[Cite as *State v. Cross*, 2023-Ohio-2286.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CRAIG MICHAEL CROSS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0008

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 21 CR 339

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Vito Abruzzino, Prosecuting Attorney, *Atty. Shelley M. Pratt,* Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, 135 S. Market St., Lisbon, Ohio 44432 for Plaintiff-Appellee and

Atty. James R. Wise, 91 W. Taggart, P.O. Box 85, East Palestine, Ohio 44413 for Defendant-Appellant.

Dated: June 29, 2023

Robb, J.

{¶1} Appellant, Craig Michael Cross, appeals his convictions for rape, sexual battery, and gross sexual imposition involving the same minor. He contends the trial court violated his right to a speedy trial; he was denied a fair trial by the victim's out-of-court testimony; the trial court committed plain error by allowing an investigator to testify at an in-camera hearing; the trial court erred sentencing him to two life sentences; and it committed plain error in its jury instructions. For the following reasons, Appellant's assignments of error lack merit and are overruled.

Statement of the Case

{¶2} Appellant was indicted by secret indictment on June 9, 2021 and charged with six felony counts. Counts one and two charge Appellant with rape of a minor who was between the ages of four and eight years old at the time of the offenses, in violation of R.C. 2907.02(A)(1)(b). Counts three and four charge Appellant with sexual battery in violation of R.C. 2907.03(A)(5). Counts five and six charge him with gross sexual imposition involving a minor under the age of thirteen in violation of R.C. 2907.05(A)(4). Each offense involved the same victim, his child.

{¶3} Appellant was arrested and served on July 23, 2021. He was appointed counsel and entered a plea of not guilty. (August 5, 2021 Judgment.)

{¶4} On August 9, 2021, Appellant requested discovery and a bill of particulars. The case was initially set for an October 19, 2021 jury trial.

{¶5} On October 12, 2021, Appellant filed three motions. He moved the court to allow him to appear without restraints and in civilian clothing during trial. Appellant also moved the court to exclude and preclude "other acts" evidence. The trial court granted his motions to appear without restraints and in civilian clothing on October 19, 2021.

{¶6} On October 19, 2021, Appellant's counsel filed his response to reciprocal discovery pursuant to Crim.R. 16(K). Defense counsel also filed a motion in limine on October 19, 2021 seeking to exclude evidence about "truth verification examinations" or polygraph tests. The jury trial was reset to October 26, 2021.

{¶7} The state moved to continue the trial on October 25, 2021 contending the prosecutor was ill and unable to proceed. The motion to continue trial was granted

October 26, 2021, and it was reset until December 14, 2021 before it was reset to the earlier date of November 16, 2021.

{¶8} Appellant moved for discharge on speedy trial grounds on November 12, 2021. The state opposed on November 29, 2021, and Appellant filed a reply in support of his discharge on December 8, 2021. The trial court overruled his motion on February 11, 2022 and reset trial for February 22, 2022.

{¶9} On February 17, 2022, the state filed its motion to permit the child victim to testify via closed circuit television. There was no written opposition filed with the clerk, but defense counsel raised a limited objection to the child's testimony via closed circuit at the beginning of trial. The objection was regarding trial logistics and was later withdrawn after counsel's concerns were addressed. (Trial Tr. 461.)

{¶10} Trial commenced on February 22, 2022. The jury returned its guilty verdict on March 2, 2022. Appellant was sentenced to two definite terms of life without parole on counts one and two; two eight-year terms in prison on counts three and four; and two 60-month terms on counts five and six. The court found counts three and four merged with counts one and two as allied offenses. It also ordered the sentences to be served consecutively. The court also imposed five years of post-release control and deemed Appellant a tier III sex offender. (March 7, 2022 Judgment.)

{¶11} Appellant raises five assigned errors on appeal.

First Assignment of Error: Speedy Trial

{¶12} Appellant's first assignment of error contends:

"The trial court violated the Defendant's Constitutional and Statutory Right to a Speedy Trial."

{¶13} An appellate court's review of a speedy trial claim is a mixed question of law and fact. *State v. High*, 143 Ohio App.3d 232, 242, 757 N.E.2d 1176 (2001). We defer to the trial court's findings of fact if they are supported by competent, credible evidence and independently review whether the trial court correctly applied the law. *Id*.

