[Cite as *State v. Arcuri*, 2016-Ohio-8254.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2015-T-0123**
FRANK ARCURI, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CR 00214.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481(For Plaintiff-Appellee).

Joseph C. Patituce, and *Megan M. Patituce,* Patituce & Associates, LLC, 26777 Lorain Road, Suite 708, North Olmsted, OH 44070 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Frank Arcuri, III, appeals his convictions and sentences for four counts of Rape. The issues before this court are whether a trial court denies a defendant his right to present a defense by precluding inquiry on cross-examination into the criminal background of a third party who was not a suspect in the case; whether it is reversible error to allow hearsay statements by witnesses who

testified at trial and were subject to cross-examination; whether an instruction on Gross Sexual Imposition is warranted as a lesser-included offense in a Rape prosecution where the defendant has offered a complete denial of the allegations and the evidence does not reasonably support a conviction of the lesser charge; whether convictions for Rape are supported by sufficient evidence and are not against the manifest weight of the evidence where the victim testified to the molestation and her testimony is corroborated by DNA and other expert testimony; and whether the findings necessary to impose consecutive sentences were made where the court did not use the precise language of the statute in making the findings. For the following reasons, we affirm the judgment of the court below.

{¶2} On March 31, 2015, the Trumbull County Grand Jury returned a four-count Indictment against Arcuri for Rape, in violation of R.C. 2907.02(A)(1)(b) and (B) and R.C. 2971.03(B)(1)(b) ("the victim was less than ten years of age").

{¶3} On April 1, 2015, Arcuri was arraigned and entered a plea of not guilty.

{¶4} On October 6, 7, and 8, 2015, Arcuri was tried before a jury. The following testimony was presented on behalf of the State:

{¶5} L.H. testified that she is eight years old. In February 2015, Arcuri was at her house, drinking with her mother (Stephanie Lawyer). After going to bed, Arcuri entered her bedroom and pulled down her pants and underwear. Arcuri touched her "pie" ("where I pee from") with "his finger and his tongue." Before doing so, he licked his finger. When he put his finger inside her pie, it hurt her and felt "like a wet dog." He also "licked his finger and put it in [her] butt" ("where I poop from"). She told him to stop.

L.H. then went and told her mother that Arcuri "did something" to her. Her mother said to "leave her alone and go away." Arcuri stopped and went to bed with the mother.

{¶6} The next morning L.H. told her mother: "[Arcuri] licked his finger and put it in my private part and * * * he put his tongue in my butt." She repeated her allegations to a police officer later that day.

{¶7} L.H. testified that something similar occurred at her house on a prior occasion. It was "around the summer" and "cold," after her father had moved out of the house. Arcuri woke her up and took her to the bathroom and "licked his finger and put it in [her] private part." She did not tell her mother on this occasion because she "thought he would stop."

{¶8} Stephanie Lawyer testified that she has lived at her current address in Bazetta Township for about four years with her three children and her boyfriend (Brandon Janes). In December 2012, the children's father left the residence. In that same month, she met Arcuri through a posting on Craigslist. At the beginning, she and Arcuri had a "romantic" relationship but for most of the three years until L.H.'s molestation they maintained a close friendship.

{¶9} Lawyer testified that, on February 23, 2015, she invited Arcuri to the house for a drink because she was depressed. Her boyfriend (Janes) had left "a week prior to that day." They began drinking about 9:00 p.m. They also smoked a "blunt." At around midnight, Lawyer "got too drunk and ended up getting sick and puking." She went to lie down in her bedroom. Arcuri masturbated her orally and digitally, being unable to maintain an erection. Lawyer was in and out of consciousness during this time.

{¶10} At around 3:30 a.m., Lawyer heard "stomping coming down the hallway" and L.H. calling, "mama." L.H. entered the bedroom, followed by Arcuri, and complained that "he won't stop messing with me." Although L.H. sounded upset, Lawyer told her to go lay down because it was late and she had school in the morning. Arcuri remained in the bedroom.

{¶11} The next morning, Lawyer woke L.H. for school. She was not asleep and looked like she had been crying. L.H. told her: "Mama, you know how you yell at me for rubbing my pie? * * * Frank tried to lick it." Lawyer sent L.H. to school.

{¶12} Lawyer testified that she confronted Arcuri with the accusation. He responded: "I didn't do nothing. Alls [sic] I did was tickle her." Lawyer drove Arcuri home. That afternoon, she took L.H. to the Bazetta Police Department and Akron Children's Hospital in Boardman. Lawyer testified that L.H. had last changed her underwear after bathing on February 21. L.H. was wearing the same underwear when she was taken to the hospital.

{¶13} Joyce Jones testified that, in February 2015, she was working as a licensed social worker at the Boardman campus of the Akron Children's Hospital doing emergency room assessments of abused children.

{¶14} Jones testified that, on February 24, 2015, she assessed L.H. to obtain information for the medical providers. L.H. reported that Arcuri "licked [her] private with his tongue and touched the inside of [her] private with his finger." L.H. did not report that she was in any pain.

