[Cite as *State v. Nelson*, 2010-Ohio-5932.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2009-P-0070**
OKEY J. NELSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0667.

Judgment: Modified, and affirmed as modified.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Okey J. Nelson appeals from his convictions and sentences for five counts of rape involving his 9-year-old stepdaughter. He challenges the sufficiency of the evidence presented by the state and claims his convictions are against the manifest weight of the evidence. He also claims the trial court erred in sentencing him to five consecutive terms of life without parole. For the following reasons, we affirm his convictions of five counts of rape, but modify his sentences.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Nelson was charged with committing five counts of rape of his stepdaughter, M, born on July 2, 1999, during the period between July 1, 2002 and October 29, 2008. His wife and M's biological mother, Stephanie Nelson, was also arrested for the sexual abuse. She was charged with complicity to rape, permitting child abuse, and child endangering. She later pled guilty to permitting child abuse and child endangering, and was sentenced to two concurrent three-year prison terms for the offenses.

{¶4} Mr. Nelson denied guilt and his case was tried to a jury. Among the state's witnesses were Mrs. Nelson, the couple's two older children, a neighbor who reported to the authority her suspicion of the sexual abuse, the detective in charge of the investigation, the nurse/pediatric sexual assault examiner who interviewed and examined M, and a physician who is a specialist in child abuse cases.

{¶5} **Trial Testimony**

{¶6} Mrs. Nelson testified that she met Mr. Nelson in 2001 at a factory where they both worked. She moved into his house a month after they met. Her two children, two-year-old M and a four-year-old son, moved in with her. Later in the year, Mr. Nelson's four children also moved in. The family moved several times. In July 2006, Mrs. Nelson took her biological son and M to live with her father because Mr. Nelson was "mentally abusive" and was "really mean and hateful" towards her, and "she couldn't take any more of it." She moved back to his house, however, shortly afterward.

{¶7} She first became suspicious of Mr. Nelson's sexual abuse of M in 2005. One day she took a walk with her other children, and, when she arrived back at the house, Mr. Nelson and M came from the other side of their duplex-style house. He

claimed they had just used the bathroom at the other side of the duplex. It aroused her suspicion because their own side of the duplex was equipped with a bathroom.

{¶8} Mrs. Nelson testified to four more incidents of suspected sexual conduct between Mr. Nelson and M. The second incident occurred in 2006 when she was pregnant. After taking a bath, she went downstairs to the basement where the couple's bedroom was located. Just then Mr. Nelson came up from the basement with M behind him. Mrs. Nelson became suspicious because the children were not allowed in their bedroom in the basement. She noticed the back of M's dress was zipped only halfway. Later in the evening, she saw that M's dress was soiled below the shoulder and M said: "daddy spit on me." Mrs. Nelson suspected the spot in her dress was semen. She washed it off later. When she confronted Mr. Nelson, he admitted "jacking off" in the basement bedroom, but claimed M came into the bedroom while he was in the room. He explained her dress may have become soiled by her sitting on the bed. He denied touching her.

{¶9} Mrs. Nelson testified to three more incidents that occurred in 2008, when M was nine. The couple was engaged in sexual conduct one afternoon in June 2008. Mr. Nelson asked her to role-play, and proceeded to talk to her as if she was "a 12-year-old little girl," while performing oral sex on her. At some point Mr. Nelson blurted out the name of one of his biological daughters, J. Mrs. Nelson became suspicious and asked him if he had "messed around" with J, and also asked about his two other biological daughters. He denied engaging in any improper conduct with them. Mrs. Nelson then asked him about M. He admitted touching her vagina with his fingers once. He promised not to touch her again and pleaded with her not to leave.

{¶10} The fourth incident occurred when Mrs. Nelson came inside the house one day to use the bathroom. She found the bedroom door locked. When Mr. Nelson opened the door, M was also in the bedroom. He claimed the two were just looking at the family's photo album and denied any improper conduct. He said he was unaware that the door was locked.

