**[Cite as *State v. McGovern*, 2010-Ohio-1361.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-08-066

Appellee — Trial Court No. 2006-CR-668

v.

Thomas A. McGovern — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

John F. Kirwan, for appellant.

* * * * *

HANDWORK, J.

**{¶ 1}** This case is before the court on appeal from the judgment of the Erie County Court of Common Pleas which, following a trial to the bench, found appellant, Thomas McGovern, guilty of two counts of rape, with an enhancement of the victim being less than ten years of age at the time of the offense, in violation of R.C.

2907.02(A)(1)(b), a felony of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree. The trial court sentenced appellant on August 28, 2008,[1] to a life sentence for each conviction of rape, without eligibility for parole, and five years incarceration for his conviction of gross sexual imposition. All sentences were ordered to be served consecutively. Appellant was also found to be a Tier III child victim sexual offender. Appellant timely appealed the judgment of the trial court and raises the following assignments of error:

**{¶ 2}** 1. "The defendant was denied his constitutional right to obtain any potential exculpatory evidence by the trial court."

**{¶ 3}** 2. "The trial court improperly permitted expert opinion testimony by a lay witness concerning child and sexual abuse of the alleged the victim."

**{¶ 4}** 3. "The trial court erred by allowing lay witnesses to offer opinion testimony as to the credibility of the alleged the victim."

**{¶ 5}** 4. "The trial court erred by allowing expert testimony to bolster the credibility of the alleged the victim."

**{¶ 6}** 5. "The trial court erred by failing to grant defendant's Rule 29 motion at the conclusion of the state's case."

**{¶ 7}** 6. "The verdict is against the manifest weight of the evidence."

**{¶ 8}** 7. "The court abused it's [sic] discretion by imposing consecutive life sentences."

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[1]The judgment entry of sentencing was journalized on August 29, 2008.

**{¶ 9}** In this case, the victim was taken into protective custody by the state of California in March 2004. On March 27, 2004, the victim's mother married appellant and resided in his home in Corona, California. The victim was returned to her mother in January or February 2006. The victim and mother resided with appellant until March 16, 2006, when the victim and mother moved to Ohio to live with the victim's maternal grandfather and his wife. In April 2006, around the time of the victim's sixth birthday, appellant came to Ohio for four to five days and stayed in the grandfather's home. Appellant obtained a new truck driver's position closer to Ohio and moved into an apartment in Huron, Ohio with the victim and the victim's mother on July 13, 2006. On August 9, 2006, based upon the victim's allegations of sexual abuse by appellant, the victim's mother obtained a civil protection order ("CPO"), causing appellant to vacate the apartment. After several alleged violations of the CPO, and after being contacted by the police regarding the CPO violations and/or the allegations of sexual abuse, appellant returned to California on or about August 24, 2006.

**{¶ 10}** The victim testified at trial that appellant put his "coochie" in her "coochie." By pointing, she indicated that a "coochie" was private parts, i.e., a person's genital area. The victim testified that appellant's coochie went inside hers, but that it did not hurt. She also testified that appellant put his fingers inside her coochie. The victim testified that this behavior occurred on numerous occasions while they were living in the apartment in Huron. When describing the incidents, the victim gave many details regarding what she was wearing, that she was watching television when appellant had her come into his

bedroom, the various positions that he would put her in, the positions he would be in, that he would tell her how good it felt, and that her mother was in the living room during each offense, either watching television or sleeping on the couch. The victim also testified that the same type of abuse occurred numerous time while they lived in California.

**{¶ 11}** Janine McNulty, intake investigation supervisor for Erie County Job and Family Services, testified that she conducted a forensic interview with the victim on August 11, 2006. Based upon that interview, McNulty determined that the incidents happened during the summer of 2006 and that appellant was the perpetrator. McNulty referred the victim for a physical examination and counseling.

**{¶ 12}** Terry Graham, police officer for the city of Huron, testified that he had specialized training in the investigation of child abuse cases. Graham testified that the report of the victim's examination revealed no physical evidence of sexual abuse or trauma. However, Graham testified that it was not unusual for there to be no physical evidence in sexual abuse cases. Graham had suggested to the victim's mother that she should obtain a CPO. Graham testified that appellant was made aware by officers in his department, and by the victim's mother, that he was in violation of the CPO. Graham repeatedly tried to reach appellant and discuss the sexual allegations with him, but was never able to conduct an interview because of appellant's unavailability. Appellant offered to meet officers at a specified time and location; however, he never appeared. Eventually, appellant was arrested on the charges in this case in the state of California.

