This assignment of error is related to the first and second assignments of error. Appellant asserts counsel was ineffective for failing to object to the testimony discussed in both the first and second assignments of error. He asserts the testimony violated the prohibition against hearsay and/or violated the Confrontation Clause. Appellant states hearsay issues fit in the ambit of ineffective assistance of counsel and counsel should have objected to the testimony. He argues for the same reasons the hearsay testimony amounted to plain error; it also establishes ineffective assistance of counsel.

{¶58} The state counters asserting the failure to object to testimony can be a tactical decision. The state argues the testimony did not amount to inadmissible hearsay and to a violation of the Confrontation Clause. Accordingly, there was no ineffective assistance of counsel.

{¶59} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶60} To show deficient performance, the defendant must show counsel's representation fell below an objective standard of reasonableness. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 687-689. Our review is highly deferential to counsel's decisions as there is a strong presumption the conduct fell within the wide range of what would be considered reasonable professional assistance. *Id.* There are "countless ways to provide effective assistance in any given case." *Id.*

{¶61} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Prejudice from defective representation justifies reversal only where the results were unreliable, or the proceeding was fundamentally unfair due to the performance of trial counsel. *Id.*, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838 (1993).

{¶62} As explained above in the first and second assignments of error, the majority of the testimony was not hearsay and none of the testimony violated the Confrontation Clause. Thus, it is difficult to conclude there was deficient performance in this case. Failure to object to error, alone, is not sufficient to sustain a claim of ineffective assistance. *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999). The Ohio Supreme Court has recognized that declining to interrupt the prosecutor's argument with objections, or failing to object to certain evidence, is not deficient performance, especially in a bench trial. *See State v. Keene*, 81 Ohio St.3d 646, 668, 693 N.E.2d 246 (1998).

{¶63} Even if a small amount of the testimony was inadmissible hearsay and amounted to deficient performance, as the first and second assignments of error explain, the outcome would not have been different. The trial court provided this court with a comprehensive analysis of its reasoning for finding Appellant guilty. That reasoning was not based on any possible hearsay or inadmissible testimony. Accordingly, prejudice cannot be found in this instance. This assignment of error lacks merit.

Conclusion

{¶64} All four assignments of error are meritless. The convictions are affirmed.

Waite, J., concurs.

D'Apolito, 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 Columbiana County, Ohio, is affirmed. Costs 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.