{¶14} Ohio recognizes both a constitutional and a statutory right to a speedy trial. *State v. King*, 70 Ohio St.3d 158, 161, 637 N.E.2d 903 (1994). The prosecution and the trial court are required to try an accused within the time frame provided by statute. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977). "[T]he statutory speedy-trial

limitations are mandatory and * * * the state must strictly comply with them.*"* *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032, ¶ 15.

{¶15} R.C. 2945.73(B) states: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." Thus, a defendant is statutorily required to raise the issue by motion made at or prior to the commencement of trial. *Id.* And if the state violates a defendant's right to a speedy trial, the court must dismiss the charges. R.C. 2945.73(B).

{¶16} R.C. 2945.71 provides the timeframe for a defendant's right to a speedy trial is based on the level of offense. A defendant charged with a felony must be brought to trial within 270 days of his or her arrest. R.C. 2945.71(C)(2). "[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). This is referred to as the triple count provision. *State v. Wright*, 7th Dist. Mahoning No. 15 MA 0092, 2017-Ohio-1211, ¶ 29, appeal not allowed, 150 Ohio St.3d 1433, 2017-Ohio-7567, 81 N.E.3d 1272.

{¶17} R.C. 2945.72 lists a number of tolling events that extend the period of time in which the state must bring a defendant to trial. Speedy trial time is tolled for "[a]ny period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused * * *." R.C. 2945.72(E). The time within which an accused must be brought to trial may also be extended by "[t]he period of any continuance granted on the accused's own motion, *and the period of any reasonable continuance granted other than upon the accused's own motion* * * *." (Emphasis added.) R.C. 2945.72(H).

{¶18} The state had 270 days from the date of Appellant's arrest to bring him to trial, absent applicable tolling periods. R.C. 2945.71(C)(2). Thus, we examine the period between July 23, 2021, the date Appellant was arrested, to February 22, 2022, the date of his trial, to determine how many days accrued against the state for speedy trial purposes. *State v. Joy*, 7th Dist. Columbiana No. 96 CO 72, 2000 WL 288519, *2, citing *City of Oregon v. Kohne*, 117 Ohio App.3d 179, 690 N.E.2d 66 (1997).

{¶19} Appellant correctly asserts the state had the burden to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72 because Appellant established a prima facie violation since the date of his arrest to the date of trial exceed 270 days, without

invoking the triple-count provision. *State v. Williams*, 10th Dist. Franklin No. 18AP-891, 2023-Ohio-1002, ¶ 14.

{¶20} The speedy trial clock began to run the day after Appellant was arrested. *State v. Szorady*, 9th Dist. Lorain No. 02CA008159, 2003-Ohio-2716, ¶ 12. Appellant was arrested on July 23, 2021. He was incarcerated for the duration of the case, and thus, the triple-count provision applies.

{¶21} On August 9, 2021, Appellant requested discovery and a bill of particulars. This tolled the state's speedy trial time until the state responded on August 30, 2021. Thus, from July 23, 2021 until August 8, 2021, 16 days passed or 48 speedy trial days, i.e., 16 times three.

{¶22} The state responded on August 30, 2021 and requested reciprocal discovery. Appellant did not provide the reciprocal discovery until October 19, 2021, which the state alleged was an unreasonable amount of time. The trial court agreed and found, based on the Ohio Supreme Court's decision in *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, that speedy trial time was tolled from the date of the state's request until the defendant's response was provided on October 19, 2021. (February 11, 2022 Judgment.)

{¶23} However, the Supreme Court in *Palmer* held a court should afford a defendant a reasonable amount of time to respond *before* finding neglect and the simultaneous tolling of the speedy time clock. Here, the trial court indicated that defendant's response 30 days later was a reasonable amount of time to provide reciprocal discovery. Consistent with this finding and *Palmer*, the state's speedy trial time should have tolled beginning only 30 days after the service of the state's request. *Id.* at ¶ 23. Stated differently, because Appellant did not respond to the discovery during the first 30 days, tolling of Appellant's speedy trial time began on the 31st day after service. *Id.*

{¶24} Thus, beginning September 30, 2021, or 30 days after August 30, 2021, the speedy trial time was tolled until the date of Appellant's discovery response on October 19, 2021. From August 31, 2021 until September 30, 2021, 30 days passed. And upon applying the triple-count provision, 90 speedy trial days passed, or 30 times three. These 90 days plus the previous 48 days equal 138 speedy trial days chargeable to the state at this juncture.