**{¶ 13}** Marge Hoyt was the victim's mental health therapist at Bayshore

Counseling from August 21, 2006, to July 2007, conducting approximately 23 sessions with the victim. Based upon the counseling sessions, Hoyt initially diagnosed the victim with adjustment disorder, with a mixture of depressed mood and anxiety, and also sexual abuse. Hoyt based her diagnosis on the fact that the victim was sad, worried, felt isolated, and did not want to be left alone. Hoyt testified that the victim disclosed the sexual abuse to Hoyt, the various positions in which appellant would engage the victim and, specifically, stated that "her father laid on top of her and put his hands on her coochie and in her coochie." Hoyt also testified that the victim told her that appellant wrapped his leg around her, putting his penis in her coochie, but that the victim said her coochie was too small. The victim stated to Hoyt that this act was what sex was and that it was "sex with her dad." Hoyt also testified that the victim stated that appellant "would wrap around her and say, 'Oh, baby that feels so good.'" According to the victim, appellant would refer to this as "cuddling." Based upon the victim's disclosures, Hoyt opined that the abuse occurred repeatedly over a period of months, possibly up to a year.

**{¶ 14}** Further into counseling, the victim's symptoms were getting worse and Hoyt changed the victim's diagnosis to post traumatic stress disorder ("PTSD"). Hoyt testified that a diagnosis of PTSD required that the victim be exposed to a trauma where she experienced a threat to her personal integrity, that she reacted with feelings of horror, helplessness or fear, and that she repeated the experience of the trauma. In the victim's case, she was experiencing the trauma again through artwork that depicted genitalia, which should not have been known to her at her age, and by sexually acting out,

specifically, fondling and "humping" other children and masturbating excessively. The victim told Hoyt that she masturbated because it felt good and that she would do it in between the times that she was with appellant. Hoyt testified that the victim's knowledge, actions and disclosures were consistent with a child who had been sexually abused.

**{¶ 15}** In July 2007, the victim was hospitalized for a week at the Kobacher Center, a center for abused children. Hoyt testified that in her experience, typically, the victims of sexual abuse who were receiving treatment through Bayshore did not require hospitalization at Kobacher. Based on the increased treatment required by the victim, Hoyt opined that the victim was "in pretty bad shape."

**{¶ 16}** Theodor Rais, M.D., child and adolescent psychiatrist and acting director of the Kobacher Center at the University of Toledo, testified that he was the team leader on the victim's case when she was admitted to the hospital for treatment. Rais testified that the victim was brought to the hospital due to a concern for her own safety, because she had expressed thoughts of suicidal ideations, had chronic PTSD, and was depressed. Based on the history provided Rais for treatment, he determined that the victim had a previous diagnosis of PTSD and a history of sexual abuse. Rais first evaluated the victim to determine if the diagnosis for PTSD was accurate, which he found it was, based upon the same type of factors as testified to by Hoyt, including the fact that the victim had inappropriately touched, including by force in some instances, eight children before coming to the unit, experienced nightmares about monsters, failed the first grade, and

excessively masturbated, even when she slept. Rais described the victim as having "a very serious case of PTSD." He also testified that based upon the victim's symptoms, and within a reasonable degree of medical certainty, the victim had a history of sexual abuse. Rais testified that, although the victim was determined not to be an immediate threat to herself, the threat she poses to other children continues and that "there is nothing that you can do but to supervise the child and never let the child be * * * in the presence of * * * other kids."

**{¶ 17}** On behalf of appellant, Dale Johnson testified that she had previously lived with appellant and his wife, the victim's mother, and was a neighbor when the victim was returned to her mother's custody. Johnson testified that the victim's mother was extremely attentive to the victim and did not work outside of the home. Johnson also testified that she gave the victim a bath on a couple of occasions. Johnson noticed that the victim was "red down there" because the victim kept scratching herself, as though she had a yeast infection. The victim also expressed "[j]ust a little bit of discomfort when she was taking her bath." Johnson further testified that the victim did not appear to fear appellant and never witnessed any inappropriate behavior by appellant toward the victim.

**{¶ 18}** Kevin McGovern, appellant's brother, also testified for the defense. McGovern testified that he was a deputy sheriff in California and that he supervised a visit on Thanksgiving for the victim and her mother. McGovern also testified that he was not aware of any overnight visits by the victim until she was returned to her mother's custody in January 2006.