{¶11} The fifth incident occurred in October 2008. Mrs. Nelson woke up one night to take care of the couple's baby. She ended up sleeping with the baby in another bed. She woke up again later to use the bathroom, around 4:30 a.m. As she walked toward the bathroom, she heard voices coming from the bathroom. The light was on but the door was locked. She knocked at the door but no one answered. She used her ring to unlock the door. When the door opened, she saw Mr. Nelson pulling up his pants and buttoning them, while M stood to one side in her nightgown. Mrs. Nelson stormed out of the bathroom, calling Mr. Nelson a "sick man" and getting ready to call the police. Mr. Nelson shoved her against the wall, grabbed her by the throat and threatened to kill her if she called the authorities. After he went to work, Mrs. Nelson asked M if Mr. Nelson had been "messing with" her. M said yes. She helped M take a shower.

{¶12} Mrs. Nelson testified that she was afraid to tell anyone about these incidents, and that she could not move out because she had no place to go. She told the jury that she was indicted on complicity to rape, child endangering, and permitting child abuse, and that she pled guilty to the latter two charges and received two concurrent three-year prison terms for her convictions.

{¶13} C. Nelson, Mr. Nelson's 14-year-old biological son, testified to two incidents of sexual conduct he witnessed between his father and M. In one incident, he saw, through a window covered with old fitted sheet, M lying on the bed with her clothes off and her legs spread apart. His father stuck his finger in some balm and then stuck it "between her vagina." He later told his foster father and a social worker about the incident, after Mr. Nelson was arrested.

{¶14} Stephanie Nelson, Mr. Nelson's 19-year-old biological daughter, testified she once shared a bedroom with M, and, one night Mr. Nelson came into the room to wake M up to use the bathroom. She found it odd because M was not known to wet the bed. Stephanie moved about in her bed and, as a result, Mr. Nelson left the room.

{¶15} Sandra Loughly, a neighbor of the Nelsons, testified that she was at the Nelsons' house for a birthday party for two of the children in July of 2008. She became suspicious after talking to Mrs. Nelson and Stephanie at the party. A few days later, she called a child abuse hotline to report anonymously about the suspected sexual abuse. On cross-examination, Ms. Loughly admitted she engaged in sexual conduct with both Mr. and Mrs. Nelson on three occasions.

{¶16} Detective Johnson, a lieutenant and a 13-year-veteran with the Portage County Sheriff's Department, began this sexual abuse investigation after receiving a referral from the Portage County Job & Family Services on October 29, 2008. On that day, he spoke with one of the Nelson children at the high school, and also interviewed M at her elementary school. He noticed a visible change in M's demeanor when the subject of the suspected sexual abuse came up. Instead of smiling and talking, she became very withdrawn and refused to make eye contact. She initially hesitated to

provide any details but opened up and became more comfortable in talking about it as the conversation went on.

{¶17} Detective Johnson then went to the Nelsons' home. Mrs. Nelson was not cooperative at first but eventually acknowledged her awareness of the inappropriate contact between her husband and M. He interviewed her on several more occasions. She was arrested on November 13, 2008. In the interview after her own arrest, she referred to M as "that girl" and claimed she lied about the sexual abuse.

{¶18} Nurse Carlyn Johnson, a pediatric sexual assault examiner, testified that she interviewed M and conducted a physical examination on October 31, 2008. The interview of M was recorded and a redacted copy of it was played for the jury, over the defense counsel's objection.

{¶19} In the interview, M stated her stepfather touched her butt and "privates" with his hands and "privates." When he touched her "privates" with his hand, he would stick his fingers "down there." He would also lick her "privates" with his mouth. He also made her touch his "privates" with her mouth and hand. He made her lick his "privates" and "pee" would always come out of his "privates" into her mouth. She described his "privates" as "hard," "squishy," and "hairy." When she was worried that she may have a baby, he assured her that "a man and a girl can't have a baby."