{¶25} As stated, Appellant responded to the state's reciprocal discovery on October 19, 2021. Thus, his speedy trial time would have begun to run October 20, 2021. However, on October 12, 2021, Appellant filed three separate motions. He moved the court to allow him to appear without restraints and in civilian clothing during trial. The trial court granted his motions to appear without restraints and in civilian clothing on October 19, 2021.

{¶26} However, his third motion filed October 12, 2021 was a motion to exclude and preclude "other acts" evidence, which had a handwritten note that it would be addressed at trial. The state did not file a written opposition. His three motions tolled his speedy trial time until at least October 19, 2021 the date two of the three motions were granted.

{¶27} Then on October 19, 2021, Appellant filed a motion in limine seeking to exclude evidence about "truth verification examinations" or polygraph examinations. The state did not file a written opposition, but this motion was addressed at the beginning of trial.

{¶28} Nonetheless, "a motion in limine filed by a defendant tolls speedy-trial time for a reasonable period to allow the state an opportunity to respond and the court an opportunity to rule." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 27. This October 19, 2021 filing tolled the time for at least 14 days to allow the state to prepare and file a response. Fourteen days after October 19, 2021 was November 2, 2021.

{¶29} The jury trial was set for October 26, 2021 when the state moved to continue the trial on October 25, 2021. The state's motion contended the prosecutor was very ill and unable to proceed. The motion also cited law supporting the contention that speedy trial should be tolled for a reasonable time as a result of the delay.

{¶30} A hearing was held on October 26, 2021, the date trial was to begin. A substitute prosecutor appeared on behalf of the state and indicated the prosecutor handling this case had become severely ill and was unable to stand for long periods of time and would be unable to fulfill her duties at the time. He asked for a reasonable continuance. Defense counsel objected to any further continuances and indicated Appellant wanted to proceed. The court then advised Appellant that the case could not

be scheduled in November of that year because of the defense counsel's schedule. The court also found the prosecutor's illness warranted a reasonable continuance. The trial was reset to December 14, 2021. The trial court found the prosecutor's illness warranted the limited continuance. (October 26, 2021 Tr.)

{¶31} The trial court subsequently moved the trial to an earlier date, November 16, 2021, to accommodate a state's witness.

{¶32} Appellant moved for discharge before the November 16, 2021 trial date. In its judgment overruling Appellant's motion for discharge, the trial court found the state's speedy trial time was tolled from the date of the state's motion to continue to the date the trial was rescheduled. We agree with this finding.

{¶33} R.C. 2945.72(H), which governs tolling, states in part: "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following: * * * the period of any reasonable continuance granted other than upon the accused's own motion * * *." Further, courts have held that a continuance based on a prosecutor's illness will toll the speedy trial time for a reasonable amount of time. *State v. Willis*, 8th Dist. Cuyahoga No. 107070, 2019-Ohio-537, ¶ 62; *State v. Watson*, 10th Dist. Franklin No. 13AP-148, 2013-Ohio-5603, ¶ 9.

{¶34} Here, the trial was delayed 22 days as a result of the prosecutor's illness. It was rescheduled from October 25, 2021 to November 16, 2021. We agree that this delay was reasonable and speedy trial time did not run during this period. R.C. 2945.72(H).

{¶35} Appellant moved for discharge on speedy trial grounds on November 12, 2021. After Appellant filed his motion, the trial court held a hearing on November 16, 2021. The court explained that trial was to commence on that date, but could not in order to allow the state to respond to his motion to discharge and the court to address the motion on the merits. Defense counsel also asked to file a reply. The trial was rescheduled to February 22, 2022 as a result of Appellant's motion for discharge. (November 16, 2021 Tr.)