**{¶ 19}** Appellant testified that he did not realize he was violating a CPO by contacting his wife and that, after finding out he was prohibited from contacting her, he returned to California. At different times, appellant's testimony would change regarding whether he knew, before leaving for California, about the sexual allegations against him. Appellant testified that he never inappropriately touched the victim.

**{¶ 20}** Appellant argues in his first assignment of error that he was denied "his constitutional right to obtain any potential exculpatory evidence by the trial court." Specifically, appellant argues that he was denied the opportunity to review the sealed records that were transferred from the Superior Court of the State of California regarding the juvenile case wherein the victim's mother lost custody of the victim for approximately two years.

**{¶ 21}** Appellant requested the release of records from California regarding the victim's contact with children services agencies or the juvenile court. Appellant asked "that said records be turned over to the Erie County Court of Common Pleas, for an in camera inspection, for the purpose of examining said records to determine the existence of prior claims of sexual abuse made by said minor child." Judge Tygh M. Tone entered an order requesting transmission of said documents. Before releasing the record to Ohio, the Superior Court of California, Orange County, required Judge Tone to enter a protective order in order to protect the confidentiality of the minor victim. On June 2, 2008, Judge Tone entered a protective order which stated that "in order to protect the minor child in this case this court will review the record received from the state of

California, County of Orange in regards to said minor before any, if any, records are released to any persons or agencies." Also, incorporating the language suggested by the Superior Court of California, Judge Tone's protective order stated the following:

**{¶ 22}** "Therefore in order to protect the confidentiality of the minor this Protective Order is entered in *Ohio v. Thomas McGovern*, Case No. 2006-CR-668, to wit:

**{¶ 23}** "Juvenile records, any portion thereof, and information relating to the contents of juvenile records may not be disseminated by the receiving persons or agencies to any persons or agencies other than those persons or agencies authorized to receive juvenile records pursuant to applicable law or as authorized by court order.

**{¶ 24}** "All records produced are limited to use in Erie County Common Pleas Court Case No. 2006-CR-668 and (except as necessary in trial) the records and their contents are not to be disclosed to anyone other than the court, the parties, their counsel (including investigators), and experts."

**{¶ 25}** After conducting an in camera review of the record, Judge Tone held that there was no potentially exculpatory information in the record and ordered that the record remain sealed. During a June 30, 2008 hearing, appellant's counsel asked the court to reconsider its decision and asserted that he could "demonstrate a good-faith belief that there are items and other information contained in that file that are necessary for the defense." Counsel later argued that, without abandoning his request for access to the entire file, the following items were necessary to formulate a defense: (1) the specific time and dates that the state of California, through its relevant agency, had custody of the

minor child; (2) records pertaining to in-home visits, investigations conducted by representatives of the relevant agencies in Orange County, California; (3) the identity of the foster parents and their last known address. Again, having found no relevant or exculpatory evidence in the California record, on July 17, 2008, Judge Tone ordered that the record would not be released to either party and would remain under seal throughout the trial. At trial, Judge Roger E. Binette also denied appellant's request for access to the record, based upon Judge Tone's prior ruling and in camera inspection.

**{¶ 26}** On appeal, appellant asserts that the information contained in the record was necessary to challenge the victim's credibility and to establish certain pertinent dates, such as, when the victim was returned to her mother, and whether there were follow-up visits by California Child Protective Service after the victim was returned to her mother and while living in California. Appellant argues that exculpatory evidence includes not only evidence which would tend to show that appellant was not guilty of the offense, but evidence that would impeach the state's case. Appellant also argues that the issue is not whether appellant "would more likely than not have received a different verdict with the evidence available," but "whether in its absence he received a fair trial."

**{¶ 27}** As set forth in *Brady v. Maryland*, (1963), 373 U.S. 83, 87, the prosecution has the duty under the due process clause to insure that criminal trials are fair by disclosing favorable evidence to the defendant that is material to either guilt or punishment. However, there is no general constitutional right to discovery in a criminal case and *Brady* did not create one. *Weatherford v. Bursey* (1977), 429 U.S. 545, 559.

See, also, *Wardius v. Oregon* (1973), 412 U.S. 470, 474. ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded * * *.")