{¶20} Using a couch in the interview room, she demonstrated how she would lie down on the edge of a bed with her legs spread, while Mr. Nelson stood over her and touched her privates. She also used anatomically correct dolls to demonstrate the inappropriate touching. She stated that afterward it would hurt sometimes when she urinated. He warned her not to tell her mother about the inappropriate touching or he

would “spank [her] butt.” She stated her mother saw what her stepfather did with her. She asked her mother to move away from Mr. Nelson.

{¶21} Nurse Johnson testified that when she noticed a rash on M’s buttocks area, she asked M about her bathroom hygiene. M told her she would “get in the bathtub after she was with Okey and her mom would help wash her off.” M also indicated the last sexual conduct with Mr. Nelson occurred about six to eight weeks before the interview.

{¶22} Dr. McPherson, the Medical Director of the Portage County Children’s Advocacy Center and a specialist in child abuse cases, testified that after reviewing M’s medical record, he believed, within a reasonable degree of medical certainty, that M was the victim of sexual abuse. He stated that although the medical examination of M did not reveal apparent lesions or residual tissue damage, a normal examination would not necessarily mean the sexual abuse did not occur. He stated that a victim’s sleep disturbances, problems in school, and other emotional and behavioral symptoms would aid him in his diagnosis.

{¶23} After trial, the jury found Mr. Nelson guilty of all five counts of rape. The trial court sentenced him to five consecutive terms of life without parole for his convictions.

{¶24} Mr. Nelson now appeals, raising three assignments of error for our review:

{¶25} “[1.] The trial court erred in sentencing the appellant to an indefinite sentence of life without parole for the offenses of rape under Ohio Revised Code 2907.02.

{¶26} "[2.] Appellant's convictions of rape were contrary to the manifest weight of the evidence.

{¶27} "[3.] The trial court erred in failing to grant appellant's Criminal Rule 29 motion to dismiss the rape charges at the conclusion of the state's case and at the conclusion of the evidence."

{¶28} In the following, we review Mr. Nelson's sufficiency-of-evidence, manifest-weight, and sentence claims, in that order.

{¶29} **<u>Sufficiency of Evidence</u>**

{¶30} When reviewing a challenge of the sufficiency of evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "The relevant inquiry is 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." Id.

{¶31} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶32} Regarding his claim of insufficient evidence, Mr. Nelson makes no real argument, other than asserting, without any elaboration, that "[c]redible, uncontradicted evidence was not shown at trial that established that sexual conduct occurred between Mr. Nelson and [M]."

{¶33} Mr. Nelson was charged with five counts of rape each with the additional specification that the victim was less than ten years old at the time of the offense. R.C. 2907.02, which defines rape, provides the following, in pertinent part:

{¶34} "(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:

{¶35} "***.

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

{¶37} Furthermore, R.C. 2907.01(A) defines "sexual conduct" as:

{¶38} "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."

{¶39} As set forth in the statute, "[p]enetration is not required to commit cunnilingus. Rather, the act of cunnilingus is completed by the placing of one's mouth on the female's genitals." *State v. Lynch* (2003), 98 Ohio St.3d 514, 2003-Ohio-2284, ¶86, citing *State v. Ramirez* (1994), 98 Ohio App.3d 388, 393; *State v. Bailey* (1992), 78 Ohio App.3d 394, 395. Fellatio has been defined as "[a] sexual act in which the mouth or lips come into contact with the penis." *State v. Shondrick*, 9th Dist. No. 3216-M, 2002-Ohio-2439, ¶29, citing Black's Law Dictionary (6 Ed. 1990) 616.

{¶40} Contrary to Mr. Nelson's bare assertion that no credible evidence was presented to the jury, the state presented ample evidence on the elements of rape. M stated in the videotaped interview he touched her buttock and her "privates" with his hands, mouth, and his "privates." She stated he would "stick his finger down there." He would also make her lick his privates until stuff "that looked like pee" would came out of his "privates" into her mouth. She demonstrated these sexual acts with anatomically correct dolls and with a couch in the room.

{¶41} The nurse who interviewed and examined M in her capacity as the pediatric sexual assault examiner testified regarding her interview and examination of M, where M described the sexual acts with Mr. Nelson. M's recounting of the sexual conduct with Mr. Nelson was corroborated by her mother, who testified to five such incidents. It was also corroborated by her stepbrother, who testified he witnessed two incidents of sexual conduct between his father and M. The testimony, if believed by the jury, provides ample evidence for the elements of rape.