{¶36} The state filed its opposition on November 29, 2021, and Appellant filed a reply in support of his discharge on December 8, 2021. The trial court overruled his motion on February 11, 2022 and the trial began February 22, 2022. The delay caused

as a result of Appellant's motion for discharge is chargeable to Appellant since a motion for dismissal on speedy trial grounds tolls the running of speedy trial time. *State v. Perry*, 7th Dist. Columbiana No. 17 CO 0009, 2018-Ohio-3940, 120 N.E.3d 446, ¶ 20.

{¶37} As stated, trial began February 22, 2022. At that time, 138 speedy trial days chargeable to the state had passed. Based on the foregoing, we conclude the state's speedy trial time had not run when Appellant's trial commenced.

{¶38} Finally, although Appellant's arguments focus on the statutory right to a speedy trial, he also refers to the constitutional right to a speedy trial under the United States and Ohio Constitutions. We employ a balancing test to analyze constitutional speedy trial claims and focus on four factors: (1) the length of the delay; (2) the reason for the delay; (3) how and when the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-532, 92 S.Ct. 2182 (1972); *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 38-39.

{¶39} As detailed previously, we addressed the length of each delay, reason for each delay, and tolling event triggering each. None appear unreasonable, contrived, or unwarranted. Further, Appellant's trial commenced approximately seven months after his arrest, and he does not allege or demonstrate prejudice from the delays or continuances. Accordingly, the balancing test does not weigh in Appellant's favor. *See State v. Phillips*, 7th Dist. Mahoning No. 15 MA 0218, 2018-Ohio-3732, ¶ 43.

{¶40} Based on the foregoing, Appellant's first assignment of error lacks merit.

Second Assignment of Error: Child's Out-of-Court Testimony

{¶41} His second assigned error asserts:

"Defendant was denied a fair trial by the Court allowing the child victim to testify outside the presence of the Defendant."

{¶42} This assignment concerns the trial court's decision to allow the state to have the child victim testify during trial via closed circuit television pursuant to R.C. 2945.481. Appellant contends the trial court committed plain error because Appellee's motion was untimely and violative of the plain language of the statute. R.C. 2945.481(C) states in pertinent part:

> Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding. The judge may issue the order upon the motion of the prosecution filed under this section, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant, for one or more of the reasons set forth in division (E) of this section.

{¶43} R.C. 2945.481(E) identifies the grounds on which a court may permit a child to testify out of the presence of the defendant or via closed circuit television. It states in part:

> For purposes of divisions (C) and (D) of this section, a judge may order the testimony of a child victim to be taken outside the room in which the proceeding is being conducted if the judge determines that the child victim is unavailable to testify in the room in the physical presence of the defendant due to one or more of the following:
>
> (1) The persistent refusal of the child victim to testify despite judicial requests to do so;
>
> (2) The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
>
> (3) The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

R.C. 2945.481(E).

{¶44} The state filed its motion to permit the child victim to testify via closed circuit television on February 17, 2022, asserting that during trial preparation the state learned of the child's extreme fear of Appellant and there was a substantial likelihood she would suffer serious emotional trauma if required to testify in his presence. The state's motion also claimed there was a substantial likelihood the child would be unable to communicate about the offenses in Appellant's presence because of her extreme fear. (February 17, 2022 Motion.)

{¶45} Trial commenced on February 22, 2022, five days after the state's motion. Appellant did not oppose the state's motion on timeliness grounds or claim he would be denied the right to confront this witness. Instead, defense counsel raised a limited objection to the child's testimony via closed circuit television at the beginning of trial. The objection was regarding trial logistics and was later withdrawn after counsel's concerns were addressed. (Trial Tr. 461.) Regardless, the state's motion was not timely under R.C. 2945.481(C).

{¶46} Appellant claims this court's decision in *State v. Messenger*, 7th Dist. Columbiana No. 21 CO 0017, 2022-Ohio-3120, 195 N.E.3d 200, ¶ 47, *appeal not allowed,* 168 Ohio St.3d 1481, 2022-Ohio-4617, 200 N.E.3d 263, requires reversal here. He contends there is no difference between *Messenger* and the facts of the instant case. We disagree.

{¶47} In *Messenger*, the defense filed an opposition brief and was steadfast against the victim testifying out of the defendant's presence. The defendant challenged the state's motion as untimely, among other reasons. *Id*. at ¶ 46. In light of Messenger's objection, we reviewed the trial court's decision to allow the untimely motion for an abuse of discretion. *Id*. at ¶ 43. This court found the trial court abused its discretion by finding good cause for the state's failure to timely file its motion. *Id*. at ¶ 47.

{¶48} Unlike *Messenger*, Appellant initially objected only on logistical grounds before foregoing the objection altogether. During the initial hearing on this issue, Appellant's trial counsel stated he was worried about communicating with his client while cross-examining the minor victim in another courtroom. Thereafter, a discussion was had during which the parties and the judge discussed defense counsel being permitted to use the courtroom telephone to obtain Appellant's questions mid-testimony and to obtain Appellant's questions in written form before his attorney concluded his cross-examination of the child. Appellant was in the courtroom during this discussion. (Trial Tr. 223-224.)

{¶49} When the issue was addressed again during in camera hearing, the state was about to offer the testimony of its investigator, and defense counsel said he was satisfied with the resolution of the issue and was withdrawing his objection. (Trial Tr. 461.) The state then presented the testimony of its investigator and also offered the child's counseling records in support of its motion, which the trial court filed under seal.

(Trial Tr. 470-471.) The trial court granted the state's motion and allowed the child to testify via closed-circuit television, finding that prongs two and three of R.C. 2945.481(E) were satisfied. (Trial Tr. 470.)

{¶50} Unlike *Messenger*, Appellant waived his objection, and the trial court did not determine whether the state had good cause for its untimely filing. Notwithstanding, Appellant argues the trial court committed plain error by permitting the child to testify via closed-circuit television since the state's motion was untimely and it affected his substantial rights. We disagree.

{¶51} "Plain error occurs when an error is not brought to the attention of the court." *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005-Ohio-775, ¶ 5. Here, the issue was brought to the court's attention, an objection was raised, and defense counsel's concerns were addressed and satisfied. Thus, we invoke the invited error doctrine. Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." *State ex rel. Kline v. Carroll,* 96 Ohio St.3d 404, 775 N.E.2d 517, 2002-Ohio-4849; *State v. Smith,* 148 Ohio App.3d 274, 772 N.E.2d 1225, 2002-Ohio-3114, at ¶ 30. Invited error waives plain error review. *Davis v. Wolfe,* 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001); *State v. Given*, 7th Dist. Mahoning No. 15 MA 0108, 2016-Ohio-4746, ¶ 55. A finding to the contrary would encourage counsel to forfeit legal arguments in an effort to create error on appeal. *See also State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 87 (overruling issue based in part on invited error doctrine since defense agreed to submit the evidence challenged on appeal).

{¶52} Even upon addressing this assigned error for plain error, we conclude there is no plain error because this is not an exceptional case requiring reversal.

{¶53} Appellate courts may notice "[p]lain errors or defects affecting substantial rights * * * although they were not brought to the attention of the [trial] court." Crim. R. 52(B). Plain error is an obvious deviation from a legal rule that affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). The appellant must show that the outcome would have been different absent the plain error. *Id.* Appellate courts should notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long,* 53 Ohio St.2d 91,

372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23.

{¶54} Despite the fact that the state's motion was untimely, we cannot agree with Appellant's contention that the trial court committed plain error warranting reversal. *See State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Defense counsel did not contend Appellant was concerned about his right to confront the witness or that he wanted more time to secure an expert or additional time to prepare. The concerns were limited to trial logistics. Appellant may have chosen not to oppose this motion because he did not want to face his child during her trial testimony. Whatever the reason, the issue was raised and waived. This is not an exceptional case warranting a finding of plain error.

{¶55} Regardless of which standard we employ, Appellant's second assigned error lacks merit.

Third Assignment of Error: Investigator's Testimony

{¶56} Appellant's third assignment of error contends:

"The trial court committed plain error to the prejudice of the defendant/appellant in allowing the prosecutor's investigator to testify regarding the state's motion pursuant to ORC 2945.481 which denied the Defendant a fair trial."

{¶57} Notwithstanding the lack of objection to the state's motion to have the child testify via closed-circuit television, the prosecution offered the testimony of Jennifer Tedrow, an investigator with the Columbiana County Prosecutor's Office, in support of its motion. Before Tedrow testified, the trial court indicated it believed her testimony was hearsay, but noted it would allow it since there was no objection. The prosecutor also indicated she had the child available, but the court ruled on the issue based on the prosecutor's arguments and Tedrow's testimony since there was no objection. (Trial Tr. 464-465.)

{¶58} Tedrow then testified about how and when she and the prosecutor learned about the victim's fear of testifying in front of Appellant. Tedrow agreed she saw the child's fearful reaction and the fear the child expressed. (Trial Tr. 468.) Tedrow recalled a conversation with the child's counselor, who told Tedrow that if the minor were required to testify in front of Appellant, the child would "suffer serious emotional trauma" and she likely would be unable to testify. (Trial Tr. 467-469.) Defense counsel waived Appellant's

presence for Tedrow's testimony and did not ask any questions on cross-examination. (Trial Tr. 466, 469.)

{¶59} Upon addressing the merits of the state's motion, the trial court found the child was permitted to testify via closed-circuit television and that R.C. 2945.481(E)(1) and (2) were satisfied. (Trial Tr. 470.)

{¶60} Appellant claims the court's decision constitutes plain error because it relied on improper testimony as evidence showing the child victim was "unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant * * *" under R.C. 2945.481.

{¶61} Appellate courts may notice "[p]lain errors or defects affecting substantial rights * * * although they were not brought to the attention of the [trial] court." Crim. R. 52(B).

> [E]ven if the error is obvious, it must have affected substantial rights, and '[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' [*State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002)]. The accused is therefore required to demonstrate a reasonable *probability* that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims.

State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23. Appellant "bears the burden of proof to demonstrate plain error on the record * * *." *Id.*

{¶62} Appellant did not object to this in camera testimony offered for the sole purpose of the state's R.C. 2945.481 motion despite the court's comment that it constitutes hearsay. (Trial Tr. 460-462.) Thus, he forfeited any error in this regard. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21 ("forfeiture is the failure to timely assert a right or object to an error").

{¶63} Nevertheless, upon reviewing for plain error, we find no plain error or defect in the trial court proceeding affecting Appellant's substantial rights and causing a manifest miscarriage of justice. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, 1247 (2002). Crim.R. 52(B) admonishes courts to only notice plain error in exceptional cases to prevent a miscarriage of justice. *Id.* A manifest injustice has been defined as a "clear

or openly unjust act[,]" *State ex rel. Schneider v. Kriener*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), and "an extraordinary and fundamental flaw in the plea proceedings." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977).

{¶64} This is not an exceptional case, and Appellant has not shown a fundamental flaw in the trial court proceedings. Accordingly, we decline to find plain error, and thus, Appellant's third assigned error lacks merit.

Fourth Assignment of Error: Life Sentences

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

"The trial court erred in sentencing the Defendant to consecutive life without parole sentences."

{¶66} Appellant claims the trial court erred as a matter of law because his indictment did not state that the victim was under the age of ten, and as such, it did not charge this essential element of the offense. Instead, Appellant claims he was only on notice of being charged with two counts of rape of a child under the age of 13, not two counts of rape where the victim was under the age of ten. Thus, life sentences were not warranted. He is not challenging the consecutive nature of the life sentences. For the following reasons, this assignment lacks merit.

{¶67} R.C. 2953.08(G)(2) sets forth our standard of review when considering a challenge to a trial court's criminal sentencing decision. It states:

> 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.

{¶68} "'Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22, quoting *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Thus, we are authorized to "increase, reduce, or otherwise modify a sentence only when [we] clearly and convincingly find * * * that the sentence is (1) contrary to law and/or (2) unsupported by the record." *State v. McGowan,* 147 Ohio St.3d 166, 2016-Ohio-2971, 62 N.E.3d 178, ¶ 1.

{¶69} Appellant did not challenge the sufficiency of the indictment before or during trial. Notwithstanding, counts one and two of the indictment charge Appellant with rape of a minor who was between the ages of four and eight years old at the time of the offenses, in violation of R.C. 2907.02(A)(1)(b). Regarding both counts one and two, the indictment states in pertinent part:

> On or about the 26th day of September, 2015 through the 21st day of August, 2020, in Columbiana County, Ohio, Craig Michael Cross did engage in sexual conduct with * * * DOB: * * * [20]11 who was not the spouse of the offender, whose age at the time of the said sexual conduct was less than thirteen years of age, to wit: <u>between 4 and 8 years of age</u>, whether or not the offender knew the age of * * *; in violation of Section 2907.02(A)(1)(b) * * *.

(Emphasis added.) (June 9, 2021 Secret Indictment.)

{¶70} Further, Crim.R. 7(B) states in part:

> The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. *The statement may be* in the words of the applicable section of the statute, provided the words of that statute charge an offense, or *in words sufficient*

to give the defendant notice of all the elements of the offense with which the defendant is charged.

(Emphasis added.)

{¶71} As Appellant contends, the indictment does not state the victim was "under the age of ten" and does not recite the statute verbatim. However, the indictment does state the victim's date of birth and she was between the age of four and eight, which is less than 10 years old, in both counts one and two. This information satisfies Crim.R. 7(B) and sufficiently notified Appellant of the charges he was facing. *See State v. Joseph*, 73 Ohio St.3d 450, 456, 653 N.E.2d 285 (1995) (holding that an indictment must adequately inform the defendant of the charge against him.)

{¶72} Here, it was abundantly clear Appellant was charged with two counts of rape involving a minor under the age of ten based on the fact that each said she was between the age of four and eight at the time of the offense. Accordingly, we find no flaw in his indictment or error of law in his sentencing based on this contention. Thus, we cannot conclude his sentence is contrary to law.

{¶73} Appellant's fourth assignment of error is overruled.

Fifth Assignment of Error: Jury Instruction

{¶74} Appellant's fifth assignment of error contends:

"The trial court erred in instructing the jury to make additional findings on Count One and Two of the Indictment."

{¶75} Jury instructions are generally left to the discretion of the trial court, and thus, we apply the abuse of discretion standard when reviewing a decision on how to instruct the jury. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989); *State v. Cain*, 10th Dist. Franklin No. 06AP-1252, 2007-Ohio-6181, ¶ 7.

{¶76} This assigned error is closely related to Appellant's fourth assignment of error. Appellant claims the trial court erred by instructing the jury to make the finding of whether the victim was under the age of ten, if it found him guilty of counts one and two. Appellant claims the jury should not have been instructed to decide this issue since this element of the offense was not set forth in counts one and two of the indictment. As a result, he claims he was not on notice of the state's intention.

{¶77} As stated under Appellant's prior assigned error, however, the indictment was sufficient since it stated in both counts one and two that the victim was between the ages of four and eight at the time of the offense. Crim.R. 7(B). Each count also included the victim's date of birth. Thus, Appellant's indictment and consequently this instruction were not erroneous.

{¶78} Appellant also claims the trial court instructed the jury too quickly, which prohibited his trial counsel from objecting. We disagree.

{¶79} App.R. 16(A)(7) requires an appellant's brief to include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Appellant fails to show where in the record his counsel was denied the opportunity to challenge the jury instruction.

{¶80} After the evidence was presented and before the closing arguments began, the trial court advised the parties on the record it would be reviewing the jury instructions. The judge then stated she had provided the jury instructions to counsel, but had not heard any response. Appellant's counsel did not raise any objections at this time despite the court's inquiry. Defense counsel did not ask questions about the instructions or object. (Trial Tr. 781.)

{¶81} Thereafter, the trial court read the jury instructions and reviewed the verdict forms with the jury. (Trial Tr. 823-839.) During the trial court's review, the prosecutor asked the trial court judge a question. Defense counsel did not question any instruction or object, and there is no indication the instructions were read too quickly or that Appellant's counsel was prevented from raising an objection. Thus, Appellant's allegation in this regard lacks merit.

{¶82} Appellant's fifth assigned error lacks merit and is overruled.

Conclusion

{¶83} Based on the foregoing, Appellant's assigned errors lack merit. The trial court's decision is affirmed.

Waite, J., concurs.

Hanni, 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.