**{¶ 28}** In this case, the juvenile record from California, including reports from children's services, is indisputably confidential. Nevertheless, it is well-settled that a criminal defendant's right to a fair trial entitles the defendant to an in camera review by the trial court of the confidential records in order to determine whether the records contain evidence material to the accused's defense. *Pennsylvania v. Ritchie* (1987), 480 U.S. 39. The proper procedure in determining the availability of confidential records is for the trial court to conduct an in camera inspection to determine: (1) whether the records are necessary and relevant to the pending action; (2) whether good cause has been shown by the person seeking disclosure; and (3) whether their admission outweighs the confidentiality considerations. *Grantz v. Discovery For Youth*, 12th Dist. Nos. CA2004-09-216, CA2004-09-217, 2005-Ohio-680, ¶ 19, citing *Johnson v. Johnson* (1999), 134 Ohio App. 3d 579, 585, and *Child Care Provider Certification Dept. v. Harris*, 8th Dist. No. 82966, 2003-Ohio-6500, ¶ 11. See, also, *State v. Hart* (1988), 57 Ohio App.3d 4, 6; and *Henneman v. City of Toledo* (1988), 35 Ohio St.3d 241, 243.

**{¶ 29}** We have thoroughly reviewed the sealed record from the Superior Court of California, County of Orange, and find no evidence of any sort that would be favorable to appellant or material to his guilt or punishment. There is no reference to any allegation of sexual abuse and no reference to any follow-up visit by any agency after the victim was returned to her mother. We also note that the other information sought by appellant

would be known to him personally because he was living with the victim and her mother at the time. Furthermore, we find that nothing the victim testified to was contradicted by anything in the record. As such, we find that the record is not necessary or relevant to the pending action, that appellant has failed to demonstrate good cause, and that any need for disclosure of the record does not outweigh the confidentiality considerations of the victim and her foster parents.

**{¶ 30}** Accordingly, we find that the trial court did not abuse its discretion in denying appellant's request to see the California record. See *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 110 Ohio St.3d 343, 2006-Ohio-4574, ¶ 9. We also find that, even though he was prohibited from having access to the victim's case file, appellant was not denied a fair trial in contravention of his constitutional rights. Appellant's first assignment of error, therefore, is found not well-taken.

**{¶ 31}** Appellant argues in his second, third and fourth assignments of error that the trial court improperly permitted testimony by lay witnesses, Hoyt and McNulty, and by expert witness, Rais. Specifically, appellant argues that the trial court should have stricken Hoyt's testimony regarding the victim's diagnosis of PTSD, the duration of the sexual abuse, and that the victim was in "pretty bad shape." Appellant also argues that the trial court erroneously allowed Hoyt, McNulty and Rais to offer opinion testimony as to the victim's credibility.

**{¶ 32}** Initially, we note that this was a trial to the bench, not a jury trial. In such cases, we give deference to a judge's decision when the evidence is introduced. *State v.*

*Fautenberry* (1995), 72 Ohio St.3d 435, 439. Also, "[u]nless the record indicates otherwise, the judge is presumed to have considered only admissible evidence." *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶ 27, citing *Fautenberry*.

**{¶ 33}** Admission of witness testimony is governed by the Ohio Rules of Evidence. Regarding the admissibility of lay opinion under Evid.R. 701, in conjunction with Evid.R. 704, lay witnesses are permitted to render a lay opinion on the ultimate issue to be decided by the trier of fact, upon satisfaction of the Evid.R. 701 standards of admissibility. *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49. "Pursuant to Evid.R. 701, lay opinion must be: (1) 'rationally based on the perception of the witness,' i.e., the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts; and (2) 'helpful,' i.e., it must aid the trier of fact in understanding the testimony of the witness or in determining a fact in issue." Id., citing *Wheeler v. Hendershot* (Nov. 28, 1984), 1st Dist. No. C-830891.

**{¶ 34}** Pursuant to Evid.R. 702, "[a] witness may testify as an expert if all of the following apply: (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable scientific, technical, or other specialized information." Also, after disclosing underlying facts or data, an expert witness may

testify in terms of opinion or inference and give the reasons therefor. Evid.R. 705.

**{¶ 35}** In *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Supreme Court concluded that sexual child abuse presented an issue for which "specialized knowledge" concerning sexual child abuse would aid a jury because "[m]ost jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse," or have an adequate "foundation for assessing whether a child has been sexually abused." *Boston*, 46 Ohio St.3d at 128. Specialized knowledge concerning child abuse may be held by "a priest, a social worker or a teacher, any of whom might have specialized knowledge * * * and training in recognizing occurrences of child abuse." Id. at 119. "[E]xpert testimony on the ultimate issue of whether sexual abuse has occurred in a particular case is helpful to jurors and is therefore admissible pursuant to Evid.R. 702 and 704." *State v. Gersin* (1996), 76 Ohio St.3d 491, 494, citing *Boston*, supra.