{¶42} Given the state of the record, we conclude that 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 rape beyond a reasonable doubt. The third assignment of error is without merit.

{¶43} **Manifest Weight**

{¶44} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created

such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶45} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin* at 175. "A finding on review that the jury's verdict was against the manifest weight of the evidence must be reserved for those extraordinary cases where, on the evidence and theories presented, and taken in a light most favorable to the prosecution, no reasonable jury could have found the defendant guilty." *Higgins* at ¶37 (citations omitted).

{¶46} Under this assignment of error, Mr. Nelson challenges the credibility of several witnesses. He first complains that he did not have an opportunity to cross-examine M on her statements made to Nurse Johnson during the interview prior to a medical examination.

{¶47} As an initial matter, we point out such out-of-court statements are admissible pursuant to Evid.R. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

{¶48} The Supreme Court of Ohio held in a recent case, *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, paragraph two of syllabus, that "[s]tatements made to interviewers at child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation

Clause." See, also, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267 (the admission of a child victim's hearsay statements made to a social worker does not offend the Confrontation Clause, when such statements are made for the purpose of medical diagnosis and treatment). On appeal, Mr. Nelson does not claim that M's statements were *not* made for medical diagnosis purposes. Therefore, his claim for a lack of opportunity for cross-examination is without merit.

{¶49} As to his claim that several questions asked by Nurse Johnson were leading, we note the following statements by the Supreme Court of Ohio regarding leading or suggestive questions in sexual abuse cases involving children:

{¶50} "[T]he trial court may consider whether the child's statement was in response to a suggestive or leading question *** and any other factor which would affect the reliability of the statements ***. If no such factors exist, then the evidence should be admitted. The credibility of the statements would then be for the jury to evaluate in its role as factfinder. In addition, the witness whose testimony brings in the child's hearsay statement can be cross-examined about the circumstances surrounding the making of the statement." *State v. Dever* (1992), 64 Ohio St.3d 401, 410.

{¶51} We have reviewed the recorded interview played for the jury in which M described the sexual conducts between her and her stepfather. We discern few improper leading questions. It is to be expected that a child of tender age such as M would have difficulties conversing about matters of a sexual nature. Nurse Johnson's interview with her was likely the first time she ever attempted to describe the details of what had occurred between her and her stepfather. Her lack of descriptive words is

understandable. When viewed in context, the occasional promptings from Nurse Johnson were often necessary for M to provide more specific answers.

{¶52} For example, when Nurse Johnson asked M to describe how Mr. Nelson's "privates" felt, she hesitated. Nurse Johnson then asked if it felt hard, soft, rough, or smooth. M then responded it felt "hard," "squishy" and "hairy." When asked about the frequency of the sexual acts, M did not answer the question immediately. Nurse Johnson therefore asked her whether it was "a lot" or "a little," to which M answered "a lot." On the occasions the nurse suggested answers, M did not always repeat what she suggested; after M revealed that Mr. Nelson put his fingers in her privates, Nurse Johnson asked if he moved or wiggle his fingers, M responded that she would move or kick him, but "he did not care."

{¶53} Therefore, upon review of Nurse Johnson's interview of M, we do not find it to be so improperly leading or suggestive as to be inadmissible. In addition, Nurse Johnson, whose testimony laid the foundation for showing the recorded interview of M, was thoroughly cross-examined about the circumstances surrounding M's statements. Thus, the credibility of M's statements is for the jury to evaluate, in its role as the factfinder.

{¶54} Mr. Nelson also contends Mrs. Nelson's statements vary in several interviews, in her proffered testimony made at the prosecutor's office, and at trial. He points out, for instance, that she mentioned in her proffered testimony, the second, third, fourth, and fifth incident, but not the first. At trial, she admitted never mentioning to Detective Johnson about the 2005 incident. Also, after she was arrested and charged with complicity to commit rape, she changed her story and accused M of lying about the

sexual abuse. Our review of Mrs. Nelson's statements on various occasions show they are substantially similar, although she would add certain details previously unmentioned. For example, at trial she testified that she saw a soiled spot in M's dress in the second incident, which she did not mention in her proffered testimony.

{¶55} Mr. Nelson also points out that, according to her own testimony, Mrs. Nelson did not actually witness any alleged sexual conduct but only saw M and Mr. Nelson in suspicious circumstances, which is inconsistent with M's statements to Nurse Johnson that her mother saw her stepfather rubbing himself against her.

{¶56} When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The fact-finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29. Issues concerning the weight given to the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶57} Our review of the trial transcript shows that Mrs. Nelson was thoroughly cross-examined regarding the differences and potential inconsistencies in her statements on the various occasions. The jury was aware that Mrs. Nelson changed her story and denied any knowledge of the sexual abuse after she was arrested herself and charged with criminal offenses. The jury was also aware she related the 2005 incident for the first time at trial, as well as the fact she added certain details in her recounting of specific incidents. The jury was free to believe all, part, or none of her

testimony, and any weight to be given to the alleged inconsistencies is solely within the province of the jury.

{¶58} We similarly reject Mr. Nelson's challenge of the credibility of the neighbor who reported the suspected sexual abuse and that of his 14-year-old son. Mr. Nelson was free to attack at trial witnesses' veracity and recollection, but we leave it up to the jury to assess their credibility and to determine what weight, if any, to give to the witnesses' testimony. *Muttart* at ¶50.

{¶59} Upon our review of the entire record, we cannot say the jury clearly lost its way in resolving conflicts in the evidence presented by the state and created such a manifest miscarriage of justice that Mr. Nelson's conviction must be reversed and a new trial ordered. The second assignment of error is without merit.

{¶60} **Sentence**

{¶61} Under the first assignment of error, Mr. Nelson claims that, for each conviction of rape, the trial court should have sentenced him to a definite prison term, rather than a term of life without parole. He cites to the authority of R.C. 2907.02 for this claim. Upon a review of the statute, we modify his sentence for counts 1, 2, and 3 to imprisonment of life for each count, but affirm his sentence of a term of life without parole for counts 4 and 5.

{¶62} **Standard of Review**

{¶63} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to the existing statutes, appellate courts must apply a two-step approach in reviewing a sentence. First, they must examine the sentencing court's compliance with all applicable rules and statutes in

imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard. Id. at ¶4.

{¶64} The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. at ¶14.

{¶65} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. Id. at ¶17.

{¶66} **Penalty Enhancement When Victim is Under Ten**

{¶67} For his convictions of five counts of rape, each with an additional finding that the victim was less than ten years of age, the trial court sentenced Mr. Nelson to a term of imprisonment of life without parole for each count, to run consecutively.

{¶68} R.C. 2907.02 governs sentences for the offense of rape. If a person is found guilty of R.C. 2907.02(A)(1)(b), i.e., that he engaged in sexual conduct with a person under 13 years of age, he is guilty of a first-degree felony. Furthermore, under R.C. 2907.02(B), the penalty for such an offender is enhanced if certain conditions are met, such as when the offender uses force, when the offender has previously committed

rape against a victim younger than 13, or when the victim is under ten years of age. See, e.g., *State v. Wagers*, 11th Dist. No. 2009-06-018, 2010-Ohio-2311, ¶22.

{¶69} R.C. 2907.02 has undergone several revisions over the years. The versions of the statute relevant to Mr. Nelson's rape offenses are the versions effective June 13, 2002 (2002 H 485) and January 2, 2007 (2006 S 260). The June 13, 2002 version governs counts 1, 2, and 3, which were committed between July 1, 2002 and January 1, 2007. The January 2, 2007 version governs counts 4 and 5, which were committed between January 1, 2007 and October 29, 2008.