{¶15} Kathryn Dudas testified that she was L.H.'s primary nurse at the Akron Children's Hospital emergency room. She collected a rape kit for L.H., including L.H.'s underwear.

{¶16} Christine Hammett testified that she is employed by the Bureau of Criminal Investigation as a forensic scientist in the biology section in Richfield, Ohio. She analyzed L.H.'s rape kit and identified two stains on L.H.'s underwear which tested positive for amylase, a component of saliva. In addition to saliva, amylase is present in other bodily fluids such as urine, feces, and vaginal secretions. Amylase was also found to be present in skin swabs from the vaginal area. After taking swabs of the underwear, Hammett forwarded the samples for DNA analysis (amylase indicates the presence of DNA, but does not contain DNA).

{¶17} Samuel A. Troyer testified that he is a forensic DNA analyst at the BCI's Richfield laboratory and analyzed L.H.'s rape kit, a swab from a stain on her underwear, swabs from her vaginal area, and DNA standards from L.H. and Arcuri. The underwear swab contained a mixture ("more than one person's DNA"). The mixture was consistent with L.H.'s and Arcuri's DNA and potentially with the DNA of a third person: "However, it was a very low level and there wasn't enough there to make a full comparison if another standard were to be relevant." The swabs from L.H.'s vaginal area were only consistent with her DNA. The statistical probability of matching Arcuri's DNA was 1 in 84,820. For a population the size of Trumbull County, only two or three other persons would be expected to match the sample profile. Troyer was unable to determine the source of the DNA, i.e., whether it came from saliva, skin cells, or some other source.

{¶18} John Melville, a physician and site director of the Child Advocacy Center at Akron Children's Hospital, testified as an expert in the field of child abuse pediatrics. Dr. Melville testified that the absence of physical injury was consistent with the type of abuse L.H. described. He noted that a child reporting that her abuser licked his fingers would be significant since "for an eight-year-old to understand that you need lubrication when you put a finger into a private part is not something [he] would expect an eight-year-old to know or come up with on her own if she were fabricating a story." The fact that a child reported pain would be indicative of labial penetration, since the hymen of a prepubertal female is "very tender" whereas a child "who rubs her own genitals would [not] typically associate having your genitals touched with being painful."

{¶19} Dr. Melville testified, with respect to the recovery of DNA, that "after 24 hours it's quite rare to recover DNA from the child's body," while it remains "far more likely to recover DNA from clothing or bed sheets or other textiles that were involved."

{¶20} Detective Joseph Sofchek, an investigator with the Bazetta Police Department, testified that, on February 24, 2015, he met with Lawyer and L.H. at the police station. He described L.H. as clinging to her mother, soft spoken, and crying. L.H. stated that Arcuri kissed her on her private parts, indicating between her legs, licked his finger and stuck it inside of her, and kissed her, indicating her anus. Thereupon, Detective Sofchek advised them to go to Akron Children's Hospital and contacted children's services.

{¶21} Detective Sofchek testified that, on March 9, 2015, he obtained buccal swabs from Arcuri.

{¶22} Following the close of the State's case, Arcuri moved for acquittal as to Count 1 pursuant to Criminal Rule 29, which was denied. The following testimony was presented on behalf of Arcuri.

{¶23} Dr. Theodore Dean Kessis, a consultant with Applied DNA Resources, testified regarding the DNA profile from L.H.'s underwear which was consistent with Arcuri's profile, i.e., Arcuri could not "be excluded" as the contributor. Dr. Kessis stated that it could not conclusively be determined that saliva was the source of the DNA and that it was possible that the presence of Arcuri's DNA was the result of "casual transfer" or "the casual handling of items you leave DNA on."

{¶24} Arcuri testified that, prior to February 23, 2015, it had been "a month or two" since he had seen Lawyer and her children. On February 23, Lawyer picked him up at about 11:00 p.m. They purchased alcohol and food before returning to her house a little after midnight. The children were in Lawyer's bedroom playing a video game. He and Lawyer ate and drank in the kitchen until about 1:00 or 1:30 a.m. when she sent the children to bed.

{¶25} Arcuri and Lawyer retired to her bedroom and began to engage in oral sex. They were interrupted by L.H. who had entered the room. Lawyer sent L.H. back to bed. He and Lawyer returned to the kitchen where they ate and drank some more and smoked marijuana. Arcuri became ill and vomited, probably because of something he ate. They returned to her bedroom and eventually fell asleep.

{¶26} Arcuri woke the next morning in Lawyer's bed as she was getting the children ready for school. Lawyer drove the children to the bus stop and Arcuri back to his home.

{¶27} Arcuri did not learn of the accusations against him until he was contacted by Detective Sofchek.

{¶28} On October 9, 2015, the jury returned a verdict of guilty on all counts of the Indictment.

{¶29} On October 21, 2015, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Arcuri to serve a prison sentence of fifteen years to life for each count of the Indictment. The sentences for the second, third, and fourth Counts were to be served concurrently with one another and consecutively to the first Count, for an aggregate prison term of thirty years to life. The court notified Arcuri regarding parole and post release control and advised him that he would be classified as a Tier III Sex Offender upon release from incarceration.

{¶30} On October 28, 2015, a written Entry on Sentence was journalized.

{¶31} On November 25, 2015, Arcuri filed a Notice of Appeal. On appeal, Arcuri raises the following assignments of error:

{¶32} "[1.] The trial court erred by denying Appellant his constitutionally protected right to present a defense."

{¶33} "[2.] The jury erred in finding Defendant-Appellant guilty as the State failed to present legally sufficient evidence to support a conviction."

{¶34} "[3.] The jury erred in convicting Defendant-Appellant of all four counts in the indictment as a conviction was against the manifest weight of the evidence."

{¶35} "[4.] The trial court erred in precluding the lesser included offense of gross sexual imposition."

{¶36} "[5.] The trial court erred in sentencing Defendant-Appellant to consecutive terms of imprisonment."

{¶37} "[6.] The trial court erred in admitting impermissible hearsay over the objection of the defense."

{¶38} Certain assignments of error will be considered out of order.

{¶39} In his first assignment of error, Arcuri argues the trial court denied him his right to establish a defense in violation of the Sixth Amendment. *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 4-5, 511 N.E.2d 1138 (1987). Specifically, Arcuri intended to inquire of Lawyer at trial whether she knew that her boyfriend, Brandon Janes, was a "convicted sex offender."[1] The trial court foreclosed this line of inquiry in limine: "I think the only relevant way you can bring that in is you're going to have to submit some kind of testimony, have an alternate theory, a witness to do that." On appeal, Arcuri argues that, "given [Janes'] criminal history, the fact that he had been present in the home, and the fact that a third source of DNA had been found in L.H.'s underwear made the line of questioning relevant to Defendant-Appellant's defense." Appellant's brief at 7.

{¶40} We find no merit in Arcuri's contention. Arcuri sought to introduce evidence of Janes' prior conviction through cross-examination. "Cross-examination shall be permitted on all relevant matters and matters affecting credibility." Evid.R. 611(B). However, "[t]he limitation of such cross-examination lies within the sound discretion of the trial court," and "[s]uch exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.E.2d 674 (1986) ("trial judges retain wide latitude insofar as the

1. Arcuri proffered no details regarding the nature of Janes' conviction.

Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

{¶41} Here, the trial court acted within its discretion by precluding Arcuri from inquiring into whether Lawyer was aware that her boyfriend was a convicted sex offender. Such questioning would have been scarcely relevant. Janes was not present at the times L.H. claimed Arcuri molested her and L.H. never raised such a claim against Janes. The mere presence of an unidentified third-person's DNA on L.H.'s underwear by itself does not create any sort of reasonable suspicion that Lawyer's boyfriend may have committed the crimes for which Arcuri was accused. According to the State's DNA expert, Troyer, the DNA in question was of "such a small amount" that he "would never be able to compare that to another standard." The presence of the unidentifiable DNA is insufficient to support a theory that someone other than Arcuri molested L.H.

{¶42} Additionally, evidence of Janes' prior conviction would have been precluded under Evidence Rule 404(B), which provides "[e]vidence of other crimes * * * is not admissible to prove the character of a person in order to show action in conformity therewith." *State v. Mason*, 82 Ohio St.3d 144, 160, 694 N.E.2d 932 (1998) ("Evid.R. 404, by its terms, applies to all character evidence, not simply to persons accused of crimes").

{¶43} The first assignment of error is without merit.

{¶44} In the sixth assignment of error, Arcuri claims the trial court erred by allowing Detective Sofchek to testify, over objection, as to statements made by L.H. and Lawyer upon his meeting them at the police station on the afternoon of February 24, 2015. Detective Sofchek testified as follows:

> [Lawyer] had said when she got up in the morning [L.H.] had been crying. She could see the redness in her eyes and she hadn't been sleeping. And she was getting up to go to school. And she asked her what had happened, and [L.H.] had told her, "You know how when I rub myself and you tell me not to rub my pie -- * * * That's what Frank did to me." I asked [L.H.] what had happened, and she told me that he kissed her. And I says [sic], "Well, where at?" She said, "On my lips." I says, "You know, your lips?" She says, "Yeah." I said, "Did he kiss you anywhere else?" She said, "On my private parts." I said, "Where at on your private parts?" And she pointed down between her legs. I says, "What else happened?" And she said, "He licked the finger and stuck it inside of me." I says, "Okay. Did anything else happen?" And she says, "Yeah, he kissed me." I said, "Where did he kiss you?" She turned around and pointed behind her, to her anus. * * * I asked her how her clothes c[a]me off, and she said Frank had took her clothes off, her pants off.

{¶45} Defense counsel objected to this line of questioning as hearsay. The State countered that the testimony was not admitted for the truth of the matter asserted,

but "for its effect on the listener," i.e., to explain Detective Sofchek's subsequent actions. The State argued in the alternative that the statements were excited utterances as L.H. was "visibly upset" and "still under the stress of the event."

{¶46} The trial court ruled that the testimony was "probably more of an existing mental, emotional, physical condition than [an excited utterance]" and overruled the objection.

{¶47} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991); *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus ("[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court").

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

{¶49} Detective Sofchek's testimony as to what L.H. and Lawyer told him was hearsay. Further, Lawyer's statement to Detective Sofchek as to what L.H. told her constituted "double hearsay" or "hearsay within hearsay."

{¶50} "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). Detective Sofchek's testimony, however, exceeded the scope of the allowance recognized in *Thomas*. "[I]n order for testimony offered to explain police conduct to be

admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged." *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 27.

{¶51} Here, Detective Sofchek's testimony went far beyond explaining why he referred L.H. to Akron Children's Hospital and obtained a search warrant to collect DNA samples from Arcuri. The detailed narration of every act of sexual conduct performed by Arcuri on L.H. was wholly unnecessary to establish a foundation to explain the subsequent course of Detective Sofchek's investigation and, thus, constituted hearsay. *State v. Willis*, 8th Dist. Cuyahoga No. 97077, 2012-Ohio-2623, ¶ 12 ("when an officer relates out-of-court statements that establish the elements of the crime charged, the statements may exceed that which is needed to establish a foundation for the officer's subsequent conduct").

{¶52} In a similar case, the court of appeals explained that, to establish a foundation for the admission of such testimony, the testifying witness "needed only to aver that [the victim] reported that appellant had done something of a sexual nature to [her] that upset or disturbed her." *State v. F.R.*, 10th Dist. Franklin No. 14AP-440, 2015-Ohio-1914, ¶ 26. Where the testifying witness "provided a detailed recitation of [the victim's] statements which included the elements of the crime of gross sexual imposition, that is, that appellant touched [the victim's] breast and buttocks," the testimony "exceeded that which was necessary to establish a foundation for her subsequent conduct in contacting the police." *Id.*; *State v. Turner*, 11th Dist. Trumbull

No. 2000-T-0074, 2001 Ohio App. LEXIS 4992, 8 (Nov. 2, 2001) ("it would have been appropriate for [DEA agent] Hiorns to testify that he spoke to Dascoulias at the start of his investigation," but "it was unnecessary for him to state that Dascoulias had identified appellant as a 'significant drug dealer' in order to explain the course of his investigations").

{¶53} We now consider whether the statements contained in Detective Sofchek's testimony were admissible under one of the exceptions to the hearsay rules.

{¶54} The trial court cited to the "Then existing, mental, emotional, or physical condition" exception which allows "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) * * *." Evid.R. 803(3). This exception permits "witnesses to relate any out-of-court statements [the declarant] had made to the effect that he was scared, anxious, or in any other state reflecting his then existing mental or emotional condition," but "does not permit witnesses to relate any of the declarant's statements as to why he held a particular state of mind." *State v. Apanovitch*, 33 Ohio St.3d 19, 21, 514 N.E.2d 394 (1987). "Finally, the testimony sought to be introduced must point towards the future rather than the past." *Id.*

{¶55} None of L.H.'s or Lawyer's statements satisfy the requirements of the state-of-mind exception. L.H.'s statements do not describe a then existing mental, emotional, or physical condition, but merely respond to Detective Sofchek's queries as to "what happened?". Lawyer described her observation of L.H. as being upset, but the only statement by L.H. related by Lawyer was that Arcuri rubbed her pie, which has nothing to do with L.H.'s state-of-mind. Not only were the statements unrelated to L.H.'s

state-of-mind, but they pointed toward Arcuri's past conduct as the cause of L.H.'s condition at the time the statements were made.

{¶56} As argued by the State, the statements contained in Detective Sofchek's testimony could have been admitted as excited utterances. Under this exception, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the rule against hearsay. Evid.R. 803(2). Essential to admissibility of statements under this exception is that "the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs." (Citation omitted.) *State v. Taylor*, 66 Ohio St.3d 295, 301, 612 N.E.2d 316 (1993). "[T]he lapse of time between the startling event and the out-of-court statement is not dispositive in the application of Evid.R. 803(2) * * * [r]ather, the question is whether the declarant is still under the stress of nervous excitement from the event." *State v. Boston*, 46 Ohio St.3d 108, 118, 545 N.E.2d 1220 (1989).

{¶57} It has also been widely recognized that "[t]he excited utterance exception to the hearsay rule should be applied liberally in a case involving the sexual abuse of a young child." *In re S.H.W.*, 2d Dist. Greene No. 2015-CA-25, 2016-Ohio-841, ¶ 22; *State v. Taylor*, 8th Dist. Cuyahoga No. 101704, 2015-Ohio-2513, ¶ 30 (the same); *State v. Bump*, 3d Dist. Logan No. 8-12-04, 2013-Ohio-1006, ¶ 60 (the same); *State v. Ashford*, 11th Dist. Trumbull No. 99-T-0015, 2001 Ohio App. LEXIS 583, 17 (Feb. 16,

2001) ("[c]onsidering the nature of the assault and the age of the declarant, it was reasonable to find that, even several days later, the four year old child was still in a state of spontaneous excitement at the time of her statements").

{¶58} In the present case, Detective Sofchek described L.H.'s demeanor at the time of her statement as follows:

> [A]s [Lawyer] told me what happened [L.H.] started crying, grabbed her mom's arm. And I said, "Let's go into my office so we can talk. * * * [She was] [v]ery soft spoken, crying. Depending what question I was asking her, she would grab her mom's arm, put her head, like bury her head or something. She didn't want to look at me when she was telling me the answers. * * * It wasn't a constant cry. More or less crying when my specific question was there.

{¶59} Although the trial court declined to admit L.H.'s statement as an excited utterance, it would have been within the court's discretion to do so. In any event, the excited utterance exception would not have applied to Lawyer's statement.

{¶60} Assuming arguendo, then, that the admission of L.H.'s and Lawyer's statements through Detective Sofchek's testimony were error, such error was harmless in light of the fact that both witnesses testified at trial on the same matters contained in the hearsay testimony and were subject to cross-examination thereon. *State v. Williams*, 2d Dist. Montgomery No. 26369, 2016-Ohio-322, ¶ 37 ("the admission of hearsay is harmless error where the declarant was also a witness and examined regarding matters identical to those contained in the hearsay statements"); *F.R.*, 2015-Ohio-1914, ¶ 37 (the same); *State v. Cochran*, 11th Dist. Geauga No. 2006-G-2697,

2007-Ohio-345, ¶ 16, citing *State v. Keenan*, 81 Ohio St.3d 133, 142, 689 N.E.2d 929 (1998) ("the admission of hearsay does not violate the Confrontation Clause if the declarant testifies at trial," and "[n]onconstitutional error is harmless if there is substantial other evidence to support the guilty verdict").

{¶61} Here, L.H.'s and Lawyer's trial testimony was substantially the same as the out-of-court statements made to Detective Sofchek. There is nothing in the record to suggest that their statements gained greater credibility by having been testified to by Detective Sofchek. L.H.'s accusations were corroborated by the presence of Arcuri's DNA in her underwear as well as the expert testimony of Dr. Melville. Accordingly, any error in the admission of Detective Sofchek's testimony as to their statements was harmless.

{¶62} The sixth assignment of error is without merit.

{¶63} In the fourth assignment of error, Arcuri argues that the trial court erred by refusing to instruct the jury on the lesser included offense of Gross Sexual Imposition.

{¶64} "A criminal defendant is entitled to a lesser-included-offense instruction, however, only where the evidence warrants it." *State v. Kidder*, 32 Ohio St.3d 279, 280, 513 N.E.2d 311 (1987). When a lesser included offense instruction is requested, the trial court's task is twofold: "first, it must determine what constitutes a lesser included offense of the charged crime; second, it must examine the facts and ascertain whether the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater." *Id.*

{¶65} "Gross sexual imposition, R.C. 2907.05(A)(3), is a lesser included offense of rape, R.C. 2907.02(A)(3) [now R.C. 2907.02(A)(1)(b)]." *State v. Johnson*, 36 Ohio

St.3d 224, 522 N.E.2d 1082 (1988), paragraph one of the syllabus. The difference between the two offenses is that Gross Sexual Imposition is based on "sexual contact," whereas Rape is based on "sexual conduct." For present purposes, "sexual contact" means "any touching of an erogenous zone," such as the pubic region, whereas "sexual conduct" requires "the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another." R.C. 2907.01(B) and (A).

{¶66} Accordingly, if Arcuri only touched L.H.'s pubic area, without penetration of the vaginal or anal openings, he would be guilty of Gross Sexual Imposition rather than Rape.[2]

{¶67} "A criminal defendant is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to 'sexual conduct,' R.C. 2907.01(A), and, at the same time, consistently and reasonably believe her testimony on the contrary theory of mere 'sexual contact,' R.C. 2907.01(B)." *Johnson* at paragraph two of the syllabus; *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the syllabus ("[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense").

{¶68} With respect to the standard of review, the Ohio Supreme Court has offered various pronouncements. If, under any reasonable view of the evidence –

2. This analysis does not apply to Count Two of the Indictment, based on cunnilingus which is defined per se as "sexual conduct." *See State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 84-86.

"considered in the light most favorable to defendant" – "it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given." *State v. Wilkins*, 64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980). Yet, "[a]n appellate court reviews a trial court's refusal to give a requested jury instruction for abuse of discretion." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240. Acknowledging that "it is obviously difficult to reconcile these two concepts," this court has deferred to the Ohio Supreme Court's formula in *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207: "whether to include such jury instructions lies within the discretion of the trial court and depends on whether the evidence presented could reasonably support a jury finding of guilt on a particular charge." *State v. Bolden*, 11th Dist. Lake No. 2014-L-121, 2016-Ohio 4727, ¶ 51, citing *Wine* at ¶ 1.

{¶69} In the present case, the evidence presented does not reasonably support a finding that Arcuri only touched L.H.'s erogenous zones, without even the slightest insertion of his finger into her vaginal and anal openings. L.H.'s testimony was unequivocal that Arcuri put his finger "in [her] private part" and "in [her] butt." That it was Arcuri's intention to penetrate L.H. digitally is evidenced by the fact that L.H. testified that, in each instance, Arcuri lubricated his fingers by licking them. With respect to vaginal penetration, L.H. testified that it hurt, which Dr. Melville noted was an indication that Arcuri had penetrated to her hymen. Contrary to this evidence, there is nothing from which it could reasonably be inferred that Arcuri stopped short of penetration. Although it is possible that he did so, none of the evidence in the record

supports that conclusion. Accordingly, the trial court acted within its discretion by refusing to give an instruction on Gross Sexual Imposition.

{¶70} Arcuri argues the trial court's refusal was error on the grounds that the court did so based on his testimony "offering a complete denial of the allegations." Arcuri notes that, at the close of the State's case, the court was inclined to give the instruction on the lesser included offense. At the close of the defense's case, however, the court changed its ruling based on the State's argument that a defendant is "not entitled to a jury instruction on Gross Sexual Imposition as a lesser-included-offense of Rape where he has denied participation in the alleged offense." Arcuri contends this violates the Ohio Supreme Court's position in *Wine*, that "it is the quality of the evidence offered, not the strategy of the defendant [i.e., whether the defendant has raised a complete defense to the crime charged], that determines whether a lesser-included-offense charge should be given to a jury." *Wine* at ¶ 26. "If the trial court had believed evidence existed to warrant the instruction [on Gross Sexual Imposition] at the close of [the State's] case, [Arcuri's] denial of the allegations should not have been a barrier to the instruction on the lesser included offense." Appellant's brief at 13. We disagree.

{¶71} Both the *Johnson* and the *Wine* cases are consistent that an instruction on a lesser included offense is not appropriate where the defendant has offered a complete defense *and* the jury could reasonably find based on the State's evidence that the defendant is only guilty of the lesser offense. In *Wine*, these circumstances were not present. The defendant admitted in a video-taped interview that he might have touched the victim, thinking her to be his wife. *Id.* at ¶ 4. The victim's testimony was equivocal on the issue of penetration, as she testified penetration would have been difficult

because of the dryness of her vagina and she was uncertain if the defendant had used lubrication. *Id.* at ¶ 10.

{¶72} In making its final ruling in the present case, the trial court acknowledged both parts of this conjunctive test when denying the request for an instruction on Gross Sexual Imposition: "Based on [the case law] and based on the fact that the only evidence we have in this case is from the victim that said there was penetration, there's no evidence in the case at all of touching, *and* his complete denial, I agree that the instruction should not include the lesser included offense." (Emphasis added.)

{¶73} The fourth assignment of error is without merit.

{¶74} In the second and third assignments of error, Arcuri argues, respectively, that there was insufficient evidence to support his convictions and that his convictions were against the manifest weight of the evidence.

{¶75} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, "[t]he 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶76} Whereas "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113

Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court reviewing whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶77} In Count One of the Indictment, Arcuri was charged with Rape, specifically "*that on or about* the Summer of 2013, * * * [he] did engage in sexual conduct with another who is not the spouse of the offender, when the offender is less than thirteen years of age * * *." (Emphasis sic.) *See* R.C. 2907.02(A)(1)(b).

{¶78} With respect to this Count, Arcuri argues that L.H.'s single statement – "he licked his finger and put it in my private part" – coupled with her testimony that the incident occurred "around the summer," after her father left, and when it was "cold," was insufficient to support a conviction and "not credible enough on its own to support the conviction." Appellant's brief at 10.

{¶79} We find the testimony both sufficient and credible. A single statement indicating that Arcuri digitally penetrated her vaginal opening is sufficient to demonstrate "sexual conduct" for the purposes of Rape. In describing other incidents, L.H. explained that her "private part" is her "pie" and that her pie is "where I pee from." Moreover, L.H.'s testimony regarding the initial molestation provided a narrative context for the

incident. She described how Arcuri woke her from sleep, what she was wearing, where she was taken to be molested, and why she did not tell anyone about the incident.

{¶80} All three of her indications of the date of the molestation were sufficient to prove that the incident occurred on or about the summer of 2013, or, at least, are not inconsistent with that time frame. Lawyer testified that the father left in December 2012 and the description of the weather as "cold" is imprecise enough to apply to virtually any time of the year. In any event, "if the evidence supports a finding that the defendant was alone with the victim during the relevant time frame and the defense is that the sexual abuse never occurred, the inability to identify a specific date does not require reversal of a conviction." *State v. Latorres*, 11th Dist. Ashtabula Nos. 2000-A-0060 and 2000-A-0062, 2001 Ohio App. LEXIS 3533, 11 (Aug. 10, 2001); *State v. Triplett*, 11th Dist. Ashtabula No. 2013-A-0018, 2013-Ohio-5190, ¶ 44 ("in cases involving the sexual molestation of minor children, the state is not required to provide exact dates because the victims are simply unable to remember such facts").

{¶81} The remaining Counts of the Indictment alleged "sexual conduct" occurring "*on or about* the 23rd day of February, 2015, through and including the 24th day of February, 2015." (Emphasis sic.) Arcuri notes that L.H.'s testimony as to how he touched her butt was inconsistent. In describing the incident, she indicated that he used his finger but, when relating what he did to her mother, she said "he licked – he put his tongue in my butt." We do not find that the inconsistency invalidates Arcuri's conviction or renders L.H.'s testimony unbelievable. At most, the inconsistency raises an issue as

to the nature of the sexual conduct with respect to L.H.'s anal opening, not as to whether there was any sexual conduct.[3]

{¶82} Finally, Arcuri challenges the DNA evidence introduced by the State. Arcuri notes that his DNA was not found in L.H.'s vaginal area, the evidence failed to establish that the substance in L.H.'s underwear was his saliva, and there was the possibility of a third person contributing DNA to the sample. These arguments have no relevance for the sufficiency of the State's evidence (the DNA evidence principally served to corroborate L.H.'s testimony) and only have minor affect on the weight of the evidence. Dr. Melville testified as to why the likelihood of obtaining a DNA sample from the victim's vaginal area decreases over time, in contrast to the likelihood of obtaining a sample from her underwear. The presence of Arcuri's DNA in L.H.'s underwear is significant corroborating evidence, regardless of whether the source of that DNA is saliva, casual touch (L.H. testified that Arcuri pulled her underwear down despite her efforts to resist), or some other of Arcuri's bodily fluids.

{¶83} The second and third assignments of error are without merit.

{¶84} In the fifth and final assignment of error, Arcuri argues that the trial court erred in imposing consecutive prison terms by failing to make the required findings at the sentencing hearing.

{¶85} The Ohio Revised Code provides, in relevant part, as follows regarding consecutive felony sentences:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the

3. We note that, in the Verdict form returned for this Count of the Indictment, the jury found Arcuri guilty "of Rape (finger/anal opening) in the manner and form as he stands charged in the indictment." Thus, there is no issue that Arcuri might have been convicted based on facts for which he was not charged.

prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶86} Under R.C. 2929.14(C)(4), a sentencing court is required to make three distinct findings in order to require an offender to serve consecutive prison terms: (1)

that consecutive sentences are "necessary to protect the public from future crime or to punish the offender"; (2) that consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public"; (3) "and * * * also" that one of the circumstances described in subdivision (a) to (c) is present.

{¶87} While the trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate those findings into its sentencing entry, it is not "required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. "[A] word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

{¶88} In reviewing a felony sentence, "[t]he appellate court * * * may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if it clearly and convincingly finds * * * [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2). The failure to make the required findings to impose consecutive sentences at the sentencing hearing renders the sentence contrary to law. *Id.* at ¶ 36-37.

{¶89} In the present case, Arcuri claims the trial court failed to find, at the sentencing hearing, that the "consecutive sentences are not disproportionate to the

seriousness of the offender's conduct and to the danger the offender poses to the public" as required by R.C. 2929.14(C)(4). We disagree.

{¶90} At various points during the sentencing hearing, the trial court stated "the Court * * * finds the sentence shall be proportional to the defendant's conduct," "the defendant is likely to commit future crimes of the same nature," and "consecutive sentences are needed to protect the public." In substance, these statements demonstrate the court engaged in the correct analysis to impose consecutive sentences. There is no meaningful difference between stating that consecutive sentences are "proportional to the defendant's conduct" and using the statutory formula that such sentences are "not disproportional." That the court considered the proportionality of Arcuri's sentence with respect to the seriousness of his conduct is demonstrated by the court's finding of several factors rendering that conduct more serious, such as L.H.'s mental injury being exacerbated by her age, the seriousness of the psychological harm she suffered, Arcuri's manipulation of his relationship with the mother to facilitate the offense, and the presence of other children who were not victims of the offenses. R.C. 2929.12(B)(1), (2), (6), and (9). *Compare State v. Chaney*, 2d Dist. Clark No. 2015-CA-116, 2016-Ohio-5437, ¶ 11 (consecutive sentences were not contrary to law where "the trial court stated 'that consecutive sentences are necessary to protect the public from future crime, and that a consecutive sentence is not disproportionate to the seriousness of the Defendant's conduct'" but "did not recite the next phrase in the statute, 'and to the danger the offender poses to the public'") (citation omitted).

{¶91} The fifth assignment of error is without merit.

{¶92} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, entering judgment and sentence against Arcuri for four counts of Rape, is affirmed. Costs to be taxed against appellant.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶93} This writer agrees with the majority's well-reasoned opinion to affirm appellant's rape convictions and sentences. I merely write separately regarding the trial court's refusal to instruct the jury on the lesser included offense of gross sexual imposition.

{¶94} At issue in this matter is the touching of a victim's erogenous zones (sexual *contact* – gross sexual imposition) versus penetration (sexual *conduct* – rape). This court was faced with a similar issue and fact pattern in *State v. Lyons*, 11th Dist. Trumbull No. 2004-T-0035, 2005-Ohio-4649, and stated the following:[4]

{¶95} "Gross sexual imposition is a lesser included offense of rape. *State v. Johnson* (1988), 36 Ohio St.3d 224 * * *, paragraph one of the syllabus. 'An instruction on a lesser included offense is only "required where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense."' *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at

4. This writer was a member on the panel and concurred.

¶21 * * *, quoting *State v. Thomas* (1988), 40 Ohio St.3d 213 * * *, paragraph two of the syllabus. In addition, the Supreme Court of Ohio has held:

{¶96} "'A criminal defendant is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to "sexual conduct," R.C. 2907.01(A), and, at the same time, consistently and reasonably believe her testimony on the contrary theory of mere "sexual contact," R.C. 2907.01(B).' *State v. Johnson*, 36 Ohio St.3d 224 * * *, paragraph two of the syllabus.

{¶97} "Rape requires sexual *conduct*. R.C. 2907.02(A)(1). Gross sexual imposition requires sexual *contact*. R.C. 2907.05(A). Therefore, a review of the definitions of those terms is helpful in our analysis of this issue.

{¶98} "'"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 cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.' R.C. 2907.01(A).

{¶99} "'"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.' R.C. 2907.01(B)." (Emphasis sic.) (Parallel citations omitted.) *Lyons, supra,* at ¶29-33.

{¶100} This court in *Lyons* went on to state the following:

{¶101} "Lyons denied having sexual intercourse with the victim. At trial, the victim testified that Lyons inserted his penis into her vagina. Likewise, she testified that Lyons inserted his finger into her vagina. Lyons argues the fact that the victim made prior inconsistent statements about whether he penetrated her warranted an instruction for gross sexual imposition. We disagree. At trial, the victim testified that Lyons penetrated her vagina with his penis and finger. Defense counsel attempted to impeach her by using her prior statements that she was not sure if Lyons put his penis inside her. However, there was no evidence presented regarding sexual contact. Pursuant to *State v. Johnson*, Lyons was not entitled to a jury instruction on gross sexual imposition, since the victim's testimony clearly described sexual conduct." *Id.* at ¶39.

{¶102} A common rule is that a judge must instruct a jury regarding any lesser offense that is necessarily a part of the charged offense if there is significant evidence that the defendant committed only the lesser crime. This supports a best practice scenario. However, a judge must give a jury instruction on a lesser included offense only if the evidence supports it. Like the appellant in *Lyons*, appellant in the case sub judice was not entitled to a jury instruction on the lesser included offense of gross sexual imposition since the victim's testimony clearly described sexual *conduct* – rape. Thus, the evidence did not support a lesser included offense instruction.

{¶103} This case involves a disturbing set of facts. As stated, the record reveals the following: the victim was under ten years of age; on the date of the incident, appellant (the victim's mother's boyfriend that she had met on Craigslist) was at her house drinking; after going to bed, appellant entered the victim's bedroom and pulled down her pants and underwear; the victim testified that appellant touched her "pie"

(“where [she] pee[s] from”) with “his finger and his tongue;” before doing so, appellant licked his finger; when appellant put his finger inside the victim’s vagina, it hurt her; the victim also testified that appellant “licked his finger and put it in [her] butt” (“where [she] poop[s] from;”) the victim told him to stop; the victim told her mother right after the incident and again the following morning; the victim also repeated what had happened to a police officer later that day; the victim also testified that something similar happened at her house with appellant on a prior occasion and she did not tell her mother at that time because the victim “thought he would stop;” the victim’s mother testified that she confronted appellant with the accusation and that he responded that he only “tickled” the victim; the victim’s mother took her to the police station and the hospital; the victim’s underwear was tested and a swab contained a mixture of DNA[5]; and the statistical probability of matching appellant’s DNA was 1 in 84,820.

{¶104} Based on the facts presented in this case, the evidence does not support a lesser included offense instruction on gross sexual imposition. The victim’s testimony did not describe sexual *contact* – gross sexual imposition. Rather, the victim’s testimony clearly described sexual *conduct* – rape.

{¶105} Accordingly, I concur.

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5. Appellant attempts to point the finger at the victim’s mother’s other boyfriend, Brandon Janes, as being the perpetrator. However, the victim blamed appellant, not Mr. Janes. No evidence or testimony ever put Mr. Janes in the home during the incident at issue. Also, no evidence existed that Mr. Janes had access to the victim, or her underwear, during this timeframe. The record is credible, not conflicting. Accordingly, Mr. Janes was simply not a factor.