**{¶ 36}** Nevertheless, *Boston* does not stand for unlimited use of expert opinion testimony, and expert opinion testimony on whether the child victim's statements concerning abuse were truthful is prohibited as such testimony infringes on the role of the fact-finder and is improper, egregious, prejudicial, and constitutes reversible error. *State v. Weaver*, 178 Ohio App.3d 504, 2008-Ohio-5022, ¶ 81, citing *Boston*, supra, at syllabus. Absent first-hand observations, "opinion testimony as to whether the defendant in fact committed the offense is prohibited." Id., citing *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, ¶ 57.

**{¶ 37}** In this case, we find that Hoyt's testimony, concerning the victim's

condition and the nature and duration of the abuse, was rationally based upon her perception of the witness during her 23 counseling sessions and was helpful to the trier of fact. Pursuant to Evid.R. 701 and 704, Hoyt was permitted to testify that the victim's behavior was consistent with that of a child who had been sexually abused. Additionally, we find that Hoyt never testified regarding the victim's credibility and never opined that appellant was the perpetrator of the sexual abuse. Rather, Hoyt merely testified regarding the statements made by the victim during their counseling sessions. We find that the victim's statements to Hoyt were admissible pursuant to Evid.R. 803(4) as they were made for the purpose of medical diagnosis and treatment. See *State v. Walker*, 1st Dist. No. C-060910, 2007-Ohio-6337, ¶ 37. Even the identity of the perpetrator of sexual abuse may be pertinent to diagnosis and treatment because it may assist medical personnel with assessing the emotional and psychological impact of the abuse on the child and formulating a counseling plan or other treatment. *State v. Jordan*, 10th Dist. No. 06AP-96, 2006-Ohio-6224, ¶ 20, citing *State v. Dever* (1992), 64 Ohio St.3d 401, 413. Furthermore, we find that any error with respect to Hoyt's testimony regarding the victim's medical diagnosis is harmless because Rais, who was qualified as an expert in this case, testified within a reasonable degree of medical certainty that the victim was suffering from PTSD.

**{¶ 38}** We also find that McNulty's testimony was admissible. McNulty conducted a forensic interview of the victim. Based upon the victim's disclosures during that interview, McNulty testified that she was able to determine when the sexual abuse

took place and who the alleged perpetrator was. It was not offered as evidence to prove the truth of the matter asserted. See Evid.R. 801(C). Rather, it explained how and why McNulty proceeded with the case as she did, e.g., referring the victim for a physical examination and psychological counseling. "[W]here statements are offered to explain an officer's conduct while investigating a crime, such statements are not hearsay." *State v. Blevins* (1987), 36 Ohio App. 3d 147, 149, citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. We also find that the probative value of McNulty's testimony is not substantially outweighed by the danger of unfair prejudice, particularly because the victim took the stand, identified appellant as the perpetrator, and was subjected to cross-examination. See Evid.R. 403(A). Furthermore, we find that McNulty never opined regarding the victim's credibility or whether appellant, in fact, sexually abused the victim.

**{¶ 39}** With respect to Dr. Rais, we find that his expert testimony was admissible. Rais testified that he was not an internationally recognized expert in the area of child abuse; however, we find that his credentials and experience qualified him as an expert in matters of child psychiatry. Rais testified that the victim was suffering from PTSD and, based upon his observations of the victim's behavior, in addition to information he received regarding her background, concluded that the victim had been subjected to sexual abuse. Rais never testified that the victim was being truthful or was credible, never identified appellant as the perpetrator, and never opined regarding the timeframe of the sexual abuse. Rather, Rais merely testified regarding his medical diagnosis and conclusions concerning the victim, the treatment she received, and whether she posed a

threat to herself or others. Rais' testimony did not go beyond permissible boundaries. See *Bell*, 2008-Ohio-2578, ¶ 57.

**{¶ 40}** Based on the foregoing, we find that the trial court did not abuse its discretion by admitting the testimony of Hoyt, McNulty, and Rais. Accordingly, appellant's second, third and fourth assignments of error are found not well-taken.