{¶70} **<u>Counts 1, 2, and 3</u>**

{¶71} In the June 13, 2002 version of the statute, the trial court is to sentence a defender whose victim is younger than 13 to a (mandatory) life sentence, when the victim is younger than ten, or when the offender uses force. The trial court, furthermore, has the discretion to sentence an offender whose victim is younger than 13 to life without parole when the offender has either previously committed rape against a victim younger than 13, or when he causes serious physical harm to the victim. That version of the statute states, in pertinent part:

{¶72} "(B) *** If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force or if the victim under division (A)(1)(b) of this section *is less than ten years of age*, whoever violates division (A)(1)(b) of this section shall be *imprisoned for life*. If the offender under division (A)(1)(b) of this section previously has been convicted or pleaded guilty to violating division (A)(1)(b) ***or if the offender during or immediately after the commission of the offense caused

serious physical harm to the victim, whoever violates division (A)(1)(b) of this section shall be imprisoned for *life or life without parole*." (Emphasis added.)

{¶73} Here, the trial court does *not* have the statutory authority to sentence Mr. Nelson to a term of imprisonment of life without parole for his convictions of counts 1, 2, or 3 under the June 13, 2002 version of R.C. 2907.02, because Mr. Nelson had not been convicted of rape of a victim younger than 13, and there was no finding that he caused serious physical harm to M. Under the statute, the trial court has no discretion but to sentence him to life imprisonment for committing rape against a victim younger than ten. Thus, his sentence of imprisonment of life without parole for these counts are "clearly and convincingly contrary to law" pursuant to *Kalish*. Therefore, we exercise our authority under R.C. 2953.08(G)(2)(b) and modify his sentence for counts 1, 2, and 3 to imprisonment of life for each count.

{¶74} **<u>Counts 4 and 5</u>**

{¶75} In contrast, in the January 2, 2007 version of R.C. 2907.02, the trial court is given discretion to sentence an offender whose victim is younger than ten to *a term of life without parole*, *regardless of* whether the offender has previously committed rape against a victim younger than 13, or whether he harms the victim. This version of the statute states, in pertinent part:

{¶76} "****If* an offender under division (A(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) ***, *if* the offender during or immediately after the commission of the offense caused serious physical harm to the victim, *or if* the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment

pursuant to section 2971.03 of the Revised Code, the court *may* impose upon the offender *a term of life without parole*. ***. (Emphasis added.)

{¶77} In the statute, the conditions for the imposition of a term of life without parole are clearly stated in the disjunctive: the trial court may impose a term of life without parole, (1) *if* the offender has previously committed rape against a victim younger than 13, (2) *if* the offender has caused serious physical harm, *or* (3) *if* the victim is younger than ten. When *any one* of these conditions is met, the court has the authority to sentence the offender to a term of life without parole. The statute unambiguously grants discretion to trial courts in determining whether to impose life without parole. *State v. Alvarado*, 3d Dist. No. 12-07-14, 2008-Ohio-4411, ¶45.[1]

{¶78} Therefore, regarding counts 4 and 5, the trial court's sentence of imprisonment of life without parole is a proper application of the statute in effect at the time of the offenses. That version of the statute provides for a sentence of a term of life without parole when the victim is younger than ten, even if the offender has not previously committed rape against a victim younger than 13, or did not cause serious harm to the victim.

{¶79} For counts 4 and 5, therefore, the trial court's sentence is not "clearly and convincingly contrary to law." As the sentence is within the statutory range, we cannot say the trial court abused its discretion in sentencing Mr. Nelson to a term of life without parole for counts 4 and 5, given the severity of the offenses reflected in the record. The first assignment is sustained in part and overruled in part.

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1. We note that the statute also permits the court to sentence the offender pursuant to R.C. 2971.03, the statute for sentencing a sexually violent offender with predator specification. That statute, however, is not applicable in the instant case.

{¶80} For the foregoing reasons, we affirm the appellant's convictions of five counts of rape and his sentence for counts 4 and 5, but modify his sentence for counts 1, 2, and 3 to imprisonment of life.

{¶81} The judgment of the Portage County Court of Common Pleas is modified, and affirmed as modified.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.