**{¶ 41}** Appellant argues in his fifth and sixth assignments of error that the trial court erred by denying his Crim.R. 29 motion for acquittal and that the judgment was against the manifest weight of the evidence. Specifically, appellant argues that the evidence was insufficient to convict him because "[t]he state failed to call a number of witnesses to lay a foundation for the expert witness's testimony including the victim's mother Rhonda Weaver and the social worker Nancy Baum." Appellant also argues that his conviction was against the manifest weight of the evidence because "[t]he only evidence against defendant was the testimony of a seven year old alleged victim who was five years old when the alleged sexual conduct by the Defendant occurred," and that the balance of the evidence presented was impermissible hearsay and was improperly allowed to bolster the victim's credibility. Appellant further asserts that "[t]he child's credibility has to be seriously questioned when she testified that Defendant had sexual intercourse with her over twenty times but the hymen remained intact," and because there was no physical medical evidence to support the verdict.

**{¶ 42}** Crim.R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. As such,

the issue to be determined with respect to a motion for acquittal is whether there was sufficient evidence to support the conviction. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

**{¶ 43}** "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. In making this determination, an appellate court must determine whether, "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**{¶ 44}** When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. The court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. Id.

**{¶ 45}** Appellant was convicted of two counts of rape, with an enhancement of the victim being less than ten years of age at the time of the offense, in violation of R.C. 2907.02(A)(1)(b), which states:

**{¶ 46}** "(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: * * *

**{¶ 47}** "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

**{¶ 48}** Sexual conduct is defined by R.C. 2907.01(A) as follows:

**{¶ 49}** "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

**{¶ 50}** Appellant was also convicted of one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which states:

**{¶ 51}** "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: * * *

**{¶ 52}** "(4) The other person, or one of the other persons, is less than thirteen years

of age, whether or not the offender knows the age of that person."

**{¶ 53}** Sexual contact is defined by R.C. 2907.01(B) as follows:

**{¶ 54}** "'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

**{¶ 55}** Based upon the evidence presented in this case, and keeping in mind that the trial court is in the best position to view the witnesses and determine their credibility, we find that there was sufficient evidence presented upon which the trial court could have relied in concluding that the state proved the offenses beyond a reasonable doubt, and that the trial court did not clearly lose its way or create a manifest miscarriage of justice. The victim testified that appellant put his coochie in her coochie and stated to her therapist that appellant made "rounds," or circles, in her coochie. Additionally, the medical personnel treating the victim testified that she demonstrated symptoms that were consistent with those of a child who had been sexually abused. Although there was no breach of the victim's hymen, we note that the victim testified that she was "too small." Moreover, penetration, however slight, is sufficient to complete vaginal intercourse. Accordingly, we find appellant's fifth and sixth assignments of error not well-taken.

**{¶ 56}** Appellant argues in his seventh assignment of error that the trial court abused its discretion by imposing maximum and consecutive sentences. We disagree.

**{¶ 57}** In applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, appellate courts must use a two-step approach when examining a trial court's sentence. *State v.*

*Miller*, 6th Dist. No. H-08-029, 2009-Ohio-2933, ¶ 8. The first step is to ask whether the sentencing court complied "with all applicable rules and statutes." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 3. Although *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12, which the trial court must still consider. Id. at ¶ 13, and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

**{¶ 58}** R.C. 2929.11 states that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing," which are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). The sentence should be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

**{¶ 59}** "The second general statute, R.C. 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' R.C. 2929.12(A) directs that in exercising that discretion, the court shall consider, along with any other 'relevant' factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider." *Foster* at ¶ 37.

**{¶ 60}** If the trial court did not comply with all applicable sentencing rules and

statutes, then "the sentence is clearly and convincingly contrary to law." *Kalish*, 2008-Ohio-4912, ¶ 3. If the trial court did comply, then this court must consider the second step, whether the trial court abused its discretion. Id. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157; and *Steiner v. Custer* (1940), 137 Ohio St. 448.

**{¶ 61}** In this case, the trial court stated that it considered the facts in evidence, oral statements, the victim impact statement, presentence investigation report, the principles and purposes of sentencing pursuant to R.C. 2929.11, and balanced the seriousness and recidivism factors of R.C. 2929.12. In sentencing appellant, the trial court specifically noted appellant's juvenile record, including rape by force, and the trauma suffered by the victim in this case because of appellant's actions. Having thoroughly reviewed the record in this case, we find that the trial court did not abuse its discretion in sentencing appellant to maximum, consecutive sentences within the authorized statutory range for appellant's offenses. Accordingly, appellant's seventh assignment of error is found not well-taken.

**{¶ 62}** On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE